



The Illinois Juvenile Defender Practice Notebook

by the Children and Family Justice Center of the
Bluhm Legal Clinic at Northwestern University School
of Law and the National Juvenile Defender Center

ModelsforChange
Systems Reform in Juvenile Justice

Prepared by the Children and Family Justice Center of the Bluhm Legal Clinic at Northwestern University School of Law and by the National Juvenile Defender Center.

The preparation of this document was supported by John D. and Catherine T. MacArthur Foundation.

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December 2008

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Models for Change

Models for Change is an effort to create successful and replicable models of juvenile justice reform through targeted investments in key states, with core support from the John D. and Catherine T. MacArthur Foundation. Models for Change seeks to accelerate progress toward a more effective, fair, and developmentally sound juvenile justice system that holds young people accountable for their actions, provides for their rehabilitation, protects them from harm, increases their life chances, and manages the risk they pose to themselves and to the public. The initiative is underway in Illinois, Pennsylvania, Louisiana and Washington and, through action networks focusing on key issues, in California, Colorado, Connecticut, Florida, Kansas, Maryland, Massachusetts, New Jersey, North Carolina, Ohio, Texas, and Wisconsin.

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With gratitude for generous contributions by DLA Piper, the Illinois Office of the State Appellate Defender, Cook County Public Defender Office, staff attorneys at the Children and Family Justice Center, and the National Juvenile Defender Center.

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**The Illinois Juvenile Defender Practice Notebook includes a collection of sample documents (on the included cd and our website at www.iljuveniledefenders.org) designed to serve as a resource for juvenile defense attorneys. These documents can be utilized as models that serve a particular purpose or as inspiration for creative, innovative efforts on behalf of juvenile clients.*

Preface



The primary goal of the *Illinois Juvenile Defender Practice Notebook* is to assist defenders who practice in one of the most rewarding and yet most challenging areas of law – juvenile defense. The practice of juvenile defense is complex and requires specialized training in order for attorneys to provide high quality advocacy. We are delighted to have partnered with our colleagues at the Children and Family Justice Center who prepared this specialized resource for Illinois juvenile defenders and we look forward to seeing it being used in practice.

The National Juvenile Defender Center released the *Juvenile Defender Delinquency Notebook* in 2000 and an update in 2006. It was our hope that states would use the *Notebook* as a foundation for creating state specific tools to enhance juvenile defense representation and we are very pleased to see this hope realized in Illinois.

The editing and production of the *Illinois Juvenile Defender Delinquency Notebook* has been truly collaborative in nature, and it is with this hope that we encourage anyone who receives this publication to distribute it and any of its portions without restraint.

Patricia Puritz

Executive Director

National Juvenile Defender Center

Chapter 1

Introduction to the Juvenile Defender System in Illinois: The Need for Zealous Advocacy



Delinquency proceedings in juvenile court are often complicated and may carry severe consequences for the children who ultimately are found delinquent as a result of these proceedings. As a result, children in juvenile court are entitled to many of the due process protections afforded to their adult counterparts.

In 2006, the National Juvenile Defender Center released the second edition of the *Juvenile Defender Delinquency Notebook*, a training manual intended as a resource for juvenile defenders on a national scale. This manual, the *Illinois Juvenile Defender Practice Notebook* (“*Illinois Notebook*”) is intended to serve as a state-specific supplement to the *Notebook*. The purpose of this manual is to assist defenders representing juveniles in delinquency matters in Illinois by providing them with a substantive guide to juvenile delinquency representation in Illinois.

1.1 Juvenile Defender System in Illinois



Points to Remember

- *Children in juvenile court have the right to due process and are entitled to all rights afforded to adults in criminal court, except the right to a jury trial.*
- *Zealous advocacy at the earliest possible moment is crucial in delinquency cases.*
- *Attorneys who are not appointed in a timely manner, who are not provided with sufficient resources to investigate and litigate cases, and who are otherwise constrained from meeting their obligations to their juvenile clients, have a duty to raise these issues in court.*

Illinois has a unique place in the history of juvenile representation. Illinois established the first juvenile court in the country, over 100 years ago. 31 Loy. U. Chi. L.J. 281, 284-85 (Winter 2000). In so doing, Illinois set some of the first standards for the treatment of juveniles accused of committing crimes.

However, early juvenile courts did not necessarily apply to children the constitutional due process protections required for adults in criminal court. Instead early juvenile courts focused on the *parens patriae* model of juvenile justice – an informal, non-adversarial setting in which the State was literally the child’s “parent” or “guardian” and resolution of the cases was based on the “best interests” of the child. Elizabeth Calvin, Sarah Marcus, *et al. Juvenile Defender Delinquency Notebook 2* (2nd ed. Spring 2006); Cathryn Crawford, *et al., Illinois: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* at vii (2007).

In the United States Supreme Court’s landmark decision in *In re Gault*, 387 U.S. 1 (1967), the Court expanded due process protections to juveniles, holding that children in juvenile court have a right to an attorney to represent them in all juvenile court proceedings, the right to cross-examine witnesses and the right to remain silent. Since the decision in *Gault*, juvenile laws and courts around the country have evolved and changed in their various approaches to juvenile justice. While laws have become more punitive in many respects – for instance, the advent of transfer laws and blended sentences – other changes in the law have been more reformative, treating child offenders differently from adult offenders. For example, in 2005, the United States Supreme Court abolished the death penalty for juvenile defendants. *Roper v. Simmons*, 543 U.S. 551 (2005). Most recently, in October 2007, the Illinois legislature, over the governor’s veto, decided to ease certain requirements for juveniles required to register as sex offenders and to submit to concomitant restrictions on residency and employment. S.B. 121 (amending the Sex Offender Registration Act (SORA), 730 ILCS 150/1 *et seq.*, by changing sections 2 and 3 of the Act and adding section 3-5, which provides for early termination of registration for juveniles). In so doing, the legislature created a procedure to allow juveniles to petition for removal from the registry – something adult offenders cannot do. *Id.* However, while there have been some positive reforms in the laws pertaining to juvenile offenders in Illinois, juvenile court is adversarial and punitive, and the quality of legal representation plays a critical role in the outcome of any individual case.

The adversarial nature of juvenile court requires that juveniles receive counsel at the earliest possible moment in order to ensure that the child’s rights are protected from the outset of the case. Indeed, when a child is held in custody, counsel must be appointed as soon as a petition is filed in juvenile court.² Attorneys also should be provided with adequate resources – such as investigators or social workers – in order to adequately represent their clients. Juvenile defenders who are not timely appointed or who are not given resources necessary to investigate and litigate their cases should not hesitate to raise these issues in court.

1.2 Comparing Delinquency and Criminal Practice



Points to Remember

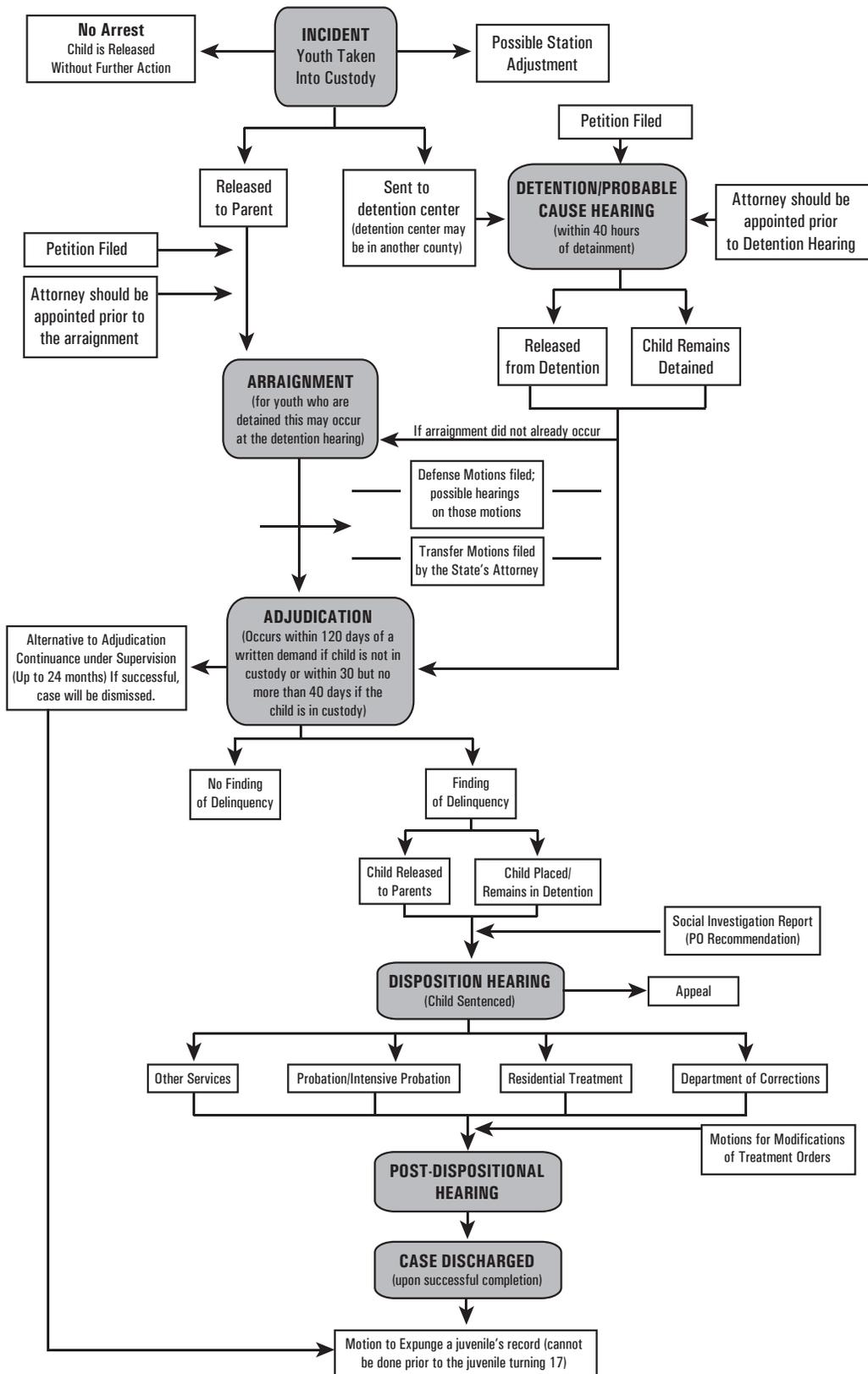
- *Cases in juvenile court have many similarities to cases in adult court; however, key differences exist that may be useful to attorneys, particularly in developing dispositional options. Still, attorneys should be aware that the consequences of juvenile adjudications may be just as far reaching as in adult criminal cases.*

How a juvenile case proceeds

In order to understand the similarities and differences between juvenile and adult criminal cases, it is important to understand the stages involved in a delinquency proceeding. The main stages of a delinquency proceeding are:

- Arrest
- Formal charging by prosecutor via a petition of wardship
- Arraignment/detention hearing
- Discovery
- Pre-adjudication motions or hearings, including motions to transfer (also, may occur at the outset of the case or early in the case) or motions to suppress
- Guilty plea or adjudication
- Finding of delinquency
- Disposition hearing
- Post-dispositional motions or hearings, including motions to modify the disposition and “bring back” dates to monitor the child’s compliance with the dispositional order
- Appeal
- Expungement (if appropriate)

An illustration of the general progression of a juvenile proceeding follows:



Thus, the main stages of a juvenile and adult criminal case are similar, and there are several similarities between the two types of proceedings. Similarities include:

- **Juveniles are subject to the same felony and misdemeanor statutes that apply to adult defendants in criminal court**
Both juveniles and adults face prosecution for alleged violations of the Illinois Code of Criminal Procedure and also are subject to the procedural rules as contained in the Illinois Supreme Court Rules and Illinois Code of Civil Procedure. However, sentencing of juvenile defendants differs, with the sentence usually terminating by the juvenile's 21st birthday if the minor is not subject to transfer or extended juvenile jurisdiction proceedings. 705 ILCS 405/5-755 (3).
- **Both delinquency and criminal proceedings are adversarial in nature**
Notwithstanding Illinois's juvenile court's historical dedication to the "best interests" of the child, juvenile court is adversarial in nature. Just as in adult court, juveniles are arraigned with respect to offenses, counsel engages in discovery and pre-trial motion practice, and juveniles face a trial (or "adjudication") with dispositions that include probation and incarceration. Defense attorneys are pitted against the State of Illinois (the State's Attorneys' offices of the various Illinois counties) to argue various aspects of the case, as in criminal courts. As a result, zealous advocacy is essential to protecting the juvenile's rights and ensuring that he has a fair trial.
- **Consequences of a conviction or adjudication in criminal or juvenile court can be far reaching**
Because the length of sentences in delinquency cases usually do not extend beyond the child's 21st birthday, and because the Juvenile Court Act has a rehabilitative focus, should not be interpreted to mean that the potential for lengthy sentences or consequences in juvenile court does not exist or should be overlooked, and does not mean that lawyers should substitute zealous advocacy with a desire to provide the minor with perceived help that an attorney believes a sentence would provide:
 - Juveniles, like adults, can be subject to incarceration in the Illinois Department of Corrections, and may be incarcerated for indeterminate periods of time. 705 ILCS 405/5-710(1)(b)³.
 - Depending on the age of the child, he or she may be subject to probation or incarceration for a period of time that is just as lengthy as an adult may face, particularly if the child's sentence extends to the 21st birthday. 705 ILCS 405/5-755(3); 705 ILCS 405/5-710(a), (b)).
 - Children may be forced to face stigmatizing consequences, such as expulsion from school or registration as sex offenders. While juvenile records historically were considered confidential, this confidentiality is not absolute; recent legislation has expanded the dissemination of information, particularly with respect to juveniles who are found delinquent of first degree murder, attempt to commit first degree murder, aggravated criminal sexual assault, or criminal sexual assault. 705 ILCS 405/1-8(C). In particular, the Sex Offender Notification and

Registration Law (SORA) allows for public access to information regarding registered sex offenders, and allows for information to be shared with the police, schools and other parties and individuals. *See* 730 ILCS 150/1, *et seq.* The Illinois Supreme Court and appellate courts have found no inconsistency between the confidentiality requirements of the Juvenile Court Act and SORA, based on SORA's "extremely limited" dissemination of juvenile sex offender information "to any person when that person's safety may be compromised for some reason related to the juvenile sex offender." *In re J.W.*, 204 Ill. 2d 50, 71-72, 787 N.E.2d 747 (2003) (minor found delinquent of aggravated criminal sexual assault was a "sexual predator" and was required to register as a sex offender for the rest of his life); *see also* 730 ILCS 150/7; *In re J.W.*, 204 Ill. 2d 50, 787 N.E.2d 747 (2003) (minor found delinquent of aggravated criminal sexual assault was a "sexual predator," and was required to register as a sex offender for the rest of his life); *but see*, S.B. 121, 95th Gen. Assemb. (2007) (providing for termination of registration after age 21); 705 ILCS 405/5-915 (excepting "sex offenses" from class of offenses for which a defendant can seek expungement).⁴

- Appropriate programs to assist in rehabilitating juveniles do not always exist, and probation often carries extensive conditions that are difficult for the minor to meet. Failure to meet such conditions can lead to incarceration.
- Additionally, children who are transferred to adult court or subject to extended juvenile jurisdiction (705 ILCS 405/5-810) potentially face the same sentences as adult offenders.
- Juveniles' prior adjudications may be used against them in future prosecutions.
- Juveniles may face denial of federal student loans, eviction from public housing, deportation, or other consequences as a result of a delinquency finding. Despite the confidentiality of juvenile law enforcement records generally, there are many exceptions to this restriction. 705 ILCS 405/1-7; 705 ILCS 405/1-8; *see also Campco, Inc. v. Lowery*, 362 Ill.App.3d 421, 429, 839 N.E.2d 655 (1st Dist. 2005) (noting that 705 ILCS 405/1-7 provides that the records of law enforcement officers relating to minors arrested before their 17th birthday cannot be disclosed to the public "except by order of court"; thus, such information could be disclosed if ordered by subpoena). Moreover, non-law enforcement agencies can obtain juvenile law enforcement records pursuant to subpoena, and there is no sanction if such agencies disclose this information to the public. *Campco*, 362 Ill. App. 3d at 430-31.

Notwithstanding the similarities, there are differences between juvenile and adult criminal proceedings, and juvenile defense practitioners should make sure they are intimately familiar with these distinctions. Differences include:

- **The juvenile system focuses more on rehabilitation as opposed to the adult system’s focus on punishment.**
Attorneys should bear this in mind when advocating for less punitive/more rehabilitative sentences in juvenile court.
- **Parents, guardians and caretakers have greater involvement in the juvenile system.**
As a result, attorneys may become confused as to their role in representing the child and communicating directly with the child versus the child’s guardians.
- **Juvenile courts often appear less formal than adult criminal courts.**
For instance, the parties may discuss matters off the record or fail to follow the rules of evidence, or lawyers may discuss matters with both client and parents at the bench. As reflected in this *Illinois Notebook*, such informality, even in delinquency matters, is not advisable and can compromise a lawyer’s representation of a juvenile client.
- **Juvenile proceedings are not considered criminal proceedings, but instead are considered to be civil in nature.**
See Adames v. Sheehan, 378 Ill. App. 3d 502, 518, 880 N.E.2d 559 (1st Dist. 2007) (“delinquency proceedings are not criminal, but civil in nature, intended to correct and rehabilitate, not punish”). However, this distinction may be deceptive because juvenile proceedings still, as a practical matter, are adversarial. There may be an impact on the child’s personal freedom as in adult criminal court, and, as discussed above, the child may be subject to serious consequences.
- **Juvenile dispositions are varied and contain more options than adult sentences.**
See 705 ILCS 405/5-710. Children in juvenile proceedings may be subject to probation and incarceration, as in adult criminal cases, but also may be put in residential placement settings. Indeed, juvenile courts have greater freedom to adjust dispositions to the needs of the particular child; and, therefore, attorneys should be creative and proactive, working with psychiatrists, psychologists, social workers and other experts to help formulate the best possible disposition for the child.
- **Juvenile proceedings may include a variety of issues not generally addressed in adult criminal proceedings.**
For instance, juvenile proceedings may include related civil or administrative hearings, such as school disciplinary hearings, and abuse and neglect proceedings. *See* 705 ILCS 405/1-3; *Juvenile Defender Delinquency Notebook* at 7; *see also* Chapter 14 (discussing related proceedings).

1.3 Interdisciplinary Approach to Juvenile Representation



Points to Remember

- *Attorneys should try to take an interdisciplinary approach to representing children in juvenile court and should consider drawing upon psychiatrists, psychologists, social workers and other experts to assist at every stage of the proceedings.*

Attorneys representing children in delinquency court face a complex range of challenges and issues. Children in juvenile court may face problems with their families, education, and physical and mental health. As such, lawyers representing juveniles should take an interdisciplinary approach to representing juveniles and draw upon psychologists, psychiatrists, social workers, and education and sentencing specialists. *See* Elizabeth Calvin, *supra*, at 8. Under Illinois case law, indigent juveniles are entitled to receive reasonable fees to employ expert witnesses when needed to raise crucial issues in a case. *Assessment* at 67 (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985). *People v. Lawson*, 163 Ill. 2d 187, 219-20, 644 N.E.2d 1172 (1994); *People v. Kinion*, 97 Ill. 2d 322, 334, 454 N.E.2d 625 (1983). Accordingly, attorneys should request that the court provide their clients with necessary experts. Experts can be valuable at many stages of the proceedings to provide insight, not only into issues pertaining to the defense of the case, but also with respect to issues involving the mental, physical and social well being of the child. For example:

- **Psychiatrists/psychologists:** evaluate fitness and competency; assist in formulating defenses at trial involving the client’s mental state at the time of the offense; or assist in developing a disposition plan to allow for the child’s rehabilitation
- **Social workers:** assist in researching the child’s social and educational background to enhance communication with the client; provide recommendations with respect to pretrial detention or disposition; facilitate communication with the child’s family members
- **Other experts and organizations:** assist in other areas of evaluation and investigation, including the following: scientific evidence, evaluation from of other cases involving the child (e.g., divorce, neglect, etc.); assistance from legal clinics or organizations specializing in areas that may be relevant to issues in the case (e.g., police misconduct, disability, education).

An interdisciplinary approach is advisable to ensure that the attorney can provide the best possible representation for the client at all stages of juvenile proceedings, and an attorney should not hesitate to call upon these experts as needed to enhance communication with the client, to fully litigate all potential issues at trial, and to ensure that any disposition reached by the court is fair and rehabilitative. Despite the inherent value of such an approach in many delinquency cases, the recently released *Assessment* (cited *supra*) noted the inadequate access

to “experts and social workers” in defender offices in Illinois. Attorneys, therefore, often are constrained in their ability to call upon such experts to assist them in taking a holistic approach to representing their clients. Therefore, attorneys often will have to find creative ways to gain the assistance of experts – for instance, by requesting that the court appoint an expert. A more detailed discussion of procuring and using experts is included in Chapters 3 and 6.

Summary

Since its inception over a century ago, the Illinois juvenile court system has undergone monumental changes. While such changes provide greater due process protections, the system has become more punitive and adversarial, and now resembles the adult criminal system in many ways, including with respect to punishment and sentencing. In some ways, the effect of prosecution in juvenile court may be even longer lasting than in adult criminal cases because of the traumatic nature of adolescence and the potential long term impact on the child. In this landscape, diligent, competent and zealous advocacy is crucial to protecting the rights of children facing prosecution in delinquency court. Additionally lawyers representing children in delinquency court should take an interdisciplinary approach by utilizing experts in order to better advocate for and communicate with their clients.

Chapter 2

Attorney-Client Relationship



In juvenile cases, the attorney-client relationship is complicated and raises difficult questions. Attorneys representing children in delinquency cases often are torn between a paternalistic interest in representing the best interests of the child, and an ethical obligation to address the child's expressed interests. Tardy appointment of counsel, and / or an attorney's failure to advocate zealously on the child's behalf, can prevent the attorney and client from developing an effective relationship. In order to cultivate a positive and trusting relationship with their juvenile clients, attorneys should strive to represent children in delinquency cases at the earliest possible moment, should represent their clients vigorously at all stages of the proceedings, and should remain dedicated to upholding the child's expressed interests.

2.1 Ethics of Juvenile Delinquency Representation: What is the Attorney's Role?



Points to Remember

- *Children are entitled to an attorney at all stages of delinquency proceedings.*
- *Because a juvenile court case is an adversarial proceeding, attorneys should advocate zealously for the client's expressed legal position.*
- *Attorneys must abide by the child's wishes with respect to matters such as whether to enter a plea, whether to be tried as a juvenile or adult, whether to waive jury trial, and whether the child will testify in his or her own behalf.*
- *Although it usually is helpful to involve parents or caregivers in the process, the attorney represents the child client. Accordingly, the attorney must abide by the client's wishes, even when the child is in conflict with the wishes of the parent.*

The “zealous advocate”

Children in delinquency proceedings have the right to be represented by counsel, and the right cannot be waived. 705 ILCS 405/1-5; 705 ILCS 405/5-170(b); *In re Gault*, 387 U.S. 1, 41, 87 S.Ct. 1428 (1966). While the Juvenile Court Act suggests that delinquency proceedings “are not intended to be adversary in character” (705 ILCS 405/1-5), this is not the case as a practical matter. As discussed in Chapter 1, delinquency proceedings have a distinctly adversarial tone and share many features common to adult criminal proceedings. As such, attorneys representing children in juvenile court must zealously advocate for their clients and challenge the prosecution by thoroughly litigating issues throughout the proceedings. On a practical level, this means the attorney must object, file motions, submit offers of proof, request clarification of court rulings, and challenge the court’s findings with respect to matters pertaining to detention, adjudication and disposition. While this may be difficult for some defenders given constraints on resources, large caseloads and an informal courtroom culture, it is imperative that attorneys recognize the benefits of zealous advocacy and attempt to litigate issues to obtain the best possible result for the client.⁵

The child’s “expressed interests”

An emerging consensus believes that children in delinquency court are entitled to receive representation of their *expressed* legal interests and positions. Calvin, Elizabeth, Sarah Marcus, *et al.*, *Juvenile Defender Delinquency Notebook*, Ch. 2 (2d. ed. Spring 2006) at 14. As noted in Chapter 1, juvenile courts historically focused on the best interests of the child. More recently, however, the model of representation for youth in delinquency court has given rise to substantial debate amongst juvenile practitioners across the United States. The two primary models are the “best interest” and “expressed interest” approaches. Under the best interest model, practitioners direct the litigation according to what they believe is in the best interest of their clients. This sometimes means that a lawyer will substitute her judgment regarding the objectives of representation when she disagrees with her client. A lawyer who practices under this model believes that the unique nature of delinquency proceedings requires the attorney to focus on what is in the client’s best interest. Practically, this means that a lawyer may forgo challenging the State’s evidence, even when the case is weak or a viable defense exists, if the attorney believes that the only way she can access services for her client is by allowing the client to be adjudicated delinquent. This approach is most often followed in abuse and neglect proceedings.

Under the expressed interest or “client directed” model, the lawyer allows the competent client to decide the objectives of representation. Although the attorney may disagree with the client’s position and may believe that pursuing the client’s stated objective is not in the minor’s best interest, the attorney nevertheless will follow the client’s direction. To be sure, the attorney will counsel the minor and identify what the attorney perceives as the disadvantages and dangers of the minor’s choice, but ultimately the attorney will follow the client’s instructions.

The IJA/ABA standards call for the client-directed model of representation. IJA-ABA Juv.Just. Stand. 3.1, 5.2. If the attorney believes that the minor is not capable of making an informed judgment or is compromised in some way, the attorney can request that the court appoint a guard-

ian ad litem, specifically for the purpose of representing the minor's best interests. IJA-ABA Juv. Just. Stand. 3.1(b) (ii) (c) (2).

Under the Illinois Rules of Professional Conduct, it appears that, at least at the adjudicatory stage, lawyers are required to follow the "expressed interest" model of representation and abide by a client's decisions on objectives. Under Illinois Professional Conduct Rule 1.2 (a), the lawyer is required to abide by the client's decisions regarding the objectives of representation. Ill. S. Ct. R. Prof'l. Conduct 1.2 (a). Rule 1.14 provides that, when a client's ability to adequately consider decisions regarding representation is impaired, due to "minority, mental disability, or some other reason," the attorney nonetheless is required to maintain, as far as reasonably possible, a normal attorney-client relationship. Ill. S. Ct. R. Prof'l. Conduct.1.14 (a). The rule allows the attorney to seek the appointment of a guardian ad litem or to take other protective action if the attorney believes that the minor cannot adequately protect his own interests. Ill. S. Ct. R. Prof'l. Conduct.1.14 (b).

Illinois case law is largely silent on this issue. The only case that directly addresses the question of the role of the attorney is a Fourth District case was decided over twenty years ago, before the 1987 and 1998 revisions to the Juvenile Court Act. In *In the Interest of K.M.B.*, 123 Ill.App.3d 645 (4th dist. 1984), the Illinois Appellate Court held that, at the *dispositional* stage of the proceedings, a lawyer has a duty to make recommendations to the court as to what is in the minor's best interest, even when the recommendations conflict with what the minor wants (emphasis added). Thus, light of long term effects of adjudications, the shift to a more punitive and adult like system, and the guarantee of due process protections for youth, an expressed interest approach appears to be warranted.

As long as the child is competent, such that he or she can make decisions and assist his or her attorney, the attorney should allow the client to make the ultimate decisions regarding the defense of the case, with the assistance of counsel. The comments to the American Bar Association Model Rules of Professional Conduct note that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." ABA Model Rules of Prof. Conduct R. 1.14, Comment 1 (2007); *See also*, IJA-ABA. Juv. Justice Stds., Stds. Relating to Adjudication, Part III Uncontested Adjudication Proceedings, Std § 3.1(b) (1996) (setting forth factors to determine whether child has mental capacity to admit allegations of the petition, including chronological age, highest grade level in school, whether child can read and write, whether child has ever been treated for mental illness or retardation); IJA-ABA Juv. Justice Stds., Stds. Relating to Counsel for Private Parties, § 5.2(a) (explaining decisions belonging to child clients);



The model of representation for youth in delinquency court has given rise to substantial debate amongst juvenile practitioners across the United States.

IBA-ABA. Juv. Justice Stds., Stds Relating to Counsel for Private Parties, Standard § 3.1(b), Commentary (“In most instances, even a youthful client will be mature enough to understand, with advice of counsel, at least the general nature of the proceedings, the acts with which he or she has been charged, and the consequences associated with the pending action”) (1996). The IJA/ABA Juvenile Justice Standards require that the client be permitted to make his or her own decisions (after conferring with the attorney) about the following aspects of the case:

- Whether to plead guilty;
- Whether to be tried as a juvenile or adult (to the extent that the child has that choice);
- Whether to waive a jury trial, (where applicable);
- Whether to testify in his or her own behalf; and
- Whether to cooperate in early disposition or consent judgment.

IJA-ABA Juv.Just.Stand. 5.2 (a); *see also*, Ill. S. Ct. R. Prof'l. Conduct. 1.2(a).

The above recommendations regarding decisions a child should be permitted to make track well-established Illinois case law regarding the decisions that “ultimately belong to the defendant” in criminal cases. *People v. Medina*, 221 Ill.2d 394, 403-04, 851 N.E.2d 1220 (2006) (recognizing five decisions that “ultimately belong to the client” after consultation with his or her attorney, i.e., what plea to enter, whether to waive a jury trial, whether to testify in his own behalf, whether to appeal, and whether to tender a lesser-included offense instruction); *See also*, 1 ABA Standards for Criminal Justice § 5.2 (2d ed. Supp. 1986).

Conversely, the ultimate decision with respect to matters of trial tactics and strategy belongs to the attorney. *See People v. Brocksmith*, 162 Ill. 2d 224, 228, 642 N.E.2d 1230 (1994) (citing *People v. Ramey*, 152 Ill. 2d 41, 52, 604 N.E.2d 275 (1992)). As such, the IJA/ABA Juvenile Justice Standards provide that the following decisions are “within the exclusive province of the lawyer,” after full consultation with the client:

- What witnesses to call;
- Whether and how to conduct cross-examination;
- What jurors to accept and strike;
- What motions to file or make; and
- Other strategic decisions that do not exclusively belong to the client.

IJA-ABA Juv.Just.Stand. 5.2(b).

The Attorney's Role with Respect to a Juvenile Client's Parents

One unique aspect of juvenile representation is the involvement of the child's parents or guardians. Successful representation of children in juvenile and criminal court often relies upon a productive relationship with the client's parents. Lawyers representing children should involve the child's parents in the process, but attorneys should be aware of their role as the *child's* attorney. As such, lawyers should be careful not to unwittingly jeopardize attorney-client privilege (discussed *infra* at 2.2.1) and should abide by the client's wishes – even when those wishes conflict with those of the child's parents. Lawyers should be able to enlist the client's parent or guardian as an ally without compromising the attorney-client relationship. Some tips for cultivating a positive relationship with the client's parents include:

- Allowing the parents to speak with you regarding their concerns and acting as a “sounding board” for them to voice their frustrations. Particularly where this is the child's first contact with the juvenile court, the parents may be confused, angry with the child and defensive about their role as the child's caretakers. It is often useful to allow the parents to express their feelings to you, the attorney. Otherwise, the parents may feel the need to voice their concerns to the court – which may harm the child's case;



Successful representation of children in juvenile and criminal court often relies upon a productive relationship with the client's parents.

- Explaining the juvenile court process and the respective roles of the attorney, judge and prosecutor, as well as how the child and his parents fit into that process. Providing such an explanation may assist the parents in understanding that the court is not only a means to discipline the child, but the process may have serious and long reaching consequences for the child. It also can provide the parents with insight as to when their opinion may or may not be helpful to the court and to the child's case.
- Explaining the attorney's role *vis a vis* the client. It is essential to explain to the parents that the attorney represents the *child* and not the parents. A detailed discussion of attorney-client privilege and explaining the privilege to both child and parents appears in section 2.2.1.
- When consistent with the child's wishes, offering to explain the parents' position to the court.

2.2 Attorney-Client Relationship Throughout the Juvenile Proceedings



Points to Remember

- *The attorneys should strive for early and timely appointment as far as possible in advance of the child's first court date.*
- *The attorney should arrange to speak with the child in person at the earliest possible time, preferably before the first court date, in order to introduce herself, explain her role, collect information regarding the child in preparation for court, and prepare the child for the upcoming proceedings.*
- *When an attorney is appointed at the first court appearance, she should insist that she be given sufficient time to speak to the client before the court proceedings.*
- *In communicating with the client, the attorney should be cognizant of the child's age, education level and mental health status. The attorney should use simple language, taking care to ask the client questions during the conversation in order to test the client's comprehension.*
- *The attorney should explain his role to the child as being the child's advocate and make sure that the client understands that the attorney does not represent the interests of the child's parents, teachers, the court or anyone else.*
- *The attorney should explain the attorney-client privilege, making clear that the attorney will not divulge to anyone else information that the child gives the attorney.*
- *The attorney should ask the child to explain the attorney-client relationship and the confidentiality rules back to her to ensure that the client understands these critical concepts.*
- *In discussing the offense with the child, the attorney should encourage the child to tell his or her entire story first, without interruption and without leaving out any detail. Only after the child is finished should the attorney follow up with additional questions.*
- *The attorney should explain to the child that even if the child admits guilt to the attorney, the child nevertheless is entitled to contest the charges (and may have a legal defense) and to force the State to prove its case beyond a reasonable doubt.*
- *The attorney should be vigilant about inquiring into any collateral issue that may be pertinent to the child's defense or well-being, such as family issues, school issues, and those pertaining to the child's mental or physical health. The attorney should be prepared to ask experts, the court and others for assistance, as appropriate.*

Having a good relationship with the client is essential to effective representation. Representing a child or teenager can be very challenging. It is critical that the attorney take the age, education level and mental health needs into account when interacting with the client. The attorney should listen to the child carefully, answer his questions, and allow him to make decisions at every stage of the proceedings, with the attorney's advice. If the attorney is honest, inquisitive and respectful of the child client, it is more likely that the client will trust the attorney. Trust is a key component to any successful attorney-client relationship.

2.2.1 Meeting with the client for the first time

Preparation

Preparation for the client interview is particularly important when dealing with children or juveniles. Clients may have many collateral issues (school, family, etc.) which interfere with the child's ability to trust or communicate with the attorney. Additionally, the juvenile client may be afraid, or unable, to express important facts. If the interviewer is not prepared, she may find it difficult to collect the relevant information. An advocate should go into the interview with two lists: a list of questions regarding the delinquency or criminal case and a list of collateral issues to explore in the initial interview. The interviewer always should try to obtain as many documents and as much information as possible about her client and the case. This means trying to retrieve, and review, prior to the interview:

- Police reports;
- School records (this will require a signed authorization form from the child and his guardian);
- Psychological or psychiatric reports available;
- Probation officer reports from previous contact with the court; and
- Previous case files.

It may be difficult to obtain all documents prior to the initial interview, but being prepared can enhance the juvenile's confidence in the attorney.

The initial interview

Ideally, the attorney's first meeting with his or her client should occur before the child's first court date, in a relaxed, quiet environment. The attorney and client should get to know one another and be able to speak freely with each other. However, in many jurisdictions, attorneys and children do not receive notification of appointment until the initial court appearance. In such cases, an attorney should speak to the client before

appearing before the judge to explain the attorney's role, principles of confidentiality and what will occur at the court proceeding. If the attorney is appointed at the time the child appears before the judge, the attorney should request a brief recess to allow her to speak to her client. Attorneys should also speak to clients in a confidential place, as opposed to the hallway, courtroom or other public setting.

At the meeting, the attorney should:

Introduce herself⁶ and provide some background information. For example, an attorney might begin an interview by saying, *"My name is _____, and I am a public defender. That means that I am lawyer for children for free. I went to law school so I could learn how to be a good lawyer. I have been a public defender for 5 years, so I have had a lot of clients. I really enjoy my job and feel lucky that I get to be your lawyer."* The attorney should use this first meeting to get to know the client somewhat, which means asking the client questions about his life. The attorney should not immediately launch into questions about the offense. In any instance, it may be helpful to have a parent in the initial interview, so both the client and the parent can understand the role of the attorney and the attorney-client privilege. During this initial meeting, the attorney should:

- Explain that she represents the client and not his parents, teachers or the judge in this matter. This means that the client is the attorney's "boss," and that the attorney has to listen to what the client wants to do.
- Give the client her phone number and tell him that he should feel free to contact the attorney at any time;
- Explain the juvenile court process; and
- Explain what is happening in the case.

Because the attorney-client privilege does not extend to communications made when the parent is present, the lawyer should not ask the client to talk about the alleged offense until after the parent leaves. An attorney might explain the scope of the privilege in this way:

"Anything you tell me, Christopher, is secret. This means I cannot tell anyone what you say, unless you give me permission. The only time that is not true is if you tell me that you are about to hurt yourself or someone else. This secret keeping is called the attorney-client privilege. The reason we have it is so you can tell me the complete truth about anything. Now, can you pretend that you are a lawyer and I am your client and explain to me what the attorney-client privilege means?"

Remember, though, that the privilege only exists when you and I talk alone. So mom, when I talk to Christopher about what happened, you cannot be in the room. This is not because we don't want you to know what is going on – or that I think Christopher will not be able to tell the truth in front of you. It is just because that is the rule about attorney-client privilege. If you are in the room with us when we talk about the case,

then I cannot keep Christopher's secrets and then the State could make you be a witness and tell what Christopher said. Does that make sense?"

The attorney then should inform the parent that the attorney needs to speak alone with the client.

If the attorney takes the time to offer such explanation to the client and his parents, everyone likely will feel more comfortable about the process. This also helps to lay the foundation for a productive relationship between the attorney and the client.

When speaking with the client, the attorney should be aware that many children (and their parents) do not understand the justice system. Even if the juvenile has had contact with the court system before, the attorney should not assume that the client understands the legal process. Helping the juvenile to understand the court procedures and the role of the attorney and client will encourage the juvenile to cooperate and take an active role in his case.

The attorney should have an attorney-client agreement and authorization forms available for the client to sign, and should take steps to ensure that the client understands the contents of the forms and the reason for them.

The attorney also should schedule the next meeting with the client before concluding the interview.

Continuing client contact

It also is important also for the attorney to keep in contact with the client throughout the case. In that regard, the attorney should take the time immediately after court to make sure the client understands what happened in court, what is expected of him before the next court date, the date of the next court date and what will happen at that date. The attorney should set the next meeting with the client before leaving the courthouse. Ideally, this meeting should occur outside the courthouse. Additionally, for especially challenging clients, the attorney should consider scheduling weekly "check in" phone calls, whereby the client calls the office at a designated time and day.

Providing an explanation in the child's language

The choice of words is very important when talking to adolescent clients. Even where the attorney and client speak the same language, issues of age, class, environment, race, ethnicity and education may impede communication. The lawyer should seek guidance on ways to improve communication with youthful clients. John D. and Catherine T. MacArthur Foundation, *Understanding Adolescents: A Juvenile Court Training Curriculum* (1999); Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective* (2d ed. 1999). Words that are commonplace for attorneys may be

entirely foreign to the child. For example, an adolescent may not understand the significance of words like “trial,” “probation,” “witness,” “testify,” “plea,” “brief,” “motion,” and “confidentiality.” The attorney should try to find simple ways to explain these terms, and should constantly take steps to ensure that the client understands what the attorney is saying. The good way to do this is to ask the client to explain what the attorney has just told him.

