

Legal Representation in Delinquency and Status Offense Cases in Nebraska

Nebraska Supreme Court Commission on Children in the Courts

**Subcommittee on Attorneys Representing Children and Youth
August, 2006**

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Executive Summary

August, 2006

Background

This report is the result of approximately eighteen months of work by the Subcommittee on Attorneys Representing Children and Youth of the Nebraska Supreme Court Commission on Children in the Courts. Surveys of attorneys and judges were conducted to assess current juvenile defense practice across the state. Social science literature that is relevant to juvenile defense practice was reviewed. Also, standards and recommendations for juvenile defense work made by various national groups were reviewed. Proposed standards for Nebraska were developed and are presented in this report. Additionally, several system and statutory recommendations are made.

Survey of Juvenile Defense Practice in Nebraska

The main findings of the survey follow. When applicable, conformity of state practice to the “*Ten Core Principles*”¹ were assessed.

- A significant number of juvenile defense attorneys, particularly in the county courts, view their duty as representing the youth’s best interests, not interests as directed by the youth. The practice of these attorneys does not conform to the *Ten Core Principles*.
- A large percentage of youth charged in juvenile court, perhaps more than half, waive their right to counsel both during police interrogation and in court proceedings. This does not conform to the *Ten Core Principles*.
- Most detained youth who are eventually appointed counsel do not have prepared counsel at their detention hearings. About half of non-detained youth meet their attorneys at or after their arraignments. This does not conform to the *Ten Core Principles*.
- Pre-trial motions are rare and a significant number of attorneys do not gather independent information. This does not conform to the features of zealous advocacy as recommended in the *Ten Core Principles*.
- The majority of attorneys do not utilize independent experts or other means to offer independent dispositional alternatives to the court. Attorneys reported that

¹ American Council of Chief Defenders National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (2004).

they lacked funding for this purpose and had difficulty getting judges to order independent evaluations. This does not conform to the *Ten Core Principles*.

- Many juvenile defense attorneys and attorneys defending juveniles in the adult system do not appear to develop or utilize evidence regarding the youth's competence or capacity to participate in the legal proceedings. This does not conform to the *Ten Core Principles*.
- Prosecuting attorneys estimate that their offices file charges regarding approximately half of the youth age 16 or over in adult criminal court. Prosecuting attorneys estimate that their offices file charges for youth 15 and younger in adult court 17% of the time on average.
- There is a paucity of training available for juvenile defense attorneys in Nebraska. This does not conform to the *Ten Core Principles*.
- The vast majority of judges and attorneys do not believe that the juvenile court process has a disparate impact on minorities or girls.
- Most juvenile defense attorneys tend to be quite experienced and most only devote a small percentage of their practice to juvenile cases.
- Language issues, cultural barriers, and high case loads are reported by a small number of attorneys as barriers to effective representation. A substantial number of attorneys report that limited financial resources for their cases is a barrier to effective representation.
- There is general statewide satisfaction for the quality of juvenile defense but general concern about the lack of appropriate community based services.

Social Science Review

- The social science literature indicates that most youths fifteen and under do not understand Miranda warnings and thus are not waiving these rights knowingly.
- Most youth fifteen and under are “significantly impaired” in the competencies that are needed to effectively participate in the legal proceedings against them.
- Most youth fifteen and under do not understand the role of counsel.
- “Interested adults” (e.g. parents) have not been found to be knowledgeable about or protective of their children's rights.
- There are consistent findings among researchers regarding the harmful effects of group placement of youths in the juvenile justice system. Grouping troubled youth

together appears to provide “deviancy training”, the transmission of anti-social values, culture and behaviors.

Background

Chief Justice John V. Hendry announced the formation of the Supreme Court Commission on Children in the Courts on January 6, 2005. The Commission, co-chaired by Chief Judge Everett O. Inbody of the Court of Appeals and Douglas County Separate Juvenile Court Judge Douglas F. Johnson includes judges, lawyers, representatives of the legislative and executive branches, and children's advocates.

One of the initial goals of the Commission was to research the effectiveness of legal representation of children within the system, including developing standards and training protocols for lawyers who represent youth in delinquency and status offense cases. A subcommittee was formed in conjunction with the Supreme Court's Minority and Justice Implementation Committee to examine the existing practice of Nebraska attorneys in delinquency and status offense defense and to develop standards and training recommendations. This subcommittee began its work in April, 2005. This report presents the findings of the study, recommends standards for attorneys representing juveniles in delinquency and status offense cases (including a recommendation for required training), and makes other system reform recommendations.

STANDARDS FOR REPRESENTATION OF JUVENILES IN LAW VIOLATION AND STATUS OFFENSE CASES IN JUVENILE COURT²

A. OBJECTIVES AND SCOPE OF THE STANDARDS

1. The objective of these standards is to ensure high quality legal representation for all juveniles facing adjudication in the juvenile court for law violations or status offenses.
2. These standards apply from the moment a petition is filed on the juvenile or the juvenile is taken into custody and extend to all stages of every case in which the State of Nebraska has filed a petition on the juvenile for a law violation or status offense and counsel has been appointed.
3. Counsel for the accused shall receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. Counsel shall have the right to have such services provided by persons independent of the prosecution.
4. Counsel shall have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

Comment

The role of the attorney is to provide independent legal counsel for the child or youth with the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.

B. QUALIFICATIONS OF COUNSEL IN JUVENILE LAW VIOLATION AND STATUS OFFENSE CASES

1. These standards shall be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.
2. The appointing or assigning authority should insure that every attorney representing a juvenile in a law violation or status offense case:
 - a. has obtained a license or permission to practice law in the State of Nebraska; and
 - b. demonstrates a commitment to providing zealous advocacy and high quality legal representation in the defense of juvenile cases; and

² The Subcommittee developed these standards with the goal of consistency with the *Standards for Appointed Counsel in Capital, Other Felony, and Misdemeanor Cases* that were simultaneously being developed by the Minority and Justice Implementation Committee. See the MJIC report for a discussion of the rationale of some of the standards proposed in this document.

- c. has satisfied the training requirements set forth in these standards; and
 - d. demonstrates knowledge and understanding of the relevant state and federal law, both procedural and substantive, governing juvenile law violator and status offense cases; and
 - e. demonstrates understanding of the specialized knowledge regarding children and youth in the juvenile justice system; and
 - f. demonstrates skill in the management and conduct of negotiations and litigation; and
 - g. demonstrates skill in legal research, analysis, and the drafting of litigation documents; and
 - h. demonstrates skill in oral advocacy; and
 - i. demonstrates skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence; and
 - j. demonstrates skill in the investigation, preparation, and presentation of evidence bearing upon mental status and competence, particularly as it bears to children and adolescents; and
 - k. demonstrates skill in the elements of trial advocacy, such as cross-examination of witnesses, and opening and closing statements.
3. New attorneys who have not been engaged in the practice of law for a sufficient time as to be able to demonstrate the above qualifications may be eligible for appointments if they are engaged in the practice of law with other attorneys, at least one of who supervises the work of the appointed attorney, or if the new attorney has 1 year of experience.

Comment

Zealous representation of juveniles in law violations and status offenses includes:

1. Meeting with the youth, individually before the first hearing to determine the position they will take at the hearing. Additionally, the attorney may also wish to meet with the youth with his/her parent(s) Note: The potential for conflict of interest between an accused juvenile and his or her parents should be clearly recognized and acknowledged. All parties should be informed by the initial attorney that he or she is counsel for the juvenile, and that in the event of disagreement between a parent or guardian and the juvenile, the attorney is required to serve exclusively the interests of the accused juvenile. Further, meetings that include the parent(s) may not provide the protection of privilege to the youth's statements to the attorney.

2. If appropriate, present an alternative- to- detention plan to the court.

3. Prior to the adjudication hearing, counsel should investigate all circumstances of the allegations; seek discovery of any reports or other evidence to be submitted to or considered by the court at the trial; if circumstances warrant, request appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protect the youth's rights; and, inform the youth of the nature of the

proceedings, the youth's rights, and the consequences if the youth is adjudicated on the petition.

4. Avoiding the use of last minute plea agreements that result from inadequate preparation by the counsel for the youth.

5. Counsel for the youth plays an important role in the disposition hearing with the responsibility to ensure that all significant needs relating to the delinquent behavior of the adjudicated delinquent youth have been brought to the attention of the court. If additional evaluations or expert witnesses are needed to aid in the preparation of the disposition hearing, counsel is responsible to request this assistance at the end of the adjudication hearing.

Prior to the disposition hearing, counsel for the youth should fully explain the possible disposition options to the youth and the youth's parents or legal custodian, and gain their views on these options. It is important to note, however, that counsel for the youth is not obligated to present the view of the parent, if this view is in opposition to the view of the youth.

6. Prior to post-disposition reviews, for youth remaining in their homes, counsel must not only rely on the information provided by the probation officer, but should also independently speak with the youth, the youth's parent or legal custodian, and the service provider(s).

7. Prior to post-disposition review, for youth placed out of home under the continuing jurisdiction of the court, counsel must not only rely on the information provided by the case manager or probation officer, but also should independently speak with the youth, the youth's parent, placement staff and others who have knowledge of the youth's progress and needs.

Specialized knowledge needed to zealously represent juvenile law violators and status offenders includes:

1. Knowledge of adolescent development and how it can aid decision-making in court,

2. Strategies for interviewing adolescent defendants, witnesses, and victims,

3. How to get high-quality mental health and chemical dependency assessments and what to do with them in court,

4. How child maltreatment and other risk factors lead children to chronically aggressive behavior,

5. How to recognize and treat young children and youth with disabilities that compromise their ability to comprehend, learn and behave,

6. Evaluating youth competence in the justice system,

7. Legal strategies to reduce the unnecessary detention of children.

8. Community treatment/rehabilitation resources.

C. QUALIFICATIONS FOR COUNSEL REPRESENTING JUVENILES IN ADULT CRIMINAL COURT

See the *Standards for Appointed Counsel in Capital, Other Felony, and Misdemeanor Cases*

D. COMPENSATION FOR ASSIGNED COUNSEL IN LAW VIOLATION AND STATUS OFFENSE CASES

1. In compensating assigned counsel in all cases, there shall be no distinction between rates for services performed in and outside of court, and the rate shall be paid for any time the attorney spends traveling in fulfilling his/her obligations to the client.
2. In compensating assigned counsel in all cases, there shall be no flat fees or caps on compensation.
3. Assigned counsel shall be compensated for all hours reasonably necessary to provide quality legal representation as documented in fee applications submitted by the attorney.
4. In cases where a juvenile is charged with a law violation or status offense, counsel shall be compensated at the hourly rate that is provided for attorneys representing adults charged with non-capital felonies.

E. REIMBURSEMENT FOR EXPENSES AND AUTHORIZED EXPENDITURES FOR PERSONS REPRESENTED BY RETAINED COUNSEL

1. In all cases involving appointed counsel, counsel shall be reimbursed for reasonable expenses necessary to provide quality legal representation as documented in fee applications submitted by the attorney. These expenses include, but are not limited to: mileage, lodging, meals, long distance telephone calls, photocopying, postage, faxes, depositions, service of process fees, collect telephone calls from the client, interpreters for foreign languages and for the visually or hearing impaired, and non-expert witness fees and expenses.
2. In all cases involving appointed counsel, costs of medical and psychiatric evaluations, expert witness fees, and investigative services shall be paid only if ordered and approved by the court. When seeking such an order the hearing shall be *ex parte*, exempt from the prohibition of Rule 3.5 Nebraska Rules of Professional Conduct, without the aid or participation of a prosecuting attorney, and the order shall be sealed until the conclusion of the case.

3. Expenditures for investigative, expert, or other services for a person who has retained private counsel for trial or appeal when the person is unable to pay for the services and such services are necessary to prepare and present an adequate defense are eligible for reimbursement from the county if the defendant is determined to be indigent.