2.2.2 Interviewing the client regarding the alleged offense

The lawyer should plan ahead and develop a strategic approach to discussing the facts of the alleged offense with the client. Some attorneys find it useful to allow the client to first tell his or her story without interruption, and then follow-up with the appropriate questions. Some other tips for discussing the case with the client are:

- If the attorney has not already done so, introduce herself (as described in section 2.2.1) and ask the client about himself. This will help the client realize that he is not being viewed in light of the offense charged but rather as an individual.
- Ask the client to tell the entire story without leaving out any details. Adolescents are prone to leaving out details and in favor of including only those parts of the story the adolescent believes are important.
- Ask the client for names, phone numbers, and other contact information for any potential trial or disposition witness.
- Be aware of when the client loses his or her concentration and needs to take a break or discuss other issues important to him.
- Be vigilant for any sign of mental illness or disability that may impair the client’s understanding of the case. For instance, appearing disinterested and defiant during the interview could be the result of normal adolescence or could indicate a mental challenge or disability. Annie E. Casey Foundation, Special Education Advocacy Under the Individuals with Disabilities Act For Children in the Juvenile Delinquency System (Eds. Joseph B. Tulman and Joyce A. McGee, 1998), available at <http://www.juveniledefender.org/files/IDEA.pdf> Attorneys should be open to seeking assistance from the clients or their families and friends, or from teachers, mental health professionals or other experts.

Collateral issues

Lawyers representing juveniles in delinquency court must try to have a full understanding of the client. This means an understanding not limited to the child’s involvement in the offense charged, but also includes the child’s social, educational and health-related needs and circumstances. Such information is not only important to the attorney’s

relationship with the juvenile, but also may be relevant to plea negotiations and pre or post-adjudication placement decisions. Additionally, this information may affect the child's willingness to take a particular course of action during the case. For instance, a child's fear that his parents' immigration status may be investigated may cause the child to want to resolve the case quickly and plead guilty, rather than going to a trial. The attorney should try to gather complete information from the child and caregivers throughout the juvenile court proceedings.

The following are some collateral issues that may affect children in juvenile court:

- School-related (special education, expulsion and discipline, etc.);
- Family history, including issues of abuse and neglect;
- Substance abuse;
- Prior counseling, therapy or contact with mental health professionals;
- Health issues;
- Immigration status; and
- Sexual orientation and identity.

Even if the attorney does not represent the child in other matters, the attorney can assist the child by informing him and his parents as to how these collateral issues may affect the delinquency case and, where appropriate, provide suggestions on ways to address them. With the client's consent, the attorney also may attempt to obtain court orders for special services or treatment the child may need. A more detailed discussion of some collateral issues that may arise in representing a juvenile client is included in Chapter 14.

2.2.3 Communication and the attorney-client interaction at every stage of the proceedings

Attorneys should be vigilant about cultivating and preserving the client's trust, explaining things clearly and allowing the child to take part in the case at every stage of the proceedings. The following examples illustrate different ways in which attorneys may communicate with their clients regarding different aspects of juvenile court proceedings:

Example



1. The initial client interview.

The attorney tells the client that if the client goes to "trial" and is found "guilty" the judge may send him to the "DOC," but that the State has told the attorney that it should have an "offer" for the juvenile to consider.

The client may not understand these terms. The attorney should define them using simple language and then ask the client to explain in his own words what the terms mean.

Example



2. The detention hearing.

At the client's detention hearing, the State offers the police report but no live testimony. The attorney offers no witnesses and says almost nothing to challenge the child's detention. When the attorney meets briefly with the client afterward, the attorney says that he did not say anything because the hearing is "just standard procedure" and that the "prosecution" can proceed by "proffer."

The attorney should have explained the detention hearing procedures in advance of the hearing and gotten the client's input on the position to take. If the judge appoints the attorney just before the hearing, she should insist on an opportunity to speak with the child beforehand. In this case, given the cursory explanation, it is likely that the client does not understand what has occurred, including the meaning of the term "proffer." The term "proffer" means offering into testimony what a person would testify to if the person were present.

Example



3. The plea offer.

Immediately after the arraignment, the attorney tells the client to plead guilty. The attorney tells the child that the State's "offer" is the best he will get, so he should take it. The attorney hands the child a paper to sign.

The attorney is pressuring the client to accept a plea without conducting a proper investigation and without explaining the consequences of the plea. This is improper and a violation of the duty to competently represent the client. See Ill. S. Ct. R. Prof'l. Conduct 1.1.

Example



4. Discussing the circumstances of the child's arrest.

In trying to determine whether any potential exists for a suppression motion, the attorney asks the client to describe everything about the day the police came to get the child. The attorney initially asks the client if the client asked for a lawyer at any time, and the client says "no." Then the attorney asks the client what he said to the police when they brought the client to the station, and the client says, "Well, I asked if the lady sitting in the room was my lawyer, and the police said no. Then I asked them when my attorney would be coming, and the police said that I could see her when I got to court."

The attorney tried phrasing the question regarding an attorney in a broader way and was able to find out that the client had actually asked about seeing an attorney,

but the police led the client to believe he would only have an attorney when he was in court. This provides a basis for a potential suppression motion.

Example



5a. Discussing the offense.

In discussing the police reports and the State's potential star witness, the client explains, "Juice is a 'chief' and I'm a 'shorty,' and the 'Hustlers' were after Juice and he shot one and told me I had to hide the gun, but I didn't see anything." The attorney says "oh, ok."

The attorney should make sure she understands the terms used by the client and why the client believes these facts are important.

Example



5b. Discussing the offense.

In discussing a stolen motor vehicle offense with a client, the attorney asks the client to describe what happened. The client says, "I wasn't even there, I don't know what they are talking about. No one believes me." The attorney tells the client that the attorney's job is to listen to what the client has to say, and that the attorney believes the client will tell the truth. The attorney then asks the client to explain further, "I was at a basketball game." The attorney asks the client to describe the game, and what the client remembers, including when and where the game was held and who was there. The attorney discovers that the client remembers the date and time of the game, the teams who played, and the names of several witnesses, including school teachers who saw him there.

Instead of allowing the client to shut out the attorney because of a feeling that no one believed him, the attorney conveyed her belief in the client and the attorney's desire to hear his explanation. The attorney consequently elicited several details pertinent to a strong alibi defense.

Example



6. Fitness to stand trial.

The attorney asks for a "BCX" in court, without discussing this with his client. When the court psychiatrist arrives to interview the child, he refuses to answer any questions. The psychiatrist finds the child "uncooperative," and the judge proceeds with the adjudication without the evaluation.

The attorney's failure to explain that the "BCX" is a psychiatric or psychological examination often used to determine the client's fitness to stand trial, has damaged the case, the lawyer's relationship with the client, and possibly has caused the child to proceed to trial and disposition even if not fit to stand trial.

Example**7. The decision to testify.**

Prior to the trial, the child says she would like to testify. The attorney believes that the child's testimony is not helpful to the case and attempts to persuade her not to testify. At trial, the child again tells the attorney she wants to testify. The attorney tells him, "I won't allow you to do that. If the judge asks you if you want to testify, you should tell him that you don't want to. Otherwise, I'm going to withdraw from the case, and you'll have to go to trial without an attorney."

The attorney is coercing the child not to testify when this is a decision that belongs to the client (*cited supra*). The attorney's actions are unethical and violate the child's right to choose not to testify and to knowingly and voluntarily waive that right, as well as his right to the effective assistance of counsel. Instead, the attorney should explain why she believes the testimony will be unhelpful, answer the client's questions and ultimately abide by the client's decision (unless the attorney has a good faith basis to believe that the client will commit perjury, which then requires the attorney to take different actions). (*See supra* section 2.1).

Example**8. Disposition.**

The lawyer stipulates to the probation department's report and does not submit additional information. He tells the client this is because it is futile to change the court's mind about the child's sentence.

The lawyer is not advocating for the client. The lawyer should have assembled any mitigation evidence, including reports from psychologists, education specialists, and other experts, as well as the testimony of family, friends, or community members. Such advocacy may cause the judge to rethink any sentencing determination, or at the least, will provide the client with the confidence that the lawyer is fighting for him.

In short, an open and respectful relationship with the child client is essential for effective representation of the client. The attorney should strive to adhere to her ethical responsibilities and communicate with the client throughout the proceedings. A failure to do so can be damaging to the case, the relationship with the client, and may even cause the attorney to face professional discipline.

2.3 Avoiding Conflicts of Interest



Points to Remember

- *As in all cases, lawyers representing juveniles in delinquency cases must avoid conflicts of interest, particularly those cases involving the attorney's direct representation of two clients charged with offenses relating to the same series of events. Such clients may have adverse or conflicting defenses.*
- *As soon as the lawyer becomes aware of a potential conflict, the lawyer should avoid discussing the facts with, or advising, either client. The attorney should immediately inform the clients and judge of the conflict and seek to withdraw from representing one or both of the clients.*
- *Although the rules of professional conduct allow a lawyer to represent co-defendants whose interests are not adverse, lawyers should rarely, if ever, consent to represent co-defendants.*

Understanding the nature of the conflict

Lawyers should not represent clients if they have a conflict of interest in a particular case. There are many ways in which potential conflicts of interest can present themselves:

Example



Both Joe and Harry are arrested for first degree murder as a result of their alleged involvement in a drive-by shooting. Joe was the driver, and Harry was the shooter.

The attorney initially may believe that she can represent both clients if the clients initially contend that they were not in the vicinity of the drive-by shooting. However, a conflict may arise if an alibi defense ultimately is not viable, and Joe's best defense becomes that he was a passenger in the car and not aware of Harry's intent.

Example



Both Audrey and Jenny are arrested for burglary as a result of their alleged entry into an apartment they were arrested after the police saw them one block from the residence looking together at a bag of items taken from the apartment.

Audrey and Jenny may rely on several different types of joint defenses. However, if Audrey contends that she only saw Jenny after the incident and Jenny already had the

bag, then Audrey's defense may be stronger than Jenny's and may even be counter to it, particularly if Jenny alleges the reverse -- that Audrey had the bag first.

Example



Mike is represented by an attorney in an aggravated battery case. The attorney learns through documents provided in pre-trial discovery that one of her former clients, Gina, is the State's star witness.

The attorney likely had no specific knowledge of a conflict when she first took Mike's case. Having discovered that Gina now will testify against Mike, the attorney faces a conflict situation because the attorney may have had confidential discussions with Gina that provide the basis to cross-examine Gina (which the attorney cannot use). See Ill. S. Ct. Rules of Prof'l. Conduct R. 1.6, 1.9.

Example



The attorney discovers through pre-trial discovery that the complainant in the case is the attorney's cousin's friend.

While the attorney may think she can put aside her feelings for her cousin's friend, the fact that a relative has a relationship with the complainant may give the appearance of a conflict.

While not every potential conflict of interest requires an attorney to withdraw from the case, attorneys should be vigilant about recognizing and avoiding such conflicts. Illinois provides lawyers with certain guidelines to avoid conflicts of interest. According to the Illinois Rules of Professional Conduct, attorneys may not represent clients in certain situations *unless* certain requirements are met:

1. Where the representation of one client is directly adverse to another client, *unless* the lawyer reasonably believes the representation of one client will not affect the other client *and* each client consents after full disclosure; or
2. Where the representation of one client is "materially limited" by the lawyer's responsibilities to another person, *unless* the lawyer reasonably believes the representation of one client will not affect the other client *and* the client consents after full disclosure." Ill. S. Ct. Rules of Prof'l. Conduct R. 1.7.

Additionally, the Rules require that if the attorney is representing *multiple clients in the same proceeding*, the attorney's disclosure to the clients "shall include explanation of the implications of the common representation and the advantages and risks involved. Ill. S. Ct. Rules of Prof. Conduct R. 1.7 (c); *Holloway v. Arkansas*, 435 U.S. 475, 484-90 (1978) (where counsel appointed to represent three codefendants at trial made a motion for appointment of counsel based on conflicts of interest, the failure of the trial

court to grant the motion or ensure that separate counsel was not required deprived the defendants of the effective assistance of counsel).

The Rules of Professional Conduct also provide guidance with respect to an attorney's former clients. According to Rule 1.9, a lawyer who has represented a client in a certain matter cannot later represent *another* client in the same matter or in a "substantially related" matter where the two clients' interests are "materially adverse," unless the former client consents after disclosure. Ill. S. Ct. R. Prof'l. Conduct. 1.9. The attorney also cannot use information relating to his representation of the new client to the detriment of the former client, unless the information has become "generally known" or other exceptions apply. Ill. S. Ct. R. Prof'l. Conduct. 1.9.

What do you do when you discover a potential conflict?

When an attorney discovers a potential conflict, she first should be sure that she understands the nature of the conflict and the applicable rules (noted *supra*). For instance, in any case with multiple defendants, lawyers should presume that a conflict exists. This is because, in such cases, the possibility exists that one defendant was the instigator and that the other may have a better defense by arguing a lesser role. Additionally, such situations may require that one defendant testify against another defendant. Whenever multiple defendants are involved, or the attorney becomes aware of a potential conflict in a case (for instance, that the lawyer's former client has a materially adverse interest to the current client), the attorney should:

1. Stop any further investigation of the facts of the case.
2. Inform the clients about the conflict and tell them that she will need to withdraw from one or both of their cases.
3. If the attorney has spoken to both clients before discovering the conflict, she will need to withdraw from both cases in order to avoid any possibility of impermissible disclosure or the use of confidential information obtained from either client.
4. Inform the juvenile court judge of the nature of the conflict and seek to withdraw from one or both of the cases as required.

If the attorney *reasonably* believes that representing multiple clients will not be harmful to either client – which is unlikely in a case involving multiple co-defendants – the attorney should:

1. Talk to the clients regarding the conflict, and explain the risks and benefits of representing both of them, and what impact joint representation may have on the case.
2. Ask the clients if they agree to the attorney's joint representation of them.
3. Obtain a written consent from the clients. Then make a record of the consent before the trial court by telling the judge in open court that the attorney understands and is

aware of the potential conflict, has discussed the conflict with the clients, and your clients have agreed to joint legal representation by the attorney represent them.

Even if the attorney does not believe that any conflict of interest exists, he or she still should make sure that the client understands the issue, understands why the attorney believes there is no conflict of interest, and should allow the client to decide whether the attorney should continue with the representation.

Summary

Attorneys representing children in juvenile court have a unique role in the justice system. Children and adolescents often enter the juvenile justice system with a multitude of collateral issues that can impact the attorney-client relationship. Additionally, it may be particularly challenging for attorneys to communicate with these clients due to their youth. Attorneys should be aware that in most cases, the client has the right to dictate many aspects of the lawyer's representation of the juvenile and only will be mistrustful of an attorney who attempts to pressure the child into a course of action the child does not want to take. Thus, attorneys should be willing to discuss the case openly, and in simple language. After providing legal advice, the attorney should allow the client to make decisions in the case. Above all, attorneys should zealously advocate for their clients according to the child's wishes and develop a trusting relationship with the client.



Chapter 2 Checklist

- ✓ Zealously advocate for your client based on the child’s “expressed interests,” and not based on your perception of the child’s “best interests.”
- ✓ The law requires that even young clients be permitted to make crucial decisions in the case, such as when to plead guilty, when to testify and whether to waive a jury trial. Therefore, be respectful of the child’s right to make these (and other) decisions and do not use pressure or coercion.
- ✓ Remember that you represent the child – not his parents, teachers, or anyone else – even though they may be involved in the process.
- ✓ Before meeting with the child for the first time and before every meeting with him or her, gather any relevant documents and be prepared with questions you would like answered on matters directly relating to the case, as well as any collateral matter.
- ✓ Try to meet with the client as early as possible before the start of the case in a relaxed, quiet environment. In that environment, attempt to calmly and patiently discuss your role, issues of confidentiality and gather all information possible at the time from the client.
- ✓ Speak to your client using simple language appropriate for the child’s age and development. Ask him to explain what you have just told him, allow him to tell a complete narrative before asking follow-up questions, and do not assume that you understand your client. Do not hesitate to ask the client to explain further what he has said.
- ✓ Obtain written releases from the client for any confidential information or records you require in preparing your defense.
- ✓ Be vigilant for any special issues regarding the client’s mental or physical health, family situation, education, etc., and do not be afraid to ask for help from relevant experts if needed.
- ✓ Continue to meet with the client throughout the course of the proceedings to keep him informed about what is happening in his case, to gather information from him, and to speak with him regarding important decisions.
- ✓ Avoid all potential conflicts of interest. It is not advisable to represent multiple defendants in the same case. The safest course of action is to inform the client or clients of the conflict, inform the court of the conflict and seek to withdraw from one or both of the cases.

Chapter 3

Understanding and Raising Issues of Mental Health and Competency



Why Lawyers Must be Aware of Issues of Mental Health and Competency in Juvenile Cases

Mental health and competency issues frequently arise in juvenile cases. The youthful age of the offender, in and of itself, gives rise to complex questions of whether the child can understand the legal processes to which he will be subjected. Additionally, children in juvenile court often have experienced various family and social issues which affect their mental health. Moreover, children who commit offenses may do so as a result of mental illness or related issues. Juvenile practitioners should be vigilant in watching for these issues and should be familiar with their implications in juvenile delinquency proceedings.

3.1 Obtaining and Using Mental Health and Fitness Evaluations



Points to Remember

- *There are various types of evaluations that attorneys may use or that the court may order, including mental health or psychological evaluations, competency evaluations, social investigation reports and sex offender evaluations.*
- *Attorneys should consider requesting mental health or psychological evaluations when they have concerns about the child's mental health, or when they believe that such an assessment may help in raising an affirmative defense, preventing transfer to adult court, reducing or mitigating the child's sentence, or where such an evaluation may help in crafting alternative dispositions.*
- *Attorneys should request evaluations of a child's competence or fitness to stand trial, plead guilty or be sentenced when questions exist about the child's ability to understand or assist in court proceedings, particularly when the child is very young.*

- *Whenever possible, attorneys should request that any report regarding the child’s fitness or mental state be first given to counsel to allow them to make a decision as to whether to put the minor’s mental state into issue. While attorneys should be aware that reports regarding the child’s fitness to stand trial may be discoverable regardless of whether the attorney intends to use the report, statements made by the child in the course of the examination will not be admissible against the child unless counsel raises the defense of insanity or drugged or intoxicated condition to show whether the child was insane, drugged or intoxicated.*
- *Illinois juvenile courts require that social investigation reports be conducted in all cases prior to disposition and that sex offender evaluations be conducted in cases involving sex offenses. The Attorney may have little control over these reports; but, as in all evaluations, the attorney should try to make sure that the evaluator has all necessary information.*
- *When attorneys request an evaluation, be aware of any rules requiring its disclosure and try to use a consulting expert hired by defense counsel before attempting to make a request to the court for an expert. Attorneys without funding for experts should consider filing ex parte motions to obtain experts or try to maintain some control over the process. Indigent juvenile defendants are entitled to the same access to experts as those with retained counsel. Even private counsel may be able to obtain a court-appointed expert if the juvenile lacks funds to pay for the expert.*
- *Whether the evaluator is chosen by the defense attorney or appointed by the court, the juvenile’s attorney should speak to the evaluator beforehand to discuss and assess the objectiveness and limitations of the examination and to offer relevant documentation and information.*
- *Discuss the evaluation with the juvenile before it occurs so the child is prepared, and urge him to be honest and answer the evaluator’s questions. However, the attorney also should make sure that the child is aware of whether any portion of the evaluation will be confidential, and explain to the child questions does not have to answer, why, and what the child can say. In such discussions, avoid directing the child regarding precisely what to say to the evaluator.*

3.1.1 Types of evaluations

There are several different types of evaluations relevant to mental health and fitness (or competence, which is often used interchangeably with the term “fitness”) that attorneys request or courts order in juvenile and criminal courts:

1. **Fitness evaluation:** The Due Process Clause of the United States Constitution forbids the prosecution of a criminal defendant who is incompetent to stand trial. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (test for competence to stand trial is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding

-- and whether defendant has a rational as well as factual understanding of the proceedings against him.") This prohibition applies to juvenile proceedings. *In re E.V.*, 190 Ill. App. 3d 1079, 547 N.E.2d 521 (1st Dist. 1989).⁷ Fitness to stand trial, plead guilty or be sentenced involves the child's ability to: 1) understand the proceedings against him or her and 2) assist in his or her defense. 725 ILCS 5/104-11. In other words, competence or fitness in the context of delinquency proceedings refers to the child's ability to participate meaningfully in his or her defense. Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective On Constitutional Provisions In Delinquency Cases*, 32 New Eng. J on Crim. & Civ. Confinement 3, at 6 (Winter 2006).

2. **Mental health or psychological evaluation:** This evaluation provides a comprehensive look at the child's psychological health and history of any mental illness. It should include an assessment of any post-traumatic psychological effects on the child. While a child's mental health is relevant to a determination as to his fitness to stand trial, it is not the conclusive; indeed, Illinois courts have held that a history of mental illness is not necessarily indicative of a lack of fitness to stand trial. *People v. Eddmonds*, 143 Ill. 2d 501, 519, 578 N.E.2d 952 (1991). As such, these evaluations should not be used to determine fitness.
3. **Sex offender evaluation:** This evaluation is required in sex cases prior to disposition and after adjudication. This evaluation examines the child's psychological health and his potential to re-offend or be rehabilitated, and must be conducted "in conformance with the standards developed under the Sex Offender Management Board Act and by an evaluator approved by the Board." 705 ILCS 405/5-701; 20 ILCS 4026/16 (requiring that sex offenders, as part of a social investigation, "submit to an evaluation for treatment, an evaluation for risk, and procedures for monitoring of behavior to protect victims and potential victims"). It is not generally appropriate, except in unusual circumstances, for such evaluations to be conducted prior to adjudication.
4. **Social investigation report:** This report is required by the juvenile court after adjudication and prior to disposition. The social investigation report is usually conducted by the probation officer. It "include[s] an investigation and report of the minor's physical and mental history and condition, family situation and background, economic status, education, occupation, personal habits, minor's history of delinquency or criminality or other matters which have been brought to the attention of the juvenile court, information about special resources known to the person preparing the report which might be available to assist in the minor's rehabilitation, and any other matters which may be helpful to the court or which the court directs to be included." See 705 ILCS 405/5-701. Like the sex offender evaluations, this evaluation should not be conducted prior to the adjudication.

3.1.2 Requesting and using evaluations

There are essentially two ways to obtain an evaluation of the client: 1) the court may order the evaluation; or 2) the defense attorney may request the evaluation. Depending on the context of the evaluation and the results, such evaluations could be helpful or harmful to the client, particularly where defense counsel does not initiate the request.

Court ordered evaluations

The court may order an evaluation of the child, either at the request of the prosecution or defense or on the court's own motion. The Juvenile Court Act and Code of Criminal Procedure provides for various circumstances in which some type of evaluation of the child should be conducted. These include, when fitness is at issue (725 ILCS 5/104-10, *et seq.*), when the child is pleading "guilty but mentally ill" (705 ILCS 405/5-605(2) 720 ILCS 5/6-2 (c), (d) (where child has a "substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior), prior to disposition (social investigation report, 705 ILCS 405/5-701), and in cases involving sex offenders (705 ILCS 405/5-701).

If statutorily mandated, court ordered evaluations are unavoidable. In such cases, the attorney should speak to the evaluator to assess the objectiveness of the particular evaluation or examination, discuss its limitations and offer the evaluator any relevant documents or information. The attorney should ask to be present during the evaluation to ensure that no questions are asked about the offense itself that are not required for the evaluation. *See Estelle v. Smith*, 451 U.S. 454 (1981) (when court-appointed psychiatrist's role became one of a State agent and gathered evidence of the defendant's future dangerousness, defendant was entitled to *Miranda* warnings and, thus, the right to an attorney present); *but see People v. Wilson*, 164 Ill.2d 436, 454, 647 N.E.2d 910 (1994) (distinguishing situation where evaluation was not court-ordered, and psychiatrist was simply gathering information regarding the defendant's suicidal tendencies). If the attorney cannot be present, the attorney should at least discuss the evaluation and its purpose with the juvenile and advise him not to discuss the offense itself. The attorney also should advise the juvenile to otherwise answer the evaluator's questions as honestly and completely as possible, but the attorney should do so without giving the client a "script" of what to say. A child's failure to cooperate in a required evaluation can give the court a negative view of the child.

Defense requests for evaluations

Defense attorneys also may seek evaluations for varying purposes, as noted above. However, even if the attorney believes that using an expert will be helpful, the attorney should be aware of certain pitfalls before requesting assistance:

1. Obtaining money for an expert. The attorney may not want the court or the State to know that the attorney is seeking an evaluation of the juvenile, at least initially. Consider looking for funding outside the court for the expert – either from the defender agency or from the juvenile’s family (at a reduced rate, if the expert agrees). If the juvenile or defender agency cannot pay for the expert, counsel should consider filing an *ex parte* motion to request appointment of or funding for an expert, indicating the reasons why the expert is necessary (*e.g.*, voluntariness of *Miranda* waiver, dispositional options, etc.). Such a motion should be detailed enough to inform the court of the basis for the motion, but should not unnecessarily make the judge aware of facts that may bias him or her against the juvenile. *See Juvenile Defender Delinquency Notebook* at 47. An indigent defendant has the right to the appointment of an expert in certain cases. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *People v. Keene*, 169 Ill. 2d 1, 7, 660 N.E.2d 901 (1995) (the protections relevant to indigent defendants’ rights to procure expert are triggered when the expertise sought goes to the “heart of the defense”).
 2. If possible and appropriate, attorneys should use a consulting expert while making clear that the evaluation is defense-related or strategy-related, such that it falls within the work product rule or attorney-client privilege. *See* Ill. Sup. Ct. R. 412(j)(i) (barring attorney work product from discovery, as an exception to disclosure requirements for expert witnesses)
 3. If attorneys use the evaluation in court, be aware that some, if not all, of the expert’s report will be discoverable. The attorney should be familiar with the applicable rules. *See* Ill. Sup. Ct. R. 412(j)(i); Ill. Sup. Ct. R. 413(c) (with respect to medical and scientific reports, providing that “subject to constitutional limitations, the trial court shall, on written motion, require that the State be informed of, and permitted to inspect and copy or photograph, any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific



If attorneys use the evaluation in court, be aware that some, if not all, of the expert’s report will be discoverable.

tests, experiments or comparisons, or any other reports or statements of experts which defense counsel has in [her] possession or control . . . except that those portions of reports containing statements made by the defendant may be withheld if defense counsel does not intend to use any of the material contained in the report at a hearing or trial”)

Regardless of who initiates the evaluation or examination, the attorney must urge the juvenile to honestly answer the evaluator’s questions. In many cases, this is in the child’s best interest because it gives the court a positive view of the child’s willingness to participate in juvenile court services or comply with the court’s wishes. However, the attorney should tell the child never to discuss the offense itself in any evaluation conducted pretrial, and should consider telling the child not to discuss the offense even in evaluations conducted after the trial, depending on the type of evaluation.

Additionally, the attorney should always speak with the evaluator prior to the evaluation to discuss the purpose of the evaluation, provide documentation if needed, and to inform the evaluator of any limitations the attorney will impose on the child’s ability to answer the evaluator’s questions (*i.e.*, to avoid self-incrimination).

Requesting and using specific types of evaluations in a delinquency proceeding

Fitness evaluation

- **When to ask for it**
A fitness evaluation should be requested whenever any question arises regarding the child’s fitness during the juvenile proceedings – a child’s competency to stand trial can be raised at any time and is not waived. *People v. Contorno*, 322 Ill. App. 3d 177, 180, 750 N.E.2d 290 (2d Dist 2001). That the child has the ability to be “competent” in juvenile proceedings is a constitutional matter. *In re E.V.*, 190 Ill. App. 3d 1079.
- **What is contained in the fitness examination report**
Once the court orders a fitness examination, it must ensure that any resulting report comports with statutory requirements. *People v. Harris*, 113 Ill. App. 3d 663, 668-69, 447 N.E.2d 941 (1st Dist. 1983); 725 ILCS 5/104-15.

The report must include:

- The examiner’s determination of fitness or unfitness, with an explanation of how the determination was reached and the facts upon which the examiner relied;
- A description of any mental or physical disability and whether it affects the juvenile’s fitness (either his ability to comprehend the proceedings or assist in his defense);

- If the report concludes that the juvenile is not fit to stand trial or plead guilty, the report should include an opinion as to whether the child can attain fitness within a year, and what is required in order for the child to attain fitness within that time;
- If the examiner cannot determine whether the child can attain fitness within a year, the report should include an explanation as to why the examiner cannot provide such an opinion; and
- Whether there is any information in the report which, if known by the child, would be harmful to him. 725 ILCS 5/104-15.

Additionally, the attorney should ensure that the report addresses all areas in which fitness is relevant in the particular case – *e.g.*, fitness to stand trial, fitness to plead guilty, etc.

Attorneys also should be careful not to rely on reports alone, particularly where the report is damaging to the child’s defense. Rather, whenever the attorney requests or receives a report regarding the child’s fitness, the attorney should request the tests used by the examiner, the results, the examiner’s notes and other bases for his or her opinions. Such information can be useful in cross-examining the witness at a trial or hearing.



Attorneys also should be careful not to rely on reports alone, particularly where the report is damaging to the child’s defense.

If, after an evaluation, the trial court determines that there is a bona fide doubt as to the child’s fitness (or if the evidence demonstrates that there is a bona fide doubt as to the child’s fitness), the juvenile court judge must order a fitness hearing. 725 ILCS 5/104-11; *E.V.*, 190 Ill. App. 3d at 1081. Once there is a bona fide doubt as to the child’s fitness, the State must prove, by a preponderance of the evidence, that the child is indeed fit to stand trial. Courts are not required to order a psychiatric examination of the child to determine whether there is a bona fide doubt as to the child’s fitness. *Harris*, 113 Ill. App. 3d at 668-69. Although there are no “fixed or immutable” signs indicating a bona fide doubt of fitness, factors relevant to a determination of a bona fide doubt of fitness include any irrational behavior by the child, demeanor, prior medical opinions on fitness, the child’s intellectual ability and counsel’s representations regarding the client’s fitness. *People v. Hanson*, 212 Ill. 2d 212, 817 N.E.2d 472 (2004); *People v. Eddmonds*, 143 Ill. 2d 501, 518, 578 N.E.2d 952 (1991); *People v. Shanklin*, 351 Ill. App. 3d 303, 306, 814 N.E.2d 139 (4th Dist. 2004); *E.V.*, 190 Ill. App. 3d at 1081-82. All of these factors combined should be considered by the court in determining whether a fitness hearing is required.

- **The court's determination of fitness**
Illinois courts also require that the record "affirmatively show the exercise of judicial discretion and judgment" in finding fitness. This means that the court's ultimate decision regarding a child's fitness must be based on the court's own independent analysis of the evidence presented and cannot simply be based on stipulations by the parties regarding fitness or on a doctor's medical conclusion alone. *See People v. Thompson*, 158 Ill.App.3d 860, 863, 511 N.E.2d 993 (3d Dist. 1987) (reversing and remanding where the trial court's decision that the defendant was fit was based solely on the parties' stipulations); *People v. Greene*, 102 Ill.App.3d 639, 643, 430 N.E.2d 219 (1st Dist. 1981) (reversing and remanding where trial court did not exercise any discretion in determining the defendant fit, but merely relied on doctor's written reports).
- **After a finding of "unfitness"**
If the child is found to be unfit, the court must determine whether there is a "substantial probability" that the child will become fit within one year. 725 ILCS 5/104-16(d). If the child is found unfit, but restorable (he can be made fit or will become fit within the year), or if the court is unable to determine whether the child is restorable, the court may require that he undergo treatment. 725 ILCS 5/104-17.

If the court orders treatment for the child, the treatment provider is required to file a report with the court within 30 days of the treatment order, assessing the treatment program's ability to provide treatment for the child and an opinion as to whether the child will attain fitness within one year of the order finding him unfit. 725 ILCS 5/104-17(e). If the provider opines that the child will attain fitness, the provider must provide a treatment plan, and may be required to submit progress reports as well. 725 ILCS 5/104-17; 725 ILCS 5/104-18. Restoration of the child must occur within the least restrictive setting possible. 725 ILCS 5/104-17(a).

The child later will be subject to a "restoration hearing" to determine whether he has since "become" fit or will become fit within one year of the order of unfitness. 725 ILCS 5/104-20; 725 ILCS 5/104-23. If the child is found fit, the court will set the matter for disposition. 725 ILCS 5/104-20(b). If the court finds the child unfit, but finds that the child is making progress toward attaining fitness, the court may continue the treatment plan. 725 ILCS 5/104-20(c).

Alternatively, the court may determine that the child cannot become fit within one year from the original finding of unfitness (at this point, there is no longer the concept of "substantial probability" of fitness). 725 ILCS 5/104-20(d); 725 ILCS 5/104-23(a). If the child cannot be made fit within a year, the defense can move for a discharge hearing, which must be held within 120 days of the motion for the discharge hearing to determine if the State can prove the juvenile guilty. 725 ILCS 5/104-23(a). Additionally, upon a finding by the court that the child cannot be made fit within one year (or, alternatively, if at the end of the year, the

court finds that it can make no special assistance to render the defendant fit), the State must move for the child's release and dismissal of the charges with prejudice, or must initiate a discharge hearing itself. 725 ILCS 5/104-23 (a). Hearsay evidence is admissible at the discharge hearing. 725 ILCS 5/104-25 (a).

If, after the hearing, the State does not prove the child guilty beyond a reasonable doubt, or if the child is found not guilty by reason of insanity, the child will be acquitted. 725 ILCS 5/104-25 (b), (c). If the child is not acquitted, he may be remanded for further treatment and the one year time limit may be extended, depending on the offense involved. 725 ILCS 5/104-25 (d). The child can appeal from an order that does not result in his acquittal. 725 ILCS 5/104-25 (d).

- **The problem of fitness determinations in juvenile court**

The issue of fitness to stand trial in delinquency cases is fraught with particular problems. While Illinois courts mechanically use the same legal standards to determine competence to stand trial as in adult cases, it is not clear that these standards should be the same for children. For instance, there is evidence that "adolescents might know what's happening in trials, but they might not yet have developed adult-level capacities to use that information in deciding how to respond in their own interests as defendants." Thomas Grisso, *Dealing with Juveniles' Competence to Stand Trial: What we Need to Know*, 18 QLR 371 (1999) at 376. Additionally, while the Illinois Code of Criminal Procedure envisions that adults may be "restored" to fitness within a year, as noted above, these standards do not necessarily apply in juvenile cases; if the underlying issue as to the child's fitness is related to the child's immaturity, there may be no way to "restore" him to fitness – he simply may need to grow up.

Mental health evaluations

- **When to ask for a mental health evaluation**

Attorneys also may request and use mental health evaluations in preparing a defense for the juvenile. Attorneys should not automatically request such evaluations, but should do so only if they deem these evaluations necessary and after already attempting to obtain an evaluation without the court's appointing an expert. Some instances where such an evaluation may be useful include:

1. **Child facing transfer to adult court.** Use for both mitigation purposes and to demonstrate that the child would benefit from juvenile court services.
2. **Adjudication.** Use to demonstrate an affirmative defense or demonstrate that the child lacked the necessary mental state to commit the offense.

3. **Disposition.** Use in mitigation to show that, even if the juvenile committed the offense, he may have not meant to cause any harm, may have not been able to fully appreciate the consequences of his actions, or may be in need of services rather than incarceration.
 4. **Diversion from juvenile court.** Use to show that solutions outside juvenile court are more appropriate to address the issues faced by the client, particularly where he has very serious mental health issues.
- **What is contained in the mental health evaluation report**

Illinois law provides no guidelines for what should be contained in this type of report. However, attorneys should consider requesting that the following information be included:

 - Developmental assessment to determine the relationship between any trauma, disability, or immaturity the child has experienced;
 - Neuropsychological, educational or other tests recommended by an expert;
 - Diagnostic evaluations (taken from the Diagnostic and Statistical Manual of Mental Disorders 4th Edition Revised – DSM-IV-TR) to determine any mental disorders; however, attorneys should be cautious in requesting this evaluation because certain evaluators may be inclined to routinely find that the child has a “social disorder,” which may cast the child in a negative light before the court; or
 - General psychological evaluation to determine the child’s general mental and emotional health.

Adapted from Juvenile Defender Delinquency Notebook at 37-44. In requesting these types of reports, attorneys should direct the expert as to what type of information would be helpful or relevant to the court. For instance, if it is important to determine whether the child might fail to comprehend that he could have injured someone in committing the offense, the attorney should let the expert know. Otherwise, the evaluation may be too general to serve a specific purpose. When possible, the attorney should provide the evaluator with relevant documents, such as the child’s school records, including any existing IEPs (individualized educational programs arising from the child’s placement in special education classes at school). Again, the attorney should not rely on the mental health evaluation alone, should request not only the tests used by the examiner, but also the results, the examiner’s notes, and other bases for his or her opinions.

Social investigation

- **When to ask for a social investigation**
These investigations are required by statute and typically are ordered by the court after adjudication and prior to the dispositional hearing. 705 ILCS 405/5-701. If the court fails to order the report, the attorney should request it at the conclusion of the dispositional hearing.
- **What is contained in the report**
A social investigation report (typically prepared by a probation officer) includes an investigation of the child's family situation, educational background, mental and physical issues or history, and other matters potentially relevant to disposition. The social investigation report also may include the probation officer's recommendation regarding potential dispositional options. Because these reports are often essential to the court's sentence or disposition, attorneys should ensure that the probation officer or other individual conducting the investigation possesses all pertinent and helpful information regarding the child, including any achievement or improvement in school, the child's positive impact on his family or community and other similar information.

Sex offender evaluation

- **When to ask for a sex offender evaluation**
This evaluation is required by statute and typically ordered by the court in sex offense cases (defined in 20 ILCS 4024/5) to evaluate the child for his or her risk, treatment, and procedures for monitoring the child to protect victims and potential victims. 705 ILCS 405/5-701; 20 ILCS 4026/16.
- **What is contained in the report**
There are no specific guidelines as to what should be contained in a sex offender evaluation. Generally, defense attorneys may not have much control over who administers these evaluations and what is contained in them. However, defense attorneys should make sure that any relevant or helpful information is provided to the evaluator and to the court.

Note: Since the Illinois Legislature's passage of S.B. 121, it may be even more vital that the sex offender evaluation be comprehensive and, ideally, support any future motions filed by the child to be removed from the sex offender registry. *See* S.B. 121. Therefore, attorneys should bear in mind that the sex offender evaluation may have far reaching impact for the child, should argue that the child's counsel should be present for the evaluation, and provide any mitigating or helpful information to the evaluator.

A note on confidentiality

While “social, psychological and medical records” generally are “privileged” in juvenile court, there are exceptions. Such records are not privileged when the defense puts the child’s mental health at issue (for example, when the defense challenges the child’s fitness to stand trial or relies on an affirmative defense of intoxication or insanity), when the records reflect court-ordered treatment for the child, or when the records are used in preparation of the social investigation report to be used at disposition. *See* 705 ILCS 405/5-910-1 (confidentiality of social, psychological and medical records); *see also*, 725 ILCS 5/104-14 (a), (b) (statements made by the defendant in fitness and sanity examinations are inadmissible against the defendant *unless* the defendant raises defenses of insanity, or that he was drugged or intoxicated); *People v. Sutton*, 316 Ill.App.3d 874, 880-83, 739 N.E.2d 543; *see also*, *People v. Wilson*, 164 Ill. 2d 436, 455-56, 647 N.E.2d 910 (1994) (noting that confidential statements made to a therapist are not admissible under Illinois law, unless they “relate[] directly to the facts and circumstance of a homicide”); 735 ILCS 5/8-802. In light of these exceptions and provisions, attorneys should instruct the client not to talk about the facts of the case and similarly instruct the evaluator of this prohibition. Attorneys also should be cognizant that, if the client discusses the details of the offense itself, this discussion may reach the juvenile court judge or other individuals.