F. STANDARDS RELATING TO CONTRACTS FOR INDIGENT DEFENSE SERVICES IN JUVENILE CASES

1. No court shall appoint an attorney who has contracted with a county to provide juvenile defense services unless the contract has been certified by the Nebraska Commission on Public Advocacy as to the following:
 - a. That the contract specifies the specific category of cases in which the contracting attorney is to provide services (e.g. juvenile delinquency; status offense),
 - b. That the contract is awarded for a minimum of two (2) years and that removal of the contracting attorney may be for good cause only,
 - c. That the contract provide that the contracting attorney be compensated at a minimum rate which reflects the following factors:
 - i. The customary compensation in the community for adult non-capital felony cases; and
 - ii. The time and labor required to be spent by the attorney;
 - d. That the contract specifies a maximum allowable caseload under the contract and provide that the contracting attorney may decline to represent clients, with no reduction in compensation, if the contracting attorney is assigned cases in excess of the specified maximum caseload. When defining the maximum allowable caseload or workload, adequate support staff (secretaries, paralegals, investigators, etc.) is a necessary component that should be considered in reaching a conclusion. The maximum allowable caseload or workload would change at any given time, if there is a decrease in number of attorneys or support staff, for any given reason.
 - e. That the contract provide that the contracting attorney provide legal counsel to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association and the Rules of Professional Conduct For Attorneys as adopted by the Nebraska Supreme Court.
 - f. That the contract provide that the contracting attorney shall be available to eligible defendants upon their request, or the request of someone acting on their behalf, at any time the Constitution of the

United States or the Constitution of Nebraska requires the appointment of counsel.

g. That the contract provide that the contracting attorney meet the qualification standards for attorneys recommended by these standards for all categories of cases specified in the contract.

G. STANDARDS FOR MAINTAINING LISTS OF ELIGIBLE ATTORNEYS REPRESENTING JUVENILES, THE APPLICATION PROCESS, AND PROCESS FOR APPOINTMENT

1. The Nebraska Commission on Public Advocacy shall maintain lists of eligible attorneys:

a. Each County or Separate Juvenile Court Judicial District within the State of Nebraska shall adopt, by majority vote of the juvenile or county court judges within the district, a systematic and publicized plan for providing assigned counsel, which shall include a method of distributing assignments of attorneys in law violation and status offense cases. The method used shall include a registration procedure. A copy of the plan required by this standard along with the roster of eligible attorneys shall be sent to the Nebraska Supreme Court.

b. As nearly as possible, assignments shall be made in an orderly way to avoid patronage and its appearance, and to assure fair distribution of assignments among all whose name appear on the roster of eligible attorneys. Ordinarily, assignments should be made in the sequence that the names appear on the roster of eligible attorneys. Where the nature of the charges or other circumstances require, an attorney may be appointed because of his or her special qualifications to serve in the case, without regard to the established sequence. Departures from assignment by the established sequence shall be made when such departure will protect the defendant's constitutional right to the effectiveness of counsel and may be made when efficient administration of assignments so requires.

c. Inclusion in or removal from a roster of qualified attorneys shall be by majority vote of all county or juvenile court judges within the district. The roster of attorneys should be periodically revised and specific criteria for removal should be adopted.

d. The rosters shall be maintained by both the Clerk of the County Court and the Clerk of the Separate Juvenile Court.

e. By a majority vote of all of the county and juvenile court judges within a judicial district, the responsibilities for adopting a plan, creating the method of appointment, creating the rosters of attorneys, or making the assignments may be delegated to the Nebraska Commission on Public Advocacy.

H.. STANDARDS RELATING TO CASELOADS AND WORKLOADS

1. Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of high quality representation or lead to the breach of professional obligations.
2. No court shall require defender organizations, assigned counsel, nor contractors for services to accept caseloads that will, in the best professional judgment of the appointed organization or attorney, lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

I. TRAINING

1. All attorneys who accept court appointments to represent juveniles in law violation and status offense cases shall be required to complete a minimum of 16 hours of relevant training every two years. The required training may be in the form of video or online training as well as seminars and conferences.
2. Upon adoption of the training requirement, court appointed attorneys will be required to certify that they either have completed the minimum 16 hours of relevant training in the previous two years or agree to receive the training within the next two years. Attorneys with less than two years of experience must complete the 16 hours of training before accepting a juvenile court appointment.

System Recommendations of the Subcommittee

The Subcommittee recommends that the Commission make the following system recommendations to the Supreme Court to promote the overall objective of these standards to ensure high quality legal representation for all juveniles facing adjudication in the juvenile court for law violations or status offenses.

- a. The Subcommittee recommends that the Commission recommend the following statutory changes to limit the ability of children and young adolescents to waive their right to an attorney and to waive certain due process rights without first consulting an attorney.
 - i. *No child fifteen years of age or younger may be questioned as a suspect about any felony unless they have consulted with an attorney prior to such questioning. The right to consult with an attorney, prior to being questioned as a suspect about any felony, cannot be waived.*
 - ii. *A child fifteen years of age or younger who is alleged in the petition to have committed a Class III or higher felony or who is detained cannot waive his or her rights without first consulting an attorney.*
 - iii. *In determining whether a waiver of any right by an unrepresented child of any age is voluntary and knowing, the court shall consider the child's ability to:*
 1. *Understand the charges;*
 2. *Understand the roles of participants in the trial process, judge, defense attorney, prosecutor, witnesses, and jury, and understand the adversarial nature of the process;*
 3. *Reason about available options by weighing his or her consequences, including but not limited to, weighing pleas, waivers, and strategies;*
 4. *Understand and appreciate the charges and their seriousness;*
 5. *Understand and realistically appraise the likely outcome of the waiver;*
 6. *Extend thinking into the future; and*
 7. *Express himself or herself in a reasonable and coherent manner.*
- b. The Subcommittee recommends that a process be developed to appoint an attorney for detained youth immediately upon detention regardless of the parent's ability to pay.
- c. The Subcommittee recommends that the Commission pursue state funding for the legal representation of juveniles facing adjudication in the juvenile court for law violations or status offenses to ensure implementation of these attorney standards and system recommendations.

Assessment of Legal Representation in Delinquency and Status Offense Cases: Survey of Nebraska Defense Attorneys, Prosecuting Attorneys, and Judges

METHODOLOGY

Participants- Three hundred and forty-six surveys were sent to juvenile defense attorneys, prosecuting attorneys (both county and city, where applicable) and judges with juvenile jurisdiction. Reminders and a second mailing were sent approximately four weeks after the initial mailing to those who had not responded. Overall, two hundred complete surveys were returned reflecting a 57% response rate. Response rates by professional category were: 50% for defense attorneys, 61% for prosecuting attorneys, and 81% for judges.

Materials- Surveys were developed after reviewing the evaluations of the juvenile representation systems in several states (e.g. Washington, Louisiana), materials from the National Juvenile Defender Center, and the literature regarding different aspects of juvenile defense.

All respondents were asked several overall assessment questions about their evaluation of juvenile legal defense in their community. Each professional group was also asked the kind of information a person in the particular role would likely have. For example, defense attorneys were asked when in the process they typically were appointed and when they typically first saw their clients and prosecuting attorneys were asked about their decisions to file cases in juvenile or adult criminal court.

LIMITATIONS OF METHODOLOGY

An important limitation of this reliance on surveys, necessitated by funding limitations for this study, is that the report relies on estimates and opinions of attorneys and judges rather than a precise measurement of the activities in question. Still, while not exact, these estimates do provide a reasonable estimate of the general practice of juvenile defense attorneys across the state.

Another caveat is that the data is presented in terms of attorneys, not youth. Of the attorneys who identified their jurisdiction, 15 were from Omaha or Lincoln and 65 were from the rest of the state. Thus, attorneys in the sample are disproportionately rural, while the number of youth in the juvenile justice system is disproportionately urban.

FINDINGS

Findings from the survey will be presented along with pertinent language from the *Ten Core Principles for Providing Quality Delinquency Representation* (in italics) to provide a context for an assessment with the degree to which Nebraska's practices conform with these principles.

The Role of the Juvenile Attorney

Counsel's paramount responsibilities to children charged with delinquency offenses are to zealously defend them from the charges leveled against them and to protect their due process rights.³

There appears to be considerable confusion about the proper role of the juvenile attorney in delinquency and status offense proceedings, particularly in the rural parts of the state. Overall, 28% of Nebraska juvenile defense attorneys believe that in representing youth charged with law violations in juvenile court it is their duty to represent their clients' best interests rather than their clients' expressed wishes as to their defense. The difference between the urban courts (Douglas and Lancaster counties) is significant. Only 7% of attorneys practicing in the urban courts believe that it is their duty to represent their client's best interests, compared with 33% of the attorneys in the rest of the state. Not surprisingly, the belief regarding the duty to represent the client's best interests is held by even more attorneys (35% overall) for youth charged with status offenses. Again, there is an urban-rural difference with 16% of urban attorneys holding this belief as compared with 38% of rural attorneys.

- **FINDING #1** A significant number of juvenile defense attorneys, particularly in the county courts, view their duty as representing the youth's best interests, not interests as directed by the youth. The practice of these attorneys does not conform to the *Ten Core Principles*.

Participation of Counsel in Juvenile Court Proceedings

Waiver of Counsel

The indigent defense delivery system should ensure that children do not waive appointment of counsel. The indigent defense delivery system should ensure that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.^{4,5}

Waiver of Miranda rights to counsel appear to be commonplace. About half of prosecuting attorneys estimate that youth waive their right to counsel during law enforcement questioning most of the time; About 25% of the prosecuting attorneys estimate that youth waive this right about half the time. Defense attorneys perceive this to be even more frequent with 68% believing that youth mostly or always waive their right to counsel during law enforcement questioning.

³ *Id.* Preamble A.

⁴ *Id.* Principle 1A.

⁵ The Principles note that the use of the term "delinquency proceedings" also includes "any proceeding lodged against an alleged status offender, such as for truancy, running away, incorrigibility, etc."

Youth also appear to be waiving their right to counsel for court proceedings at a high rate. Over 29% of defense attorneys, 33% of prosecuting attorneys, and 29% of judges report that youth waive their right to counsel at the detention hearing about half the time or mostly. Thirty-two percent of defense attorneys, 46% of prosecutors, and 70% of judges report that youth waive their right to counsel at the arraignment about half the time or mostly.

Parental influence appears to be a main reason that youth waive their rights to attorneys. Sixty-three percent of defense attorneys, 40% of prosecutors, and 40% of judges believe that parental pressure is the main reason for a youth waiving the right to counsel about half the time or mostly. Judges consistently advise the youth of their rights to an attorney, however the youth's ability to fully understand the advisement is not typically assessed.

- **FINDING #2** A large percentage of youth charged in juvenile court, perhaps more than half, waive their right to counsel both during police interrogation and in court proceedings. This does not conform to the *Ten Core Principles*.

Stage of Participation by Counsel

The indigent delivery system recognizes that the delinquency process is adversarial and should provide children with continuous legal representation throughout the legal process including, but not limited to, detention, pre-trial motions or hearings, adjudications, disposition, post-disposition, probation, appeal,....⁶

Approximately one-third of defense attorneys report that they typically meet detained clients before the detention hearing. Approximately one third of attorneys report that they meet their clients at the detention hearing and the remainder meet them sometime after the detention hearing. Again, there is a significant urban-rural difference. In the urban courts, one third of the attorneys reported that they typically meet their clients before the detention hearing and the remaining two thirds reported that they meet their clients at the detention hearing. In the rural courts approximately one third of attorneys also reported they typically meet their clients before the detention hearing. However, only 27% meet their clients at the detention center. Thirty-eight percent meet their clients after the detention hearing. Thus, although youth in both the urban and rural courts may not typically have attorneys at their detention hearings who are prepared to actually provide zealous representation that opposes their client's detention, almost 40% of youth in rural courts who eventually have representation do not get that representation until after this critical proceeding.

For youth who are not detained, 53% of attorneys report that they typically meet their clients before the arraignment; 27% report they meet the youth at the arraignment; 20% report they meet them after the arraignment.