3.2 Challenging an Evaluation or an Unfavorable Report



Points to Remember

- *Courts may require certain evaluations, such as sex offender evaluations, psychological or mental health evaluations, fitness evaluations or social investigation reports. While these may be helpful to the child in many cases, the attorney may believe that the evaluations could provide the court with information that is harmful to the client’s case.*
- *If the attorney believes that an evaluation ordered by the court is not helpful to the child’s case, the attorney should initially object, particularly if the evaluation is not statutorily required. If the child must undergo the evaluation, attorneys should try to be present for the evaluation, try to ensure it is as complete as possible and is relevant to the issue being evaluated, and should consider requesting that a defense expert also be permitted to conduct an evaluation.*
- *Attorneys should be prepared to counter any report harmful to the child on the child’s defense regarding the child’s mental health, competency, social background or sex offender status at a trial or hearing, by challenging the expert’s qualifications, methodology and the basis for his opinion.*

3.2.1 Considering a challenge to a court ordered evaluation

If the evaluation is not required by statute, but either the State or the court requests it, the attorney should do the following:

1. **Consider the purpose of the evaluation.** For example if the State requests a general psychological evaluation of the client that the defense attorney believes is simply a tactic to obtain harmful information regarding the client, the attorney should object. However, if the court orders such an evaluation after the child has violated his probation by running away from an abusive home, the attorney may believe that such an evaluation will allow the court to better understand the child's behavior. Therefore, the purpose and context of the evaluation may determine whether or not the attorney chooses to object.
2. **Consider who will be performing the evaluation.** If the evaluator is court-appointed – for instance, the Forensic Clinical Services Department of the circuit court – the attorney should determine whether she believes that the evaluation will be objective and will be favorable to the client's case. Who is conducting the evaluation can have a great impact on its result. Talk to the evaluator beforehand to discuss and assess the objectiveness and limitations of the examination and to offer relevant documentation and information.
3. **Object, if needed.** As noted above, if the evaluation is potentially harmful to your client or at least provides the possibility that the client will reveal harmful facts about the offense itself, object to the evaluation in court, file a written objection to follow up, and include the issue in a post-trial motion, if necessary.
4. **Ask to be present for the evaluation.** The client arguably has the right to counsel in an evaluation that may elicit information to be used against the client. *See Estelle*, 451 U.S. 454 (cited *supra*); *Wilson*, 164 Ill.2d at 454 (cited *supra*). Attorneys should argue that the client has a right to have the attorney present whenever a court-ordered evaluation has the potential to elicit information that may be used against the client.
5. **Try to limit the scope of the report,** to avoid delving into issues involving the offense, or other areas that may be harmful to the adjudication or disposition of the case.
6. **Try to limit who can view the report and attempt to have it released to defense counsel first.** Defense attorneys can be blindsided by an unfavorable or harmful report. Additionally, particularly if the evaluation was conducted outside of the attorney's presence or may be used as evidence against the minor at trial, the attorney can argue the report contains information that violates the privilege against self-incrimination. *See People v. Lee*, 128 Ill. App. 3d 774, 779, 471 N.E.2d 567 (1st Dist. 1984) (noting that Illinois's fitness statute's restrictions on the use of information elicited from the defendant during a fitness examination (cited

supra) are derived from the Fifth Amendment's privilege against self-incrimination); *People v. Slywka*, 365 Ill. App. 3d 34, 49-50, 847 N.E.2d 780 (1st Dist. 2006) (no Fifth Amendment issue arose from a juvenile's participation in a routine social investigation, but where such statements were used against the defendant at a subsequent trial, without making the juvenile aware of that possibility, the Fifth Amendment's protections were implicated). Therefore, attorneys should try to view the report first, and, if necessary, have the court view the report *in camera* to determine whether portions may be redacted.

7. **Argue against the credibility of or the weight to be given to the report** by attacking the evaluator's credentials, the facts or tests upon which the report is based, or by arguing against the use of the report as a violation of *Miranda*, if possible (*See Smith, Wilson, cited supra*).
8. **Try to obtain an independent evaluator of the attorney's own choosing to counter the court-ordered evaluation or provide a different viewpoint.**

Adapted from Juvenile Defender Delinquency Notebook at 57-59.

3.2.2 Countering an unfavorable report at trial or at a hearing

If, after the attorney's best efforts, an unfavorable expert report is used over the attorney's objection at a trial or hearing, with respect to mental health, fitness, or other issues, the attorney may have no choice but to counter the report through cross-examination and/or by calling an expert (as noted above). Some specific strategies to address the impact of a prosecution's expert witness are:

1. **Investigate the expert**, particularly with regard to his or her credentials, opinions in other cases (*e.g.*, the expert always finds the defendant fit to stand trial), publications, etc.
2. **Challenge the expert's qualifications.** A defense attorney should consider challenging an expert's qualifications if sufficient grounds exist to do so. Even if an expert has testified many times, he or she may not have testified with respect to the specific issue at hand. *For example: a psychiatrist with expertise in a child's fitness to stand trial is called to testify regarding the child's rehabilitative potential as a sex offender.*
3. **Challenge the basis for the evaluation.** If the attorney provided the evaluator with all relevant information and the evaluator failed to consider some portion of it, the attorney should question the evaluator regarding his failure to consider this piece of information.
4. **Challenge methodology, diagnoses or conclusions of the report.** An attorney may lack the knowledge to do this by herself, but should at least find an expert who

can analyze and explain the report and help the attorney formulate questions challenging its substance. Some grounds include:

- a. Issues regarding the DSM-IV-TR diagnoses, including such issues as: the child may not necessarily fit into one of its categories; adolescents are often “over diagnosed” with certain disorders including “conduct disorder” and “oppositional defiant disorder;” the conduct may simply be a facet of adolescent behavior;
 - b. Completeness of the evaluation. The attorney may challenge the fact that the evaluator failed to assess, for example, whether the child was competent in all areas of the proceedings, including the nature of the offense, pleas, possible punishments, the child’s ability to reason, make decisions, and participate in the proceedings, and also the child’s ability to understand and waive *Miranda*; or
 - c. Inappropriateness or inapplicability of the testing used. For example, in some jurisdictions, evaluators improperly use a type of board game that is actually designed for witnesses rather than defendants.
5. **Challenge any other weaknesses in the expert’s opinion or background.** For example, challenge the expert’s tendency to render the same opinion in every case or the fact that he only testifies for the prosecution.

Adapted in part from the Juvenile Defender Delinquency Notebook at 61-65.

Summary

Consideration of mental health and competency issues are particularly complex in juvenile court. Attorneys should not hesitate to seek evaluations of their juvenile clients, particularly where the attorney has doubts about the child’s mental health or competence. However, attorneys also should be aware of the pitfalls of these evaluations and be willing to challenge reports that are incomplete, based on faulty information, or authored by experts unqualified to evaluate the child on a given subject matter. Finally, attorneys should be aware of issues regarding confidentiality and disclosure.



Chapter 3 Checklist

- ✓ Be vigilant for any issues involving the child’s mental health and comprehension, including issues involving the child’s education, physical health and home life.
- ✓ Be aware of when mental health and fitness evaluations may be useful and request them as needed.
- ✓ Prepare your juvenile client for the evaluation.
- ✓ Meet with any evaluators beforehand to discuss and assess their methods and the type of evaluation they will perform.
- ✓ Consider hiring your own consulting expert, if possible, before informing the court of your intention to conduct an evaluation; alternatively, file an ex parte motion requesting the appointment of an expert.
- ✓ Argue that you have the right to be present for any evaluation, go to the evaluation, make sure the evaluator has all necessary records and reports, and discuss any confidentiality issues with the child prior to the interview, but instruct the child to honestly answer the evaluator’s questions. If appropriate, instruct the child not to discuss the offense itself.
- ✓ Investigate the qualifications, prior opinions and methodology of any expert who will testify at trial. Do not hesitate to challenge a harmful report or attempt to limit the scope of an evaluation required by the court or requested by the State, if such a report, or the expert’s testimony based on the report, will not be helpful to the juvenile.

Chapter 4

Arrest



What Attorneys Need to Do to Effectively Represent Their Juvenile Clients at the Outset of the Case

An attorney's representation of a minor at the outset of delinquency proceedings, and even prior to the initiation of a delinquency petition, can make a crucial difference in the child's case.⁸ Unfortunately, in many jurisdictions in Illinois, defenders are not appointed until the child's first appearance, thereby compromising the attorney's ability to represent the child in any early court proceeding.

An attorney's representation at the early stages of the case, even before a petition is filed, can help the defense strategy going forward or can even avoid the child's prosecution. Therefore, attorneys should strive to begin their representation of juveniles at the earliest possible moment, before arrest, if at all possible, or at the very latest, before the detention hearing.

4.1 Representing the Client at the Time of Arrest



Points to Remember

- *Whenever possible, attorneys should strive to begin their representation at the time of the child's arrest in order to protect the child's right to remain silent and avoid an involuntary statement. The attorney, if possible, should be present at the police station when the child is taken into custody.*
- *If the attorney cannot be present at the police station, she should call the police station and speak with an officer to inform the police that the attorney represents the child. The attorney should request to speak with the child to instruct him not to speak with the police without the attorney being present. If the police refuse to allow the attorney to speak with the child, the attorney should assert via phone and in writing her client's right to remain silent. If appropriate, attorneys also should advise the parents to go to the station and assert the child's right not to make a statement without a lawyer present.*

4.1.1. Representing the client before arrest when the police are interested

Juvenile defenders do not always have the luxury of assisting their clients prior to their arrest; oftentimes, they may not even be aware of the arrest until the first court date. Additionally, due to statutory limits requiring appointment of counsel by the court (*see* 55 ILCS 5/3-4006), the attorney may not be involved until after a petition is filed. However, particularly where an attorney has previously represented a client, the client or a family member may call to inform the attorney that either an incident has occurred and/or the police are looking for the client. In such cases, the attorney can assist the client in several different ways prior to any arrest:

1. If the child believes that the police are looking for him or that there is an outstanding warrant for the child's arrest, the attorney should try to verify the existence of a warrant. The attorney may do this by checking the court computers (public defenders or the clerk's office may be able to access this information). Alternatively, the attorney may consider contacting the police, probation officers or the State, although doing so should be a last resort to avoid alerting any agency to incriminating information about the child. Alternatively, if there is no warrant for the child's arrest, the attorney may call the investigating officers or detectives, if known, to ascertain the current situation.
2. Arrange to talk with the child, either in person or on the phone. If there is no warrant for the child's arrest, but the attorney knows that the police are looking for the client, the attorney should talk to the child about the benefits of the two of them going to the police station together. This will ensure that the child has counsel, and that the police are on notice of this fact. If the child does not want to go to the police station, the attorney should prepare and give to the child a "notification of rights" letter to carry with him and hand to the police in the event that the child is taken into custody, notifying the police of the attorney's representation of the child and asserting the child's rights.
3. If the attorney has verified that an outstanding warrant exists for the child's arrest, the attorney should advise the child of the fact of the warrant and discuss the possibility of voluntary surrender, and, if appropriate, facilitate the client's surrender. Voluntary surrender will allow the child some control over the circumstances of the arrest, puts him in a better posture before the court with respect to detention and disposition, and helps to ensure that the child's constitutional rights are protected at the time of arrest. While one could argue that a person with an outstanding warrant does not have an affirmative duty to surrender to the police, it is illegal for him to commit a physical act to resist or obstruct arrest or service of legal process. *See* 720 ILCS 5/31-1 (2008). The nuances of these laws is beyond the scope of this manual; in most instances, the prudent course of action for an attorney to take is to advise her juvenile client that surrender does not mean an admission of guilt and, when done with an attorney, may be the most sound course to take. Ultimately, however, the decision to surrender belongs to the client. An attorney, however, cannot advise a juvenile to leave the state or conceal himself. *See* 720 ILCS 5/31-5 (discussing

offense of concealing or aiding a fugitive). Nor can the attorney advise the child to take affirmative action to resist or avoid process. See 720 ILCS 5/31-4 (2008).

4. If the child chooses to surrender, the attorney should arrange for the surrender and accompany the child to the police station.
5. If the child has not been arrested and chooses not to surrender, the attorney should talk to the child about his rights upon arrest and advise him to tell the police as soon as he is taken into custody that he has an attorney and that he wishes to speak with his attorney immediately. The attorney can also provide the client with the notification of rights letter referenced in item 2 above.

4.1.2. Attorney's representation at the time of arrest: the benefits of, and need for, early intervention in Illinois

Like adults, juveniles have a right to counsel once adversarial proceedings begin. 705 ILCS 405/1-5(1); *see also*, 55 ILCS 5/3-4006 (providing that a public defender "shall act as attorney, without fee, before any court within any county for all persons who are held in custody or who are charged with the commission of any criminal offense, and who the court finds are unable to employ counsel"). With respect to his arrest, once a child is arrested and subject to questioning, the police must inform the client, in accordance with *Miranda*, that he has a right to an attorney. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Smith v. Illinois*, 469 U.S. 91 (1984); *see also*, *People v. Reid*, 136 Ill.2d 27, 56-57, 554 N.E.2d 174 (1990) (noting that voluntariness of juvenile's confession is based on various factors, including whether the juvenile waived his right to counsel during custodial interrogation).

Indeed, Illinois' Juvenile Court Act goes even further. It requires that law enforcement officers who arrest a child make reasonable attempts to notify a parent or other person legally responsible for the minor regarding the minor's arrest. 705 ILCS 405/5-405. Illinois courts have held that the purpose of this requirement is to provide the parent with an opportunity to confer with counsel at an early stage. *See, e.g., In re D.B.*, 303 Ill. App. 3d 412, 419, 708 N.E.2d 806 (1st Dist. 1999). While the absence of a parent is not dispositive of the issue of whether a confession was voluntary, it is relevant to the question of whether there was coercion. *Id.* ("The relevant inquiry is whether the absence of an interested adult contributed to the coer-



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cive circumstances surrounding the interview, not whether contact with a parent was denied”).

Undertaking representation of the client at the time of arrest can be extraordinarily beneficial in several ways, including:

- preventing the child from making a statement that is against his or her best interests;
- ensuring that any questioning of the client is non-coercive; and
- preventing any brutality or abuse by the police, or at the least, ensuring that a record is made of any such misconduct.

Additionally, representing the child prior to the child’s first court appearance can also assist in the lawyer’s representation including:

- allowing the attorney to gather information about the client and the offense at a very early stage, thereby aiding the attorney to advocate for a lack of probable cause or to advocate for better alternatives to detention, as well as to prepare for adjudication or pleas;
- providing the attorney with a head start in researching and requesting expert or medical evaluations, as well as obtaining relevant records, which can often take a long time to procure;
- assisting the attorney to foster a better relationship with the child and his family; and
- preparing the child for the initial court appearance, including any question the court may have regarding the child’s background, grades, disciplinary and school history, and any issue that may arise at the detention hearing.

If an attorney learns that her client has been arrested, she should:

1. **Call the police station to confirm that the child is there.** The attorney then should inform the police that she: a) represents the child; b) would like to speak to the child; and c) asserts the client’s right to remain silent. If the attorney is allowed to speak to the client, she should advise the child that he should not speak to the police unless the attorney is present. The lawyer also should tell the child not to discuss the case with anyone else at all, even the child’s parents or someone identifying himself or herself as “the people’s attorney,” as those discussions are not confidential. The lawyer should document all conversations with the police.
2. **If at all possible, go to the police station to see the child in person.** This is the best possible way to safeguard the child’s rights at this stage. The attorney should

insist on seeing the child immediately, and should inform the police that the attorney formally requests to be informed of any further questioning or procedure, including lineups or testing by the police.

3. **Bring a camera to document any injury to the client as well as a formal letter invoking *Miranda* rights on behalf of the client.** The attorney should have the child sign the letter, as well as the police or officers present. If the officers refuse, the attorney should write on the letter that the officers have refused to sign it. If the child is being questioned by the Chicago Police Department, and the assigned public defender is not authorized or available to go to the police station, the child's family may contact an organization such as First Defense (1-800-LAW-REP4), which administers a legal hotline to dispatch attorneys to police stations to advocate for individuals who are detained by the police.
4. **Make sure that an officer has contacted or has made attempts to contact the child's parents and has taken the child to a youth officer (705 ILCS 405/5-405); see also, *In re Marvin M.*, 890 N.E.2d 984, 1003 (2d Dist. 2008) (noting that juvenile officer's role is that of a "physical guardian," and involves "protecting the physical person of the minor and ascertaining that the police are not improperly taking advantage of the minor's youth in attempting to wring a confession from him").** If appropriate, assist in locating the child's parents so that they can be present at the station.
5. **Advocate for the child's release to the parents, if appropriate.** The attorney should cite any helpful factors, such as minimal negative background information, performance in school, disabilities, involvement in social programs and familial support. See Elizabeth Calvin, Sarah Marcus, *et al. Juvenile Defender Delinquency Notebook* (2nd ed. Spring 2006) at 68-77.

4.1.3 Representing the client in line-up, show-up and other police procedures

Line-ups, show-ups and photo arrays are various ways in which police attempt to obtain an identification of an alleged offender. "Show-ups" typically occur at the scene of the offense and involve the police asking an eyewitness to point out the offender. "Line-ups" usually occur at the police station while the client is being detained, and involve the suspect being placed in a group of other somewhat similar looking individuals, such that an eyewitness may identify one of the individuals as the offender. "Photo arrays" generally refer to the police placing a photo of the suspect in a group of photos for the eyewitness to make an identification.

Unfortunately, suspects are not entitled to the assistance of counsel at these proceedings if they occur prior to the initiation of adversary proceedings (by formal charge, preliminary hearing, indictment, information, petition or arraignment). See *People v. Bolden*, 197 Ill. 2d 166, 175, 756 N.E.2d 812 (2001); see also, *In re Price*, 20 Ill. App. 3d 357, 314 N.E.2d 235 (1st Dist. 1974) (juvenile not entitled to counsel at a lineup where the

lineup occurred before the filing of formal charges). However, the attorney can take some steps to protect the client's rights, as follows:

1. **If possible, interview the witness making the identification** to determine what the eyewitness initially observed, his or her reliability as an eyewitness (*e.g.*, details about the perpetrator's physical description, lighting conditions, opportunity to observe the offender, whether the witness knows your client from any previous interaction, etc.), and what police told the eyewitness prior to the identification (for any indication of suggestiveness). While it is unlikely an attorney will have the opportunity to interview the witness in the police station, remember that the attorney should make an effort to interview the witness before the hearing or trial.
2. **Take careful notes documenting the lineup or show up procedures**, including date and time, names of all people present, number of eyewitnesses and whether the witnesses view the lineup separately, what is said to each witness regarding the lineup procedure, and what the witness says or does while making the identification. All of this information may become crucial if the attorney decides to challenge the lineup or show up.
3. **Object to suggestive procedures.** Objecting to suggestive and unfair lineups and show ups can help the juvenile receive a fairer and more objective procedure. For example, at a show up (which attorneys are rarely present at because they occur at the scene just after the alleged offense), the attorney might object if the juvenile is the only person shown to the witness, if the juvenile is handcuffed or otherwise restrained, or if the police use leading language in procuring the identification (*e.g.*, "Is this the kid who took your purse?").

At a lineup, the attorney should object:

- if there are very few individuals in the lineup (*See People v. Blumen-shine*, 42 Ill. 2d 508, 511-13, 250 N.E.2d 152 (1969) (procedure whereby police showed the victims a lineup with the defendant alone and then with an accomplice was improperly suggestive) (*but see, People v. Kin-zie*, 31 Ill.App.3d 832, 834-35, 334 N.E.2d 872 (1st Dist. 1975) (numerical composition alone does not make a lineup improperly suggestive));
- if the client or anyone else is not dressed in street clothes, or if the client appears markedly different from the other individuals in terms of his clothing or grooming (*see People v. Maloney*, 201 Ill.App.3d 599, 558 N.E.2d 1277 (1st Dist. 1990) (finding lineup was per se suggestive where the defendant was the only person who appeared "unkempt and disheveled" while the other participants all appeared well groomed));
- if the other participants in the lineup do not bear at least some physical resemblance to the client (the participants need not be identical, but

strong physical differences can be unduly suggestive) (*Maloney*, 201 Ill. App. 3d at 607-08);

- if the client is not allowed to choose his own position in the lineup (*See, e.g., People v. Coleman*, 203 Ill.App.3d 83, 560 N.E.2d 991 (1st Dist. 1990) (noting that defendant's choice of his own position in a lineup indicated it was not suggestive in nature); *People v. Lucas*, 140 Ill.App.3d 1, 487 N.E.2d 1212 (1st Dist. 1986) (although 17-year old defendant was positioned in the middle of the lineup, the fact that he chose that position suggested that the lineup was proper));
- if the police single out the client in any way during the lineup (*Blumenshine*, 42 Ill. 2d at 511-13);
- where there is more than one eyewitness, if the eyewitnesses view the lineup together (*see People v. Lopez*, 93 Ill. App. 3d 152, 160, 416 N.E.2d 1127 (1st Dist. 1981) (noting criticism for practice of having more than one witness view a lineup at the same time)); and
- if the police or anyone else present do or say anything suggestive (*see Blumenshine*, 42 Ill. 2d at 511-13 (police told witnesses that suspects were in custody and first showed witnesses the accused alone, and then showed witnesses the accused with the alleged accomplice); *see also, People v. Brooks*, 187 Ill. 2d 91, 109, 718 N.E.2d 88 (1999) (photo array improperly suggestive where Assistant State's Attorney told the witness several times before viewing the lineup that defendant was the one who had shot the witness).

While the police might not change any objectionable facet of the lineup or show up, objecting will ensure that the police were made aware of the attorney's objections and set the stage for raising those objections in a motion to suppress and on appeal. Accordingly, the attorney should keep a careful record of all objections made and the responses to those objections.

4. **Follow similar procedures for photo arrays and tests.** It is rare that attorneys will have the opportunity to represent a client during these types of procedures prior to the initiation of formal charges. If the attorney has the opportunity to be present, she should follow procedures similar to the ones detailed above for show ups and lineups. If the attorney is present for some sort of testing (for example, a polygraph or psychological test), the attorney might either advise the client not to participate in the test or not to discuss the offense itself, assuming such advice is permissible and appropriate (*e.g.*, the court has not ordered the particular test). The attorney also should be aware of or determine the credentials of the examining person, the methodology involved in the test, and note or object to any suggestive tactic or question. The attorney also should take careful notes of the questions posed and answers given by the client. All of this information may

be useful in cross-examining the police or an expert or in preparing a defense expert. *See Juvenile Defender Delinquency Notebook at 78-80.*

4.2 Representing the Client Prior to Temporary Detention



Points to Remember

- *Attorneys should be aware of standardized screening instruments used to make detention decisions in order to effectively advocate against detention in front of probation officers, detention intake personnel, or the juvenile court judge.*
- *Attorneys must prepare for detention hearings by gathering as much information as possible regarding the juvenile, his family situation, background, school, health, etc. This requires an attorney to meet with the child, and his parents in advance of the hearing.*
- *At the detention hearing, the attorney should be prepared to call witnesses, offer evidence and advocate for the child's release.*

When a child is first arrested, the police initially determine whether the child should be detained or released to his parents. If the police decide that the child should be detained, they may take the child to the detention center or request that a probation officer evaluate whether detention is appropriate. Depending on the county in which a youth resides, a probation officer or detention center staff initially may make the decision of whether to detain. *See supra Assessment at 37.* Detention or probation staff in some counties in Illinois are beginning to use a standardized screening instrument to make initial detention decisions (*i.e.*, the AOIC model detention screening instrument, promulgated by a multi-agency group), which may be modified by individual counties. *See, www.ncjj.org/stateprofiles/profiles/IL07.asp?state=%2Fstateprofiles%2Fprofiles%2FIL07.asp&topic; see also Assessment at 37.* (Where counties do not use a standardized screening instrument, attorneys may want to consider requesting that the counties in which they practice do so in the interest of cultivating uniformity in such assessments.)

Additionally, in counties without a juvenile detention facility, children who are detained may be sent far away or may be placed in an isolated area of an adult jail. This may be tremendously detrimental to the child. Thus, it is crucial for attorneys to try to prevent the initial detention of the client.

The factors considered in the AOIC model screening instrument include the most serious of the current offenses, any additional current offense, prior arrests, risk of failure to appear, the child's legal status, and any aggravating and mitigating factor; however, these factors may vary significantly from county to county. *See Illinois Criminal Justice Information Authority, Research Bulletin Examining Pretrial Juvenile Detention Screening Practices in Illinois, at 7*

(November 2004) (discussing model screening instrument). In light of these factors, attorneys may be able to assist their clients at this stage by:

- asking to be present for any interview with the child and his parents;
- speaking with the probation officer, police officer or youth officer (“intake officer”) in advance to determine how the interview with the child, and his parents, if applicable, will be conducted, and to advocate for the child by discussing any helpful or mitigating information; and
- speaking with the child and his parents to prepare them for the interview with the intake officer. The attorney should emphasize that 1) any discussion with the intake officer will not be confidential; 2) the parents should not discuss the alleged offense with the probation officer and may tell the officer that the attorney instructed them not to discuss it; and 3) help them identify mitigating or helpful information that would persuade the officer to recommend the child’s release.

Even if the attorney is not representing the child at this stage, being aware of the existence of a standardized instrument and the potential factors used to detain the child can be useful in advocating at a later detention hearing that the child should be released from custody. For instance, attorneys may be able to argue that the person screening the child incorrectly calculated the point values associated with the various factors and, therefore, reached the wrong conclusion as to whether the child should be detained. More importantly, however, attorneys should know that adherence to these screening instruments is not mandatory. Therefore, attorneys can and should argue that, notwithstanding the results provided by the instrument, other factors indicate that the child should not be detained. The screening instrument is intended to be used as a tool to determine whether to hold the child until he can appear before the court; it is not a substitute for judicial decision-making.

4.3 Advocating for Alternative Means of Resolving the Case Before it is Prosecuted: Station Adjustments, Probation Adjustments and Other Alternatives



Points to Remember

- *Attorneys should be aware of alternatives to juvenile court and discuss them with the juvenile; however, some alternatives require admissions by the client that may be admissible in court if the minor does not abide by certain terms.*
- *Attorneys should be prepared to advocate for alternatives to delinquency court.*

Many times, particularly in cases where the offense itself is relatively minor, or where the child has little or no delinquency background, attorneys can advocate to keep the child out of the juvenile court system entirely. The Juvenile Court Act provides for various “immediate interaction” programs, designed to prevent future delinquency. *See* 705 ILCS 405/5-300. Additionally, other diversion programs have been developed to address delinquency outside the juvenile court system. While these programs are not always an option, defense lawyers should be aware of them so that, in appropriate circumstances, they can advocate for their juvenile clients to participate in these programs.

4.3.1 Station adjustments

In some cases, the police will choose to impose a “station adjustment” on an arrested child. Station adjustments are not adjudications of delinquency, and do not constitute prosecutions in juvenile court. A station adjustment is a decision by a police officer to handle a delinquency matter informally, rather than through formal juvenile court proceedings. *See* 705 ILCS 405/1-3(15) and 705 ILCS 405/5-301. There are two types of station adjustments: informal and formal. Both require a determination by the police officer that “there is probable cause to believe” that the child committed the offense. *See* 705 ILCS 405/5-301(1)(a) and (2)(a). In determining whether to resolve a matter through either an informal or formal station adjustment, a juvenile police officer considers the following factors:

- Seriousness of the offense;
- Minor’s history of delinquency;
- Minor’s age;
- Minor’s culpability;
- Whether the offense was committed in an aggressive or premeditated manner; and
- Whether the minor used or possessed a deadly weapon. 705 ILCS 405/5-301.

In exchange for receiving a station adjustment, a minor may have to abide by various conditions, including reporting to a police officer, obeying a curfew, paying restitution, attending school and performing community service. *See* 705 ILCS 405/5-301(1)(e) and (2)(d). If the minor fails to abide by the conditions, his case may be referred to the juvenile court. *See* 705 ILCS 405/5-301(1)(f) and (2)(i)(v).

Unlike an informal station adjustment, a formal station adjustment requires that the child make an admission to the offense and that the child and his parents sign a formal agreement to the adjustment, which includes the consequences of any violation of the terms of the agreement. *See* 705 ILCS 405/5-301(2)(b)&(c). A minor’s admission

in a formal station adjustment is admissible at further court proceedings. *See* 705 ILCS 405/5-301(2)(h).

When an attorney goes to the police station to represent a juvenile, she should advocate for an informal station adjustment over a formal station adjustment and make sure to discuss the conditions being imposed on her client and all of the consequences for not following the conditions.

4.3.2 Probation adjustments

A probation adjustment is a procedure by which the probation officer conducts a preliminary conference with the minor, his parents, the juvenile police officer, the State's Attorney, the victim and other interested parties to resolve the case without filing a juvenile petition. 705 ILCS 405/5-305. While there is no provision that the minor be represented at such a conference, an attorney may be able to represent the child's interests at the conference. Any statement the minor gives during this conference is not admissible in court.

After the conference, the probation officer submits a non-judicial adjustment plan, which may require supervision, counseling, treatment and other conditions for the minor to follow. 705 ILCS 405/5-305(5) Again, following up with the client by a staff social worker or other trained personnel is advisable to make sure the child and his parents are fully aware of the requirements of this type of diversion program.

Summary

Attorneys can make an enormous difference in a juvenile case by intervening early, ideally prior to or at the time of the child's arrest. In addition to allowing the attorney more time to prepare the case for the stages of pre-adjudication hearings, adjudication and disposition, early intervention can prevent the juvenile client from making admissions, and may even result in diversion to non-judicial programs or dismissal of the case altogether. Thus, attorneys should be familiar with the ways in which they can assist their juvenile clients at these early stages of the case.



Chapter 4 Checklist

- ✓ Talk to the client as early as possible. If the child is wanted by the police, discuss with the child the benefits of voluntary surrender and, if the child agrees to surrender, arrange to accompany the child to the police station.
- ✓ If the child is in custody, go to the police station and request to see him. If you cannot go to the police station, call the station. Assert the client's right to counsel and to remain silent, and write down the details of the conversation, including the officer's name, superiors' names, and responses to your questions.
- ✓ At the station, ensure that all procedures are followed, for example, that a youth officer was present and that the child's parents have been notified.
- ✓ Become familiar with the child's background, education, physical and mental issues, etc., and be prepared to advocate to the police, probation personnel or detention center personnel for the child's release to his parents or other appropriate alternatives to detention. Speak with any relevant experts or resources as soon as possible to develop placement alternatives.
- ✓ Discuss possible alternatives to juvenile court (station adjustments, community mediation, etc.) with the child and, if appropriate, his parents, and be prepared to advocate for them. In addition, follow up with social workers and other trained personnel who can further describe these options to the client.

Chapter 5

Representing the Client at the Detention and Probable Cause Hearing



Avoiding the Child's Detention and Advocating for Early Dismissal of the Case

As noted in Chapter 4, the early appointment of counsel and counsel's zealous advocacy at the early stages of the case can be enormously beneficial in obtaining a positive result for the client. An attorney's efforts to keep a child from being detained or in challenging a finding of probable cause, can be both enormously beneficial to the child's well-being, as well as essential to the defense of the case itself. It is therefore critical that attorneys be aware of ways in which they can assist their clients at the detention and probable cause hearings.

5.1 Representing the Client at the Detention and Probable Cause Hearing



Points to Remember

- *Strict time limits exist in which a child must appear before a judge for a detention hearing (under Illinois statutory law, within 40 hours of arrest or detention, excluding holidays and weekends; under United States Supreme Court law, within 48 hours of arrest or detention, including weekends or holidays).*
- *Attorneys should advocate zealously at probable cause and detention hearings by gathering information about the child and the circumstances of the arrest, speaking to the child, reviewing police reports and any evidence the State intends to present, cross-examining witnesses presented by the State, and by presenting live testimony and evidence.*
- *Attorneys also should speak with experts, including doctors, therapists and educators to develop pretrial alternatives to detention.*

- *Zealous advocacy at detention hearings may have an ancillary effect on the positive development of the attorney-client relationship.*
- *Attorneys should be aware of and prepared to challenge defects in the petition or defects in service of the petition, particularly where these flaws can result in dismissal of the charges against the minor.*

5.1.1 When must the child have a hearing after he or she is taken into custody in Illinois?

Children who are taken into custody must receive a hearing within 40 hours of their detention to determine whether they must remain in custody. 705 ILCS 405/5-415 (1).⁹ Because in Illinois this time period excludes weekends and court holidays, children may be kept in detention for longer periods prior to receiving a hearing. 705 ILCS 405/5-415; *but see County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (requiring that judicial determinations occur within 48 hours of arrest). An attorney should take steps to ensure that a detention hearing occurs as soon as possible.¹⁰ If a child is detained in excess of 48 hours without judicial review, the attorney should file a motion under *Riverside* requesting the child's immediate release. If a *Riverside* motion is unsuccessful, attorneys should file a motion for release based on 705 ILCS 405/5-415 if the child is detained in excess of 40 hours, excluding holidays and weekends.

5.1.2 The need for zealous advocacy at the detention hearing

Detention is the "temporary care of minor who is alleged to be or has been adjudicated and requires secure custody for the minor's own protection or the community's protection." 705 ILCS 405/5-105 (5). In order to detain a child pending the delinquency proceedings, a judge must find (1) that probable cause exists to believe the minor committed the delinquent act and (2) it is of immediate and urgent necessity for the protection of the child, others or property to keep the child detained. 705 ILCS 405/5-501(2) (*see* S.B. 2118, noted *supra*, modifying section 5-501 to require that a minor have an adequate opportunity to consult with counsel prior to a detention hearing). For the purposes of the detention hearing, the determination of probable cause can be based on testimony or proffer. 705 ILCS 405/5-501. If the court finds that probable cause does not exist, then the petition is dismissed. 705 ILCS 405/5-501 (1). If the court finds probable cause exists, the court must decide whether there is an urgent and immediate necessity for the protection of the child or of the person or property of another to detain the child pre-adjudication. 705 ILCS 405/5-501 (2). In making this determination, the court considers a number of factors. *See id.*

Zealous advocacy at the detention hearing is critical for a number of reasons:

- By collecting and presenting evidence, the attorney may be able to persuade the judge that the minor and the community will be best served by releasing the minor. Even in cases where the minor is alleged to have committed a serious offense, exposing weakness in the State's case and presenting the court with detailed information on the child and non-detention options available may persuade the judge to release the child. Not only is release most likely the result the child wants, studies have shown that minors who are detained pre-trial are more likely to receive sentences of incarceration or other out-of-home placements. *See Assessment at Appendix C, Encouraging Judges to Support Zealous Defense Advocacy from Detention to Post-Disposition* (Summer 2006) at 111-12.
- The detention hearing is the first opportunity the lawyer has to present her child to the court in a favorable light and, in some instances, to preview the attorney's theory of the case.
- Equally important is the impact that zealous advocacy may have on the development of the attorney-client relationship. The detention hearing is often the first opportunity the child has to meet his lawyer. When the child sees the lawyer making an argument on his behalf, it can give the child confidence that the lawyer is not "against him," but rather is fighting for him. This can be especially important for public defenders, who are often viewed by the child and his parents as part of the system that is prosecuting the child.

5.1.3 Challenging probable cause

As noted above, the court must initially make a finding of probable cause at the detention hearing. *See In re Jerome S.*, 372 Ill.App.3d 642, 647, 867 N.E.2d 1206 (4th Dist. 2007) ("[P]robable cause exists if the facts and surrounding circumstances are sufficient to justify a reasonable belief by the arresting officer that the defendant is or has been involved in a crime," quoting *People v. Garvin*, 219 Ill.2d 104, 847 N.E.2d 82 (2006)). If the court finds there was no probable cause to arrest, it can no longer detain the child and must dismiss the petition, although the State may reinstate the petition. 705 ILCS 405/5-501(1). At the probable cause hearing, the prosecutor may present evidence through live testimony or by proffer or may even submit the police report as evidence, thereby denying the defense attorney the ability to cross-examine the police officer. 705 ILCS 405/5-501 (2); *In re C.J.*, 328 Ill.App.3d 103, 112-13, 764 N.E.2d 1153 (1st Dist. 2002) (finding the use of proffers pursuant to section 5-501 constitutional). The defense also may present evidence at the hearing, either through live testimony or by proffer. Counsel should weigh the risks of an early exposure of the defense strategy against the probability of success at obtaining the minor's release.

Thus, defense attorneys should take the following steps with regard to the probable cause hearing:

- Speak with the child in advance of the hearing to gather information regarding the circumstances of the arrest;
- Become familiar with the State's evidence as soon as possible, and prepare to cross-examine any police officer regarding the arrest (including factors relevant to a determination of probable cause, such as time and proximity to the offense, whether the information was the result of a tip, etc.);
- Object to the State's use of a proffer in order to set the stage for any challenge relating to probable cause on appeal or to preserve the child's rights in the event of later successful challenges to the use of proffers;
- In serious cases or in cases where there is a viable challenge to probable cause, consider (with the child's approval) asking for a continuance of one to two days to gather additional facts;
- Present evidence and witnesses after weighing the risks and benefits of doing so at this early stage in the proceedings; and
- Consider subpoenaing the arresting officer to testify. *See In re W.J.*, 284 Ill. App.3d 203, 209, 672 N.E.2d 778 (1st Dist. 1996) (suggesting that at the probable cause and detention hearing, the minor has the right to cross-examine the State's witness, and that in transfer cases, the minor has the right to re-subpoena the State's witnesses with respect to the issue of probable cause for purposes of transfer).

In contesting probable cause based on proffer by the police, the attorney should focus on challenging the following:

1. Whether the arrest report or proffer is attested to by someone with personal knowledge of the facts contained therein. While hearsay and proffers are admissible at the hearing, all information considered by the court must be "relevant and reliable." 705 ILCS 405/5-501. Thus, the attorney may be able to argue that a particular document is neither relevant nor reliable if the attesting officer has no personal knowledge of the facts contained therein.
2. Whether the proffer and documents submitted by the State indicate that an offense actually occurred. *For example, a challenge could be made where a proffer indicates that the child committed retail theft because he took a video game from a store, but the store owner reported that the child was apprehended as he was walking back into the store with the game and another bag of merchandise and said he forgot that he still had the game and had not intended to buy it or take it (no intent to retain the merchandise).*

3. Whether the proffer or other documents sufficiently indicate that the client was the person who committed the offense. *For example, a challenge could be made where a complainant reported that his iPod was stolen from his backpack and he did not see the offender. The juvenile, who owned an iPod, was arrested on a busy street while running to catch a bus.*

Although it is admittedly difficult to challenge successfully probable cause, it is not impossible. Lawyers should be aggressive in challenging probable cause and hold the State to its burden.

5.1.4 Is it a matter of “urgent and immediate necessity”

As in the case of probable cause, evidence on whether continued detention is warranted may be submitted by proffer or live testimony. In considering whether to detain the child, the juvenile court considers “whether it is a matter of immediate and urgent necessity for the protection of the minor, another person, or the property of another person that the child be detained” or whether the child is likely to flee the jurisdiction.

The court considers a number of factors when making this determination, including: (1) nature and seriousness of the alleged offense; (2) minor’s record of delinquency offenses; (3) minor’s record of failing to appear in court; and (4) the availability of non-custodial alternatives. 705 ILCS 405/5-501 (2). The statute does not limit the court’s considerations to these factors, and lawyers should present other evidence to the court, such as school performance and activities, family relationships and responsibilities, positive peers and adults, etc.