⁶ *Id.* Principle 1B

Surveys submitted by prosecuting attorneys and judges report that they perceive even fewer defense attorneys meeting their clients prior to the detention hearing and at the detention hearing, as compared to self reports by the defense attorneys.

- **FINDING #3** Most detained youth who are eventually appointed counsel do not have prepared counsel at their detention hearings. About half of non-detained youth meet their attorneys at or after their arraignments. This does not conform to the *Ten Core Principles*.

Zealous Advocacy

*The indigent defense delivery system.....recognizes the need for zealous representation to protect children....*⁷

Defense attorneys, prosecutors, and judges all estimated that pre-trial motions to suppress, pre-trial motions in limine, pre-trial discovery motions, and pre-trial motions regarding competence were rarely filed.

The majority (76%) of defense attorneys report that they mostly or always interview witnesses before the adjudication. However, 21% of the attorneys report they interview witnesses before the adjudication about half the time or less frequently.

- **FINDING #4** Pre-trial motions are rare and a significant number of attorneys do not gather independent information. This does not conform to the *Ten Core Principles*.

*The indigent defense delivery system utilizes expert and ancillary services to provide quality juvenile defense services.*⁸ *The indigent defense delivery system has an obligation to present independent treatment and disposition alternatives to the Court.*⁹

The majority of defense attorneys reported that they often used social workers as experts (presumably Nebraska Department of Health and Human Services caseworkers). These experts would be providing the state's treatment and disposition plan, not an independent alternative. The majority of defense attorneys rarely or occasionally used mental health professionals as experts and rarely used investigators as experts. A number of attorneys commented that it was difficult to get judges to order evaluations that are independent of HHS. Independent treatment or dispositional alternatives were occasionally submitted to the courts.

- **FINDING #5** The majority of attorneys do not utilize independent experts or other means to offer independent dispositional alternatives to the court. This does not conform to the *Ten Core Principles*.

⁷*Id.* Principle 1.

⁸*Id.*

⁹*Id.* Principle 8.

Capacity, Competency, and Waiver of Jurisdiction

The Representation of Children and Adolescents is a Specialty

The indigent defense delivery system must recognize that children and adolescents are at a crucial stage of development and that skilled juvenile delinquency defense advocacy will positively impact the course of clients' lives through holistic and zealous representation.

The indigent defense delivery system must provide training regarding the stages of child and adolescent development and the advances in brain research that confirm that children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults. Expectations, at any stage of the court process, of children accused of crimes must be individually defined according to scientific, evidence-based practice.

The indigent defense delivery system must emphasize that it is the obligation of juvenile defense counsel to maximize each client's participation in his or her own case to ensure that the client understands the court process and to facilitate the most informed decision making by the client.¹⁰

The indigent defense delivery system further acknowledges the specialized nature of representing juveniles processed as adults in transfer/waiver proceedings.¹¹

Considering and raising issues regarding the youth's capacity and competency to participate in the juvenile court process appears to vary across attorneys and courts. There was general conformity in the perceptions of attorneys, prosecutors, and judges so only the defense attorneys' views will be presented. The following table shows the distribution of attorneys' report of how often issues regarding the youth's competency are considered. To illustrate the interpretation of the following table: 17% of attorneys report that mental capacity is rarely raised; 25% of the attorneys report that mental capacity is occasionally raised; etc.

¹⁰ *Id.* Preamble B.

¹¹ *Id.* Principle 2A.

Frequency of Consideration of Youth's Competency Issues

	Rarely	Occasion-ally	About Half the time	Mostly	Always
Mental capacity	17%	25%	3%	30%	20%
Low educational level	20%	30%	12%	24%	14%
Low comprehension level or literacy	17%	31%	15%	24%	14%
Age	8%	14%	18%	37%	24%
Understanding of the charges against them	13%	17%	13%	32%	26%
Understanding of the court proceedings	12%	21%	12%	31%	25%
Ability to understand and answer questions posed by attorney	17%	16%	11%	35%	21%
Ability to weigh consequences of accepting/rejecting the plea	15%	16%	15%	36%	19%
Ability to make basic decisions about the trial	17%	16%	14%	36%	18%

Prosecuting attorneys estimate that their offices file charges regarding approximately half of the youth age 16 or over in adult criminal court. Information regarding how many of these charges were for minor-in-possession cases was not assessed. Further, the frequency that juveniles requested and were granted waivers to juvenile court was not assessed.

Prosecuting attorneys estimate that their offices file charges for youth 15 and younger in adult court 17% of the time. Half the attorneys estimated that they file in adult court on these younger teens 5% of the time or less.

Prosecuting attorneys reported the amount of weight they give various factors in their decision as to where to file charges involving juveniles as follows (on average):

- Dangerousness- a lot of weight
 - Sophistication/maturity- a lot of weight
 - Amenability to treatment-between some weight and a lot of weight
 - Mental capacity-some weight
 - Competency to assist in their defense-a little to some weight
- **FINDING #6** Many juvenile defense attorneys and attorneys defending juveniles in the adult system do not appear to develop or utilize evidence regarding the youth's competence or capacity to participate in the legal proceedings. This does not conform to the *Ten Core Principles*.

- **FINDING #7** Prosecuting attorneys estimate that their offices file charges regarding approximately half of the youth age 16 or over in adult criminal court. Prosecuting attorneys estimate that their offices file charges for youth 15 and younger in adult court 17% of the time.

Training

The indigent defense system provides and supports comprehensive, ongoing training and education for all attorneys and support staff involved in the representation of children.¹²

Approximately one-fifth of juvenile attorneys reported that training for all new attorneys and separate training for juvenile lawyers was available to them. Forty-six percent of juvenile attorneys reported that mentoring or supervision was available to them. Prosecuting attorneys have somewhat of a training advantage, with about half reporting they have training available for new attorneys, 40% reporting separate training for juvenile issues, and 54% reporting available supervision or mentoring.

The following table reflects the responses by defense attorneys as to whether training on the various topics has been available to them and whether they would be interested in such training. As can be seen from the table, with the exception of training on general practices and procedures in juvenile court, less than one-third of the responding attorneys report that any of the other topics have been available to them. On a positive note, the attorneys conveyed a strong interest in training on a variety of topics, especially, dispositional alternatives; child development & issues of capacity; mental health & health care issues; available community resources; and competency standard (including developmental considerations).

¹² *Id.* Principle 7.

Training Availability and Interest

	Training on this topic has been available	Interest in training on this topic
Detention alternatives	24%	85%
Dispositional alternatives	27%	90%
Available resources in the community	28%	87%
General practice and procedures in the juvenile court	46%	76%
Amenability to treatment	18%	68%
Pretrial motions practice	30%	74%
Competency standard (including developmental considerations)	20%	87%
Client – specific dispositions	25%	68%
Child development & issues of capacity	23%	90%
Cultural competency	10%	71%
Dispositional needs of females	18%	71%
Community alternatives	23%	86%
Mental health and health care issues	26%	91%
Special education	21%	73%
Interviewing techniques	24%	73%
Appeals	32%	74%
Conditions of confinement	16%	79%
Right to treatment	15%	74%
Minority over-confinement	7%	66%
Waiver of jurisdiction (transfer from adult to juvenile court)	27%	66%

- **FINDING # 8** There is a paucity of training available for juvenile defense attorneys in Nebraska. This does not conform to the *Ten Core Principles*.

Fairness and Equity

*The indigent defense delivery system must promote fairness and equity for children.*¹³

Only 8% of judges, 7% of defense attorneys, and 2% of prosecutors believe that there are practices or procedures in the juvenile court process that appear to have a disparate impact on youth of color or their families. Those that did identify a disparate impact suggested that minority youth are more likely to be detained because of the perception that minority families provide less supervision, because of poverty related limited

¹³ *Id.* Principle 10.

resources (e.g., land-line telephones that expedite electronic monitoring), and because of a lack of culturally competent and bilingual services.

Fourteen percent of judges, 3% of defense attorneys and no prosecutors believe that there are practices or procedures in the court process that appear to have a disparate impact on girls. Those that did identify a disparate impact suggested that there were fewer resources available for girls and more restrictive placements for girls due to a perception that high risk behaviors will more negatively impact girls (e.g. pregnancy).

- **FINDING # 9** The vast majority of judges and attorneys do not believe that the juvenile court process has a disparate impact on minorities or girls.

Additional Findings

The remaining findings do not correspond with specific principles but provide useful information about the general juvenile attorney practice in Nebraska.

Work Setting, Specialization and Experience

Juvenile defense work is primarily provided by either county public defender offices or case-by-case appointments to individual attorneys. Regardless of the work setting, most attorneys defending juveniles do it for a relatively small portion of their work time. Half of the attorneys do this work for 15% or less of their work time. Only 7% of the respondents reported that they do more than 50% juvenile work. Most of the attorneys reported that they just spent a few hours of their work week on juvenile cases.

Judges and defense attorneys estimated that the average length of experience of attorneys handling delinquency or status offense cases in their communities was between 9 and 10 years. The attorneys reported that they themselves had an average of 15 years of experience. About 40% of the attorneys reported using paralegals to assist them in their work.

- **FINDING #10** Most juvenile defense attorneys tend to be quite experienced and most only devote a small percentage of their practice to juvenile cases.

Challenges

Forty-five percent of the defense attorneys reported that their ability to provide effective legal representation was impaired because Spanish was a youth's primary language at least occasionally. Sixteen percent reported impaired ability to their legal representation because a language other than Spanish (or English) was a youth's primary language at least occasionally. Cultural differences and immigration issues were cited as at least occasionally interfering with the attorney's ability to provide effective representation by about 20% of the attorneys.

Defense attorneys reported that high caseloads (22% of respondents) and limited financial resources for the case (41% of respondents) impeded their ability to provide effective representation at least occasionally.

Estimates regarding the prevalence of mental health problems that related to the youths charges varied from 29% for defense attorneys, 27% for judges and 21% for prosecutors. Half of the prosecutors believed that 10% or less of the youth they prosecuted have mental health problems that relate to their charges.¹⁴

- **FINDING # 11** Language issues, cultural barriers, and high case loads are reported by a small number of attorneys as barriers to effective representation. A substantial number of attorneys report that limited financial resources for their cases is a barrier to effective representation.

General Perceptions

Many judges provided comments indicating their general satisfaction with the quality of juvenile representation in their courts, but they recognized that this representation suffers from funding pressures. Judges also conveyed concerns about the growing burden of the expense of juvenile representation on their county budgets. Judges also provided comments about their recognition of juvenile court as rehabilitative, not punitive, and how that view requires a different approach from attorneys rather than a zealous defense against the charges. Defense attorneys commented on difficulties getting appropriate services for youth, difficulties in getting judges to order evaluations that are independent of HHS, difficulties in dealing with parents, and growing case loads. Prosecutors generally had great respect for the quality of representation by juvenile attorneys, but a number expressed strong sentiments regarding the lack of appropriate community based services and highly specialized services for the youth that come in to the court system.

- **FINDING # 12** There is general statewide satisfaction for the quality of juvenile defense but general concern about the lack of appropriate community based services.

¹⁴ See *Assessing the Need for and Availability of Mental Health Services for Juvenile Offenders, 2002*. D.C. Herz & A. L. Poland, Report to Nebraska Coalition for Juvenile Justice and Nebraska Crime Commission. This study assessed the prevalence of mental health and substance abuse problems in juvenile offenders in 13 Nebraska Probation districts in 2001. The findings indicated that 52% of the assessed youth had mental health and/or substance abuse problems, with the majority of the problems in the mental health rather than substance abuse arena. Thus, it appears that the legal community, including the defense bar, significantly underestimates the incidence of these problems in the youth in the juvenile justice system.

Social Science Review

Several areas of social science research have direct policy implications for the system and practice of juvenile defense. The following sections will first review the empirical findings regarding common impairments to youths' competence and capacities in the legal arena. This research supports the need for legal representation for youth facing adjudication in the juvenile court system. The next section reviews the empirical literature regarding limitations to the actual "rehabilitative" impact of many typical Nebraska dispositions- primarily aggregate living and treatment situations. This research is important because it suggests that many Nebraska youth in the juvenile justice system, including status offenders, are being subjected to dispositions that are intended to be rehabilitative but in fact may be harmful. Again, the best defense a youth has against harmful dispositions is zealous advocacy: first, to reduce the likelihood of the youth being adjudicated and second, to ensure that dispositions fit the rehabilitative goals of the juvenile court.