In challenging detention, lawyers should:

1. Become familiar with the circumstances of the offense and the child’s delinquency background, including any pending cases;
2. Speak with the client and his parents to gather as much information as possible regarding the circumstances of the arrest, explanations for any previous history of delinquency or for any failure to comply with a summons, family life, health (physical and mental), education, and any other information which may be helpful in advocating for a non-custodial placement;
3. Prepare the parent and others to testify at the detention hearing;
4. Speak with teachers, community members, probation officers, doctors and others who can provide helpful testimony or information and provide alternatives to detention. Attorneys should request that these people appear as witnesses and /or ask that they provide letters or other documentation in support or in lieu of their testimony;

5. Craft a placement plan that the lawyer can propose to the court as an alternative to detention in a custodial setting;
6. Advocate for the child's release or least restrictive placement alternative; and
7. Where the court has released the minor, advocate against pre-adjudication conditions that are cumbersome, unrealistic or unrelated to the charge and the minor's individual circumstances.

It is important to note that detention advocacy does not end when the attorney obtains the release of his client. Judges may impose pre-adjudication conditions such as a curfew, school attendance, participation in after school programs with electronic monitoring, no association with gang members, no contact with the victim, etc. 705 ILCS 405/5-505 (1). Attorneys should discuss the potential restrictions with the child and discuss how they will impact the child's daily life, as well as whether it is realistic that the child will comply with them. For example, a client may resist electronic monitoring because he does not want his classmates on the basketball team to see an ankle bracelet. A client who fears for his safety due to gang hostilities may not want to go to school. Attorneys should listen to concerns by the client and articulate the client's objections or concerns. Not only may the court limit the conditions, but the attorney has laid the foundation for arguing against a future motion to detain the minor that is based on a violation of the pre-adjudication conditions.

It bears repeating that detention hearings generally are the first opportunity for the juvenile court judge to learn about the child, as well as the first opportunity to advance the theory of the case or of the child. Moreover, the attorney's diligence in representing the child at this proceeding demonstrates to the child that the attorney will be a strong advocate for him; thus, even when the attorney knows that she will lose the detention hearing, zealous advocacy at this stage has a significant impact on the development of the attorney-client relationship and how the client views the lawyer.

5.1.5 Arraignment and service of the petition

The state must file a petition or petition of wardship to begin formal proceedings against children in delinquency cases. 705 ILCS 405/5-520. The petition must include the following:

- An allegation that the child is delinquent;
- The charges against the minor;
- Name, age and residence of the minor;
- Names and residences of the child's parents;

- If no parent can be found, name and residence of the child’s guardian, legal custodian or nearest known relative;
- If the child is in detention or shelter care, the date when that was ordered by the court, or the date set for a detention hearing;
- If any of the facts are not known, this should also be stated; and
- A prayer that the minor be adjudged a ward of the court.

The arraignment may occur at the time of the detention hearing or soon after, but must occur prior to the trial. 725 ILCS 5/113-1. At the detention hearing, the court typically informs the child of the charges against him by reading the petition, and the child must enter a plea of guilty, guilty but mentally ill, or not guilty. 725 ILCS 5/113-1; *See Chapter 10 for more information on pleas.* The attorney should be aware of any defects in the petition (based on the factors listed above) and may move to dismiss it.

Barring exceptional circumstances, the child should not enter a guilty plea at the time of arraignment. It is unlikely that an attorney will have had time to conduct a meaningful investigation into the case at this early stage of the proceedings and, consequently, would not be in a position to assess the strengths and weaknesses of the State’s case.



While the arraignment may seem rote or routine to the attorney, she should talk to the child prior to the arraignment to discuss what will occur.

While the arraignment may seem rote or routine to the attorney, she should talk to the child prior to the arraignment to discuss what will occur. Doing so will help to cultivate a positive and communicative attorney client relationship at an early stage and help to ensure that the child has a clear understanding of the proceedings going forward.

The attorney should be aware that the minor’s parents or legal guardian (or nearest relative, if appropriate) must be served with the petition. *In re J.W.*, 87 Ill. 2d 56, 429 N.E.2d 501 (1981). While service to the custodial parent is crucial, the State also is required to serve the non-custodial parent, if known, if that parent pays child support, communicates with the child on a regular basis easily and can be located. The service must either be personal, or if not possible, then by certified mail (typically, for an out-of-state parent) or by publication (see next page). *Id.*; 705 ILCS 405/5-525 (1)(e)(detailing service requirements).

If by personal service, the petition must be served at least three days before the parent or guardian is required to appear in court. *Id.*

Additionally, service may occur by publication in cases where: 1) service is not made within a reasonable time; 2) if any person is served as a respondent under the designation of "All Whom It May Concern"; 3) service cannot be made because the whereabouts of a respondent are unknown; or 4) the child has been detained or sheltered, and summons has not been served personally or by certified mail within 20 days from the date of the order of court directing such detention or shelter care. 705 ILCS 405/5-525 (2)(b).

A failure to properly serve a child's parents or legal guardians is a violation of the child's due process rights. Lack of service means the Juvenile Court lacks jurisdiction over the matter, and any subsequent order by the court is *void*.¹¹ *In re C.H.*, 277 Ill.App.3d 32, 660 N.E.2d 545 (3d Dist. 1995). However, the failure to serve a *non-custodial* parent by publication whose whereabouts are unknown does not deprive the court of jurisdiction. 705 ILCS 405/5-525 (2)(b).

Given the importance of service with respect to the court's jurisdiction, the attorney should:

- Make sure that the minor's parents or legal guardians, including non-custodial parents paying child support or otherwise contributing to the child's care, have been properly served with the petition as described in ILCS 405/ 5-525; and
- If it appears that the State has failed to comply with service requirements, consider moving to dismiss the delinquency proceedings as void based on a violation of due process. Some reviewing courts have considered such a claim on appeal, even where the minor arguably waived the issue by not raising it before the juvenile court (*see In re C.H.*, 277 Ill.App.3d at 34). This may be because such courts have found that the State's lack of diligence in serving the child's parents is important in determining whether the reviewing court should consider the issue on appeal. Thus, it ultimately may be the individual appellate court's or panel's determination whether the child has waived this issue by not raising it before the juvenile court. Consequently, the attorney should raise defective service in the juvenile court, in order to avoid such an issue of waiver on appeal.¹²

5.2 Advocacy After the Detention Hearing: Review of the Decision and Other Options



Points to Remember

- *Attorneys should consider asking the court to modify or reconsider its decision to detain the child, particularly if new circumstances arise which indicate that detention is no longer appropriate.*
- *Attorneys also can move to reconsider the probable cause determination if they have new information regarding the facts that formed the basis of the probable cause determination, changes in the law or if they believe that the court was mistaken about the facts or misapplied the law.*
- *Even if the attorney is successful in keeping the child out of detention, the attorney should consider filing a motion to modify the order specifying the pre-adjudication conditions to which the minor is subject when the child has complied with the order for a period of time, in order to provide the child with less restrictive conditions.*

An attorney who loses a detention hearing still may have an opportunity to secure a juvenile's release. An attorney may request that the court modify or vacate the detention order. 705 ILCS 405/5-501 (7). The court may do so, based on the following circumstances:

- It is no longer a matter of immediate and urgent necessity that the minor remain in detention or shelter care; or
- There is a material change in the circumstances of the family from which the minor was removed; or
- A person, including a parent, relative or legal guardian, is capable of assuming temporary custody of the minor; or
- Services provided by the Department of Children and Family Services or a child welfare agency or other service provider have been successful in eliminating the need for temporary custody.

A hearing on the motion must occur within 14 days of its filing. 705 ILCS 405/5-501 (7).

While 705 ILCS 405/5-501(7) does not specifically set out any ground for the court vacating the probable cause finding as well, it does suggest that the court may vacate a probable cause finding. 705 ILCS 405/5-501 (7) ("In the event that the court modifies or vacates a temporary [detention] order but does not vacate its finding of probable cause, the court may order that appropriate services be continued or initiated in behalf of the minor and his or her family.") Asking the court to vacate the probable cause determination may be appropriate where the attorney discovers new information suggesting that the probable cause determination was incorrect, where changes in the law require reconsideration of that determination or where the attorney believes that the court clearly misconstrued the facts or misapplied the law.

Attorneys should file motions to modify or vacate the detention decision whenever it appears that circumstances may have changed which warrant the court's reconsideration of the child's continued detention. Such circumstances may include: the availability of a family member outside the immediate family to take custody of the child, positive behavior in the detention facility, the availability of health, community, therapeutic or other services to assist the child upon release, or a change in the environmental factors present when the child allegedly committed the offense (*e.g.*, the child's family moves to a different city or neighborhood).

Motions to modify are not limited to detention. If a child is complying with pre-adjudication conditions, the attorney should consider requesting that the court modify the order to grant the minor more freedom. For example, if a minor has complied with all of his conditions including a 6 p.m. curfew, the attorney may ask the court to extend the curfew to 9 p.m., or to eliminate the curfew altogether. Not only may such a request be warranted, but it is helpful for a child to see that following the rules may lead to positive results. If a child later is placed on probation, such an experience may increase his chances of successfully completing probation.

Summary

Advocacy at the probable cause and detention hearings, and even at the arraignment, can alter the course of juvenile court proceedings and make an enormous difference to the child, by avoiding detention or causing the dismissal of charges. Additionally, advocacy at these early stages of the proceedings also can affect the chances of success in juvenile court by allowing the child to demonstrate to the court that he is able to comply with pre-adjudication conditions. Therefore, attorneys should know how to best advocate for their clients at these early court proceedings.



Chapter 5 Checklist

- ✓ At the probable cause and detention hearings, try to challenge as not “relevant and reliable” any proffer or evidence supporting probable cause cross-examine any witnesses, present evidence and witnesses, and argue that the child should not be detained. Propose any alternative placement that the court may consider.
- ✓ Discuss the child’s plea options with the child and his parents before the arraignment, ensure that the child understands these options, and object to any defects in the petition. See Chapter 10 for further information about pleas.
- ✓ Object to any deficiency in the service of the petition on required parties, particularly on non-custodial parents.
- ✓ If the child remains in detention or the child loses at the probable cause hearing, ask the court to reconsider its findings with respect to probable cause and the need for detention whenever a change in circumstances indicates that detention is no longer warranted or where the probable cause finding was erroneous.
- ✓ Even if you are successful in keeping the child from being detained but there are pre-adjudication conditions, request that the court modify the conditions to allow the child more freedom if the child is complying with the existing order.

Chapter 6

Investigating the Case



An attorney's investigation of the matter is essential to her preparation of the case for trial or a plea agreement. Attorneys may accomplish this in a variety of ways, including speaking with the client and witnesses, reviewing police reports and other documents, and hiring investigators and experts to evaluate the evidence. The law provides attorneys with various means to investigate the case in juvenile proceedings. Attorneys should know how to utilize these rules and strategies to prepare the best possible defense.

6.1 Using Rules and Tools to Gather Information



Points to Remember

- The prosecution has a duty to disclose all material information regarding the child's guilt or punishment, including information that may be used to impeach the credibility of a prosecution witness.
- Attorneys should be aware of the applicable rules and law governing discovery in juvenile cases in order to gather information and to ensure that they comply with the rules governing disclosure to the prosecution.
- Attorneys have a duty to investigate a case and engage in discovery even when they think their juvenile clients are guilty.

Planning ahead: a note about strategy in discovery and investigation

It is helpful to have an idea of the possible theories of defense before proceeding with discovery and investigation. Because it can often take a long time to receive requested information, attorneys should prioritize requests and make each request as soon as possible. Investigating the case requires knowledge, strategy, efficiency and organization. A starting point is familiarity with the governing law.

6.1.1 Discovery in juvenile proceedings: what the rules require:

The term “discovery” refers to a method of obtaining information from the State following the charging of the minor by requesting that the State provide the information. Typically, the request is made through formal court documents. The Illinois Supreme Court Rules govern discovery in civil and criminal proceedings, and separate sets of rules apply to civil and criminal cases, respectively.

Illinois courts have held that because juvenile proceedings technically are not criminal proceedings, discovery is not constitutionally mandated in juvenile proceedings in Illinois. Thus, these courts have found that criminal discovery rules do not apply in juvenile proceedings and that civil discovery rules may be applied at the court’s discretion. *In re C.J.*, 166 Ill. 2d 264, 271-72, 652 N.E.2d 315 (1995); see also Ill. Sup. Ct. R. 411 (Committee Comments) (“The Committee considered but unanimously declined to make the rules applicable in juvenile court proceedings since the nature of such proceedings generally does not require discovery rules. However, if such proceedings become more adversarial in nature, it may be desirable or necessary to apply the rules to them at some future date. In any event, the requirements of *In Re Gault*, (1967) 387 U.S. 1, must be met.”); *People ex rel. Hanrahan v. Felt*, 48 Ill. 2d 171, 269 N.E.2d 1 (1971) (applying civil discovery rules at the juvenile court’s discretion). The disclosure of exculpatory evidence, including the disclosure of evidence that would impeach the credibility of a prosecution witness, is required in juvenile proceedings, pursuant to the United States Supreme Court’s decision in *Brady v. Maryland*. *In re C.J.* at 271-72 (citing *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution must disclose to the accused favorable information material to guilt or punishment); *In re R.V.*, 288 Ill.App.3d 860, 681 N.E.2d 660 (1st Dist. 1997); Ill. Sup. Ct. R. 412 (c).

Despite ruling by the Illinois Appellate and Supreme Courts regarding the application of discovery rules to juvenile cases, these decisions predate the 1998 changes to the Juvenile Court Act which implemented many more features into juvenile proceedings generally seen in criminal proceedings, such as expanding the scope of transfers to adult criminal court, using terminology typically only applied in criminal proceedings (“trial” versus “adjudication”), and mandating incarceration until the age of 21 for children who commit certain offenses or have specific types of prior adjudications. See Cathryn Crawford, et al., *Illinois: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* (Fall 2007) at 23-24 (citing 705 ILCS 405/5-815, 705 ILCS 405/5-820 and 705 ILCS 405/5-750(2)); *In re Jamie P.*, 223 Ill. 2d 526, 536, 861 N.E.2d 958 (2006) ; see also, Committee Comments to Rule 411, cited above.

In general, these changes “represented a fundamental shift from the singular goal of rehabilitation to include the overriding concerns of protecting the public and holding juvenile offenders accountable for violations of the law.” Cathryn Crawford, et al., *Assessment* at 23 (quoting *In re Jamie P.*, at 536). Additionally, the Juvenile Court Act provides that, in all proceedings under the Act, “[t]he procedural rights assured to the minor shall be the rights of adults unless specifically precluded by laws which enhance the protection of such minors.” 705 ILCS 405/1-2(3)(a). Thus, juvenile defense practitioners often argue for the application of criminal discovery rules (sometimes in addition

to civil discovery rules), based on the more punitive and criminal-like nature of the 1998 Juvenile Court Act. Juvenile defense practitioners should be aware of the relevant Supreme Court Rules and try to invoke them to assist them in obtaining discovery.

The criminal discovery rules are outlined in Illinois Supreme Court Rule 411-415 and 417:

- **Rule 411:** specifies that the discovery rules apply in criminal cases where the accused may be sentenced to incarceration.
- **Rule 412:** provides details of what must be disclosed to the accused, including names of, and contact information for, potential witnesses, statements of the accused and any co-defendant, prior convictions, and any material information that would tend to negate the defendant's or respondent's guilt or would reduce his punishment; the rule specifies how the disclosures should occur.
- **Rule 413:** indicates what the defense must disclose to the prosecution, including notice of defenses, the names of all witnesses, their written or recorded statements and all written memoranda documenting their statements, medical and scientific reports; and specifies that the defendant may be required to submit to court-ordered lineups, photographs, DNA testing and other tests.
- **Rule 414:** provides for taking evidence depositions in order to preserve evidence where witnesses may become unavailable at the time of trial.
- **Rule 415:** provides guidelines for the regulation of discovery, including a continuing duty to disclose, provisions for in camera proceedings and sanctions for discovery violations.
- **Rule 417:** governs the production of DNA evidence and requires the proponent of the evidence to make available all DNA evidence.

While juvenile defense practitioners generally should rely upon the criminal discovery rules in investigating their cases, they should consider relying on civil discovery rules when it appears that these provisions may benefit the case. Some of the relevant civil discovery rules are:

- **Rule 201:** provides general information regarding the scope of discovery, methods of discovery and the regulation of discovery.
- **Rule 201-212:** governs the taking of depositions.
- **Rule 213:** provides guidelines for written interrogatories to request information, including the production of witnesses or documents.

- **Rule 214:** governs discovery of documents and tangible objects upon written request.
- **Rule 215:** provides for the taking of physical or mental examinations of the parties.
- **Rule 219:** provides for consequences of violating discovery rules, for example, barring certain defenses or witnesses.

Violations of discovery rules and the constitutional obligations to provide discovery (see *Brady v. Maryland*, 373 U.S. 83 (1963) are serious matters, and can result in delays, the suppression of evidence and even the court’s refusal to allow witness testimony. See *Brady*, 373 U.S. 83; Ill. Sup. Ct. R. 415(g) (sanctions for the failure to comply with discovery rules include permitting the discovery of the material, granting a continuance, excluding the evidence or any such order which the court deems necessary); Ill. Sup. Ct. R. 413 (discussing the defense’s disclosure obligations); *People v. Johnson*, 262 Ill. App.3d 781, 635 N.E.2d 827 (1st Dist. 1994) (trial court’s exclusion of two defense witnesses was not an abuse of discretion where the defense improperly failed to disclose these witnesses until the end of the State’s case).

Examples of these violations include:

Example



The State fails to disclose evidence that a key State’s witness was offered a reduction in charges in a pending case against him in exchange for his testimony. The witness testifies against the defendant at trial, and the defendant is adjudicated guilty. Post-trial, while trying to unearth mitigating evidence for the dispositional hearing, the defense attorney speaks with the witness and discovers for the first time that the witness was given this benefit in exchange for his testimony. The attorney files a motion for a new trial raising the issue, and the court grants the request. (*Brady v. Maryland*).

Example



Before the motion to suppress hearing, the juvenile defendant tells his lawyer that he had another lawyer at the police station named “Ms. Brown,” and that she told the police she was his lawyer and told him not to talk to the police until she returned. The juvenile later tells his attorney that he thinks that Ms. Brown spoke with a witness regarding the offense. The defense lawyer forgets about this conversation until the day of trial, when Ms. Brown appears in court, having found out the trial date from the child’s mother. Ms. Brown tells the defense attorney that the witness recanted his statement when he spoke with her. The attorney asks the judge to add Ms. Brown to the witness list, but the judge denies the request, finding that the delayed disclosure is prejudicial to the prosecution. Ms. Brown is not allowed to testify.

To avoid potentially damaging consequences, attorneys should be aware of the applicable rules and law in requesting discovery and in complying with, and defending against, discovery requests.

6.1.2 Obtaining information in juvenile proceedings

Attorneys may use an array of discovery devices to obtain information from the opposing party. In requesting information, juvenile defense attorneys should be cognizant of the possible tension between the desire to request as much information as possible to avoid overlooking information and the need for specificity in the requests to ensure proper compliance by the prosecution. Generally, attorneys can address these concerns properly by approaching the discovery process in a systematic manner.

Before discussing the steps that the attorney can take in pursuing discovery, it is helpful to review the types of discovery requests and procedures available.

Types of discovery requests and procedures

1. Motion for a bill of particulars, which is a request for more specific or particularized information regarding the charging document, including the precise location of the offense, date and time of the offense, name of the complainant, etc. This often is included in the juvenile's motion for discovery (see below).
2. General requests for discovery under Illinois Supreme Court Rules 213, 214 (interrogatories), 412 (disclosure to the accused), 414 (evidence depositions) and 416 (regulation of discovery), including a motion for discovery. These can be used to request (i) evidence the State intends to use against the minor; (ii) information that may relate to the credibility of the witnesses; (iii) evidence that tends to exculpate the accused or reduce punishment (*Brady* material), including the names and addresses of potential State witnesses as well as any prior statements by them; prior statements of the accused and any co-defendants, portions of relevant preliminary hearing transcripts, including the testimony of witnesses who may testify pre-trial or at trial; (iv) expert reports, including those relevant to medical or scientific examinations as well as information regarding any experts' qualifications; (v) police reports and other reports generated as part of the investigation of the case; (vi) any tangible objects that the prosecution will use at trial; (vii) records



To avoid potentially damaging consequences, attorneys should be aware of the applicable rules and law in requesting discovery and in complying with, and defending against, discovery requests.

of prior convictions of the accused or witnesses, and (viii) information as to any electronic surveillance or recordings, as well as evidence depositions.

3. Subpoenas duces tecum, which is a subpoena requiring the witness to appear and to bring with him the requested documents, or to obtain certain documents from the police, hospitals, schools, employers and any other people of entities. Examples of documents to subpoena include:
 - Police reports and investigative files.
 - Disciplinary records of police officers involved if the child alleges police brutality or misconduct.
 - Lineup photographs, scene photographs, photo arrays.
 - Police procedures (including general orders regarding preservation of crime scenes, reporting injuries of suspects in custody, discharge of firearms, interviews of youth, etc.).
 - Firearm records and trace summaries.
 - Police laboratory files, records and notes.
 - Personnel records.
 - Last known contact information for witnesses.
 - School disciplinary records of the complaining witness.
 - Mental health records of the complaining witness.
 - Criminal history information for prosecution witnesses.

An attorney may decide that issuing subpoenas to the police department is unnecessary in light of the fact that she served a motion for discovery on the State. However, in some cases, especially serious or complex ones, it is advisable to subpoena the police directly for documents and other evidence in their possession or control. The State may not have received everything from the police and is only required to tender to what it has in its possession or control.

4. Subpoenas for witnesses secures the appearance of a particular witness or witnesses at a trial or hearing. While not technically a discovery tool, witness subpoenas may be used as a means to follow up on a subpoena duces tecum when the particular agency, office or institution served fails to comply with the subpoena. Attorneys then may use a subpoena to command the witness to appear and comply with the request for documents.
5. Motions to take evidence depositions are used to preserve testimony. While not necessarily common or required in juvenile cases, these types of motions may be useful to preserve the testimony of witnesses who later may become unavailable because of sickness, incompetency, geographical considerations or other reasons. *See Jeffrey S. Kinlser, et al., 10 Ill. Prac., Civil Discovery § 2.11 (2007); Ill. Sup. Ct. R. 202, 414.*
6. Motions to take discovery depositions, which are used to gather a wide array of information from a potential witness prior to trial. Typically used in civil cases, discovery depositions allow a party to question a witness thoroughly to test his

memory, knowledge, opinions, etc., and may be used for impeachment or as substantive evidence at trial, depending on whether it meets hearsay requirements. Kinsler, at § 2.11; 202.

7. Motion to inspect evidence which is useful when physical evidence is in the custody of the police or the prosecution. Attorneys always should inspect physical evidence prior to trial, even if it seems like a routine object (e.g., a gun). Inspection may reveal chain of custody deficiencies, materials differences between the object described in reports and the object inventoried, etc.

In addition to these formal motions, defense attorneys also may use less formal means of requesting information, such as letters to the prosecution or oral requests in court or to the State. Defense attorneys always should document in writing each request for information – formal or informal – and memorialize any response (or non-response) to these requests.

A step-by-step approach to the discovery process in juvenile cases

The following is a step-by-step approach that attorneys can take to request discovery and gather information in any juvenile proceeding:

Step

1

Initial written general request for discovery.

Make an initial written general request for discovery that encompasses all potential information you hope to obtain from the prosecution.

Early on, preferably at the first or second court appearance, attorneys should file a broad and comprehensive written request for information from the prosecution. Although defender agencies typically generate boilerplate form requests, the attorney should review the form to ensure that they cover particular information that may be relevant to the specific case. Submitting a written request helps preserve the record if issues relating to discovery arise later and help ensure compliance by the State.

Step

2

Initial investigation and additional information.

After conducting an initial investigation, consider what additional information is needed and the appropriate way to obtain the information.

Depending on the type of information sought, formal discovery requests – directed to the prosecution or in the form of subpoenas duces tecum – may be the best method to obtain information. Consider the information needed, why the information is needed, and the type of request that will be best. As noted above, such requests have the advantage of creating a record of the request and providing a means to enforce the request. How-

ever, some types of information may be more easily obtained by informal means – for instance, having the child sign a release for his medical records. In cases where an attorney requests confidential information about her client (e.g., medical, school or mental health records), an informal request is advisable because the attorney will receive the documents directly. The attorney can review the requested documents and decide whether the information has value to the case. In the event that the information has no value, the attorney has avoided unnecessary disclosure of confidential information.

Example: The attorney wants to obtain her client’s school records to see if they support an alibi defense that the client was at school at the time of the offense. She has her client sign a release for those records. Upon reviewing the records, the attorney determines that her client was at school but there was an early dismissal. Accordingly, the records do not support the alibi theory. The attorney does not need to give these records to the State but can investigate other sources of support for the child’s defense.

Step 3 File supplemental requests.

File supplemental requests for information as needed.

Discovery is an ongoing process. Therefore, as investigation proceeds, attorneys should not hesitate to file supplemental requests for discovery in order to refine and add to their original requests.

Step 4 Subpoena duces tecum.

If it appears that a supplemental request will not yield the necessary evidence or information needed, serve and file a subpoena duces tecum.

In many instances, repeated requests for information from the prosecution are not sufficient to obtain certain information or evidence because it is not in the direct control of the prosecution (for instance, tapes of 911 calls). In such cases, the attorney should file a subpoena duces tecum to request the information from the particular agency.

Step 5 Follow up.

Follow up on requests.

It is not enough to request information and hope that the other party complies with the request. Attorneys should be diligent about following up with all requests. Techniques for keeping records of requests for information, and following up on the requests, are:

1. Keep a thorough record of all formal and informal requests for discovery, including the date of the request and the responding party's response. For example, if immediately after receiving the juvenile's general discovery request, the Assistant State's Attorney says that he is trying to obtain a particular witness's address, memorialize that conversation in writing. One can never anticipate what is going to be a discovery issue at a later date, so the sound practice is to make a record. Consider setting a weekly schedule to follow up on outstanding requests.
2. Document every conversation with the prosecution regarding outstanding discovery, either in a letter or on the record while in court. This avoids any dispute as to the status of the request and the prosecution's response.
3. Review all materials received in response to discovery requests as soon as possible to ensure the materials are complete. Make a log of what is incomplete and follow up with the responsible party immediately, preferably in writing, to request the missing information. Additionally, if the information leads to new areas of investigation that should be developed, follow up with any additional discovery requests or investigation. Continually log progress on these requests as well.

In some courtrooms, judges or prosecutors may ask that attorneys sign a document affirming that a particular request to the prosecution is complete. Attorneys should not sign such a document until after reviewing the information. At the least, if no opportunity exists for review, write in a statement that there has been no chance to review the information yet, but that the response appears complete.

4. Determine whether the response to a discovery request necessitates the use of an expert. For example, if a police report indicates that a witness thought the juvenile appeared "out of it" or did not seem to comprehend what was happening at the time of the offense, consider obtaining a medical or psychological evaluation of the child. If there are no funds for expert witnesses, consider filing an ex parte motion with the court for such an evaluation in order to keep the information confidential until a decision is made whether the child's mental state will be raised.
5. Review the materials received with the child. Attorneys often treat discovery as a process independent of the client. However, the client may be the best person to provide information regarding witnesses named by the State and other pertinent facts.
6. Follow up when a party or person refuses to comply with a request or subpoena. First, ensure that the party is actually refusing to provide the information. Ask the State or subpoenaed party to put their refusal or objection in writing. Consider writing a formal response to the objection and following up with a phone call or file a motion to compel (see next page).

7. Ensure that every witness has been served with a subpoena. Serve the subpoena “personally,” either by the attorney delivering the subpoena to the witness, or by having an investigator or the local sheriff’s department serve the subpoena. The subpoena also may be served under certain conditions by certified or registered mail. Ill. Sup. Ct. R. 237; 725 ILCS 5/115-17; but see, e.g., Rule 15.3 Subpoenas, Rules of the Circuit Court of Cook County, Criminal Division (requiring personal service of witnesses in criminal cases). In either case (personal service or by mail), the summoning party must pay for the witness’s mileage and fees (and must enclose this payment with the subpoena if serving it by registered mail). Ill. Sup. Ct. R. 237. Also, check local rules to determine any exceptions or modifications to these requirements.¹³ If the child is indigent, the attorney should argue that the child should not be required to pay the witness fees.
8. In cases involving many documents, number each page of a document as the documents are received. This can be useful if the State presents a document at trial that was not tendered in discovery.

Step

6

Other motions or types of requests.

Determine whether there are other motions or types of requests which should be filed to obtain outstanding information.

As noted above, there are many ways to obtain relevant information. If the attorney already has submitted discovery requests and subpoenas duces tecum for information and followed up on these requests, consider whether there are other methods to obtain the information. For instance, if the child complains that he was mistreated or harmed while detained at the time of his arrest, and the attorney discovers through requests for information that the detention center has the clothing the child was wearing when arrested, then file a motion to examine this evidence.

Examples of what to ask for and where to get it

- **Police reports, lineup photographs, police manuals, mug shots, station adjustment information:** available from the police department (use a subpoena duces tecum).
- **Information regarding the investigation of the offense, including circumstances of the arrest, electronic surveillance, evidence seized, witnesses, etc.:** available from the police and/or the prosecutor with a discovery request, although the prosecutor likely will be required to provide some information even without a request.
- **Complaints against particular police officers:** in Chicago, available from the Office of Professional Standards, but most cities have an internal affairs office.

- **Juvenile court records:** available from the clerk of the circuit court, juvenile division. Attorneys may request copies of their juvenile client’s records with signed authorization. However, if an attorney seeks to obtain copies of another juvenile’s court file (e.g., the complaining witness or co-defendant) the attorney likely will need a court order. 705 ILCS 405/1-8 (B) (discussing confidentiality of juvenile court records); 705 ILCS 405/5-901 (6) (noting that the provisions for confidentiality of the juvenile court file, do not preclude the use of such information where admissible in court or used for impeachment); see also, 705 ILCS 405/1-7 (C) (“The records of law enforcement officers concerning all minors under 17 years of age must be maintained separate from the records of arrests and may not be open to public inspection or their contents disclosed to the public except by order of the court . . .”); *People v. Norwood*, 54 Ill. 2d 253, 296 N.E.2d 852 (1973) (section of Juvenile Court Act requiring that law enforcement maintain separate records for juveniles, does not prohibit use of these records to impeach a juvenile who testifies as a witness).



- **Juvenile prison records:** available from Juvenile Corrections division of Department of Juvenile Justice; available by subpoena, but may need a court order for a witness other than the attorney’s client. 705 ILCS 405/1-7 (C) (*cited supra*); 705 ILCS 405/1-8 (B,C); *Norwood*, 54 Ill. 2d 253 (*cited supra*).
- **Criminal records and outstanding warrants:** accessible on circuit court computers and by request to the prosecutor.
- **Family court records:** may be available from the juvenile court’s abuse and neglect division; but may require a court order, particularly where the party is not the client. 325 ILCS 5/11 (discussing confidentiality of abuse and neglect records); 705 ILCS 405/1-8; *In re K.D.*, 279 Ill.App.3d 1020, 666 N.E.2d 29 (2d Dist. 1996) (Juvenile Court Act’s restriction of access to juvenile court records applies to abuse and neglect proceedings); *People v. Bean*, 137 Ill. 2d 65, 560 N.E.2d 258 (1990)(noting the defendant’s right to cross-examine a witness on a crucial issue, even where protected by a statutory privilege, but holding that the court’s procedure in conducting an in camera review of records to determine which records were relevant to the witness’s impeachment was proper).

- **Medical and psychological records of witnesses:** available from the individual hospital or clinic. An attorney can obtain with a signed release from the juvenile or may even access mental health records herself if specifically authorized to do so by the court (see 740 ILCS 110/4, cited below). Other parties seeking to subpoena these records will require a court order. See 705 ILCS 405/5-910-1 (confidentiality of social, psychological and medical records); 740 ILCS 110/1, et seq. (“Illinois Mental Health and Developmental Disabilities Confidentiality Act”); 740 ILCS 110/3(a) (“All records and communications shall be confidential and shall not be disclosed except as provided in this Act.”); 740 ILCS 110/4 (discussing who is entitled to consent to release of records, and specifying that an attorney representing a child who is 12 years old or older in a judicial or administrative proceeding can consent to the release of records, but only if the court provides an order indicating that the attorney has the right to access such record); 740 ILCS 110/5 (b) (discussing requirements for signed release from the recipient of mental health information); 740 ILCS 110/10 (a) (records and communications may be disclosed in a civil, criminal or administrative proceeding when the recipient of mental health information if the court or administrative hearing officer finds, after in camera examination of the evidence, that “it is relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible; that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm”); 740 ILCS 110/10(d) (specifying that subpoenas for mental health information under the Act must be accompanied by an order); see also, *Bean*, 137 Ill. 2d 65; *People v. Dace*, 114 Ill. App. 3d 908, 913, 449 N.E.2d 1031 (3d Dist. 1983) (“In spite of the statutory privilege, it is well established that the mental history of a witness is relevant to his credibility and a permissible area of impeachment”).
- **911 tapes and radio communications:** available via general written discovery requests to the prosecution; then follow up the request with a letter, and finally issue a subpoena duces tecum to the appropriate agency. The Office of Emergency Communications in Chicago reports that it destroys these communications after 30 days (except in homicide cases), so attorneys needing information from this Chicago agency should issue a subpoena or write a letter as soon as possible requesting that these communications be preserved. Generally, attorneys should check with their local police departments for rules governing the destruction of such documents. If the police inform the attorney that the documents have been destroyed, the attorney should request that the police verify this in writing.
- **Telephone or electronic communications:** available from the service provider (i.e., Comcast) with a subpoena duces tecum for basic information (numbers called, etc.), but more detailed information may require a court order.

- Protocols used by a state agency or hospitals as relevant to the case (e.g., processing a crime scene, conducting a sex assault investigation by using a “rape kit,” interviewing a child witness, etc.): available via a subpoena duces tecum to the relevant agency or hospital, and consider following up with a subpoena for the witness’s appearance at a trial or hearing.



When the party served with a discovery request or subpoena duces tecum does not comply with the request, ask the court to force compliance.

Exhausting the remedies

When the party served with a discovery request or subpoena duces tecum does not comply with the request, ask the court to force compliance. This may be done by filing a motion for rule to show cause (requiring that the party appear to explain the reason for non compliance), a motion to compel (requiring that the party produce the information), and finally, by requesting that the court sanction the other party (particularly the prosecution) for the failure to comply with the request.

Defending against prosecutorial requests for information

Typically, prosecutors, like defense lawyers, file generic requests for discovery at the start of the case. As noted supra, it is generally up to the juvenile court’s discretion as to how to apply discovery rules. Nonetheless, defense lawyers should be aware of their potential obligations under the Illinois Supreme Court Rules. See Ill. Sup. Ct. R. 201; Ill. Sup. Ct. R. 413. In response to a written motion by the State, per the court’s discretion, defense attorneys may have an obligation to provide certain information to the State including:

- **Defenses:** the defense must inform the State of any defenses the juvenile defendant will make at a hearing or at trial. See Ill. Sup. Ct. R. 201; Ill. Sup. Ct. R. 413(d).
- **Alibi:** where the juvenile defendant is asserting an alibi defense, he is required to provide specific information about the place where he maintains he was at the time of the alleged offense. See Ill. Sup. Ct. R. 413(d).
- **Witnesses:** names and last known addresses of persons the defendant intends to call as witnesses, along with any written or recorded statements and prior convictions. See Ill. Sup. Ct. R. 201; Ill. Sup. Ct. R. 413(d). Unlike the prosecution,

the defense does not have to disclose names or statements of witnesses it does *not* intend to call.

- **Documents and tangible information:** the defense must produce documents, books, papers, photographs and other tangible information the defense intends to use as evidence or impeachment at a hearing or at trial. See Ill. Sup. Ct. R. 201; Ill Sup. Ct. R. 413(d).
- **Medical and scientific reports:** if the defense intends to raise the issue of the child's or a witness's medical condition at the time of trial, the defense must produce reports or results of physical or mental examinations or scientific tests of the client or the witness, and the qualifications of the authoring or examining experts. Ill. Sup. Ct. R. 215; Ill. Sup. Ct. R. 219; Ill. Sup. Ct. R. 413; Ill. Sup Ct. R. 415; See also Chapter 3 *supra*, Competency (discussing situations where medical and psychological or psychiatric reports need not be disclosed). However, portions of the reports containing statements by the defendant may be withheld if the defendant does not intend to use any of the report at trial. Ill. Sup. Ct. R. 215; Ill. Sup. Ct. R. 219; Ill. Sup. Ct. R. 413; Ill. Sup Ct. R. 415; See also, Chapter 3, Competency. After receiving records or reports, the juvenile's attorney may decide not to raise the mental or medical issue. In such cases, the attorney may not be required to tender the reports or records. Attorneys need to be very careful when assessing their obligations under these rules, as violations may result in sanctions. Where an attorney is not sure about her obligation to tender certain documents, she should consult with a supervisor or an ethics expert (e.g., a law professor).

Additionally, Rule 413 allows the court to require the defense to produce other material information to the State, based on a reasonable request from the State. Although this rule may not be strictly applicable in juvenile cases, it is clear that the juvenile court judge has the discretion to require the child to produce other relevant information, provided that the information is not subject to any constitutional limitations or privilege.

In defending against discovery requests by the State, or in determining what to provide to the State, juvenile defense attorneys should be aware of these obligations, and limit their responses to the State's request. In other words, in general, attorneys should provide only what is asked and nothing more. To properly respond to discovery and protect themselves and their clients from sanctions for failures to comply with requests from the State for discovery, attorneys should:

1. Review the rules to see if the requested material must be disclosed.
2. Determine whether the requested material is otherwise protected. Some reasons may be:
 - the Constitution protects the client from having to divulge the information (e.g., the Fifth Amendment privilege against self-incrimination);
 - attorney-client privilege or the work product rule apply; or

- the material is a medical or psychiatric examination of the juvenile, but the attorney does not intend to use the material at trial and has not put the juvenile's mental or medical health into issue.
3. If the attorney determines that the information must be disclosed, redact any portions of the material which are not discoverable.
 4. If the attorney has a basis for resisting disclosure, she should be prepared to argue against the production of material by researching the relevant rules and case law. Also, consider whether it would be more appropriate to request that the court view the material in camera before disclosing it to the State. In most instances, it is advisable to assert any applicable privilege or protection in writing.
 5. Keep detailed logs and records of all information and documents produced to the State, including the date of the State's request, the date of any response, and the substance of the disclosed information.
 6. There may be times when an attorney has a document in her possession that is harmful to her client. However, that alone is not a legitimate basis for failing to tender it. An attorney also may not destroy unhelpful evidence. An attorney, however, may decide to forgo calling a particular witness in lieu of turning over a copy of that witness's statement. Lawyers have a professional and ethical responsibility to adhere strictly to the rules of discovery.

6.2 Investigating the Case



Points to Remember

- Begin investigating the case at the earliest possible moment by interviewing the client, reviewing any initial police reports, and speaking to witnesses identified by the client and the reports.
- Document and preserve any evidence.
- Visit the scene of the offense and canvass the area for potential witnesses.
- Identify potential forensic or medical experts as early as possible to ensure that an expert can be retained in advance of any hearings or trial.
- Take along a second person, such as a legal assistant, when speaking with potential witnesses. Remember that notes of witness interviews are discoverable by the prosecution.
- Be creative – in addition to accessing court files and records, the internet, government agencies, and technical texts can provide useful information.