Juvenile Waiver of *Miranda*

The seminal work investigating juvenile comprehension of *Miranda* rights was published twenty-five years ago and still serves as the foundation for much of the research in this area.¹⁵ Grisso examined adults and juveniles both with and without a history of contact with the justice system. This research found that only 21% of juveniles showed adequate understanding of the four components of a *Miranda* warning, and 55% of juveniles demonstrated no adequate comprehension on any of the four warnings. The findings also indicated that juveniles fifteen and younger are especially unable to comprehend the concepts involved in a *Miranda* warning, almost all juveniles who obtained IQ scores below 75 demonstrated a lack of comprehension of their rights, and juveniles are more likely than adults to misunderstand the function of legal counsel, thus not benefiting from the protection that lawyers can provide.

"Interested adult" requirements have been enacted in several states, based on the assumption that an adult can and will provide assistance to the juvenile in understanding and decide about whether to waive their rights. However, research indicates that juveniles who are provided with an interested adult are no less likely to waive their *Miranda* rights than those juveniles who are not provided with such an adult.¹⁶ Several researchers have suggested that the adult may be anxious or confused at the time of consultation, and therefore may be unable to provide meaningful assistance¹⁷, or may even be angry and contribute to the coercive pressure of an interrogation.¹⁸ Grisso's earlier research found that 70% to 80% of parents offered no advice when communicating with their children during an interrogation, and of the 20% of cases where advice was given, parents advised their child to waive their rights and speak to the police without benefit of an attorney

¹⁵ Thomas Grisso, JUVENILE'S WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981).

¹⁶ *Id.*

¹⁷ L. Oberlander, N. Goldstein, & A. Goldstein, Competence to Confess, in *FORENSIC PSYCHOLOGY* (2003) 335-358.

¹⁸ Thomas Grisso, FORENSIC EVALUATION OF JUVENILES (1998).

three times more often than advising the youth to assert the right to remain silent. Along these lines, regardless of the presence of an interested adult, Grisso found that only 9% of juveniles exercised their right to silence, and “refusal to talk was virtually non-existent below age 15.”¹⁹

Juvenile Adjudicative Competence

The MacArthur Juvenile Adjudicative Competence study²⁰ examined over 1,400 youth (both males and females) between the ages of 11 and 24. At the time of the study, half of these juveniles were in jail or detained in detention centers, and the other half were of similar gender, age, ethnicity and socioeconomic status, but residing in the community. Results indicated that age clearly influences capacities relevant to competence to stand trial. Youth aged 11-13 were consistently found to be less capable in judgment, understanding, and reasoning than older youth. Specifically, juveniles aged 11 to 13 were three times more likely than adults to exhibit “serious” impairment in their competence-relevant abilities, and juveniles aged 14 to 15 were twice as likely as adults to be judged as “seriously” impaired. Moving beyond formal competence criteria, when faced with critical decisions during the criminal justice process, the youngest teens (aged 11-13) were regularly less capable of making the best choice during police interrogation, attorney consultation, and accepting a plea agreement.

Younger adolescents appear to hold erroneous beliefs about legal counsel. About a third of adolescent defendants believed that the lawyer could decide whether to advocate for them or not and that defense attorneys defend the innocent but are more like police officers for the guilty.²¹ A recent study found that the more time a juvenile spent with his attorney, the more the juvenile understood the police interrogation and adjudication processes.²² This relationship was most strong for youth with poor cognitive abilities, but was evident for all the young defendants. Mere experience in the juvenile justice system (previous arrests) was not related to higher competence.

Peer Group Placement

There are consistent findings among researchers regarding the harmful effects of group placement of youths in the juvenile justice system. According to a recent report by top researchers in child development,²³ “placement of deviant teens into groups with

¹⁹ Thomas Grisso, *supra* note 15.

²⁰ Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, & N. Dickon Reppuci, (2003). “Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants.” *Law & Hum. Behav.* 333-363.

²¹ Thomas Grisso, *supra* note 15.

²² Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, *LAW & HUM. BEHAV.* 723-742, (2005).

²³ Kenneth A. Dodge, Thomas J. Dishion, & Jennifer E. Lansford, *Deviant Peer Influences in Intervention and Public Policy for Youth*, SOCIAL POLICY REPORT, SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT (2006).

other deviant youth is the most common and most costly of all public policy responses to deviant behavior by a child.” The authors of this report reviewed many studies and meta-analyses of studies and found that placement with deviant peers in juvenile justice interventions limited the otherwise positive effects of the interventions and often resulted in an overall negative impact on the youth.

The mechanism of the negative effect of the peer group appears to be “deviancy training” (i.e. the reinforcement of antisocial behavior by delinquent peers).²⁴ By creating an in-group of juvenile delinquents, group treatments and detention may serve to maintain antisocial behavior, and such settings could even service as a “training ground” where youth learn from one another and antisocial behavior escalates²⁵ (Bootzin & Bailey, 2006).

The above researchers have argued that the effects of deviancy training are so strong that they even outweigh any beneficial effects of non-residential group based treatments, such as out-patient group therapy. However, another group of researchers have recently published a review of studies regarding group treatment (as opposed to residential placements) and have found that “the deviancy training potential of treatment sessions appears less significant than the more extensive peer influences outside treatment.”²⁶ Thus, there is some debate in the field regarding whether any grouping of delinquent or delinquency prone youth will cause more harm than good. There is, however, little debate about the “deviancy training” effects of residential grouping of these youth where the peer influences that are ever present will provide multiple opportunities for the transmission of anti-social values, culture, and behaviors.