Having familiarity with the discovery rules is only one aspect of gathering information relevant to preparing a defense. Attorneys also must investigate using methods outside of the formal discovery rules and procedures. To effectively investigate the case, attorneys should:

1. Begin the investigation at the earliest possible moment. As soon as the attorney begins her representation of the client, she should:
 - Speak with the client regarding the offense and any witness, including name, alias and where each witness can be found;
 - Review any initial police reports.
 - Make an effort to speak to all witnesses identified in the police reports, by the prosecution, and by the juvenile. If these witnesses provide additional names, speak with those people as well.
2. Visit the scene of the offense. There is no substitute for observing the location of the offense itself to provide an attorney with a sense of how events unfolded. If the client is not being detained, consider visiting or revisiting the scene with the juvenile and/or any relevant witness. The attorney (or an investigator) also should canvass the area for any potential witness to the offense. While at the scene, take photographs.
3. Preserve any physical evidence. For example, if the juvenile says that the police ransacked his room during the search, take photographs of the room. If the juvenile says

that he bled on his shirt after being struck by a police officer, take possession of that shirt. While there is no Illinois law on the subject, it is generally true that a lawyer, in the course of her duties and when reasonably necessary, may take possession of evidence in order to subject it to tests that do not alter or destroy that evidence. See Restatement (Third) of Law Governing Law. § 119 (2000). However, after taking possession of the evidence and completing any allowable test, the lawyer must notify the prosecution of her possession of such evidence or turn it over to the prosecuting authorities. *Id.*

4. Research and hire experts (or consider filing an ex parte motion to appoint an expert) to assist with analyzing any forensic evidence. A forensic expert may be needed if:
 - a. There is blood, semen or other DNA evidence to examine or test;
 - b. There is gun or ballistics evidence to examine or test;
 - c. There is fingerprint evidence; or
 - d. There is any type of physical evidence connecting the juvenile to the offense and the State is likely to use a police laboratory to analyze the evidence.
5. Identify and hire experts to assist with medical evidence, mental health issues, defenses, and other areas in which experts may be helpful. Some examples are:
 - a. A gynecologist or pediatric gynecologist in a sex offense case in which the juvenile is accused of a sex crime;
 - b. A psychologist or psychiatrist to examine the juvenile regarding
 - i. the child's ability to understand *Miranda*
 - ii. the child's fitness to stand trial
 - iii. affirmative defenses, such as insanity, diminished capacity, or self-defense
 - iv. adolescent development and how it impacted your client's behavior at the time of the offense;
 - c. An eyewitnesses identification expert;
 - d. A gang expert to counter officer gang specialist testimony or to support a compulsion defense; or
 - e. A pathologist on cause of death issues.
6. Identify any witness (adverse or defense-related) and speak with them in person.

Speaking with witnesses: techniques and special problems

Interviewing witnesses is often the centerpiece of a sound defense strategy. However, this can be a difficult area to navigate, particularly when dealing with adverse, prosecution-friendly witnesses. The following are some suggestions for witness interviews:

1. **Take another person along for the interview.** It is often a good idea to take along another person to attend the meeting, such as an investigator, a law clerk or some other reliable person who can be available to testify at trial or at a hearing. Because attorneys or investigators who are questioning the witness focus on crafting the questions they ask, they may not hear or process all of the witness's answers. Taking another person to the interview can be extraordinarily useful for recalling details of an interview. Additionally, this person also can be useful if it becomes necessary to impeach the witness at trial.
2. **Remember that attorneys typically are required to turn over their notes of conversations with potential witnesses.** See *People v. Carrasquillo*, 174 Ill.App.3d 1023, 529 N.E.2d 603 (1st Dist. 1988) (in adult criminal case, defense was required to disclose notes of interview with prosecution witness, even without a request from the prosecution); see also, Ill. Sup. Ct. R. 201. An attorney may not want to memorialize a witness statement for a number of reasons. To protect this information from discovery, consider framing the information as a legal memorandum or "strategy" memorandum (and, thus, "work product"), showing the attorney's theories of defense. However, simply labeling a memorandum "work product" does not render a statement undiscoverable and should not be used as a tactic to circumvent the attorney's obligation to turn over discoverable material.
3. **Consider taking a tape recorded statement or a written and signed statement from prosecution witnesses in order to preserve and pinpoint their statements.** The attorney can write out the statement herself, but should do so in first person form from the attorney's point of view, and have the witness review, correct and sign the statement.
4. **Ask all witnesses if they have spoken to other people about the incident to determine whether additional interviews or discovery must be conducted.**
5. **If an adverse witness refuses to speak to the juvenile's attorney, ask whether the witness was told to refuse such an interview.** Obtain as much information regarding who instructed the witness not to speak, what exactly was said and when. It is impermissible for the prosecutor to instruct a witness not to speak to the defense attorney. Upon learning that the prosecution has done so, consider calling the prosecutor and ask that he inform the witness, in the presence of the juvenile's attorney that the witness is allowed to speak to the juvenile's attorney. If the witness may have been tainted and, due to police or prosecutorial actions, consider filing a motion to compel the witness to appear for a deposition, a motion to bar the witness from testifying, or, if there has been deliberate prosecutorial misconduct, a motion to dismiss the petition.

6. Keep a log of witnesses who have been identified and / or interviewed, including contact information.

Sources of information

In drafting discovery or looking for information, many resources can be helpful. For example:

- In addition to the police, prosecutors, the courts and medical providers, the internet has a myriad of resources available to find witnesses, locate public records (including weather information, street maps, etc.) and other information.
- FOIA (Freedom of Information Act) requests allow the public to obtain public information from government records.
- Scientific and medical manuals including the Physicians Desk Reference, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), the Merck Manual, many of which are available on line.
- Weather data may be crucial in determining visibility (for purposes of eyewitness identifications) or for verifying various versions of events on the day of the offense (see www.ncdc.noaa.gov).
- It often is useful to be able to see a photograph of the area of the offense or any other relevant location. Maps, satellite photos and street level views of many locations are available on Google (see www.maps.google.com).
- Incarceration information for adult offenders is available at the Illinois Department of Corrections website (www.idoc.state.il.us).

See also, Elizabeth Calvin, Sarah Marcus, et al. *Juvenile Defender Delinquency Notebook* (2nd ed. Spring 2006) at 97-102.

Summary

Investigation is the foundation for a defense, and juvenile defense attorneys should be creative and tenacious in seeking information. Defense attorneys must be aware of formal and informal methods of obtaining evidence, documents and access to witnesses. Ultimately, a juvenile case turns on the evidence unearthed during discovery. Defense attorneys should begin their investigation into a case early.



Chapter 6 Checklist

- ✓ Use formal and informal means of investigating information, as needed and as is best suited to the type of information desired.
- ✓ Although criminal discovery rules are not technically applicable in juvenile cases, and civil rules are applied at the court's discretion, the regulation of discovery is generally determined by the juvenile court judge. Most courts apply the criminal discovery rules. Attorneys should be aware of civil and criminal discovery rules and use them to obtain information.
- ✓ Draft a broad and encompassing request for all relevant information at the beginning of the case to ensure that the State can begin providing you with necessary information. Follow up with more specific requests as needed and as information is produced.
- ✓ Use different types of discovery tools to obtain information, such as interrogatories, a bill of particulars (for specifics regarding the charging document and the offense), subpoenas (to compel the appearance of witnesses), subpoenas duces tecum (to obtain documents), depositions (to preserve testimony of potentially unavailable witnesses or to conduct a more formalized interview of a witness prior to trial), and motions to compel (for the non production of documents or witnesses).
- ✓ Document all discovery requests and responses to ensure compliance.
- ✓ Be aware of, and comply with, defense discovery obligations. Generally, the defense is required to produce contact information for potential witnesses, notes of interviews with witnesses, possible defenses and documents the defense will use at trial. The names of witnesses that are not going to be used at trial do not have to be listed.
- ✓ Be prepared to object to requests for information where the request is overbroad or calls for information protected by a privilege. Review documents to see if portions need to be redacted. Be prepared to defend objections in court.
- ✓ When speaking with witnesses, bring along a second person. Notes taken during a witness interview are discoverable if the witness is called at trial.
- ✓ Ask witnesses to whom they have made statements and what was said.
- ✓ Be creative in determining sources of information other than the State, for instance, by obtaining names of witnesses from the client, canvassing the area of the offense, researching relevant books and databases and using the internet.

Chapter 7

Developing a Defense



Developing a defense strategy is an on-going process. As the case progresses, a seasoned advocate constantly will review new information to determine the best possible strategy at a given moment. This chapter discusses considerations and strategies for developing a defense.

7.1 Strategies for Early Dismissal of the Case, Suppression of Evidence, and Other Means of Resolving the Case Before Trial



Points to Remember

- *When the offense is minor, non-violent or a drug offense, or where the child has little or no background, consider seeking alternatives to juvenile court, such as mediation, teen court, or drug court.*
- *Try to seek early dismissal of the case by looking for flaws in the charging documents, such as mistakes regarding specifics of the offense, or improper naming or service of the petition of wardship on parents and guardians.*
- *Successful motions to suppress crucial evidence may result in an early and favorable resolution of the case. In addition, even if a motion is lost, the information elicited at suppression hearings may have tremendous value to pretrial preparation.*
- *The fact that a juvenile has admitted the charged conduct to his attorney does not relieve the attorney of the obligation to explore (and possibly present) a defense.*

Oftentimes, the best possible result for a juvenile client, aside from avoiding juvenile court altogether, is for the case to be dismissed in its early stages before the child is subjected to the full juvenile court process. There are various methods for attorneys to seek dismissal of the case or resolve the case prior to trial, several of which are listed below. Additionally, Chapter 8, *infra*, provides a more detailed analysis of pre-adjudication motions and practice.

7.1.1 Flaws in the charging documents, flaws in service, or lack of jurisdiction and other issues

Jurisdiction, generally

With limited exception, the juvenile court has jurisdiction over any minor who violates or attempts to violate State law, federal law or any municipal county or ordinance prior to his or her 17th birthday. 705 ILCS 405/5-120, 705 ILCS 405/5-130. This is true *regardless of where the act occurred*; thus, the State does not have to prove the location of the offense in order to establish jurisdiction. *People v. Hugo G.*, 322 Ill.App.3d 727, 735-36, 750 N.E.2d 247 (1st Dist. 2001). Minors who violate traffic, boating, fish or game laws or municipal or county violation do not have to be prosecuted under the Juvenile Court Act, but any detention of a juvenile must be in compliance with the Act. 705 ILCS 405/5-115.

Looking for flaws

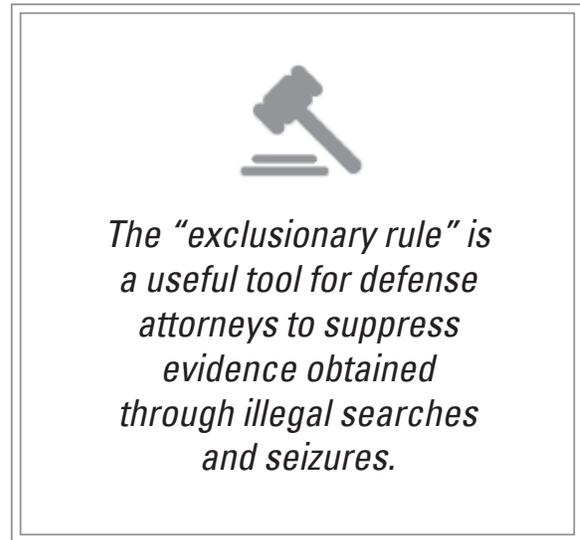
As noted *supra* in Chapter 4, the petition of wardship is the formal charging document in a juvenile court, and must include various components, including the specifics of the charged offense, an allegation of the child's delinquency, the child's residence and residence of his parents, and the fact that the child is entitled to an attorney. Ch. 4.3.2b, *supra*; 705 ILCS 405/5-520. Defects in the petition may be considered jurisdictional, which may require dismissal of the petition.¹⁴ For instance, the failure to name a child's parents or guardian in the petition – a necessary party in a juvenile case -- is a violation of due process and requires dismissal. *See People v. S.S.*, 146 Ill.App.3d 681, 682-83, 496 N.E.2d 1165 (1st Dist. 1986); *People v. R.D.S.*, 94 Ill.2d 77, 82-83, 445 N.E.2d 293 (1983). Similarly, the failure to properly serve a necessary party to a juvenile proceeding, such as the child's guardian or custodial parent, may also result in dismissal. 705 ILCS 405/5-525. Thus, where the petition fails to include required information, particularly that which would put the child or his parents on notice of the charges, or if the necessary parties to the proceeding (for example, the child's parents or guardian) are not properly served, the attorney should move for dismissal of the petition. *See In re S.R.H.*, 96 Ill. 2d 138, 449 N.E.2d 129 (1983). However, the State may re-file the petition, even where the petition is dismissed on jurisdictional grounds. 720 ILCS 5/3-4 (a prosecution is not barred if the initial prosecution was "before a court which lacked jurisdiction over the defendant or the offense"); *In re Gilberto G.-P.*, 375 Ill. App. 3d 728, 873 N.E.2d 534 (2d Dist. 2007). Filing

a motion to dismiss, even when the State has the right to re-file, may be beneficial to a juvenile client in the following ways:

- a client detained under a flawed petition may be released from custody;
- the State may decline to re-file; and
- the issue has been preserved for appeal.

7.1.2 Motions to suppress evidence and statements

Motions to suppress evidence and statements are vehicles that defense attorneys may use to exclude certain evidence obtained in violation of the Fourth and Sixth Amendments of the United States Constitution. U.S. Const., amend. IV, VI. The “exclusionary rule” is a useful tool for defense attorneys to suppress evidence obtained through illegal searches and seizures. Where certain physical evidence or statements are the only or the primary proof of the offense, the exclusion of this evidence can lead to an acquittal or dismissal of the charges. Motions to suppress will be discussed in greater detail in Chapter 8, *infra*, but for purposes of this section, attorneys should be aware of these motions and their potential to assist in the defense in a case. An attorney should consider trying to suppress evidence or statements where:



- the minor defendant has made an incriminating statement to the police;
- the charges are based on the police’s seizure of important physical evidence such as drugs or guns or other contraband, obtained with or without a warrant;
- the minor was detained by the police, particularly where he was detained overnight or for a long period of time, or where the child did not speak with a parent, youth officer or attorney, or where the minor reports that he was threatened or abused by the police;
- a minor has limited intelligence, functioning, or other characteristics that may have prevented him from understanding *Miranda* warnings;

- the police arrested the minor without probable cause and then took a statement or physical evidence from him; or
- there is an eyewitness identification of the minor defendant at a show up or lineup.

Given the importance of suppression motions, where there is a good faith basis for filing a motion to suppress, it is almost always a good idea to file one.

7.1.3 Motions regarding the minor defendant's fitness to stand trial and plead guilty or determine witness competency

Fitness and mental health are discussed in detail in Chapter 3, *supra*. As a matter of defense strategy, however, attorneys should be aware that, as discussed in Chapter 3, a defense attorney's filing of motions regarding the client's fitness and mental health, while necessary in an appropriate case, will not necessarily lead to the dismissal of any charge. Rather, the child may be required to be examined periodically to determine whether he has attained fitness to stand trial. The fact that an attorney believes her juvenile client is unfit does not relieve the attorney from her duty to discuss with that child the pros and cons of filing a fitness motion. However, there may be some tension between the attorney and the child if the attorney believes that the child is incompetent to even make the decision on whether to raise fitness. In such cases, the attorney should try to explain that these motions may ultimately protect the child's rights and may help ensure that the child receives a fair trial. The attorney may consider requesting that the court appoint a *guardian ad litem* for the client. 705 ILCS 405/5-610 (1).

Witness competence, as distinguished from a defendant's fitness or competence to stand trial, involves a person's qualification to serve as a witness. *See* 725 ILCS 5/115-14. An attorney should consider raising this issue where there is an issue of the witness's ability to be understood (even with interpretation) or to understand the duty to tell the truth. *Id.* This issue may be particularly important where a child witness or complainant will testify at trial, because young children often have difficulty distinguishing between fantasy and reality. John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 Wash. L. Rev. 705, 707 (Oct. 1987); *People v. Miles*, 351 Ill. App. 3d 857, 866, 815 N.E.2d 37 (noting that children, especially younger children, are "particularly susceptible" to suggestion by adults) (4th Dist. 2004). In addition, young children may be difficult to understand. In such cases, the defense attorney should consider requesting a competency hearing to determine the child's competence to testify at trial. 725 ILCS 5/115-14(c) (competency hearings must be initiated by defense counsel and not by the judge); *People v. Westpfahl*, 295 Ill. App. 3d 327, 330-31, 692 N.E.2d 831 (3d Dist. 1998) (same). If the child is not competent to testify, he may be prevented from testifying altogether.

7.2 Theories of Defense: Potential Defenses in Illinois Courts



Points to Remember

- *There are various theories of defense that attorneys may use depending on the facts of the case. For instance, attorneys may choose to rely on a theory that the State has failed to prove its case beyond a reasonable doubt. Attorneys should be aware of different defense theories and evaluate them in light of the strengths and weaknesses of the potential evidence and testimony.*
- *Affirmative defenses are specific defenses asserting that even if the conduct complained of occurred, the child's conduct is excused based on certain facts. When properly raised, these defenses can force the prosecution to disprove the affirmative defense. Attorneys, therefore, should be aware of these defenses and raise them in a timely manner, as far in advance of the trial as possible.*

Defense attorneys eventually must settle on a theory of the case, that is, the approach that the attorney will take in defending the case at trial. The most obvious choice – that the State has failed to meet its burden of proving the minor guilty beyond a reasonable doubt – may be the only option available in case. However, there are other options in developing a defense theory and attorneys should be aware of what defenses the law allows.

It is worth noting that the child's admission of certain conduct related to an offense does not end the inquiry. For instance, evidence may have been obtained illegally, the conduct may be excusable, or the minor may be guilty of a lesser offense. A child's admission to the attorney should not necessarily lead to the conclusion that the child should plead guilty.

In choosing a particular defense, it also is important to consider whether the child should testify. When presenting several types of defenses – for instance, a defense that requires affirmative evidence of innocence or evidence of the child's conduct with respect to an affirmative defense (*e.g.*, self-defense) -- defense counsel is often faced with the choice of whether to advise her juvenile client to testify. There are a number of factors to consider in rendering this advice, including the credibility of the child, any corroborating evidence, and the strength of the State's case. While the child makes the ultimate decision on whether to testify, the attorney should be prepared to explain the pros and cons, as well as the attorney's recommendation.

7.2.1 Reasonable doubt

Sometimes the best or only defense available is that the State has failed to prove the client's guilt beyond a reasonable doubt. It is well-established that the prosecution must prove a juvenile defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967) (applying due process protections to juveniles).

A reasonable doubt defense focuses on diminishing or destroying the State's evidence through cross-examination or impeachment of the State's evidence. Although a minor is not required to call witnesses, a "reasonable doubt" defense also may involve the presentation of defense witnesses.

As noted above, the State bears the burden of proof in a juvenile delinquency trial and a reasonable doubt defense can serve as a means to ensure that the fact-finder holds the State to its very high burden. Indeed, a good reasonable doubt defense calls into question the State's entire theory of its case and its version of the events by creating doubt about the credibility or reliability of the State's witnesses, its evidence or methodology in obtaining the evidence, and/or the logical inferences that may be drawn from the State's evidence. For instance, in a drug delivery case in which the arresting officers are impeached with regard to the sale of drugs they purportedly witnessed, where the chain of custody of the drugs is tainted, or where other witnesses have contradictory testimony, the defense may prevail without putting forth any affirmative theory of innocence.

A defense of reasonable doubt may be particularly useful where:

- There is little or no helpful defense evidence, but the State's evidence or investigation is flawed;
- The State's witnesses are not credible, can be impeached or have an extensive criminal background (705 ILCS 405/5-150 (1) (d));
- The State cannot secure the attendance of its witnesses (*e.g.*, a witness has moved with no forwarding address); or
- The child does not want to testify or is not likely to testify well, is not likely to survive scrutiny under cross-examination, or has an extensive juvenile background (*see* 705 ILCS 405/5-150(1)(d)) (evidence and adjudications under the Juvenile Court Act "shall be admissible . . . in proceedings under this Act or in criminal proceedings in which anyone who has been adjudicated delinquent under Section 5-105 is to be a witness including the minor or defendant if he or she testifies, and then only for purposes of impeachment and pursuant to the rules of evidence for criminal trials").

In crafting a reasonable doubt defense, the attorney should look at the relevant statute or statutes, identify all of the elements contained therein, and defend against each element.

While a reasonable doubt defense may be the best defense in many cases, it often does not lend itself easily to telling a story that may appeal to the court regarding the child's defense or version of the events. However, a savvy advocate often can craft a story by impeaching or discrediting the State's witnesses and evidence (for instance, arguing that discrepancies in the police officers' stories show that the police rushed to judgment or that an eyewitness's contradictory testimony suggests that the child is innocent).

7.2.2 Innocence

Although a theory of innocence may be inferred from a reasonable doubt defense, a defense that focuses on the child's innocence generally differs from a reasonable doubt defense in that the juvenile actively asserts a theory that he is innocent of the offense. For example, a minor may present alibi witnesses; he may have witnesses testify that he did not match the description of the offender; witnesses to an arrest may testify contrary to the police officer's account, thereby casting doubt on all of the officer's testimony; or the minor himself may testify that he did not commit the act alleged.

In putting forth a theory of innocence, the attorney should remember that she is not required to prove the juvenile innocent. Instead, the defense is simply a way for the court to find that reasonable doubt exists as to the child's guilt of the offense. In raising an innocence-based defense, the attorney should not hesitate to remind the court – directly and indirectly through cross-examination, impeachment and presentation of the defense case – that the State must prove its case.

7.2.3 Affirmative defenses

Affirmative defenses refer to defenses where the defendant contends that, even if the prosecution's allegations are true, he or she is not legally culpable for the offense. In other words, an affirmative defense may excuse the defendant's conduct, *regardless* of whether he committed the alleged acts. Thus, unless the prosecution's evidence raises the issue of the alleged defense, the defendant must present some evidence of the defense. 720 ILCS 5/3-2. Defense counsel generally is required to give notice to the prosecution of an affirmative defense within a reasonable time prior to the trial. Ill. Sup. Ct. R. 413 (d).

Specific offenses may have their own particularized affirmative defenses, so defense lawyers must make sure that they are familiar with the statutes relevant to the offense. Some examples of common affirmative defenses are:

- **Self-defense or defense of others:** requires that force was threatened against the child or another person, the child was not the aggressor, danger of harm was imminent, the threatened force was unlawful and that the child actually and reasonably believed that a danger existed and the child's use of force was necessary and appropriate to the danger faced (720 ILCS 5/7-1); *People v. Ross*, 100 Ill.App.3d 1033, 1038, 427 N.E.2d 955 (1st Dist. 1981) . Additionally, the use of deadly force in this context is limited to those situations where the threatened force will cause death or great bodily harm or the force threatened is a forcible felony. *Ross*, 100 Ill. App. 3d at 1038.
- **Defense of dwelling:** a person is justified in using force against another to the extent that he believes such force is necessary to prevent or terminate unlawful entry into, or attack on, his dwelling. Force resulting in death or bodily harm

is limited to instances where the defendant reasonably believes it is necessary to protect himself or another person in the dwelling from personal violence or to prevent the commission of a felony (720 ILCS 5/7-2).

- **Compulsion:** the child committed the offense under threat of imminent death or great bodily harm, which the child reasonably believed would be inflicted upon him if he did not commit the act or offense (720 ILCS 5/7-11). Compulsion is not a defense for offenses punishable by death. An attorney defending a gang-related case where the minor was acting under orders from a high-ranking gang member may want to explore this defense.
- **Necessity:** the child was placed in the situation by no fault of his own and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury that might reasonably result from his own conduct (720 ILCS 5/7-13). An adolescent who drives without a license in order to drive away from rival gang members could invoke this defense if he was prosecuted for driving without a license.
- **Entrapment:** the child's conduct was induced by a public officer or employee for the purpose of obtaining evidence to prosecute the child, provided that the child was not predisposed to commit the offense (720 ILCS 5/7-12). For example, an attorney may raise this defense where an undercover police officer appears to induce the child into participating in a drug deal.
- **Involuntary intoxication or drugged condition:** the child was involuntarily made intoxicated or was drugged, and this condition deprived him of substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (720 ILCS 5/6-3). A child who shoots a gun at passing cars after being plied with alcohol by his older friends may raise this type of defense.
- **Insanity:** the defendant, due to a mental disease or defect, lacked the ability to appreciate the criminality of his conduct.

Lawyers raising a defense that relates to a minor's state of mind (such as a self-defense claim) should consider arguing that the court apply a "reasonable child" standard (rather than a "reasonable man") standard, taking into consideration the developmental and perceptual differences between children and adults.

Generally, once a defendant presents evidence of an affirmative defense, the State has the burden to prove the defendant's guilt beyond a reasonable doubt as to that issue, as well as each element of the offense. In other words (aside from cases where the defendant raises an insanity defense), the State typically has the burden of *disproving* the affirmative defense and *proving* the elements of the crime. *See People v. Durden*, 231 Ill. App. 3d 84, 596 N.E.2d 98 (1st Dist. 1992). In a jury trial, once the defendant presents *some* evidence of the affirmative defense, even if the evidence is *slight*, the jury must

be instructed regarding the affirmative defense. *People v. Sims*, 374 Ill. App. 3d 427, 433, 871 N.E.2d 153 (3d Dist. 2007) .

Where a defendant raises an insanity defense, however, the burdens are somewhat different. When raising an insanity defense at trial, a defendant must prove by “clear and convincing evidence” that he or she is not guilty by reason of insanity. However, the State must still prove the defendant guilty beyond a reasonable doubt of each element of the offenses charged. 720 ILCS 5/6-2.

7.3 Organizing the Defense Case



Points to Remember

- *Attorneys should keep files organized, with a separate file for every case, and, ideally, a working and master file for the attorney and the office, respectively. Each case file also should have clearly labeled sub-file categories for client intake information, pleadings, correspondence, discovery, notes, expert reports and information, etc.*
- *Attorneys should maintain an adjudication or hearing notebook, which includes all key materials for the hearing or trial in an easy-to-access format.*
- *Attorneys should select a single theory and develop a theme to defend a case. The theory should be supported by the facts, and the theme should be one that will enable the judge to find the child not guilty. Attorneys should use the theme throughout the trial when presenting the evidence. However, attorneys also should be prepared for the possibility that new information presented at trial may require them to alter the theory or theme.*
- *In structuring the defense case at trial, the attorney should take into account the types of pretrial motions and objections she plans to raise, the potential impact of favorable and non-favorable evidence or testimony, the documents which the State (or defense) will attempt to introduce into evidence, and the order in which she wants to present witnesses, if any. The attorney also should prepare an opening statement to reflect the theory and theme of the case, and an outline of a closing argument that may be altered according to the evidence that is actually introduced at trial and arguments the State makes.*

Organization is crucial to any advocacy strategy. In the hectic pace of litigation, it is easy to become overwhelmed. Therefore, lawyers must have a clear sense of how to approach a particular case in a systematic manner.

7.3.1 Keeping the case file organized

Keeping an organized file is essential to developing an organized approach to the defense of a juvenile case. Ideally, many defender offices, law firms and legal aid organizations may have a dedicated filing system to keep master files of cases. Nonetheless, attorneys should maintain their own, well-organized working file to ensure that the attorney is up-to-date with all developments in the case and is prepared and able to address each question posed by the court. In offices and jurisdictions where juvenile defense attorneys have access to computers and scanners, having easy and organized access to a case file is easier than ever.

In general, every case should have a separate file, including different cases involving the same defendant. The file should be labeled with the client's name (first name and last initial only, rather than a complete last name) and the case number. Additionally, the file should have the attorney's name and contact number on it, in the event the file is lost.

The attorney can use the cover of the file to list hearing dates and record events that occur in court. While the attorney also should keep a master calendar with all court dates in all of the attorney's cases, a case file that clearly lists the court dates on the cover is an easy reference tool.

Depending on the size of the file or the complexity of the case, the attorney can use the inside file cover or a separate sheet of paper that is easily accessible to include other useful information, such as the client's contact information and a time log of actions taken on the case.

Attorneys use various methods of organizing the documents within a file. Some suggestions for sub-file categories within a case file are included below. Regardless of the method used, it should allow the attorney quick access to what has occurred in the case and any necessary information regarding the client. In general, within sub-file categories, the documents should be organized with the most recent document on top and the oldest document at the bottom. The following sub-files may be used for both the paper and the electronic file.

Potential sub-file categories include:

- Client intake information: notes of initial interviews with the client, including their family and social history, education, etc.;
- Correspondence: all correspondence in the case. However, in cases where discovery is voluminous or complex, attorneys may consider keeping a separate sub-file for correspondence with the State relating to discovery;
- Pleadings: all court filings in the case;

- Discovery: all materials obtained in discovery. If the attorney feels these documents are too voluminous to place in a single transportable file, the attorney can keep this in a master file at her office;
- Investigation/interviews: notes or information gathered as a result of informal discovery processes like investigation and interviewing of witnesses;
- Expert information/reports;
- Attorney notes and charts;
- Dispositional information; and
- Research.

Additionally, many attorneys like to keep a trial or hearing notebook to assist them at important trials or hearings. These notebooks usually consist of a binder with labeled tabs, and can be reused for different cases or kept by the attorney for historical reference after the master files due sent to storage. Some examples of the “tabs” are:

- Pretrial motions
- Opening
- Anticipated evidentiary issues/research
- Witnesses
- Impeachment documents
- Key documents
- Closing

In a complex case, these categories may be divided further to reflect examinations or impeachment of different witnesses, various evidentiary issues and the like. The notebook should be thorough, but should allow the attorney to find information quickly and easily.

7.3.2 Theory, theme and telling the child's story

The theory of the case is essentially the attorney's chosen strategy of defense, for instance, that the child is innocent of the offense because she has an alibi for the time in question. The theory tells the court the reason why the child should be found not-guilty. The theme of the case is the moral justification for why the child should win. *See* Lubet, Steven, *Modern Trial Advocacy: Analysis and Practice* (2004, 3rd edition), 8-9

The three ground rules for establishing a theory are:

1. The theory is logical: it is based on undisputed or otherwise provable facts;
2. The theory is simple: it makes maximum use of undisputed facts and relies as little as possible on facts that are highly contested or difficult to prove; and
3. The theory is easy to believe. *Lubet, Steven, Modern Trial Advocacy, Analysis and Practice* (2004, 3rd edition), 8-9.

A good theory answers the following questions in a short, concise form: "What happened? Why did it happen? Why does that mean my client should win?" *Lubet, id.*

The theme of the case tells the trier of fact the moral reason why the juvenile should win. The theme, best presented in a single sentence, appeals to the justice of the case. *Lubet, Id.* Ideally, a theme is something that the juvenile court judge can remember easily and focus on as a way to find the child not guilty of the offense. In other words, the theme is a tangible expression of the theory of the case.

Example

David C. is charged with aggravated discharge of a firearm at school. The witnesses saw David take something out of his pocket before entering the school and say that they heard a shot fired. The State also claims it has evidence that David said he brought the gun to school because some neighborhood kids told him just before the first day of school that he would be jumped by a large group of kids. When kids started beating him up, he brought out the gun and it accidentally discharged as he tried to get away.

Theory	Theme
Statement Is Suppressed	
<p>The State will not be able to prove each required element beyond a reasonable doubt. Although many people saw David pull something out of his pocket just before he ran through the double doors where a shot was fired, no one will testify that the object was a gun. No one, not even the victim, will testify that he saw David shoot, or even hold, a gun.</p>	<p>David was just at the wrong place at the wrong time.</p>
Self Defense	
<p>David was told repeatedly before the first day of school that he was going to get jumped by a large group of people. He asked his mother not to make him go to school. He asked his brother to help him get out of the first day of school. He was told he had to go to school. Using the logic of a 15-year old, David took a gun with him for protection. When 10-15 boys did in fact begin beating him, David pulled out the gun to scare people off. The gun accidentally discharged when he ran out the gymnasium doors.</p>	<p>David was a terrified little boy looking for protection.</p>

The theory and theme of the case set the stage to tell the child's story. Telling the child's story is often a crucial part of the case. Even if the attorney elects to present no evidence of her own, having a memorable and coherent theory and theme essentially forces the prosecution to rebut or even disprove the defense theory.

7.3.3 Organizing and structuring the case

After the lawyer has settled upon a theory and theme of the case, she must determine how to organize and structure the defense case at trial. Assuming that the lawyer has collaborated with the client regarding the defense strategy, the lawyer should take the following steps to structure the defense at trial:

1. List all witnesses for the State and defense, including the crux of the anticipated testimony of each witness.
2. List all documents which the State and defense intend to present, highlight crucial portions of each, and indicate which witness will testify regarding the document, as well as what each document purports to prove.
3. Analyze the strengths and weaknesses of each piece of evidence, including witnesses and documents.
4. Consider how to attack each portion of the State's evidence, including any pre-trial motions the attorney wants to raise to bar certain evidence or ensure that the attorney can present her own evidence.
5. Anticipate (and be ready with case law to address) objections to State evidence and testimony.
6. Determine the order in which the defense witnesses should testify, bearing in mind that it may be better to present the fewest possible witnesses for a given point in order to avoid inconsistencies; that important witnesses should testify first and last in the defense case; and that, if the child testifies, he should also testify last in order to give you the opportunity to determine whether his testimony is still necessary, and to ensure that the child has heard all of the testimony before giving his own testimony.
7. Use the theory and theme to develop an opening argument that tells the child's story or explains the theory by utilizing key words or phrases that state the theme. Defenders generally should not waive openings, even if the State does. This is the child's opportunity to put the theory of the case before the judge. Opening arguments are discussed in greater detail in Chapter 11.
8. Create an outline for the closing argument that echoes the theme stated in the opening argument, but also highlights important portions of the evidence presented at the adjudication. However, the attorney should not tie herself to this outline because the prosecution will have the opportunity to make a closing argument first. Accordingly, careful notes should be taken of the State's closing argument and responses to its arguments incorporated as needed within the closing argument. Additionally, unexpected testimony or evidence that arises or is barred at trial may alter the closing argument. Closing arguments are discussed in greater detail in Chapter 11.

9. Keep a running log of objections, motions, and the court's rulings in order to draft a post-trial motion raising these issues as needed. *See* Chapter 13 for a further discussion of preserving the record on appeal.

See also Juvenile Defender Delinquency Notebook at 122-23.

By planning ahead and being systematic in an approach, attorneys can structure a juvenile's defense effectively and thoroughly while preserving any issues that should be raised post-trial or on appeal.

Summary

Attorneys should start building a defense at the beginning of the case. Defense attorneys should constantly reassess defense strategies as they gather more information through discovery. Additionally, attorneys should maintain an organized case file and be prepared with a cogent strategy of presenting or evidence at trial in a systematic manner.



Chapter 7 Checklist

- ✓ Try to seek early dismissal or resolution of the case by challenging defects in the petition of wardship (particularly jurisdictional defects) in an effort to suppress important evidence, or raise issues of fitness or witness competency where appropriate, after discussing these issues with the juvenile.
- ✓ Be aware of potential theories of defense, including available affirmative defense, and be prepared to use them where appropriate.
- ✓ Keep cases and case files organized, preferably by maintaining a master file that is kept in the office with all key documents and an attorney working file that the attorney may use, transport, and take to court.
- ✓ Use adjudication or hearing notebooks to keep crucial materials for adjudications and trial within easy reach.
- ✓ Develop a theory and theme of the case that can be articulated simply for the court and will provide the court with a reason to find the juvenile not guilty of the offense.
- ✓ Be organized, deliberate and systematic in developing a structure for the defense of the case, considering the potential witnesses and evidence, the best order of presentation for the defense case, as well as possible motions and objections.
- ✓ Use the theme in the opening and closing argument, but keep the closing argument outline flexible to allow the incorporation of key facts or evidence produced at trial, and to respond to the State's closing arguments.

Chapter 8

Pre-Adjudication Motions and Practice



As noted in previous chapters, there are many steps that precede the actual trial or adjudication of a juvenile case. Zealous pre-adjudication advocacy can set the stage for a successful result after adjudication or a guilty plea. Therefore, it is useful to discuss the potential motions that can be raised during pre-trial proceedings, before discussing pleas (Chapter 10) and adjudication (Chapter 11).

8.1 The Importance of Zealous Advocacy in Pre-Adjudication Motion Practice



Points to Remember

- *Attorneys should file written pre-trial motions in order to build the best possible defense, strengthen their relationship with their juvenile client, and ensure the best possible plea agreements if the child chooses to plead guilty.*

Pre-trial motion practice is essential to zealous advocacy. The diligence with which attorneys are prepared to file and pursue pre-trial motions can fundamentally affect the type of discovery obtained, whether experts are procured, the type of evidence admitted at trial, and possibly whether the case is dismissed altogether. Even where the child likely will enter a guilty plea, attorneys should file motions as needed in order to procure the best possible disposition for the client.

Additionally, motions – particularly those in writing – preserve the record on appeal (*see* Chapter 13). Because many appellate issues require that the child raise the issue before or during trial in order to pursue it on appeal, the failure to raise a potential appellate issue in juvenile court can be fatal to such claims on appeal. Moreover, a trial attorney's vigorous motion practice puts the State on notice that the attorney's representation throughout the proceedings will be vigorous.

Finally, attorneys who do not hesitate to file motions whenever appropriate send a strong message to their juvenile clients that the attorney is on the child's side and dedicated to achieving the best possible outcome for the child. Such advocacy, therefore, can assist the attorney in developing a positive relationship with the child and his family. Additionally, an attorney's diligent pre-adjudication representation can help give the child and his family confidence in the juvenile court process.

8.2 Types of Motions and Hearings

While some types of motions are particular to the individual case, many types of motions may be common to many or most juvenile cases.¹⁵



Points to Remember

- *File suppression motions whenever crucial evidence may have been obtained in violation of the child's rights, particularly where the police did not have a warrant for the search or where the search exceeded the scope of a warrant. Such motions may be used to bar evidence or the child's statements taken as a result of the search of a child's home, vehicle or person after a stop on the street, and in many other contexts. Lawyers should almost always file a motion to suppress evidence or statements.*
- *Be aware of Illinois' statutory exceptions to the hearsay rule, know how to use them to introduce helpful evidence and be prepared to challenge their admission where grounds exist to do so.*

8.2.1 Suppression motions

Motions to suppress evidence or statements often are critical in juvenile cases. Such motions can prevent the prosecution from using key pieces of evidence – such as confessions or contraband – against the juvenile where the evidence was obtained illegally by the police or State. These motions also are a valuable discovery tool and allow attorneys to explore the State's witnesses' version of events and to pin them down. In addition to the Constitutional principles governing suppression motions, the Illinois Code of Criminal Procedure specifically prescribes the guidelines for filing motions to suppress. *See* 725 ILCS 5/114-11; 725 ILCS 5/114-12. Importantly, the statute requires that issues of suppression be litigated before trial, unless the defendant was unaware of the grounds for such motions. 725 ILCS 5/114-11(g); 725 ILCS 5/114-12(4)(c).

The exclusion of illegally-obtained evidence

Evidence seized in violation of the Fourth Amendment of the United States Constitution cannot be used at trial under the exclusionary rule. *See Mapp v. Ohio*, 367 U.S. 643, 655-

60 (1961) (applying the exclusionary rule established in *Weeks v. United States*, 232 U.S. 383 (1914) to the states under the Fourth and Fourteenth Amendments); *People v. Carrera*, 321 Ill.App.3d 582, 748 N.E.2d 652 (1st Dist. 2001). This applies not only to evidence obtained as a direct result of the search, but also to evidence that is the “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

Additionally, illegally obtained confessions violate the Fifth Amendment of the United States Constitution. *See generally, Miranda v. Arizona*, 384 U.S. 436 (1966). Specifically, the juvenile may be able to suppress his statement by arguing that he was deprived of his right to remain silent and not incriminate himself or his right to have an attorney present during his interrogation by the police. *See People v. Lopez*, No. 103768, 2008 WL 2446802, 12 (June 19, 2008) (15-year-old juvenile defendant’s statement was involuntary under the Fifth Amendment).

Stop and frisk

This type of search is governed by *Terry v. Ohio*, 392 U.S. 1 (1968), the landmark United States Supreme Court case that set forth guidelines when the police “stop and frisk” a person. The Fourth Amendment prohibits the search and seizure of a person without probable cause to arrest, which typically must be supported by a warrant. *People v. Cox*, 202 Ill. 2d 462, 466; 782 N.E.2d 275 (2002). An arrest or seizure “occurs when the circumstances are such that a reasonable person, innocent of any crime, would conclude that he was not free to leave.” *In re D.G.*, 144 Ill. 2d 404, 409, 581 N.E.2d 648 (1991). Where a juvenile is involved, this standard is modified to “consider whether a reasonable juvenile would have thought that his freedom of movement was restricted.” *Lopez*, 2008 WL 2446802 at 12 (juvenile defendant’s voluntary presence as police station “escalated” into an involuntary seizure when he was told he was implicated in a crime, left in an interview room for four hours without contact with his family or any person interested in his well-being and was never told that he was free to leave). In making this assessment, particularly where the defendant is a juvenile, the court may look at many factors, including the child’s experience with the criminal justice system and his educational background. *Id.* at 13.

In *Terry*, the Supreme Court carved out an exception to the Fourth Amendment’s prohibition against search and seizure without probable cause for a brief stop of a person by the police, where the police have a reasonable, *articulable* suspicion that the person has committed or is about to commit a crime. *Terry*, 392 U.S. at 1. The stop only can last long enough to resolve that suspicion. Additionally, the officer may frisk the individual if the officer has a reasonable suspicion that the person is armed. A search of the person, thus, cannot exceed a limited pat down or search for weapons. In Illinois, *Terry* has been applied in juvenile cases to evaluate the validity of a stop and frisk procedure by the police. *See generally, In re Mario T.*, 376 Ill.App.3d 468, 875 N.E.2d 1241 (1st Dist. 2007) (stop and frisk of juvenile was not supported by reasonable articulable suspicion and thus, cocaine discovered as a result of the frisk should have been suppressed).

Given *Terry*'s implications, attorneys should consider moving to suppress evidence as a result of a street stop where any of the following facts apply:

- There was no warrant;
- The child was not doing anything that would reasonably be suspicious;
- The officers did not indicate that the child was free to leave or it was obvious that he was not free to leave;
- The officers questioned the child, particularly if they did more than ask basic information regarding his name or address;
- The child was instructed to do something like empty his pockets;
- The police searched him with or without his consent and found something;
- The officers went beyond a frisk (*e.g.*, they searched the child's pockets);
- The child was handcuffed, restrained, put in a police car or taken away from other individuals he was with; or
- The police took the child's belongings from him.

Depending on the facts, a motion to suppress may be warranted.

Example



Johnny Z., a juvenile, is walking with friends in an area known for narcotics activity. He is approached by the police, who stop and ask his name and why he is in the area. Johnny says that he lives down the street. The police do not question the other individuals who are with Johnny. The police then do a pat-down search of Johnny, and, finding nothing, ask him to empty out all of his pockets. He complies, and the police find a small bag that contains cocaine. The attorney challenges the search based on the fact that the police had no reasonable or articulable suspicion to stop Johnny, and that, after they found nothing as a result of the pat-down, had no reason to force Johnny to empty his pockets.

The attorney has a sound basis upon which to raise the motion to suppress. While the police do not need to be aware of facts giving rise to probable cause under *Terry*, they at least need to have a reasonable and "articulable" suspicion that Johnny committed a crime. Here, the police have no reason to suspect that Johnny committed a crime – aside from Johnny's presence in an area known for narcotics activity – and certainly have no reason to suspect him over any other member of his group of friends. Additionally, even assuming that the police could stop Johnny under *Terry*, their preliminary questioning and pat-down search of Johnny (which did not reveal that Johnny had any weapons on his person) gave them no reason to detain Johnny further. The police exceeded the scope of the initial stop, and the drugs should be suppressed.

Evidence of an individual's flight from the police is often a significant factor considered by the courts in determining whether a stop was appropriate in a particular case. See *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000); *In re D.W.*, 341 Ill.App.3d 517, 525, 793 N.E.2d 46 (1st Dist. 2003). While flight alone may not, in and of itself, provide grounds

for a *Terry* stop, it may justify the stop in conjunction with other factors, for instance, the defendant's presence in a high crime area. *Wardlow*, 528 U.S. at 124. Nonetheless, even with evidence of flight, attorneys should not hesitate to challenge the stop where other factors suggest that the stop was unreasonable.

Warrantless entry into the home

Juveniles have a reasonable expectation of privacy in their own homes. As a result, the United States Supreme Court places strict limitations on searches conducted of people's homes without a search warrant (as well as searches of the immediate "curtilage" of the home, which means the area near the home, *e.g.*, a garage or garage shed). See *Payton v. New York*, 445 U.S. 573 (1980) (warrantless and nonconsensual entry into a suspect's home, in the absence of exigent circumstances, to make a routine felony arrest is unconstitutional); *People v. Accardi*, 284 Ill. App. 3d 31, 671 N.E.2d 373 (2d Dist. 1996) (warrantless entry onto and seizure of marijuana plants within curtilage of home was unreasonable). Thus, the police may not enter a person's home without a warrant unless exigent circumstances exist. *Payton*, 445 U.S. at 590.

In determining whether exigent circumstances exist to support a warrantless entry into a home, Illinois courts have required that the State demonstrate the following factors: (1) the crime under investigation was recently committed; (2) there was any deliberate or unjustified delay by the police during which time a warrant could have been obtained; (3) a grave offense was involved, particularly a crime of violence; (4) there was reasonable belief that the suspect was armed; (5) the police officers were acting on a clear showing of probable cause; (6) there was a likelihood that the suspect would escape if he was not swiftly apprehended; (7) there was strong reason to believe the suspect was on the premises; and (8) the police entry was made peaceably, albeit non-consensually. *In re D.W.*, 341 Ill. App. 3d 517, 527, 793 N.E.2d 46 (1st Dist. 2003). These constitutional protections have been applied to overnight guests at someone else's residence as well as to juveniles living within a home. *Minnesota v. Olson*, 495 U.S. 91 (1991) (overnight guests have standing to contest the search of a home); *People v. Wimbley*, 314 Ill.App.3d 18, 23, 731 N.E.2d 290 (1st Dist. 2000).

Given the strict limitations on warrantless searches of the home, attorneys should be prepared to challenge the arrest of the child or search of the premises any time that the



The police may not enter a person's home without a warrant unless exigent circumstances exist.

police enter the child's home (or a home where the child is staying overnight) when the police conduct the search or arrest without a warrant.

Example



The police receive a tip that someone is breaking into vehicles and stealing stereo parts. While canvassing the neighborhood, they notice that a garbage can in an alley has some old car stereo parts in it. They knock on the door of the first floor apartment in a nearby building, but hearing no answer, they enter the apartment through an unlocked back door. They see Laura B. sitting in her room with what appears to be used stereo parts and arrest her. The attorney moves to suppress the stereo parts found in Laura's room, because the police failed to obtain a warrant to enter the apartment and there were no exigent circumstances to justify their warrantless and non consensual entry.

The stereo parts should be suppressed and cannot be used against Laura because the police had no warrant to enter her home, and there was no indication that anyone allowed them to enter or that exigent circumstances required that they enter without satisfying these requirements.

Challenging the warrant

Even where the police have a warrant to arrest the child or search his home, this does not mean that attorneys should rule out the possibility of raising a suppression motion. Courts may authorize the issuance of an arrest warrant based on a finding of probable cause where the totality of circumstances and facts known were sufficient to lead a person of reasonable caution to believe that the law was violated and that evidence of the violation was on the premises to be searched or that the accused committed the offense. *People v. Beck*, 306 Ill.App.3d 172, 178, 713 N.E.2d 596 (1st Dist. 1999); *People v. Hooper*, 133 Ill. 2d 469, 552 N.E.2d 684 (1989). Additionally, an arrest warrant must comply with the specific requirements listed in 725 ILCS 5/107-9. Thus, even where a warrant has been issued, attorneys may still move to suppress evidence or quash the child's arrest based on a lack of probable cause for the issuance of the warrant or because the requirements of 725 ILCS 5/107-9 have not been adequately satisfied. Attorneys also may raise a motion under *Delaware v. Franks*, 438 U.S. 154, 155-56 (1979), for an evidentiary hearing to challenge the veracity of the affidavit supporting the search warrant. In so doing, the party raising the motion initially must make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and that "the allegedly false statement is necessary to the finding of probable cause." *Id.* A *Franks* hearing may also be appropriate where information, necessary to a determination of probable cause, intentionally or recklessly is omitted from the affidavit. *People v. Sutherland*, 223 Ill.2d 187, 860 N.E.2d 178 (2006).

Automobile stops and searches

Generally, automobile stops are justified only where probable cause exists, the police have an “articulable and reasonable suspicion” that the motorist is unlicensed, the automobile is not registered, or the “occupant is otherwise subject to seizure for violation of the law.” Prof. John F. Decker and Prof. Ralph Ruebner, *Illinois Decisions on Search and Seizure* (ISBA 2005) at 69. Under *Terry*, a traffic stop – for instance, the brief investigatory stop of an individual traveling in excess of the posted speed limit -- is proper. *People v. Koutsakis*, 272 Ill.App.3d 159, 163, 649 N.E.2d 605 (3d Dist. 1995); *People v. Roa*, 377 Ill. App.3d 190, 196, 879 N.E.2d 366 (3d Dist. 2007) . The reasonableness of a traffic stop is based on various factors, including the stopping officers’ experiences, the driver or occupants’ actions, the location and time during which the vehicle is on the road, etc. *Roa*, 377 Ill. App. 3d at 200; *People v. Leggions*, 382 Ill. App. 3d 1129, 890 N.E.2d 700, 706-09 (4th Dist. 2008). Additionally, if the vehicle is stopped because of reasonable suspicion that the automobile is not registered or licensed, or for some other possible traffic stop, the stop is valid, even if the police had an ulterior motive in conducting the stop (for example, if the police suspect the driver is engaged in a drug transaction). *Whren v. United States*, 517 U.S. 806 (1996) ; *People v. Rucker*, 294 Ill. App. 3d 218, 669 N.E.2d 1203 (2d Dist. 1998). In the course of the stop, the officer also may order that the occupants step out of the car to “promote officer safety.” *Maryland v. Wilson*, 519 U.S. 408 (1997). In other words, if the officer, after stopping the defendant, sees something that appears to be a weapon, the officer may order the defendant to exit the car.



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Nonetheless, *Terry’s* restrictions still apply to investigatory stops. Accordingly, once the officer has made the stop, the officer can only detain the driver and occupants briefly for questioning and then must let them go if the officer does not immediately observe anything that gives rise to probable cause (*e.g.*, seeing drugs in plain view on the car seat). *People v. Roberson*, 67 Ill.App.3d 193, 197, 854 N.E.2d 317 (4th Dist. 2006).¹⁶ Where, for instance, the police conduct a traffic stop and then “seize” the vehicle in order to write a warning ticket, the seizure can become unlawful “if it is prolonged beyond the time reasonably required to complete that mission.” *Illinois v. Caballes*, 543

U.S. 405, 407 (2005) (finding that a narcotics “dog sniff” of the exterior of a car is not unlawful where it does not prolong the lawful traffic stop beyond the time required to write the warning ticket).

Based on the law in this area, attorneys should be prepared to move to suppress statements or evidence obtained pursuant to an illegal vehicle stop or search. Depending on the circumstances of the case, it is entirely possible that, even if the stop was proper, subsequent questioning or a search of the vehicle or the child was unreasonable such that the product of the search or questioning should be suppressed.

Example



Mike O. is a passenger in a car driven by his friend. The police pull the car over for a traffic stop because the car has a broken tail light. After obtaining the driver’s license and registration, the police then ask Mike and the driver to step out of the car while they search it. They discover drugs under the passenger seat, and Mike is charged. The attorney moves to suppress the admission of the drugs because the police had no authority to order the occupants out of the car when they had no fear of their safety and lacked probable cause to search the vehicle.

Although the police had authority to make the initial stop of the car based on the broken tail light, they exceeded the scope of their initial stop and lacked probable cause to search the car. After the initial stop and questioning, the police observed nothing that would give rise to probable cause sufficient to conduct a search of the automobile.

Illegally obtained confessions

Juveniles who are arrested often make statements or confessions to the police. When the police arrest and proceed to take a statement from any individual, particularly a child, the officers are required constitutionally to inform the individual that: 1) he has the right to remain silent; 2) anything he says may be used against him; 3) he has a right to an attorney to be present for any questioning; and 4) if he is indigent, a lawyer will be appointed to represent him. *Miranda*, 384 U.S. 436 (1966) at 467-473. These warnings stem from several constitutional rights, in particular, the Fifth Amendment of the United States Constitution’s privilege against self-incrimination and the concomitant right to have counsel present during custodial interrogations. *Id.*; *McNeil v. Wisconsin*, 501 U.S. 176 (1991). Where a confession is taken, even where the individual is provided the appropriate *Miranda* warnings, the State has the burden to show that the confession is knowingly, intelligently and voluntarily made. *Miranda*, 384 U.S. at 475.

As noted in Chapter 4, the Juvenile Court Act provides additional protections for children who are arrested, including requiring that the police make a reasonable effort to notify the child’s parent; and, if the arrest is conducted without a warrant, to take the

child to the nearest juvenile police officer, who may have the discretion to release the minor (if the offense is a misdemeanor). *See supra* Chapter 4 at 4.1; 705 ILCS 405/5-405.

When a defendant moves to suppress his confession, the State has the burden to show that the confession was voluntary. In determining whether a confession is voluntary, the court considers “the totality of the circumstances, including the defendant’s age, intelligence, background, experience, mental capacity, education, physical condition, experience with the criminal justice system, the legality of the detention, the duration of the detention, the duration of questioning, and any promises, threats, deceit, and physical or mental abuse by police.” *People v. Richardson*, 376 Ill.App.3d 537, 541, 875 N.E.2d 1202 (1st Dist. 2007), *leave to appeal allowed*, 226 Ill.2d 627, 882 N.E.2d 81 (Jan. 30, 2008). When the defendant is a juvenile, the issue before the court is whether a reasonable juvenile “would have understood that he had a genuine choice about whether to continue talking to the police.” *Lopez*, 2008 WL 2446802 at 24. The court also considers whether a parent or other interested adult was present and whether the police provided the child with an opportunity to consult with such an adult. *Id.* *See also, People v. Westmoreland*, 372 Ill.App.3d 868, 889-90, 866 N.E.2d 608 (2d Dist. 2007) (juvenile’s confession was involuntary where police refused 17 year-old’s requests to contact his mother and made no

effort to contact his parents, and where the youth was immature and became terrified as a result of the police’s statements to him during the interrogation); *In re R.B.*, 232 Ill. App.3d 583, 592-93, 597 N.E.2d 879 (1st Dist. 1992) (finding that the absence of a parent or youth officer “interested in defendant’s welfare” contributed to the coercive atmosphere of the 15 year-old’s interrogation).

Courts also have noted that late-night questioning of juvenile defendants, or questioning that lasts 18 hours or more, when considered with other factors, can contribute to the coercive atmosphere surrounding certain juvenile confessions and cause them to be found involuntary. *See People v. Savory*, 82 Ill. App. 3d 767, 774-75, 403 N.E.2d 118 (3d Dist. 1980) (8-hour period of questioning, followed later by 10 ½ hour period of questioning, even though interrupted by meals and a break in between these periods of questioning, indicated that confession was involuntary); *People v. Griffin*, 327 Ill.App.3d



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538, 763 N.E.2d 880 (1st Dist. 2002) (18-hour detention followed by late night questioning for 30 minutes, weighed against admission of a confession).

Additionally, where the defense moves to suppress the child's confession, the State must show that the confession was made "knowingly" and "intelligently," and that the child understood his *Miranda* rights. In re M.W., 314 Ill.App.3d 64, 68-69, 731 N.E.2d 358 (1st Dist. 2000). While whether a confession was made knowingly and intelligently is distinct from the question of whether a confession was voluntary, both involve consideration of many of the same factors, including the child's age, mental ability, language and experience. *Id.* at 69. Thus, where there is evidence that a child lacks the ability to comprehend the terms described in *Miranda* warnings, or lacks the ability to form an intent to waive these rights, his confession is not knowingly or intelligently made. *Id.* at 71.

Attorneys should always consider suppressing a juvenile client's damaging statement. Where the child is not given *Miranda* warnings, asks for an attorney and is not given one, or expresses his desire to remain silent, attorneys should file a motion regarding the violation of the child's constitutional rights. Even where the child receives *Miranda* warnings and makes a statement, attorneys still may argue that the statement is not voluntary, or may argue that the statement was not knowingly and intelligently made because the child lacked the ability to understand the *Miranda* warnings and waive those rights.¹⁷ In light of the "totality of the circumstances" standard applicable to motions to suppress statements, attorneys should be ready to use any relevant factor to argue that the confession was coerced, involuntary, or unknowingly made, and in so doing also may consider assembling information regarding the child's mental health and capacity to understand and waive *Miranda* warnings, if they were given.

Example



The police arrest Jenny D., a minor, and take her to the police station for questioning at 11:00 p.m. They question her for a few hours, but Jenny says nothing helpful. She then asks to speak with her mother and says that she wants to know if she can have a lawyer. The police say they will find out if she can have an attorney present, but then continue questioning her.

Jenny has grounds for a suppression motion because the police ignore her request to speak with her lawyer. She also can argue that she was denied an opportunity to have her parent present – an important factor in determining whether a child's confession is voluntary.

The next morning, after spending a sleepless night in detention, during which the police continue to question her, Jenny confesses to the offense for which she is ultimately charged.

Jenny also has grounds for a suppression motion because of the coercive circumstances presented here, i.e., where the child is kept in custody all night and continuously questioned, without access to her parents or an attorney, despite her request.

Example



After some reports of drug dealing, teachers at Mark N.'s middle school focus on Mark, based on a report from a student that she overheard Mark discussing "blows" with another student in the hallway. The teachers report their suspicions to the police. The police tell Mark's principal to call Mark into the office. Mark's principal calls him into an office after school, with a police officer present, and tell Mark that he must tell everything he knows about the drug dealing going on in school. Mark denies that he knows anything and asks to leave. The officer blocks the door, and the principal says that if Mark hopes to graduate from middle school and if he doesn't want the police to arrest him, he must stay and answer their questions. Mark admits that he was selling drugs.

Mark has an argument that his statement should have been suppressed. Even though his questioning ostensibly occurred on school grounds by school personnel, it is clear that the principal acted under the police's direction and as an agent for the police. Mark also was not permitted to leave, which suggests that, for all practical purposes, Mark was in custody at the time of the interrogation.

Example



Nina D., a 15-year-old, is brought into the police station after being arrested for aggravated battery. She asks for an attorney and for her mother and refuses to make a statement. The police call Nina's mother, who arrives shortly thereafter. Nina's mother also asserts Nina's right to an attorney to the police. The police then ask Nina's stepfather, who is in the waiting area of the station, to speak with Nina and convince her to make a statement. The police tell him that it is in Nina's best interest to admit responsibility for the offense. After speaking with her stepfather, Nina agrees to give a statement.

Nina can argue that her statement should be suppressed because the police ignored her request to have an attorney present, and then used the stepfather – acting as an agent of the police – to make Nina give a statement.

Example



Leon F., a 10-year-old child with several documented learning disabilities, is arrested and taken to the police station. A police officer begins reading him Miranda warnings from a pre-printed card. Leon interrupts the officer several times saying, "What? What is a 'right'? What is 'silent'? Does this mean I have to answer your questions?" The officer ignores Leon's questions and proceeds to take a statement from Leon.

Leon has an argument that his statement was not knowingly made. Leon indicated several times that he did not understand the warnings that were given to him. Additionally, at the suppression hearing, the attorney may be able to put on an expert witness who can attest to Leon's inability to comprehend *Miranda*, based on his history of learning disabilities.

8.2.2 Motions filed pursuant to the Illinois statutory hearsay exceptions

Attorneys attempting to object to the admission of certain statements based on hearsay, or seeking to introduce potential hearsay statements, also may file motions pursuant to Illinois statutory hearsay exceptions. Hearsay is "testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of the matters therein, and thus resting for its value upon the credibility of the out-of-court asserter." Michael H. Graham, *Cleary and Graham's Handbook of Illinois Evidence* § 801.1 (8th ed. 2004). A common misconception is that a person who has made an out-of-court statement may testify about the statement. That is incorrect. The fact that the declarant is present in court and testifies to the statement is irrelevant to the issue of whether the out-of-court statement is hearsay.¹⁸ *Id.*; *People v. Lawler*, 142 Ill. 2d 548, 568 N.E.2d 895 (1991).

Example



The witness testifies that she told the police on the night of the incident that her purse contained \$100 and a gold watch.

This is still hearsay, even though the declarant is testifying in court. The witness is testifying to her own out-of-court statement.

Hearsay is generally barred as inadmissible, even in juvenile trials. *People v. Pitts*, 133 Ill. App. 2d 859, 272 N.E.2d 250 (5th Dist. 1971) (noting that quantum of proof and evidentiary rules are the same in juvenile proceedings as in adult proceedings); *see also, In re R.M.*, 307 Ill.App.3d 541, 718 N.E.2d 550 (1st Dist. 1999) (noting that out-of-court statements are hearsay, but that the Juvenile Court Act makes an exception for minors in matters pertaining to abuse and neglect). There are many traditional or "firmly rooted" exceptions to the hearsay rule, including:

- Excited utterance;
- Spontaneous declaration;
- Dying declaration; and
- Statements made for purposes of receiving medical treatment.

See 23 C.J.S. Criminal Law § 1176.

Additionally, Illinois provides certain statutory exceptions to the prohibition against the admission of hearsay. These include:

- Prior statements by a complainant under the age of 13 or a person who is a “moderately, severely or profoundly mentally retarded person.” 725 ILCS 5/115-10
- Prior inconsistent statements. 725 ILCS 5/115-10.1
- Prior statements when a witness refuses to testify despite a court order. 725 ILCS 5/115-10.2
- Prior statements of elder adults. 725 ILCS 5/115-10.3
- Prior statements of a declarant who is deceased. 725 ILCS 5/115-10.4
- Testimony of a qualified individual that the property is a “safe zone.” 725 ILCS 5/115-10.5

Each statute contains specific requirements for the admission of the type of statements at issue. While all of these exceptions may not be relevant to all juvenile proceedings, an understanding of some of the more relevant provisions is useful.

Motions filed pursuant to 725 ILCS 5/115-10

Section 115-10 governs the admissibility of prior inconsistent statements in certain enumerated offenses involving complainants under the age of 13. Because it is not uncommon for juveniles to be charged with crimes (particularly sex offenses, which are listed in this section) involving complainants who, like the minors themselves, also are young, this statute may be applied in delinquency cases. Thus, pursuant to 115-10, the child’s statement made to another person is admissible where the child complains of the relevant sexual or physical act or describes any act that is the element of an offense, where such offense is subject of the prosecution for which the child (or mentally retarded person) is a victim, as long as the following are satisfied:

1. the court finds in a hearing outside the jury’s presence that the time, content and circumstances of the statement provide sufficient safeguards of reliability; and
2. the child either testifies at the proceeding *or* is unavailable as a witness, and there is corroborative evidence of the act which is the subject of the statement. 725 ILCS 5/115-10.

The statute requires that the prosecution give the defense notice of its intent to introduce a complainant’s prior statement. 725 ILCS 5/115-10. Therefore, attorneys likely will need to prepare to oppose the prosecution’s motion to admit testimony pursuant to this

statute or will need to prepare a motion to bar such testimony. The admissibility of the statement then will be litigated at a hearing prior to the trial.

The viability of 725 ILCS 5/115-10, as well as other statutory and non-statutory hearsay exceptions, has been the subject of much litigation since the United States Supreme Court's decision in the landmark Confrontation Clause case, *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the United States Supreme Court held that prior testimonial out-of-court statements of witnesses who do not testify at trial violated a defendant's constitutional right to confront the witnesses against him, unless the defendant had a prior opportunity to cross-examine the witness *and* the witness was unavailable to testify at trial. While *Crawford* itself did not specifically define the term "testimonial," the *Crawford* Court observed that it referred to *ex parte* testimony or its "functional equivalent," (*e.g.*, affidavits, custodial examinations, and pretrial statements that the declarant would reasonably expect to be used in prosecution) and applied "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id.* at 51-52, 68.

Since the *Crawford* decision, Illinois courts have further specified to which categories of statements *Crawford* applies. The Illinois Supreme Court has suggested that whether a statement is "testimonial" depends on whether "the objective circumstances indicate that a reasonable person in the declarant's position would have anticipated that his statement likely would be used in prosecution." *People v. Stechly*, 225 Ill. 2d 246, 292, 870 N.E.2d 333 (2007). As such, statements which are elicited by DCFS workers, medical workers, social workers, and others acting as agents of law enforcement (including those who are "mandated reporters" required to report abuse and neglect and to testify in court pursuant to 325 ILCS 5/4), may be viewed as testimonial depending on various factors (*e.g.*, whether the person taking the statement is acting on behalf of the police or for the purpose of prosecution). *Id.* at 297-303.

Additionally, Illinois courts generally have held that *Crawford's* principles are not violated where the declarant appears at trial and is subject to cross-examination. See *People v. Miller*, 363 Ill.App.3d 67, 75, 842 N.E.2d 290 (1st Dist. 2005); *People v. Monroe*, 366 Ill.App.3d 1080, 1087, 852 N.E.2d 888 (2d Dist. 2006).

The implication of the decision in *Crawford* is that, whenever a juvenile complainant's prior statement potentially will be used at trial, defense attorneys should prepare to challenge the statement on grounds that it violates the juvenile defendant's right of confrontation. The following grounds may provide a basis to prevent the statement from being introduced at trial:

- the child complainant's prior statement against the child defendant was made to the police, a DCFS worker, or someone in a law enforcement position, where such statement reasonably could be anticipated to be used in litigation;
- the child complainant is not going to testify at trial;

- the child complainant testifies but, during his or her testimony, claims to have forgotten the incident, refuses to testify, or otherwise fails to testify regarding the prior statement. In this case, the attorney may be able to argue that there were no opportunity to cross-examine the witness as required by *Crawford* and other Confrontation Clause cases. See *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (Confrontation Clause is “generally satisfied when the defense is given a full and fair opportunity to probe and expose [...] infirmities through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness’s testimony.”) *People v. Yarbrough*, 166 Ill. App.3d 825, 831, 520 N.E.2d 1116 (5th Dist. 1988) (in context of section 115-10.1, witness’s lack of memory regarding his prior testimony effectively made impossible any cross-examination regarding his prior statements).

There is one notable exception to the application of the Confrontation Clause discussed in the *Crawford* decision. If the juvenile defendant *causes* the witness’s unavailability, then the juvenile defendant is precluded from raising a Confrontation Clause claim under the doctrine of forfeiture by wrongdoing. *Stechly*, 225 Ill. 2d at 268-78. In order to invoke this doctrine, the State must show by a preponderance of the evidence that the defendant “intended by his actions to procure the witness’s absence.” *Id.* at 277. Therefore, if the defendant’s actions – for example, threatening the witness with harm if the witness testifies in court – demonstrate that the defendant intended to prevent the witness from testifying, then *Crawford*’s protections will not apply.

Motions to admit prior inconsistent statements

As noted above, Illinois statutory scheme also provides for the admission of certain prior inconsistent statements that meet particularized requirements. According to 725 ILCS 5/115-10.1, a prior statement is admissible if:

1. the statement is inconsistent with the witnesses’ prior trial testimony; and
2. the witness is subject to cross-examination concerning the statement; and
3. either
 - a) the statement was made under oath at a hearing or trial; *or*
 - b) the statement narrates or describes an event of which the witness had personal knowledge; *and*
4.
 - a) the statement is proved to be written or signed by the witness; or
 - b) the witness acknowledges the making of the prior statement under oath at the trial or at another trial or hearing; or
 - c) the statement is shown to have been accurately recorded. 725 ILCS 5/115-10.1.

Given the somewhat stringent requirements of the statute, lawyers must take specific steps to comply with the statute in order to admit a prior statement pursuant to section

115-10.1. Defense attorneys should be aware of what is required under this section -- 115-10.1 can be useful to attorneys who want to admit the prior statement of a State witness whose prior statement contradicts the witness's trial testimony, or even a defense witness who changes his testimony at trial or cannot seem to recall the details of his prior statement. Alternatively, attorneys should be prepared to challenge such statements introduced by the State that do not meet these requirements.

Statements that do not meet the requirements of 115-10.1 still may be admitted to impeach the witness (that is, to undermine the witness's credibility), but do not constitute substantive evidence. Because impeachment evidence is not really evidence, it cannot be considered by the court for its substance. Nonetheless, it can be used to undermine a witness's credibility or to weaken the witness's trial testimony. The difference between impeachment and substantive evidence is particularly important in jury trials, where the jury can be specifically admonished not to consider the prior statement as substantive evidence if it does not meet the requirements of 115-10.1. This is useful in a situation where the State attempts to introduce a defense witness's prior statement incriminating the defendant, because it means that the State cannot argue that the prior statement is the truth, but must only suggest that the contradiction between the statement and the witness's testimony means that the witness is not credible.

Similar to section 115-10, under *Crawford* and the Confrontation Clause, attorneys also may be able to challenge the admissibility of a prior inconsistent statement where the witness appears on the witness stand but, during his or her testimony, claims to have forgotten the incident, refuses to testify, invokes the Fifth Amendment privilege against self-incrimination, or otherwise fails to testify regarding the prior statement. *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965); *People v. Redd*, 135 Ill.2d 252 (1990) (where the witness had asserted his Fifth Amendment privilege and refused to testify, the substantive admission of the witness's grand jury testimony violated the "subject to cross-examination" requirement of section 115-10.1); *Yarbrough*, 166 Ill.App.3d. at 831.

8.2.3 Motions to bar evidence (motions *in limine*)

Motions *in limine* are used by attorneys seeking to bar evidence from being admitted at trial. Typically, these motions include those to preclude evidence based on hearsay, prejudice, privilege or irrelevance. *Id.*

Defense attorneys should file motions *in limine* prior to trial whenever they are aware of the possibility that the prosecution may try to admit inadmissible evidence in the case. Because a motion *in limine* also can be used to prevent the State from even mentioning the improper evidence, it can be useful in a jury trial, particularly where the attorney believes that the State may try to alert the jury to the inadmissible evidence. The following are some points to consider when raising a motion *in limine*:

- Raise the motion in advance of the trial, if possible, as opposed to the day of trial (or even during trial). This increases the likelihood that the court will grant the motion because it allows the court to carefully consider the issue, rather

than making an impulsive decision or denying the motion as punishment for the tardy failure to raise it.

- Raise the motion in writing to ensure a complete record.
- Be aware that in a bench trial, a motion *in limine* will alert the judge to possibly damaging or prejudicial information prior to the trial, and thus may prejudice the judge against the client in advance of the trial. If this is a concern, consider requesting that another judge hear the motion or asking for the judge to recuse himself after the motion has been ruled upon.
- In the motion, request that the prosecution be barred from mentioning or making any reference to the evidence.
- If the motion is granted, discuss with the State and the judge the parameters of the court's ruling so that all parties are clear about what can and cannot be said during the trial.
- If the motion is granted, the juvenile's attorney should not open the door to the evidence herself. Doing so may cause the court to reverse its ruling on the the motion and allow the State to mention the evidence. Ask the State to admonish its witnesses of the pretrial ruling.
- If the State mentions the evidence despite the motion, object immediately and move to strike the evidence. If before a jury, ask for a sidebar if it appears that the court has forgotten the previous ruling or there is another related issue. Even if the judge sustains the ruling and strikes the evidence, consider moving for a mistrial based on the fact that the cat is now "out of the bag."
- If the juvenile's attorney is not successful in persuading the court to grant the motion, raise the objection again when the State raises the objectionable evidence. It is possible that the court will reverse its previous ruling when it hears the evidence in context.
- If the court reserves its ruling on the motion, raise it again during trial before the State introduces the evidence and again, after the State mentions the evidence.



Motions in limine are used by attorneys seeking to bar evidence from being admitted at trial.

- Be strategic. In some instances, it may not be desirable to raise the issue in a motion if it is uncertain that the State will introduce the evidence or if the evidence should not be highlighted.

8.2.4 Motions to request the appointment of experts

Motions to request experts are discussed in Chapter 3. These may be brought before the court as an *ex parte* motion. As discussed in Chapters 3 and 6, the attorney should consider filing motions to request evidentiary experts as well as medical, social and psychological experts.

8.2.5 Other motions

Defense attorneys must be prepared to raise any other issue by motion as necessary. Examples include motions raising witness competency and the defendant's fitness to stand trial (Chapter 3), discovery-related motions (Chapter 6) and motions to sever (where the State charges co-defendants jointly for the same offense).

Summary

Pre-adjudication motion practice is essential to developing a defense in a juvenile case. In addition to limiting the evidence that the State may be able to present at the juvenile's trial (and ensuring that the defense is able to present crucial evidence of its own), zealous pre-adjudication advocacy can assist in building a relationship with a client and in increasing the child's confidence in the juvenile court process. Attorneys, therefore, should be aware of the various types of motions available and be prepared to use them effectively.



Chapter 8 Checklist

- ✓ Be prepared to raise and argue motions at every stage before adjudication in order to develop a strong defense case, build a better relationship with the juvenile client, and set the stage for a reasonable plea and disposition.
- ✓ At the detention and probable cause hearings, be prepared to challenge the basis for the detention and whether there was probable cause to arrest the child.
- ✓ Raise discovery-related motions as early as possible in the case to obtain evidence from the prosecution, police or other third parties, or to obtain forensic, medical or mental health experts.
- ✓ Consider the possibility of filing a motion to suppress evidence or statements, when the police obtain crucial evidence or incriminating statements from the juvenile defendant, particularly where the police: 1) have no warrant for the search or arrest; 2) exceed the scope of the warrant; or 3) take a statement from the juvenile.
- ✓ File motions challenging the admission of evidence pursuant to the hearsay rule or to Illinois's statutory exceptions to the hearsay rule; in particular, where the State moves to admit the prior statements of child complainants or other prior inconsistent statements. Also, be aware of these statutory exceptions in order to introduce evidence pursuant to these exceptions.
- ✓ If the State seeks to introduce the prior statements of a complainant or witness, examine whether the statement is "testimonial," particularly if the complainant is not going to testify at trial, if the juvenile defendant was not given a prior opportunity to cross-examine the complainant or witness, or if the witness or complainant testifies but cannot be properly cross-examined due to the witness's or complainant's refusal to testify, memory loss, invocation of the privilege against self-incrimination or any other circumstance.
- ✓ File motions *in limine* to bar the State from introducing evidence of, or referring to, inadmissible evidence. If the State introduces the evidence despite the court's ruling on the evidence, object, move to strike the evidence and consider moving for a mistrial.

Chapter 9

Transfer to Criminal Court and Extended Jurisdiction



Some children, by virtue of their age, type of offense, and other factors, are transferred to adult criminal court. These children do not receive the various services and dispositional options offered to children in juvenile court and instead, are subjected to the processes and types of sentences typical of adult criminal cases. Similarly, children who are subject to extended jurisdiction, or so-called “blended” sentences, face potentially severe consequences – the imposition of an adult sentence – if they are not successful in completing the juvenile sentence. Therefore, defense attorneys should be familiar with the applicable transfer procedures and be prepared to advocate against transfer or an extended jurisdiction designation.

9.1 Illinois’s Transfer Statutes, the Types of Transfer and their Consequences



Points to Remember

- *There are four types of transfer, each of which provides the attorney with different methods to challenge the transfer – automatic, mandatory, presumptive and discretionary transfers.*
- *Transfer proceedings are the method by which children are transferred to adult court for certain offenses.*
- *Extended jurisdiction is a type of so-called “blended” sentencing whereby the minor receives a juvenile and an adult sentence, and must serve the adult sentence if he fails to successfully complete the juvenile sentence.*
- *The consequences of transfer or extended jurisdiction can be severe, subjecting the child to lengthy adult sentences and a public, permanent record, and depriving children of the services and dispositional options available in juvenile court.*

The term “transfer” refers to a juvenile’s transfer to adult criminal court and the imposition of adult sentences. The consequences of a guilty verdict in adult court may include many years in prison or even a life sentence without the possibility of parole. Juveniles transferred to adult criminal court are entitled to the same protections as adults; in particular, the right to a jury trial, which is not afforded to juveniles in juvenile courts. Even in extended jurisdiction cases (*see infra*, section 9.1.5), where the child may be subject to an adult sentence if he violates the juvenile court sentence or commits a new offense, a juvenile also is entitled to a jury trial, based on the potential imposition of the adult sentence. 705 ILCS 405/5-810 (3); *In re J.W.*, 346 Ill. App. 3d 1, 804 N.E.2d 1094 (1st Dist. 2004).

Many state statutes, including in Illinois, are rooted in the due process requirements in *Kent v. United States*, 383 U.S. 541 (1966), holding that transfer hearings must comport with due process, fairness and statutory requirements. *Kent*, 383 U.S. at 552-53; *People v. Clark*, 119 Ill.2d 1, 8-12, 518 N.E.2d 138 (1987); *People v. Taylor*, 76 Ill.2d 289, 298-300, 391 N.E.2d 366, 370-71 (1979). The State typically has the burden to present adequate evidence supporting the judge’s decision to transfer. *People v. Ollins*, 231 Ill.App.3d 243, 606 N.E.2d 192, 197 (1st Dist. 1992). Illinois’ current version of the transfer statute and the relevant factors applicable to transfer decisions are detailed below.

9.1.1 Automatic transfer

The term “automatic transfer” refers to the class of potential juvenile cases automatically excluded from the jurisdiction of the juvenile court pursuant to 705 ILCS 405/5-130. Children are subject to automatic transfer to adult criminal court where:

1. the child is at least 15 years old at the time of the offense; and
2. the child is charged with one of the following:
 - a) first degree murder;
 - b) aggravated criminal sexual assault;
 - c) aggravated battery with a firearm where the minor personally discharged a firearm;
 - d) armed robbery with a firearm;
 - e) aggravated vehicular hijacking with a firearm; or
 - f) unlawful use of a weapon while in school (depending on the type of weapon and circumstances involved), regardless of the time of day or the time of year; or on the real property comprising any school, regardless of the time of day or the time of year. 705 ILCS 405/5-130(1)(a), (3)(a).