Although the researchers would advocate that policy makers avoid all group placement of youth, public safety concerns, the needs of youth whose families cannot provide a safe home, and limitations in therapeutic foster homes will undoubtedly require some youth to be placed in group placements. A high staffing ratio and a high degree of structure appear to lessen the deviancy training effect in these settings, most likely by giving the youth fewer opportunities to interact without direct supervision by adult staff. Also, short-placements (e.g. 10 days in a detention center) appear to have fewer negative outcomes than long-term placements.²⁷ Younger youth placed with slightly older youth are the most vulnerable to the impact of deviancy training.

Summary/Discussion of Social Science

The social science literature indicates that most youths fifteen and under do not understand Miranda warnings and thus are not waiving these rights knowingly. Similarly,

²⁴ T.J. Dishion, J. McCord & F. Poulin, *When Interventions Harm: Peer Groups and Problem Behavior*, AMER. PSYCHOL. 755-764 (1999).

²⁵ Richard Bootzin & Elaine Bailey. *Understanding Placebo, Nocebo, and Iatrogenic Treatment Effects*, J. CLIN. PSYCHOL., 871-880 (2005).

²⁶ Bahr Weiss, Nnalise, Caron, Shelly Ball, Julie Tapp, Margaret Johnson & John Weisz, *Iatrogenic Effects of Group Treatment for Antisocial Youths*, J. CONSUL. & CLIN. PSYCHOL., 1036-1044, (2005).

²⁷ D.W. Osgood, J.K. Wilson, P.M. O’Malley, J.G. Bachman, & L.D. Johnston, *Routine Activities and Individual Deviant Behavior*, AMER. SOC. REV., 635-655 (1996).

most youth fifteen and under are “significantly impaired” in the competencies that are required to competently face adjudication. One of the impairments that most youth have is that they do not understand the role of counsel. Consequently, if a youth under the age of sixteen waives his or her right to counsel, the overwhelming scientific literature indicates that the waiver is not knowingly made. The literature also suggests that the best way to help youth gain an understanding of the legal process is to have them meet with an attorney. Time spent with an attorney, as opposed to time spent in the legal system, was most likely to increase the youth’s competence in the legal system.

Gault²⁸ held that despite the rehabilitative intent of the juvenile court, youth still had certain due process rights including the right to counsel. Comments in the survey discussed in this report indicate that a number of Nebraska judges and attorneys believe that the rehabilitative needs of many of the youth create a tension between responding to these needs and protecting the youth’s rights. For example, there was some endorsement of the proper parental role in encouraging their child to “face the music” “own up to what they had done”, etc. Parental pressure was the most cited reason for youth’s waiving their rights. Clearly, there is a belief that the dispositions that the court imposes have a rehabilitative effect on the youth. Unfortunately, as described above, there is reason for concern regarding the rehabilitative impact of many of the dispositional alternatives that are available to the court. The harmful, rather than rehabilitative, effects of the many dispositions involving group placement imposed on youth in our system creates a strong argument for the need for zealous defense for these youth. It is of particular concern that status offending youth who do not pose public safety hazards may be harmed by the very interventions that are imposed to help them.

Zealous defense may succeed in keeping a number of youth out of the system entirely or at least minimize their placements in aggregate residential settings. Thus, while protecting the legal rights of the youth, as directed by Gault, such defense is also expected to protect troubled youth from further “deviancy training” and make it less likely that a number of the youth will continue in a delinquency-criminal trajectory.

²⁸ In re Gault (387 U.S. 1 (1967))

Recommendations of National Groups Regarding Juvenile Defense

National Council of Juvenile and Family Court Judges

Youth Charged in the Formal Juvenile Delinquency Court Must Have Qualified and Adequately Compensated Legal Representation – Alleged and adjudicated delinquent youth must be represented by well-trained attorneys with cultural understanding and manageable caseloads.

Juvenile delinquency court judges and judicial offices should be extremely reluctant to allow a youth to waive the right to counsel. On the rare occasion when the court accepts a waiver of the right to counsel, the court should take steps to ensure that the youth is fully informed of the consequences of the decision. A waiver of counsel should only be accepted after the youth has consulted with an attorney about the decision and continues to desire to waive the right.²⁹

American Bar Association Steering Committee on the Unmet Legal Needs of Children

- Every juvenile should have ready access to competent counsel.
- Every juvenile should have an unwaivable right to counsel.
- Every juvenile should receive assistance of counsel throughout the entire justice process.
- Every jurisdiction should establish minimum requirements and standards for lawyers that are consistent with the *IJA/ABA Juvenile Justice Standards*.
- Every jurisdiction should ensure that lawyers have manageable caseloads and access to resources sufficient to investigate and prepare the case properly.
- Every jurisdiction should ensure that safeguards are in place to adequately assess a child's competency to understand and participate in the justice process. Guilty pleas should only be entered into with the full knowledge and consent of the juvenile.
- A lawyer's principle duty is to zealously represent the juvenile.
- Every jurisdiction should ensure that lawyers who represent juveniles are provided with regular, ongoing and comprehensive training, supervision and assistance.³⁰

²⁹ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES*, 25 (2005)

³⁰ AMERICAN BAR ASSOCIATION STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN, *AMERICA'S CHILDREN: STILL AT RISK*, 259 (2001).

American Council of Chief Defenders National Juvenile Defender Center

Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems

1. The indigent defense delivery system upholds juveniles' right to counsel throughout the delinquency process and recognizes the need for zealous representation to protect children.
2. The indigent defense delivery system recognizes that legal representation of children is a specialized area of the law.
3. The indigent defense delivery system supports quality juvenile delinquency representation through personnel and resource parity.
4. The indigent defense delivery system utilizes expert and ancillary services to provide quality juvenile defense services.
5. The indigent defense delivery system supervises attorneys and staff and monitors work and caseloads.
6. The indigent defense delivery system supervises and systematically reviews juvenile defense team staff for quality according to national, state, and/or local performance guidelines or standards.
7. The indigent defense system provides and supports comprehensive, ongoing training and education for all attorneys and support staff involved in the representation of children.
8. The indigent defense delivery system has an obligation to present independent treatment and disposition alternatives to the court.
9. The indigent defense delivery system advocates for the educational needs of clients.
10. The indigent defense delivery system must promote fairness and equity for all children³¹

³¹ American Council of Chief Defenders National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (2004).