A case brought under the automatic transfer provision is filed directly in adult court. There is no hearing in juvenile court. If the State does charge the child with one of the enumerated offenses, as well as others that are not enumerated, the child must be tried in criminal court on all of the charges. 705 ILCS 405/5-130(1)(b)(ii), (3)(b)(ii). If, before trial, the State files an indictment that does not contain one of the enumerated offenses, then the State can proceed only in juvenile court unless the child waives juvenile court jurisdiction. 705 ILCS 405/5-130(1)(b)(i), (3)(b)(ii).

If, after a trial, the State does not prevail on the transfer offense and the court enters a finding of not guilty on that offense, the child must be sentenced under the Juvenile Court Act (sections 5-705 and 5-710) unless the State moves, within 10 days of the verdict, to sentence the child under the criminal code and the court agrees after conducting a hearing on the matter. *See* 705 ILCS 405/5-130(1)(c)(ii), (3)(c)(ii). The court's decision to sentence the child under the criminal code may be based on the following:

- evidence that the offense was committed in an aggressive or premeditated manner;
- age of the child;
- child's history;
- availability of juvenile court services to rehabilitate or treat the minor;
- security of the public; and
- whether the child possessed a deadly weapon when committing the offense. 705 ILCS 405/5-130(1)(c)(ii), (3)(c)(ii).

9.1.2 Mandatory transfer

The State may file a motion to transfer based on the mandatory transfer provision. This motion is filed in juvenile court. The State is required to prove at the hearing there is probable cause that:

1. The minor is at least 15 years old and committed a forcible felony;
2. The child was previously adjudicated delinquent or found guilty of a felony; and
3. The act that constitutes the offense was committed in furtherance of criminal activity by an organized gang;

OR

1. The minor is at least 15 years old and committed a felony;
2. The child was previously adjudicated delinquent or found guilty of a forcible felony; and
3. The act that constitutes the offense was committed in furtherance of criminal activity by an organized gang;

OR

1. The minor is at least 15 years old and committed an enumerated offense under the presumptive transfer provisions (705 ILCS 405/5-805(2)) (*See infra* section 9.1.3); and
2. The minor was previously adjudicated delinquent or found guilty of a forcible felony;

OR

The minor is at least 15 years old and committed aggravated discharge of a firearm either in a school, on school property, within 1000 feet of school property, at a school-related activity, or while boarding, riding, or exiting any vehicle used to transport students to school or school-related activities. 705 ILCS 405/5-805.

9.1.3 Presumptive transfer

The presumptive transfer statute provides that, if the juvenile court judge finds probable cause exists to believe the allegations in the petition are true, then there is a “rebuttable presumption” that the juvenile defendant should be transferred to criminal court under certain conditions. According to the statute, this rebuttable presumption takes effect when the State proves there is probable cause that:

1. The child is at least 15 years old; and
2. He or she committed one of the following offenses:
 - a) a Class X offense other than armed violence;
 - b) aggravated discharge of a firearm;
 - c) armed violence with a firearm where the predicate offense is a Class 1 or Class 2 felony, and the State’s motion to transfer alleges that the offense was committed in furtherance of the criminal activities of an organized gang;
 - d) armed violence with a firearm when the predicate offense violates the Illinois Controlled Substances Act, the Cannabis Control Act, or the Methamphetamine Control and Community Protection Act;
 - e) armed violence with a machine gun or other weapon described in 720 ILCS 5/24-1(a)(7);
 - f) an act in violation of Section 401 of the Illinois Controlled Substances Act (720 ILCS 570/401), which is a Class X felony (possession, delivery or intent to deliver certain drugs), while in school, or on a vehicle transporting students to or from school or a school-related activity, or on the property of a public housing agency;
 - g) an act in violation of Section 401 of the Illinois Controlled Substances Act (720 ILCS 570/401) within a school or on a public way within 1000 feet of the school, when the delivery or intended delivery of the controlled substance is to a person under 17 years old. 705 ILCS 405/5-805(2)(a).

While a finding of probable cause of the existence of these factors creates a presumption that the minor will be transferred to adult criminal court, this presumption may be rebutted if the judge finds, based on “clear and convincing” evidence, that the minor would benefit from the programs and services of juvenile court. The court’s assessment is based on the following factors:

1. The child’s age;
2. The child’s history, including: a) any history of delinquency, b) any previous history of abuse and neglect; c) any mental health, physical or educational history, or d) any combination of these factors;

3. The circumstances of the offense, including: a) seriousness of the offense; b) whether the child is charged as the principal or someone accountable for the offense; c) evidence the offense was committed in an aggressive and premeditated manner; d) evidence the offense caused serious bodily harm; and e) evidence the minor possessed a deadly weapon;
4. Advantages inherent in the juvenile treatment, including treatment and services; and
5. Whether concern over public safety requires that the child be sentenced under the Criminal Code of Corrections, considering: a) the child's history of services and willingness to participate in available services; b) whether there is a reasonable likelihood that the child can be rehabilitated before the expiration of juvenile court jurisdiction (at age 21); and c) the adequacy of punishment or services.

In considering these factors, the court must give greater weight to the seriousness of the alleged offense and the minor's prior record of delinquency than to other factors. 705 ILCS 405/5-802(2)(b).

9.1.4 Discretionary transfer

The juvenile court judge also has the discretion to transfer to adult court any child at least 13 years old who is charged with an offense in juvenile court, if the judge finds there is probable cause to believe that the petition's allegations are true and that it is not in the public's best interests to proceed in the juvenile court. In making this determination, the State proves that there is probable cause with respect to the following factors:

1. The child is at least 13 years old;
2. The child has: a) previous criminal or delinquency history; b) previous abuse and neglect history; or c) any negative mental health, physical or educational history; or d) any combination of these factors;
3. The circumstances of the offense, including: a) seriousness of the offense; b) whether the minor is alleged as being accountable for the offense or the principal; c) the offense was committed in a premeditated manner; d) the offense caused serious bodily harm; and e) evidence the minor possessed a deadly weapon;
4. The advantages of treatment in the juvenile system;
5. That public safety requires sentencing under the Criminal Code, considering: a) the child's history of services and willingness to participate in available services; b) whether there is a reasonable likelihood that the child can be rehabilitated before the expiration of juvenile court jurisdiction (at age 21); and c) the adequacy of punishment or services. 705 ILCS 405/5-805(3).

In considering these factors, the court must give greater weight to the seriousness of the alleged offense and the minor's prior record of delinquency than to other factors. 705 ILCS 405/5-805(3).

Additionally, the transfer statute provides that the evidentiary rules applicable in a dispositional hearing also apply to transfer hearings. 705 ILCS 405/5-805(4) (citing 705 ILCS 405/5-705). This means that any helpful evidence may be admitted to allow the court to resolve this issue.

9.1.5 Extended Jurisdiction

Certain juveniles may not be transferred to adult court, but still may become subject to adult criminal sentences. In Illinois, this procedure, known generally as “blended sentencing,” is provided for in the extended juvenile jurisdiction (“EJJ”) statute. Under the statute, the prosecutor may file a motion to designate a proceeding as an extended jurisdiction juvenile prosecution in cases where the child is at least 13 years old and commits an offense that would be a felony if committed by an adult. 705 ILCS 405/5-810(1)(a). In such cases, if the juvenile court judge finds that probable cause exists to believe the allegations in the petition, then there is a rebuttable presumption that the proceeding will be designated as an extended jurisdiction juvenile proceeding.

However, this presumption may be rebutted based on the following factors:

- the age of the minor;
- the history of the minor, including history of delinquency or criminal activity, abuse and neglect, mental and physical health, and educational background;
- the circumstances of the offense, including the seriousness of the offense, whether the minor is charged based on an accountability theory, whether there is evidence the offense was committed in an aggressive and premeditated manner, whether there is evidence the offense caused serious bodily harm, and whether there is evidence the minor possessed a deadly weapon;
- advantages of treatment within the juvenile justice system;
- whether the security of the public requires sentencing under Chapter V of the Unified Code of Corrections: (1) the minor’s history of services, including the minor’s willingness to participate meaningfully in available services; (2) whether there is a reasonable likelihood that the minor can be rehabilitated before the expiration of the juvenile court’s jurisdiction; (3) the adequacy of the punishment or services.

In considering these factors, the court must give greater weight to the seriousness of the alleged offense and the minor’s prior record of delinquency than to other factors. 705 ILCS 405/5-810(1)(b).

The consequence of an extended jurisdiction designation is great. If the minor is adjudicated delinquent, he is given an adult sentence as well as a juvenile sentence. 705 ILCS 405/5-810(4). If the minor successfully completes his juvenile sentence, the adult sentence is vacated. 705 ILCS 405/5-810(7). However, if the minor violates his juvenile sentence, the adult sentence will be imposed. 705 ILCS 405/5-810(6). In such cases, the judge can issue a warrant for the child’s arrest. If the judge finds, after a hearing, that the child committed a new offense, the judge must impose the new sentence. *Id.* If the

judge finds that the child committed any other violation of the sentence, the judge may either impose the adult sentence or order the continuation of the juvenile sentence. *Id.*

Extended jurisdiction was intended to serve as an *alternative* to transfer to adult court. If transfer is inappropriate in a given case, extended jurisdiction also may be inappropriate. Attorneys should bear this in mind when defending against a motion to designate a proceeding under EJJ, and should consider arguing against an EJJ designation in cases where transfer also would be inappropriate.

9.2 Strategies for Avoiding and Dealing with Transfer: Advocacy Before, During and After the Hearing



Points to Remember

- *In cases involving automatic or mandatory transfer, the attorney should try to intervene early to assess whether the prosecutor will reduce the charges to a non-transferable offense.*
- *In cases involving mandatory, presumptive and discretionary transfers, attorneys should challenge aggressively the finding of probable cause whenever there is a basis to do so.*
- *In cases involving presumptive or discretionary transfer or an extended jurisdiction designation where the court considers many factors in determining whether to transfer the child, the attorney's zealous advocacy at the transfer hearing can result in avoiding transfer.*
- *Attorneys should file a formal written response or objection to the State's motion to transfer a case or designate it as an extended jurisdiction proceeding, setting forth the reasons that the transfer or designation is inappropriate.*
- *Attorneys should prepare for transfer and extended jurisdiction hearings as they would for a trial, by speaking with the juvenile, investigating the case and the child's background and social history in great detail, questioning the State's witnesses and testimony and presenting evidence and testimony.*
- *Given the relaxed evidentiary standards applicable at transfer and EJJ hearings, attorneys should be broad and creative in investigating and presenting relevant evidence and testimony to convince the judge that transfer is not appropriate.*

- *Attorneys should not hesitate to use experts, where appropriate, to argue against transfer.*
- *Attorneys should be prepared to ask the court to reconsider a decision to transfer or apply an extended jurisdiction designation to the case, and should know how and when to appeal these decisions. While attorneys can and should challenge these decisions in the criminal or juvenile courts immediately following the transfer or EJJ hearing, attorneys typically can appeal the transfer designation only after the child is sentenced in adult court, but may appeal the propriety of the EJJ designation after the juvenile disposition has been imposed.*

Whenever the State moves to transfer a juvenile case to adult criminal court or to designate a proceeding as EJJ, the juvenile's attorney should consider filing a formal response or objection to the motion, setting forth the reasons that the transfer or designation is inappropriate. The response may include State and federal constitutional challenges, including:

- Violations of *Apprendi v. New Jersey*, 530 U.S. 466 , 490 (2000) (on the basis that the sentence exceeds the statutory maximum without affording the minor the right to have a jury determine the factors supporting the increased sentence beyond a reasonable doubt);
- Eighth Amendment (cruel and unusual punishment); and
- Equal Protection/Due Process under the Fifth and Fourteenth Amendment and Article I, Section 2 of the Illinois Constitution.

Automatic and mandatory transfers

In automatic transfer cases, there may be little that the juvenile defense attorney can do to avoid transfer once the prosecutor has issued charges against the child. However, in mandatory transfer cases, the attorney may be able to take some steps to prevent transfer to adult criminal court. This opportunity at prevention occurs because the State, in order to achieve mandatory prevention, initially must demonstrate that there is probable cause to support the allegations in the petition and those allegations that pertain to the factors relevant to mandatory transfer. Therefore, the attorney should:

1. Speak with the juvenile to determine the facts of the offense and whether there are defects or errors in the petition's allegations; and prepare to challenge these defects and errors, particularly with respect to:
 - a) the child's age (whether he is at least 15 years old);

- b) the child’s prior record (whether he was previously adjudicated delinquent of a felony or forcible felony);
 - c) the instant offense (whether it is a felony or forcible felony); and
 - d) the facts alleged as they pertain to the necessary factors for mandatory transfer, including the type of offense involved, whether there is evidence a gun was used, whether there is evidence of gang activity, and whether there is evidence the offense occurred during school or at a school-related activity.
2. Challenge the basis for a finding of probable cause with respect to the offense, *even if the court initially found probable cause at the time of the detention hearing*. See *In re R.L.*, 282 Ill.App.3d 839, 847, 668 N.E.2d 70, 74 (1st Dist. 1996) (fundamental fairness requirements as outlined in *Kent v. United States* demand that the minor receive a separate hearing or determination of probable cause at the time of the transfer hearing). In so doing, the attorney should consider asking the court to allow the defense to present witnesses on the issue of probable cause and arguing that the defendant has the right to do so.
 3. If the case is transferred to adult criminal court, meet with the juvenile to discuss the ramifications of the transfer, and whether a new attorney will represent the child; also, if applicable, meet with the new attorney to apprise her of the case and to provide her with relevant files and information.

Presumptive and discretionary transfer

In cases involving discretionary or presumptive transfer, the attorney has more latitude to challenge the transfer than in automatic or mandatory transfer cases. Initially, as in mandatory transfer cases, the attorney should speak to the child to verify information regarding the child’s age and the nature of the offense, and should challenge probable cause. A more detailed discussion regarding representation at the probable cause hearing can be found in Chapter 5.

In presumptive and discretionary transfer cases, the juvenile court holds a transfer hearing to determine whether transfer is appropriate. Thus, attorneys should be familiar with the factors relevant to the judge’s determination to transfer the case and should be prepared to advocate against the transfer in the hearing. In particular, the attorney should:

1. Speak with the juvenile to gather any information regarding the child’s educational background, family history, and mental health, as well as his role in the offense, and whether he should testify at the hearing, including the substance of the hearing;
2. Research the child’s history with the juvenile court system or services, as well as information regarding available services which may be helpful to the child;
3. Prepare to present relevant witnesses at the transfer hearing, including the child, his parents or family members, teachers, community members, and reports or testimony by psychologists and psychiatrists and others who can demonstrate mitigating circumstances that weigh against transferring the child;

4. Be creative in your approach to crafting arguments regarding the relevant factors. For example, in discussing the child's age, the attorney may consider going beyond the child's chronological years, and putting on an expert to address the child's brain development and its impact on the child's decision-making ability and amenability to rehabilitation;
5. Consider presenting testimony by service providers, such as administrators of treatment programs, who can tell the court the services they offer, the client's eligibility for the program, and whether the program will be helpful in rehabilitating or treating the child;
6. Request that the Assistant State's Attorney provide you in advance of the hearing with the name of any witness he or she intends to present at the transfer hearing, as well as any relevant documentation, so that you can counter it;
7. Present available evidence of the detrimental effects of transfer, including, but not limited to, recidivism rates and suicide; and
8. Treat the transfer hearing generally as you would a trial. Make opening and closing statements that take into account the relevant factors, present witnesses, cross-examine the State's witnesses, and object to any evidence that is inaccurate or incomplete, bearing in mind that all evidence that is helpful to the court in determining the issue will be admissible to the extent of its probative value, even if such evidence would not be admissible at trial. 705 ILCS 405/5-805(4).

Extended jurisdiction

In preparing to challenge an EJJ designation, attorneys should recognize that if transfer is inappropriate in a given case, then EJJ also is likely inappropriate. Thus, there may be similar grounds on which to challenge the child's EJJ designation.

Given that the ultimate result in designating a proceeding as EJJ can be just as serious as a negative result in a transfer proceeding, attorneys should take any and all steps to prepare for an EJJ hearing as they would to prepare for a transfer hearing. As noted in the previous discussions of automatic, mandatory and presumptive transfers, this includes speaking with the child to gather background information, gathering information regarding the child's history with juvenile court services, investigating potential witnesses and preparing to challenge the State's witnesses. In addition to challenging the designation at a hearing by presenting evidence and witnesses, cross-examining the State's witnesses and objecting to inaccurate or incomplete information, attorneys facing an EJJ designation for their clients also can take the following steps:

1. If the court ultimately designates the proceeding as subject to EJJ and orders the imposition of juvenile and adult sentences, the attorney should seek the lowest possible adult sentence available, based on the client's youth and any other pertinent mitigating factors. An offender's youthful age is a mitigating factor, which can support a lower sentence;
2. Ask the court for clarification of the conditions that will trigger the imposition of the adult sentence. The EJJ statute is not clear as to what new offenses or violations of the juvenile sentence will trigger the new offense, and this decision may be within the juvenile court judge's discretion, *See Megan M. Sulok, Extended Jurisdiction Juvenile Prosecutions: To Revoke Or Not To Revoke*, 39 Loy. U. Chi. L. J. 215, 258-59 (2007). Ask for as much clarity as possible;
3. Move to reconsider the EJJ designation if new facts come to light prior to the trial that suggest it was improperly imposed;
4. Generally, children subjected to transfer to adult court or an EJJ designation are afforded the same rights as adults. Therefore, although children in juvenile court are not usually entitled to a jury trial, they are given this right when transferred to adult criminal court or where the proceeding is designated as an EJJ case. *See 705 ILCS 405/5-810(3); In re J.W.*, 346 Ill. App. 3d 1, 10-11, 804 N.E.2d 1094 (1st Dist. 2004). Therefore, attorneys should be prepared to request a jury trial in the event that the case is designated as an EJJ proceeding;
5. Move to reconsider the juvenile sentence if it appears unfair, unduly burdensome, or if it contains too many difficult requirements;
6. Speak with the juvenile regarding the necessity of complying with the juvenile sentence if and when it is imposed, and the need to avoid committing new offenses or being subject to arrest while serving the juvenile sentence;
7. If appropriate, and with the child's consent, cultivate a positive relationship with the child's probation officer, and inform him or her of any improvements or positive developments concerning the child;



Given that the ultimate result in designating a proceeding as EJJ can be just as serious as a negative result in a transfer proceeding, attorneys should take any and all steps to prepare for an EJJ hearing as they would to prepare for a transfer hearing.

8. If appropriate, and with the child's consent, request a status date at some point in the future to allow the court to reconsider the juvenile sentence and consider vacating the adult sentence;
9. In order to make a record of institutional failures should a violation occur, hold the probation officer or the Department of Juvenile Justice accountable by asking the court to order reports on how they are meeting the child's needs; and
10. If the State moves to impose the adult sentence based on a violation of the juvenile sentence or a new offense, challenge at the hearing the purported violation or new offense in the same manner in which an attorney would defend against substantive charges. Be aware that the State bears the burden of proving the violation or offense only by a preponderance of the evidence. 705 ILCS 405/5-810(6).

Where the State moves to file for transfer and EJJ simultaneously, the attorney should consider whether she should ask the court for a ruling on transfer prior to the EJJ hearing. So doing may allow the attorney an opportunity to determine whether she should argue that EJJ is a more appropriate alternative to transfer in that particular case.

Be creative in investigating and presenting evidence and testimony at transfer or EJJ hearings

One cannot overstate the importance of the transfer or EJJ hearing. Even though the evidentiary rules are somewhat relaxed at these hearings, attorneys should be prepared to present any testimony or evidence that will convince the court to avoid transfer or an EJJ designation. While it is obvious that an attorney should strive to address any factor relevant to the transfer or EJJ designation, it may not be obvious that many types of evidence arguably are relevant to the transfer or EJJ determination and, thus, can be admitted at the transfer hearing. Moreover, given the broad evidentiary guidelines applicable at such hearings, defense attorneys should not hesitate to be creative and vigorous in investigating and presenting evidence that demonstrates why the child should remain in juvenile court and receive a juvenile disposition. Some types of evidence which should be investigated or presented include:

- A social investigation of the child's history and family background, conducted by a social worker hired by the defense;
- Psychiatric or psychological evaluations or testimony to show that the child either lacks or has lesser culpability for the offense due to his mental state at that time, or to demonstrate that the child would be better served and is amenable to treatment by juvenile court services;
- Interviews, affidavits or testimony by family, friends, educators or community members regarding the child's personal characteristics, such as his ability to be rehabilitated, their knowledge of any childlike behavior, or his lack of gang involvement;
- Experts who can testify to the fact that the adult criminal system is not suitable for the child;

- Photos of the child taken around the time of the offense, to demonstrate his youth, particularly when there is a significant lapse between the offense and the time of the transfer hearing;
- Testimony by witnesses to the offense who can testify to the child's lack of involvement in or lack of culpability for the offense;
- Medical testimony or reports regarding the influence that particular drugs or alcohol may have had on the child at the time of the offense; and
- Any evidence which humanizes the child and suggests that he would be appropriately served by the juvenile court.

In other words, attorneys preparing for a transfer or EJJ hearing should think broadly about potential evidence. As such, the attorney should take a view of considering the child's entire life and history in order to cultivate evidence that will be useful at the transfer or EJJ hearing. Based on the attorney's assessment of this evidence, she should be prepared to request that the court allow the presentation of relevant evidence or testimony and the retention of experts as appropriate. Further information on filing motions to hire experts can be found in Chapters 3 and 8.



Tip

Because the facts regarding the offense itself and the child's criminal history are important considerations in these types of hearings, attorneys may be tempted to put the child on the witness stand to testify at the transfer or EJJ hearing. However, in most cases, this is not an appropriate or effective strategy because it may put the child in a position of waiving his right not to incriminate himself, and may result in damaging testimony. Therefore, attorneys should present evidence, without presenting the child's testimony.

Appealing the transfer or EJJ designation

Juveniles do not have a constitutional right to an immediate (interlocutory) appeal of a transfer to adult court. *See People v. Taylor*, 76 Ill. 2d 289, 307-08, 391 N.E.2d 366 (1979). Juveniles may challenge the EJJ designation on appeal after the juvenile sentence has been imposed, but can challenge the constitutionality of the provisions related to imposing the adult portion of the sentence only *after* they have received the adult sentence. *See In re J.W.*, 346 Ill.App.3d 1, 12-14, 804 N.E.2d 1094 (1st Dist. 2004) (following his disposition and the imposition of the juvenile sentence, minor could appeal the propriety of the EJJ designation itself, but could not appeal the constitutionality of the revocation provisions because they implicated the adult sentence, which the minor was not yet required to serve); *see also In re Christopher K.*, 217 Ill.2d 348, 359, 841 N.E.2d 945, 952 (2005) (minor's challenge to EJJ designation rendered moot where the minor had successfully completed his juvenile sentence). Additionally, juveniles may challenge the transfer decision on appeal, following their sentencing in adult criminal court.

Attorneys who seek to challenge transfer or an EJJ designation should attempt to do so first in the juvenile court, by moving to reconsider the transfer or EJJ designation. If this is unsuccessful, the attorney should file a notice of appeal following the imposition of a sentence in juvenile court, or following the imposition of the adult sentence, after the EJJ proceeding (if the attorney is raising an issue regarding the revocation of the juvenile sentence). Transfer decisions generally are reviewed for abuse of discretion. *In re R.L.*, 282 Ill.App.3d 839, 846, 668 N.E.2d 70 (1st Dist. 1996).



Note

If there are other issues (aside from the EJJ designation) to appeal, the attorney should file an appeal after the imposition of the juvenile sentence, as these issues likely will be considered ripe for review and may be deemed waived if not raised at that time.

The State also has the right to appeal when the trial court decides to transfer a case back to juvenile court prior to sentencing, particularly where the child ultimately is convicted of a non-transferable offense and the court determines that it, therefore, should transfer the case back to juvenile court for sentencing. Ill. Sup. Ct. R. 604(a)(1); *People v. DeJesus*, 127 Ill. 2d 486, 537 N.E.2d 800 (1989); *People v. A.T.*, 303 Ill.App.3d 531, 534-35, 708 N.E.2d 529 (2d Dist. 1999). However, the defendant may not be incarcerated or held on bail pending the resolution of the State's appeal. Ill. Sup. Ct. R. 604(a)(3). Therefore, if the State moves to appeal the transfer back to juvenile court, the attorney should seek the child's release or move for an appeal bond for his release pending the resolution of the State's appeal.

9.3 Discussing Transfer and Extended Jurisdiction with the Client



Points to Remember

- *Transfer and extended jurisdiction are difficult concepts for children to understand and attorneys should be prepared to discuss these terms, their ramifications and consequences, and the procedures involved, and to answer any of the child's questions regarding these proceedings.*

Transfer and blended sentencing are not simple terms for most people, let alone children, to grasp and understand. Because the stakes in these types of cases often are much higher than in the average juvenile case, attorneys should communicate clearly when discussing the possibility of transfer or an extended jurisdiction designation with the child client.

Discussing the potential consequences of criminal proceedings or an adult sentence

A child without prior experience with the adult criminal system often is clueless regarding the procedures involved and the possible sentences that may be imposed on him. The following are areas that the attorney must discuss with any child facing transfer or EJJ, and with his parents:

1. **What happens if the child is transferred or the proceeding is designated as an EJJ proceeding?** The attorney should be prepared to explain the possible sentences, including any potential enhancement (*e.g.*, for carrying a firearm) or additional conditions that may be imposed. In the case of EJJ, the attorney also must make sure that the child understands what circumstances may trigger the court to give him the adult sentence, so that the child understands his obligation to comply with the juvenile sentence.
2. **Is there any reason why the child might want to be transferred?** Generally, the answer to this question is a resounding “no,” because of the lack of age-appropriate services and dispositions in criminal court, the severity of the applicable penalties, and the fact that the child will be saddled with an adult conviction, rather than a juvenile adjudication. However, in an extraordinary case, the child may want to consider transfer in order to receive a jury trial, or in the hope that an adult court judge will be more lenient in dealing with a child. For instance, the child may want to go to adult court because he believes that he will receive probation instead of a sentence of incarceration. While these instances are relatively rare, attorneys should be prepared to discuss them with the client and should be particularly prepared to discuss the long-term consequences of an adult conviction with the client, including the fact that this may mean that the child’s future cases go directly to adult court.
3. **What can the child do to avoid transfer or the EJJ designation?** The attorney should carefully explain in plain language the factors relevant to the transfer or EJJ determination, what will occur at any potential hearing, and what kind of evidence may be helpful. This allows the child to assist the attorney in providing information that may be useful at the transfer or EJJ hearing. Additionally, the attorney should inform the child if pleading to a lesser, non-transferable offense is an option that the child should consider.
4. **What is adult criminal court like and who will represent the child there?** If transfer to criminal court is a possibility, the attorney should explain the differences between criminal and juvenile court, *e.g.*, different judges, the right to a jury trial, the fact that the courtroom will be open to the public, etc. The attorney also should inform the child if the attorney will not be the same attorney who represents the child in adult criminal court. Some defender agencies typically have defenders assigned to particular adult courtrooms. The attorney, however, should make sure the child understands that the attorney will be in contact with whoever is assigned to the case in criminal court to inform them about the case.

These are just some examples of questions that may arise in transfer and EJJ cases. Attorneys should be prepared and willing to discuss this complex area of the law with the child in simple and practical terms. Attorneys should be open to answering any of the child's questions.

Summary

Transfer and extended jurisdiction are complex proceedings that can result in severe consequences for children subjected to the proceedings. As a result, attorneys should be familiar with the procedures involved, and should be prepared to advocate zealously to keep the child in juvenile court. Additionally, given the complicated and serious nature of these proceedings, attorneys should be vigilant about communicating with their young clients to ensure that these children understand the applicable procedures and potential consequences.



Chapter 9 Checklist

- ✓ Review and understand the various types of transfer proceedings and the extended jurisdiction statute when these provisions are potentially applicable, and be familiar with the relevant factors required for each.
- ✓ If possible, particularly in automatic transfer cases, intervene early to determine whether there is a possibility that the State will reduce or alter the charges to avoid these provisions, and discuss the possibility of a plea with the juvenile.
- ✓ File a formal written objection or response to the motion to transfer or to designate the proceeding as an EJJ proceeding.
- ✓ Investigate and prepare for transfer and EJJ hearings with an extensive and creative view as to the potentially relevant evidence. Information regarding the child's background, upbringing, mental and physical health, education, role in his or her family or community all can be relevant to the transfer or EJJ determination.
- ✓ Think broadly about the types of witnesses and evidence to introduce at the transfer hearing, including experts and family or community members who can testify to the child's amenability to and the appropriateness of juvenile court services.
- ✓ If unsuccessful in challenging the transfer or EJJ designation, consider moving to reconsider the decision or challenging it on appeal.
- ✓ Communicate with the child clearly and simply regarding transfer and EJJ, explaining the potential consequences, procedures and other ramifications of these provisions, and answer questions that the child or his parents may have.

Chapter 10

Plea Bargaining and Agreements in Illinois Juvenile Courts



Pleas are an essential part of juvenile litigation and can be a useful tool in obtaining a favorable disposition for the client. However, because pleas carry serious consequences, attorneys should not be too hasty to recommend that the client agree to a State offer of a plea or seek one themselves. Attorneys must take special care to ensure that their juvenile client's decision to enter a plea is both informed and voluntary. This means that attorneys must discuss any potential pleas with their juvenile clients, providing them with full information regarding the risks and benefits of entering into the plea. The child alone makes the ultimate decision on whether to plead guilty.

10.1 Types of Guilty Pleas



Points to Remember

- *The rules and procedures governing guilty pleas in adult criminal court apply to pleas in juvenile court.*
- *In negotiated pleas, the parties agree to a reduction or dismissal of some charges and/or a specific sentence or range, while in an open or blind plea, the parties do not agree to a specific sentence or range of sentence; both types of pleas have particular distinctions and requirements.*
- *When discussing the state's plea, the attorney must take care to give the child full information of the risks and benefits of accepting an offer, as well as sufficient time to make an informed and thoughtful decision. Attorneys operating in a jurisdiction where the prosecution conditions an offer on immediate acceptance should engage in a discussion with their juvenile clients regarding pleas well before the court date.*

Guilty pleas in juvenile court must receive the same protection as is constitutionally required for pleas in adult criminal cases. *In re A.G.*, 195 Ill.2d 313, 318, 746 N.E.2d 732 (2001); *cf.*, *In re Beasley*, 35 Ill.App.3d 816, 820, 342 N.E.2d 803 (1st Dist. 1976). Specifically, juvenile pleas must be made knowingly and voluntarily, as is constitutionally required in criminal cases. *In re A.G.*, 195 Ill. App. 3d at 315. The Illinois Supreme Court Rules set forth the types of pleas available in criminal (and, consequently, juvenile) proceedings. The provisions discussing pleas are found generally in Illinois Supreme Court Rules 402 and 605 and discussed in greater detail below.

“Negotiated” pleas and “open” pleas

Negotiated pleas, defined in Rule 605 (b) and (c), refer to a plea agreement in which the prosecution has (i) made concessions regarding the sentence that will be imposed, or (ii) bound itself to a specific sentence or sentencing range. Ill. Sup. Ct. R. 605(b), (c); *see also People v. Zarka-Nevling*, 308 Ill. App. 3d 516, 520-26, 720 N.E.2d 334, (4th Dist. 1999) (analyzing the distinction between open and negotiated pleas).

Example: After discussions between the juvenile’s attorney and the State, the Assistant State’s Attorney has agreed to two years of probation in exchange for the child’s guilty plea to a burglary offense.

The distinguishing feature of a negotiated plea is that it is an agreement between the parties for a specific sentence or range of sentences. The State must provide a factual basis for the plea (usually done in the form of a stipulation by the parties as to what the State would have presented as evidence). However, the judge is not required to accept the terms of the plea agreement. Ill. Sup. Ct. R. 402(d). Attorneys should familiarize themselves with the court practices to determine the likelihood of a judge accepting the plea agreement.

If the judge is made aware of the details of the plea agreement and his concurrence is conditional on the aggravation and mitigation evidence presented to him, the juvenile can decide to withdraw his guilty plea if the judge determines that a more severe disposition than what was agreed to is required. The juvenile would withdraw his plea prior to sentencing. If the plea is withdrawn, the judge must recuse himself from the case. Ill. Sup. Ct. R. 402(d)(2). If the judge is not made aware of the details of the plea agreement, the judge must inform the juvenile that if he goes forward with the plea, the judge is not bound by the agreement. Thus, prior to actually pleading guilty, the juvenile can choose to not go forward with the plea.

“Open” pleas

“Open” pleas or “blind” pleas, in contrast to negotiated pleas, refer to the type of plea where the State does not agree to any specific sentence. In such cases, the parties may indicate that they have reached an agreement, and that the State will dismiss certain charges, but the judge ultimately imposes a sentence within the applicable statutory range. Ill. Sup. Ct. R. 605(b), (c); *see also Zarka-Nevling*, 308 Ill. App. 3d at 520-26.

Even in jurisdictions where parties routinely enter into blind pleas, attorneys should consider whether there is any benefit to entering into such pleas. Because there is no agreed-upon sentence, and not necessarily any reduction in charges, the minor is required to admit culpability for the offense without any guaranteed benefit to doing so. While there may be certain exceptional cases in which such pleas are advantageous (for example, where the judge appears particularly sympathetic or the child seeks to avoid additional court involvement at all costs), this is often not the case. Thus, attorneys should carefully consider whether an “open” or “blind” plea is truly beneficial to the client.

10.2 Considerations for the Attorney in Negotiating and Agreeing to a Plea



Points to Remember

- *Attorneys have an obligation to thoroughly investigate the case and conduct discovery before entering into plea negotiations.*
- *Attorneys should be aware of all potential consequences, including long term or far-reaching consequences that may include sex offender registration, limitations on receiving college financial aid, or immigration consequences before considering whether to recommend a potential plea or plea offer to the juvenile.*

While the plea process is routine to many lawyers, they must assess each plea offer individually. Attorneys should bear in mind that the minor’s admission to the offense can lead to serious consequences, including having certain conditions imposed on the minor that restrict his freedom, such as sex offender registration, deportation, public housing eviction, and the possibility that the finding of delinquency will affect the minor’s disposition in future cases. Thus, it is important for attorneys to consider carefully the possibility of any plea, discuss it extensively with the child, and allow the child to decide what course of action to take.

10.2.1 The role of investigation and discovery in determining when to plead guilty to the offense

Except in the most exceptional cases (such as a first time misdemeanor offense where the State is offering a term of supervision and the child does not want to return to court), attorneys should not enter into a plea agreement on behalf of the child before they have the opportunity to thoroughly investigate the case. This means that attorneys generally should avoid entering into plea discussions prematurely (*e.g.*, at the first court appearance).

Conducting an investigation and engaging in discovery prior to entry of a plea is crucial and can assist the attorney in the following ways:

- Revealing the strengths and weaknesses of the State’s case, including the availability and potential testimony of witnesses, existence of physical evidence, and the existence of, nature of and circumstances surrounding any statement made by the minor, thereby placing the attorney in a better posture to negotiate for a fair disposition;
- Identifying suppression issues;
- Providing insight into the child’s delinquency background, including circumstances relating to previous arrests or dispositions, which may be relevant to plea discussions or negotiations;
- Providing information regarding the child’s social, educational, and family history, including evidence of mental or physical issues that may bear on the child’s involvement in the offense or his ability to understand and appreciate the right to a trial or to plead guilty;
- Providing the attorney with information regarding potential services or dispositional options to better negotiate the appropriate disposition; and
- Allowing the attorney to cultivate a better relationship with the juvenile to help ensure that the child reaches the best possible decision on whether to plead guilty.

Not only does an investigation generally lead to better results in a plea negotiation, but a juvenile who has participated in and understands the process leading to a plea is much more likely to comply with the conditions of the sentence imposed.

10.2.2 Consequences of the plea

As noted above, many potential consequences can result from entering a guilty plea, and attorneys should be fully aware of them before discussing any plea with the juvenile. For instance, children who admit their culpability for an offense may be required to serve time in the Department of Juvenile Justice or to comply with extensive conditions of probation. Additionally, children may face certain collateral consequences for their admissions, which they may not foresee as the direct result of the plea. While these consequences vary, some are listed below:

- ineligibility for federal financial educational aid for pleading guilty to a drug offense (*see* FAFSA Drug Conviction Worksheet, <http://www.fafsa.ed.gov/before013.htm>);

- harmful immigration consequences for non-citizen clients, including inadmission or deportation (*see In re Devinson-Charles*, Int. Dec. 3435 (BIA 2000), *In re Ramirez-Rivero*, 18 I. & N. Dec. 135 (BIA 1981); *see also* Immigration Benchbook for Juvenile and Family Courts 52 (2005), available at <http://www.ilrc.org/resources/sijs/2005%20SIJS%20benchbook.pdf>);
- eviction from public housing (735 ILCS 5/9-118);
- school expulsion (105 ILCS 5/10-22.6);
- registration as a sex offender for a term of years or for life, thereby subjecting themselves to certain restrictions on their movement or residence, as well as to the potential disclosure of the offense to law enforcement, school officials and other parties (730 ILCS 150/2(A)(5)); or
- consideration of the disposition in subsequent proceedings or dispositions (705 ILCS 405/5-705; 705 ILCS 405/5-501).



Many potential consequences can result from entering a guilty plea, and attorneys should be fully aware of them before discussing any plea with the juvenile.

Attorneys must be aware of all potential consequences in order to determine whether to recommend that the child accept a particular plea. Moreover, children who agree to a plea generally are not admonished by the court regarding these and other far reaching consequences and, therefore, must rely on their attorneys to explain them. Additionally, while the court may provide the child with certain admonitions (*See* Ill. Sup. Ct. R. 402, 605), it may fail to do so in language which the child understands. Therefore, it is the attorney's obligation to fully inform the child client of all of the potential consequences of the child's plea to ensure that the plea, in fact, is knowing and voluntary.

10.3 Negotiating a Plea Agreement



Points to Remember

- *Have a strategy for negotiations with the prosecution and be prepared to discuss the strengths of the juvenile and the juvenile's defense, weaknesses in the prosecution's case, and other factors that may convince the prosecution not to go to trial.*
- *Make the prosecution aware that any plea agreement must be beneficial to the child in that it must provide the child with a better alternative than trial.*

Before initiating any negotiation with the prosecution or responding to any offer by the prosecution, the attorney should first discuss the potential negotiation or offer with the child. After familiarizing herself with all relevant information and verifying with the child that he is open to the negotiation, the attorney should then arrange a formal meeting with the prosecutor.

Some steps the attorney can take to ensure a successful plea negotiation with the State follow:

1. Have a strategy for dealing with the prosecutor and a desired offer in mind (if the State has not already provided one). This may be based on the attorney's knowledge of the individual prosecutor, the facts of the case and other factors.
2. If possible, let the prosecutor provide an offer first in order to determine the prosecution's view of the case. Alternatively, think of a way to persuade the prosecutor to resolve the case quickly.
3. Discuss the client's strengths, including progress in school, outside activities, family structure, lack of criminal history, obstacles that he has overcome, etc. Both the minor and the family can help you identify the juvenile's positive qualities.
4. Discuss the strengths of the defense case, without revealing sensitive or confidential information; be strategic in deciding how much to reveal in the negotiations.
5. Point out the weaknesses in the State's case and, if appropriate, the burdensome nature of a trial for the prosecution. Point out the lack of evidence, problems with the witnesses, or the potential unavailability of key witnesses.
6. Be open to alternative adjudicative and dispositional strategies and suggest them where appropriate. For instance, the child may be willing to agree to certain conditions, such as drug treatment or counseling.

7. Be clear that the child will agree only to a result that will be a better alternative than trial. Request that the State agree to dismiss or reduce charges and/or recommend less severe dispositions than what the client would face if he loses at the adjudication.
8. Speak with the child to confirm his agreement with the plea offer, before entering into any agreement with the State. Again, this is the child's decision, so the attorney should not enter into any plea agreements on the child's behalf without conferring with him first.
9. Memorialize in writing any offers or agreements.

Adapted from Elizabeth Calvin et al., Juvenile Defender Delinquency Handbook 179-81 (2d ed. 2006).

10.4 Deciding Whether to Recommend a Plea

After investigating the case and becoming familiar with the potential consequences, the attorney, at some point, will have to consider whether it is appropriate to recommend to the child that he accept a plea offer from the State. Some factors the attorney should consider include:

- Strengths and weaknesses of defense case versus the prosecution case, considering availability and credibility of witnesses, physical evidence, and the existence of any admissions by the juvenile;
- Result of pre-adjudication motions or, if they have not all been litigated, likelihood of success on pre-adjudication motions (*e.g.*, motion to suppress);
- Strength of affirmative defenses;
- Whether the child will testify, strength of the testimony;
- Prior adjudications or convictions of the child or other witnesses;
- Severity of the offense, including type of offense, whether the child was a principle or accomplice, whether a firearm was involved, and whether any victims suffered injury and, if so, the extent of such injury;
- Evidence of positive behavior or progress in school, with family and in the community;
- The child's ability and willingness to comply with probation conditions and other restrictions, and degree of family support for doing so;
- Attitude of the judge and prosecutor toward the child, similar offenses, and conditions under which the child is making his decision whether to go to trial rather than plea;
- Interest of the child and his family in going to trial versus taking a plea; and

- Long term and short term consequences of taking the plea.

See Elizabeth Calvin, *et al.*, *Juvenile Defender Delinquency Notebook* 175-76.

Based on the attorney's analysis of these factors and others, the attorney should assess the desirability of taking or seeking a particular plea agreement and should discuss her recommendation with the child.

10.5 Communicating with the Child Client Regarding a Potential Plea



Points to Remember

- *The decision of whether to plead guilty belongs to the child; the attorney's role is to communicate clearly and simply the potential consequences and benefits of a particular plea and provide a reasoned recommendation to the client.*
- *The attorney should take the time to explain what will happen in court with respect to the plea hearing and should address the child's questions or concerns.*

As noted in Chapter 2, the decision of whether to plead guilty to an offense belongs to the child client. Chapter 2.1, *supra*, citing *People v. Medina*, 221 Ill.2d 394, 403-04, 851 N.E.2d 1220 (2006), and 1 ABA Standards for Criminal Justice § 5.2 (2d ed. Supp. 1986). Consequently, the attorney's role is not to pressure or coerce the child into any particular course of action, but to provide the child with sufficient information to make the decision of whether to plead to an offense.

Some tips for discussing pleas with the child client

There is no magic formula for explaining the risks and benefits of a particular plea offer to the child. However, below are some tips for having this discussion in a clear and understandable way:

1. Explain the difference between going to trial and entering a plea agreement.

Example



"Johnny, the State is charging you with burglary, which means the State says that you went into Ms. Walker's house without her permission and took her purse. The State has to prove that you did this beyond a reasonable doubt. That means that the judge, after the trial, has to be really sure that you committed the burglary."

If we go to trial, the State has to have someone go in front of the judge and tell him that you went into Ms. Walker's house and you took the purse. Right now, the State says that they will have Ms. Walker tell the judge that she did not give you permission to go into her house and take her purse. Ms. Walker's neighbor, Ms. Jenny, will tell the court that she saw you leave the house carrying something under your jacket. I will ask the witnesses questions, too. My job is to show the court that Ms. Walker and Ms. Jenny are mistaken or lying. This is called cross-examination. With Ms. Jenny, I will focus on the fact that she never saw you with the purse. With Ms. Walker, I will ask her about the big argument she had with your mom the morning before she said you took her purse.



*The decision of whether to plead guilty to an offense belongs to the child client...
The attorney's role... [is] to provide the child with sufficient information...*

We already talked about your right to testify, and you still have that right. We do not have to call any witnesses, because the State has the job of proving you took the purse. This is like when your mom gives you money for lunch and asks for the receipt to prove that you used the money for lunch and not video games. The receipt is evidence. People's words also can be evidence, like asking them to tell what they saw. We can put on evidence or we can just try to make the State's evidence look bad.

If you plead guilty, you do not get a trial and Ms. Walker and Ms. Jenny will not talk to the judge. We will not get to ask Ms. Walker or Ms. Jenny questions to prove they are lying or mistaken. Instead, you just admit that you committed the burglary. If you admit you took Ms. Walker's purse, it is like going to trial and losing."

2. Explain to the child in simple, non-legal terms what the plea offer is or what you would like to ask of the prosecution.

Example



"Johnny, the prosecutor is offering you one year of probation if you plead guilty or admit that you committed the burglary. Under the law, burglary is when someone goes into a place where he isn't supposed to be and intends to take something that belongs to someone else. If you plead guilty to burglary, you are admitting that you went into Ms. Walker's house without her permission and took her purse. After you plead guilty, the State will ask the judge to sentence you to one year of probation. 'Probation' means that you will be assigned a probation officer who will be watching over you for one year and will report anything you do wrong to the judge. You will have to do what the probation officer and

the judge say you have to do. This may mean that you have to go to school every day, check in with your probation officer at certain times and stay out of trouble. If you do not do what the probation officer tells you to do, for instance, if you skip school, he could give you more rules to follow and could even send you to prison.”

3. Explain the pros and cons of entering into the plea based on your assessment of the various relevant considerations (discussed on the previous page).

Example



“Johnny, I think that the down side of agreeing to this plea is that you’ll have to be on probation and agree to any restriction or condition that goes along with that. Also, if you get into trouble while you’re on probation or after that, you could have to do even more time on probation or even be taken into custody and put in jail if you’re found guilty of violating probation. The upside of pleading guilty is that you will only be given one year of probation as long as you do what the judge and probation officer tell you to do and, if we go to trial and lose, you may get a probation period longer than one year and more conditions. Also the State has two strong witnesses against you who know you from the neighborhood, and they say they saw you break into the house right before the stuff was taken from it. Ms. Jenny, one of the witnesses, even says she saw you leaving the house with something under your arm, and she has no reason to lie. So the judge might believe them.”

4. Ask the client to explain what it means to have a trial, what it means to plead guilty, what he understands regarding the plea offer, and the pros and cons of entering into the plea.
5. If probation is part of the plea offer, explain to the client in real terms what probation means for daily life, differentiating between reporting and non-reporting probation. Also, talk about whether the client realistically can comply with the terms of probation. Many times, minors have unrealistic expectations about their behavior. It is critical to go into detail with the client about the terms of probation.
6. Talk about the potential collateral consequences of the plea.

Example



“If you plead guilty, and get in trouble again and are found guilty of another offense, the judge can use your previous conviction against you to give you a harsher sentence. This is true even if the second time that you got into trouble was after your probation was over. Additionally, even though juvenile court records are supposed to be secret, people still can find out if you have a conviction. Your school may find out about this conviction and use it to expel you or discipline you, if you are in public housing your family may lose their housing, you may not be able to get certain licenses for jobs, and if you want to go

to college you may not be able to get certain federal loans. Also, if there are any questions about whether you are in this country legally and the immigration authorities find out about your conviction, they may use it to send you out of the country.”

7. Make a recommendation if appropriate, but do not pressure the child to take it.

Example



“I can’t tell you what to do – the decision is yours. Like I said before, the State’s evidence looks pretty strong because Ms. Jenny saw you leaving the house with something under your arm and doesn’t have a reason to lie. The deal is also much better than the sentence you may get if we go to trial and lose. I would recommend taking it.”

8. Tell the client what will happen in court.

Example



“Before you plead guilty in open court, we can try to meet with the judge and discuss with him the offer that the state is giving in order to determine if the judge likely will accept it. If he agrees to hear the offer, we will go into his chambers. While we are in his chambers, the judge may ask for facts about your case and the offense as well as information about your role in the offense, your family background, progress in school, and other things that the judge wants to know to see if he agrees with the sentence. The judge may or may not agree with the agreement. If the judge decides not to go along with the agreement, you can withdraw your guilty plea. If this is the case, you will get a new judge for your case.

We also do not have to meet with the judge in his chambers to tell him the agreement. Instead, we can go right to courtroom. Before you plead guilty, the judge will talk to you about what that means. He will talk about what you have been charged with and tell you what the possible punishments are if you go to trial and lose. He will ask you if you agree to give up your right to go to trial and question witnesses. You will have to answer all of his questions out loud. If you agree, you’ll say ‘yes.’ He’ll also ask you if you are agreeing to this ‘knowingly and voluntarily,’ which means that you understand what you are doing, and that no one is forcing you do plead guilty. If that’s true, you’ll say ‘yes.’ If we did not tell the judge about the agreement prior to going in front of him in the courtroom, he will tell you that he does not have to go along with the agreement and that if you plead guilty, his sentence may be different. If you are confused or don’t understand what is going on, you can tell me and I will tell the judge that you need a minute to ask me questions.”

9. Ask the client throughout the discussion if he has questions, and answer them as clearly and simply as possible.

In engaging in these types of discussions with the juvenile, the lawyer should include the child’s parents as well where appropriate. In so doing, the lawyer may take several ap-

proaches. She briefly may tell the parents that there is a plea offer without offering details, then speak with the child alone, and after thoroughly explaining the plea to the child and with the child's permission, bring the parents back in to explain the offer to them. Alternatively, with the child's permission, the lawyer may conduct the entire discussion in the parents' presence, but then ask the parents to leave the room before asking the child if he has questions or wants to discuss the matter alone with the lawyer. To the extent that the lawyer believes that the parents can assist the lawyer in communicating with the child, the lawyer should include the parents in the discussion. However, the lawyer should be wary of the situation in which the child's parents attempt to pressure the child to take a plea.

In all cases, the attorney should make sure that the child understands the risks and consequences of taking a plea, and should attempt to advise the parents in this regard as well. As with all decisions, the lawyer must convey to the child that the lawyer represents the child alone, that the child may tell the lawyer anything in confidence, and that the ultimate decision is up to the child.

10.6 Entering into Plea Agreements



Points to Remember

- *Prepare the child for the plea hearing by ensuring that the child wants to enter into the plea and that the child understands what will occur at the hearing.*
- *Make sure the child fully understands the plea and the rights he is waiving when entering the plea.*
- *When the attorney, child and the State have come to terms with a plea agreement, the attorney should request a formal "402" conference to ensure that the court will accept the plea. ("402" conference is explained below).*
- *Attorneys should make sure the court properly admonishes the child (in child-friendly language) regarding the rights he is waiving and the consequences for entering a plea.*
- *Be cognizant of the fact that the court is required to provide different information to the child depending on whether there is a negotiated plea as opposed to a blind or open plea agreement.*
- *Consider putting the plea agreement in writing.*
- *Make sure that the prosecution adheres to any agreement reached, and be prepared to stop the proceedings if it does not do so.*
- *Be aware of the child's rights in the event that he wishes to reconsider the plea or sentence or challenge it on appeal.*

The “402” conference

In cases with the potential for a plea agreement, the defense attorney can request a “402” conference. During the course of the conference, the judge typically will examine the factual basis for the plea, evaluate mitigating and aggravating circumstances, and indicate whether the judge will concur with the sentence agreed to by the parties or not.

The trial court cannot initiate the plea discussion or conference. Prior to the child pleading guilty, the court generally admonishes the child of the following: (Ill. Sup. Ct. R. 402(a);¹⁹ 705 ILCS 405/5-605(2) (a))

- the nature of the charges;
- the minimum and maximum penalties and, if applicable, additional penalties based on the child’s prior adjudications;
- the child has the right to plead or not plead guilty;
- pleading guilty means that the child will not have a trial, will not have the right to confront witnesses, and will not have the right to a jury (if applicable);
- (if there is an agreement regarding a specific sentence or disposition between the prosecution and the defense and the judge requests to hear the terms of the agreement), whether the court concurs in the disposition, whether the court seeks to hear evidence in aggravation or mitigation for purposes of determining the appropriate disposition, or whether the court’s concurrence is conditional until it hears evidence in aggravation and mitigation;
- (if there is no agreement to the sentence or the parties have not sought the court’s agreement to the sentence) the court is not bound to any agreement between the State and the defense, and the court may change the sentence at the time of disposition;

Ill. Sup. Ct. R. 402; 705 ILCS 405/5-605(a).

Additionally, the judge typically informs the child that, during the plea conference, the judge may learn certain facts about the case or the child that the judge ordinarily would not learn. As a result, the child usually will be unable to substitute judges after the Rule 402 conference. *See People v. Lawrence*, 29 Ill. 2d 426, 428, 194 N.E.2d 337 (1963) (motion for change of venue, based on the prejudice of the judge, was properly denied where it was filed after the parties appeared before the judge in a conference to ascertain what type of punishment the defendant might receive if he pleaded guilty); *People v. Bey*, 133 Ill. App. 2d 250, 251, 272 N.E.2d 726 (1st Dist. 1971) (motion to substitute judges was made too late where it was made after the judge had indicated his view of certain matters in a conference held at the defendant’s request).

Thus a formal plea conference provides the child with certain protections before he actually enters into a plea. In addition to providing some assurance that the child understands the ramifications of entering into the plea, Rule 402 also provides that, if no plea results, or if the child withdraws his plea, or if the plea is overturned on appeal, the plea discussions are not admissible against the child at any proceeding. Ill. Sup. Ct. R. 402; *see also, People v. Cowherd*, 114 Ill.App.3d 894, 899-900, 449 N.E.2d 589 (2d Dist. 1983) (equating the introduction of plea-related discussions during which defendant had displayed a “subjective expectation to negotiate a plea” with a violation of the defendant’s due process rights). Moreover, if the court indicates

that it concurs or conditionally concurs with the plea agreement, but then withdraws its concurrence, it must inform the parties about the change and afford the child the opportunity to withdraw the plea. Ill. Sup. Ct. R. 402(d); *People v. Collins*, 100 Ill. App. 3d 611, 613-14, 426 N.E.2d 1274 (4th Dist. 1981) (finding “the crucial due process aspect of the procedure under Rule 402(d) to be the requirement that the court must tender to a defendant the opportunity (1) to affirm or withdraw a guilty plea entered upon a court’s subsequently withdrawn concurrence or conditional concurrence in a plea agreement, or (2) to persist in or withdraw a guilty plea entered on a plea agreement after a court that has not concurred in the agreement has explained its right to disregard the agreement and the consequences of its doing so”). Under Rule 402(d), if the client withdraws his plea, the judge is required to recuse himself. Ill. Sup. Ct. R. 402(d)(2).

Due to the nature of the “402” conference and the protections it provides the minor, attorneys who want to take advantage of the procedure should do so formally and clearly on the record. Attorneys also may cite to the rule (*e.g.*, “Judge, we’re requesting a conference pursuant to Illinois Supreme Court Rule 402”), bearing in mind that, as noted above, in juvenile cases only those protections in the rule that implicate the minor’s due process rights may be technically applicable. Engaging in less formal methods of plea discussions with the court can be detrimental to the juvenile. Specifically, the juvenile is not admonished regarding his rights with respect to the plea agreement and he may be subjected to the inappropriate disclosure of such discussions in future proceedings. These are risks that the attorney cannot and should not take. Rather, the attorney should make sure that the admonitions and protections provided in the rule are adhered to, and that the admonitions are given to the child in simple language, or at least, that the attorney explains the admonitions to the child in child-friendly language.

Doing a final check-in with the client

First, before the child actually enters into the plea, the attorney should again ensure that the child understands what he is agreeing to and the reasons why he wants to enter into the plea. For example, if the child cannot articulate his reasons for entering into the plea or is basing his decision on parental pressure, or imagined concerns, this may mean that the child’s decision is either not truly voluntary or not well-reasoned. The attorney also should determine if the child has questions or concerns regarding giving up his right to go to trial.

Second, the attorney should again go over the actual plea agreement with the child (and his parents, if the child permits) to be certain that the child understands all of the terms of the agreement.

Third, the attorney should inform the child what will occur when he enters into the plea in court, detailing what the judge will say and what, if anything, the client will be expected to say. *See* section 10.5, *supra*. The attorney once again should make sure that the child understands that in pleading guilty, he is in fact telling the judge that he committed the offense and that a guilty plea is considered a conviction.

The plea colloquy

If the plea is not entered into directly following the 402 conference but at a subsequent court date, the judge will review the factual basis for the plea and will likely repeat the admonitions given before the 402 conference. The judge will likely state the charges, the available sentencing range and the terms of the agreement reached by the parties. The judge then will explain the rights the child is waiving in entering the plea and ask if the child wishes to plead guilty. To ensure that the minor is entering the plea voluntarily, the court will ask the minor if anyone has made any threats or promises. As with the Rule 402 admonitions, if the court does not admonish the child regarding the consequences of the plea in simple language that the child can understand, the attorney should request that the court do so.



First, before the child actually enters into the plea, the attorney should again ensure that the child understands what he is agreeing to and the reasons why he wants to enter into the plea.

In blind or open pleas, a dispositional hearing may immediately follow the plea hearing or may be held at a separate date. In cases where a possibility exists that the child will be committed to the Department of Corrections, the court will order a social investigation report. 705 ILCS 405/5-701. Some courts order social investigation reports as a matter of course in all cases. Social investigation reports and dispositional hearings are discussed in greater detail in Chapter 12.

After conducting the dispositional hearing, the court will sentence the minor. The court must then admonish the child regarding his post-dispositional and appeal options. Some of these admonitions vary, depending on the type of plea involved. Particularly, the court must tell the child:

1. The child has the right to appeal.
2. In cases involving an open or blind plea, the child, within 30 days of the disposition, must file *either* a written motion to reconsider the disposition (if challenging the sentence) *or* a written motion to vacate the judgment and for leave to withdraw the guilty plea (if challenging the plea itself), putting the reasons for the request in the motion.
3. In cases involving a negotiated plea, the child, within 30 days of the disposition, must file a written motion to vacate the judgment and for leave to withdraw the guilty plea, putting the reasons for the request in the motion (*even if the child simply wants to challenge his sentence*).
4. If the motion to reconsider the disposition or vacate the plea is allowed, the sentence will be modified or the plea will be withdrawn and a new date set for the trial.

5. If the plea is withdrawn, the State can reinstate any charges that were dismissed as part of the plea agreement.
6. If the child is indigent, he will be provided with transcripts and an attorney to help prepare the motion.
7. The failure to raise an issue in the motions can result in the issue being waived. Ill. Sup. Ct. R. 605(b), (c); Ill. Sup. Ct. R. 604(d); *In re J.T.*, 221 Ill.2d 338, 851 N.E.2d 1 (2006).

Withdrawing from the plea or requesting reconsideration of the disposition

It is important to understand the distinction between the types of pleas, because each may involve certain obligations on the part of the court, the State or the juvenile. For instance, where the juvenile enters into a negotiated plea, the defendant must file a motion to withdraw the plea in order to challenge the sentence or conviction on appeal, but where the juvenile enters into an open or blind plea, he need only file a motion to reconsider the sentence if he wishes to reconsider the sentence. Ill. Sup. Ct. R. 605.

There may be situations where things do not go as planned or where the client changes his mind. Below are some strategies for dealing with these situations:

- Make sure that the agreement discussed during the plea hearing accurately reflects the agreement reached with the prosecution. If it does not, say so immediately, and, if necessary, ask for time to renegotiate. *See Santobello v. New York*, 404 U.S. 257 (1971) (State's failure to comply with a plea agreement resulted in remand for specific performance of the plea or a determination of whether the defendant should be allowed to withdraw the plea).
- If the child changes his mind after entering into the plea, discuss with him his change of heart and determine whether legal grounds exist to vacate the plea.
- If the attorney or child believes there may be grounds to appeal, file a motion for leave to withdraw the plea or reconsider the sentence. Although these requirements are not necessarily jurisdictional in juvenile cases, they still are required under Rule 604(d). Ill. Sup. Ct. R. 604(d) *In re William M.*, 206 Ill. 2d 595, 605, 795 N.E.2d 269 (2003). Thus, where the child fails to follow the written motion requirements of 604(d), the matter is remanded to the juvenile court in order to ensure that the court properly admonishes the child under the rule. Ill. Sup. Ct. R. 604(d); *In re William M.*, 206 Ill. 2d at 605. Attorneys should refer to the rule for applicable filing requirements.
- Additionally, where the child is represented by an attorney after the imposition of the sentence, the attorney must file a 604(d) certificate to certify that the attorney has consulted with the child by mail or in person to ascertain the child's complaints of error in the plea or sentence, has examined the report of proceedings with regard to the plea, and has amended the motion as needed. Ill. Sup. Ct. R. 604(d); *In re J.T.*, 221 Ill. 2d 338; *In re A.G.*, 195 Ill. 2d 313, 321-22, 746 N.E.2d 732 (2001) (holding that Rule 604(d)'s attorney

certificate requirement applies to juvenile appeals, but refusing to consider whether such requirement is a jurisdictional bar to appeal).

- If the attorney moves to reconsider the sentence or withdraw the guilty plea, and these motions are granted, ensure that the next steps are taken, *i.e.*, resentencing or a new date for trial. If the motions are denied, the attorney should speak to the child about filing a notice of appeal and, if the child agrees, should file the notice of appeal within 30 days of the denial of the motions. Ill. Sup. Ct. R. 604(d), 606; *In re J.T.*, 221 Ill. 2d 338,346-47, 851 N.E.2d 1 (2006) (failure to file a notice of appeal is a jurisdictional bar to appeal).

Taking these steps can help ensure that the plea agreement reflects the intent of all of the parties.

Summary

Although defense attorneys in juvenile cases are often tempted to engage in plea negotiations at the first opportunity, it is essential that attorneys thoroughly investigate the case and consider filing and possibly litigating any potentially helpful motion before entering into any agreement. Doing so can ensure that the child is in the best possible posture for plea discussions. Additionally, the decision of whether to plead guilty to an offense ultimately belongs to the child. Therefore, attorneys should explain to the child, in simple terms, the benefits and risks inherent in any plea agreement, and allow the child to make the ultimate decision. Finally, attorneys should be cognizant of the State's obligations to comport with any plea agreement and should be aware of the child's options in the event that the child changes his mind regarding the plea.



Chapter 10 Checklist

- ✓ Thoroughly investigate the case before entering into plea negotiations. Do not take the first opportunity to enter into an agreement.
- ✓ Consider filing motions that provide the defense with a strategic advantage before entering into plea discussions.
- ✓ Communicate with the child in simple terms regarding any potential plea offer or agreement, and allow the child to make the final decision regarding the plea.
- ✓ Request a formal 402 conference before the judge to ensure that the child is properly admonished regarding any plea agreement.
- ✓ Prior to the plea hearing, ensure that the child understands and concurs in the agreement and explain what will occur at the hearing.
- ✓ Be prepared to point out any discrepancy between what the State has agreed to and what the State represents before the court.
- ✓ Be cognizant of the child's obligations to preserve his appeal rights or challenge the plea or sentence, in the event that the child changes his mind or is dissatisfied with the plea.
- ✓ If there is a good faith basis for doing so, file a motion to vacate the judgment and for leave to withdraw the guilty plea or a motion to reconsider the sentence or disposition, as well as a 604(d) certificate to demonstrate compliance with post-plea obligations.

Chapter 11

Adjudication



The term “adjudication” usually refers to trials in juvenile court and involves the State’s presentation of evidence and proof of the allegations contained in the delinquency petition. With some limited exceptions, minors are tried before a judge rather than jury. Juvenile trials share all other characteristics of trials in adult criminal court. To follow is a basic primer on the features of a trial in delinquency court.

11.1 The Structure of the Adjudication: An Overview



Points to Remember

- *Trials in juvenile court generally follow the structure of criminal trials in adult court.*
- *The trial is comprised of opening statements, the State’s presentation of the evidence, motions for a directed finding, the defense’s evidence, the State’s rebuttal evidence (if any), closing arguments and the verdict.*
- *The rules of evidence apply in delinquency trials.*
- *The State bears the burden of proving each element of the offense beyond a reasonable doubt.*

The following is a brief overview of the components of the trial:

1. Opening statement: the introduction to each side’s story regarding the case, stated in terms of what the lawyers expect the evidence to show.
2. State’s presentation of evidence:
 - direct examination of witnesses by the State

- cross-examination witnesses by the defense
 - re-direct examination by the State
 - re-cross by defense attorney (not always permitted)
3. Defense motion for a directed finding: a motion by the defense's motion for an acquittal based on the State's failure to demonstrate that its evidence could support a verdict of guilty beyond a reasonable doubt. *See People v. Borash*, 354 Ill.App.3d 70, 79-80, 820 N.E.2d 74 (1st Dist. 2004).
 4. Defense presentation of evidence (assuming that the court denies the motion for a directed finding).
 5. State rebuttal case: any witness the State calls to rebut the testimony of defense witnesses.
 6. Closing argument: the parties' summation of the evidence, including the conclusions that the fact-finder should draw from the evidence; the State has they right to close first, followed by the defense; the State then has a final opportunity to respond to the defense's arguments (rebuttal).
 7. If applicable, jury instructions and allowed evidence submitted to the jury.
 8. Verdict.

11.2 Opening Statements



Points to Remember

- *The opening statement is the attorney's first opportunity to present her theory of the case. Therefore, defense attorneys typically should not waive the opening statement. An opening statement, even a brief one, allows the court or the jury to place the evidence in the context of the defense's theory of the case as the evidence is being presented.*
- *In the opening statement, counsel cannot argue about the evidence, but may preview for the fact-finder what she expects the evidence to show. A good opening statement orders the facts in a way that suggest the desired conclusion.*

Opening statements are the first opportunity for the parties to present their respective theory of the case. By the time of trial, the attorney should have developed a theory and theme of the case (*See Chapter 7 supra*) and should have a strong sense of the story that the attorney wants to tell. The attorney also should be aware of all of the evidence and testimony the State intends

to present, as well as the evidence (if any) the attorney wants to present for the defense. The attorney should have witnesses necessary to complete impeachment under subpoena.

The opening statement must be stated in terms of the attorney's reasonable, good faith expectation of what the facts and evidence will show. A persuasive opening statement outlines the evidence that will be presented and suggests why this evidence will demonstrate that the defense's theory of the case is correct.

Defense attorneys trying cases in front of a judge may be tempted to waive the opening argument. However, attorneys should not give up this opportunity to preview the defense's theory of the case. In failing to deliver an opening statement, the defense misses a key opportunity to color the receipt of the evidence by the fact-finder; without hearing an opening statement, the fact-finder is left to guess at the defense's theory of the case as it hears the prosecution's case.

In crafting the opening statement, attorneys should be aware that they cannot actually argue the case in the opening statement, but only can indicate what they believe, in good faith, that the evidence will show. Steven H. Lubet, *Modern Trial Advocacy: Analysis and Practice* at 413 (3d ed. 2004); 34A Ill. Law and Prac. Trial § 85 (Dec. 2007); *People v. Reed*, 324 Ill.App.3d 671, 681, 755 N.E.2d 1000 (5th Dist. 2001). Opening statements also are not the proper place to argue the applicable law. Pieczynski, Linda, 6 Ill. Prac., *Criminal Practice & Procedure* § 26:15 (2nd ed.). Attorneys, therefore, must walk a fine line in the opening argument. They should refrain from telling the fact-finder how to interpret or draw conclusions from the evidence, but should provide the fact-finder with the facts that will paint a picture as to what the evidence will show.



The opening statement must be stated in terms of the attorney's reasonable, good faith expectation of what the facts and evidence will show.

Example



You will not be able to find David guilty of attempted murder because the State's star witness is lying about what she saw.

This is an improper argument for the opening because it is too conclusory and argumentative at this stage. Rather than identifying facts for the court, the attorney is telling the fact-finder what conclusion to draw.



The evidence will show that the State's witness, Suzy, provided the police with two different versions of what she saw at the time of the offense. In the first statement, taken at the scene of the offense, Suzy, like many other witnesses, told the police that she did not see the shooting because she was lying on the floor of the gym when David ran out. A week later, Suzy had a fight with David. It was at this point that she called the police and said that she was standing outside when she saw David shoot a gun at the alleged victim in this case.

This is proper for opening, because the attorney is simply stating what the evidence will show, allowing the fact-finder to draw the conclusion that the witness is not credible.

As a procedural matter, the State is given the opportunity to deliver its opening statement, followed by the defense. In many jurisdictions, the State waives opening. In such case, the defense need not directly address what it thinks the State's theory will be, but instead simply puts forth the defense theory of the case. When the State does give an opening, the defense still should put forth its own theory, but also may take the opportunity to address the State's theory and suggest why the evidence will not support that theory.

One problem faced by defense attorneys in arguing the opening statement is that the attorney may not have an affirmative defense, but may have only an argument that the State cannot prove its case beyond a reasonable doubt. *See Chapter 7.* This does not mean that the defense should avoid offering a theory of the case in its opening statement. As noted in Chapter 7, a reasonable doubt theory can be premised on deficiencies in the State's evidence, the lack of credibility of witnesses and various other facts demonstrating the weaknesses in the State's proof. Therefore, even in reasonable doubt cases, defense attorneys may use the opening to state factually any expected deficiency in the evidence that can support a reasonable doubt defense.

In light of the restrictions placed on the opening statement, defense attorneys should not only be careful to adhere to the rules, but also must object when the State engages in improper argument. If the objection is sustained, particularly where a jury is present, the attorney should move to strike the improper argument and ask that the court issue an instruction to the jury to disregard the argument in order to preserve the issue for appeal.

11.3 The Prosecution's Case



Points to Remember

- *During the prosecutor's direct examination, the defense attorney should take careful notes in preparation for her cross-examination and should object as warranted to the prosecutor's questions or the witness's answers.*
- *Attorneys should be well-prepared to cross-examine the State's witnesses by conducting a thorough investigation and discovery, raising pre-trial motions to bar references to improper or inadmissible evidence or testimony, crafting potential questions, being aware of potential objections to questions and possible responses to these objections, and by listening carefully to the direct examination.*

After the opening arguments, the prosecution typically begins its presentation of the evidence. These State's witnesses may include police officers, eyewitnesses and other witnesses who have pertinent information regarding the offense.

11.3.1 The defense attorney's role during the State's direct examination

During the State's direct examination of a witness, the defense attorney should listen carefully for any objectionable questions, take notes to assist in the cross-examination, and try to assess the strengths and weaknesses of the witness within the context of the State's theory of the case. It is important for defense attorneys to object to potentially harmful or objectionable material. If the information is harmful and the attorney can find some basis to object to it, the attorney may succeed in keeping out the information. Attorneys should have a solid understanding of the rules of evidence – and insist that they are followed during trial.

Even where the information is not particularly harmful, the attorney still should object in order to preserve the issue for appeal. The appellate attorney may be able to raise an issue on appeal based on the objection. In any case, appellate attorneys often cannot raise an issue regarding the admission of improper evidence in the absence of an objection by the defense attorney, so attorneys generally should err on the side of objecting to harmful and potentially objectionable material. Some common objections that the defense attorney may consider raising during the State's direct examination include:

- **Leading the witness:** a party may only ask open-ended questions on direct examination and must avoid leading the witness via the form of a question or putting words in the witness's mouth.

- **Question calls for hearsay/answer is hearsay:** when the State appears to be asking a question for which the only answer would be hearsay (*e.g.*, “What did Malcolm say he saw the defendant do?”), or where the witness, although not prompted specifically by the State, testifies to an out-of-court statement by someone other than the defendant; and, in either case, there is no applicable hearsay exception.
 - Contrary to common belief, a witness is not permitted to testify as to his or her own out-of-court statement, unless a foundation has been laid for an exception to the hearsay rule.
- **Relevance:** when the question calls for testimony that is irrelevant to the issue at hand, particularly where such testimony could be damaging to the defendant.
- **Calls for speculation:** when the State asks the witness to speculate about something about which the witness has no personal knowledge or expertise (*e.g.*, asking a witness who appeared on the scene shortly after the incident and saw the police arrest the child, “Why did the police take Johnny away?”)
- **Narrative/non-responsive:** when the witness proceeds to launch into a long narrative in response to the prosecutor’s question, the defense attorney may raise an objection, particularly where it appears that the witness is trying to help out the prosecutor, even though the prosecutor did not directly pose a question on a particular subject.
- **Lack of personal knowledge:** when the witness is asked a question for which the proper foundation for personal knowledge has not been laid (*e.g.*, asking the police officer, “What did your partner do after you left the scene with the witnesses?”)

If the witness makes an objectionable statement before the defense has an opportunity to object (or before the court has an opportunity to rule) and the court sustains the objection, then the attorney should, as noted above, request that the court strike the testimony.

11.3.2 The defense attorney’s cross-examination of a prosecution witness

Cross-examination is a crucial skill that any attorney should strive to learn; however, this can take years of practice to master. Defense cases may be won or lost due to an effective cross-examination. The key to effective cross-examination is preparation. Before the trial, the attorney should use discovery and investigative procedures to develop information regarding each of the prosecution’s witnesses, the general points on which they are helpful to the prosecution, any documents containing each witness’s statements, documents that the State may seek to introduce through each witness, and any potential areas of impeachment.

Additionally, in preparing for cross-examination, it is helpful to write out as many of the possible questions the attorney wants to pose. Depending on the attorney's comfort level and experience, the attorney then may turn these questions into an outline format in order to avoid simply reading questions to the witness. The attorney should be prepared to modify the questions after hearing the prosecutor's direct examination. Attorneys that are too tied to their prepared cross-examination may ask a question about a subject the State did not address or neglect to cross on a point that was not anticipated.

The following are some tips for conducting an effective cross-examination:

- Be cognizant of the theory of defense. This will place in context any information elicited or contradicted.
- Have a theory of the witness: is the witness lying because of a bias or is she just mistaken?
- As far as possible, pose short simple questions that call for a "yes" or "no" answer.
- As far as possible, ask only the questions to which the answer already is known. Few things are worse than to be surprised by a witness's unfavorable answer to a question that the defense attorney unwittingly elicits.
- Establish what is wanted from the witness: in some instances, the State witness may have evidence that is favorable to the defense. In others, the defense may want the fact-finder to reject all of the witness's testimony.
- Resist the temptation to attack the witness on every point made on direct examination; instead, focus on only the points that are important to the defense.
- Anticipate possible objections to questions and prepare responses to these objections in advance of the trial.

11.3.3 Special techniques for cross-examining certain witnesses

Certain witnesses present particular problems for defense attorneys. For instance, police officers, experts, eyewitnesses, co-defendants and complainants may present unique challenges for attorneys on cross-examination.

Police officers

Police officers usually are very familiar with testifying in court and often are highly rehearsed in their answers. As a result, they can be difficult witnesses to question. However, certain techniques can be helpful in questioning these witnesses. Attorneys

should adopt one or all of the following strategies in accordance with their theory of the case and theory of the witness:

- Challenge the police officer’s qualifications or experience, particularly with respect to the offense at issue.
- Use police reports to impeach the witness and attack his memory: police officers often leave pertinent details out of their police reports, which you can use to your advantage.
- Question the witness regarding procedures that are followed in similar cases and whether he followed them in this case.
- Watch for any gap in the witness’s observation of the offense or in his handling of the evidence. Make sure that the officer is testifying from what he personally did or observed; officers commonly testify regarding an investigation based on what other officers may have done or seen. While the court may make some allowances for this type of testimony as part of the “course of investigation,” question the officer about his lack of personal knowledge or observation.
- Question the witness regarding any deceptive techniques he used to gain evidence, such as hiding his identity (*e.g.*, pretending to be a buyer interested in purchasing drugs), lying to the suspect, conducting electronic surveillance, or using confidential informants.
- Question the witness regarding the degree of force used in apprehending the witness, particularly the use of excessive force.

Experts

Like police officers, expert witnesses often are well prepared to testify. Some tips for cross-examining expert witnesses called by the prosecution were discussed in Chapter 3. These tips include:

- Question the expert regarding his qualifications, training and experience;
- Question the expert regarding his repeated appearances as a State’s witness and whether his conclusions have always been the same (*i.e.*, whether the witness is called by the prosecution only and if the witness always reaches a particular finding);
- Question the expert regarding limitations on meeting with the child (if applicable) or the expert’s opportunity to review key materials, such as whether the expert only met with the child once or only reviewed certain materials provided by the prosecution;

- Question the expert regarding treatises or articles that contradict his hypotheses, findings, or methodology; and
- Question the expert regarding his own previous contradictory findings or testimony.

Adapted from Delinquency Notebook at 196-97.

Eyewitnesses

Eyewitnesses, or witnesses who identify the client as the person who committed the offense or as someone seen at the scene of the offense, can be essential witnesses to the prosecution. In Illinois, the testimony of a *single* witness can be sufficient to convict, so it is particularly important to thoroughly cross-examine these types of witnesses. *People v. Martinez*, 348 Ill. App. 3d 521, 529, 810 N.E.2d 199 (1st Dist. 2004); *People v. Ramos*, 339 Ill. App. 3d 891, 901, 791 N.E.2d 592 (2d Dist. 2003). Additionally, Illinois law concerning eyewitness and identification and the pattern jury instruction on eyewitness identification provide some guidance regarding important areas to cover when examining an eyewitness regarding his or her identification of the defendant. In particular, factors relevant to assessing the reliability of an identification include: 1) opportunity to observe the offender at the time of the offense; 2) witness's degree of attention at the time; 3) accuracy of the witness's prior description of the offender; 4) witness's level of certainty at the time of confrontation; and 5) the length of time between the offense and the confrontation by the witness. *Ramos*, 339 Ill. App. 3d at 901; Illinois Pattern Jury Instructions Criminal, 3.15. Thus, attorneys should question the eyewitness regarding each of these factors. In so doing, the attorney may inquire into:

- Lighting conditions at the time;
- Length of time during which the eyewitness viewed the offender and the circumstances (*e.g.*, Were bullets flying while the eyewitness caught a brief glimpse of the offender? How many other individuals were present with the offender?);



Illinois law concerning eyewitness and identification...provide some guidance regarding important areas to cover when examining an eyewitness regarding his or her identification of the defendant.

- Distance from the witness to the offender;
- Whether the eyewitness and the offender are the same race;
- Whether the eyewitness needed any aid to assist in his or her hearing or eyesight and whether the witness was using those aids at the time of the observation;
- Circumstances of the identification or confrontation, *e.g.*, line up or show up by the police, whether the police contacted the witness or the witness volunteered to speak with the police, the length of time between the offense and the confrontation, what the witness told the police or what the police asked during the confrontation, photos of the lineup, if applicable;
- Differences between the eyewitness's description of the offender and the defendant; and
- Bias against or history with the client.

Attorneys who are defending cases in which the State's key or sole evidence is the testimony of an eyewitness should consider securing an eyewitness identification expert witness to testify regarding the common factors that lead to mistaken identifications. *See People v. Allen*, 376 Ill. App. 3d 511, 526, 875 N.E.2d 1221 (trial court erred in rejecting defense expert's testimony on eyewitness identification without conducting a "meaningful inquiry" into the proposed testimony).

Co-respondents or Co-defendants

Co-respondents or co-defendants can provide compelling testimony against your client. However, such witnesses are vulnerable on cross examination, particularly since they often testify due to favorable deals with the State, fear of prosecution or to deflect blame. Although a co-defendant's testimony is not viewed by Illinois courts as particularly strong, it nonetheless is sufficient to sustain a conviction. *See People v. Singleton*, 367 Ill. App. 3d 182, 188, 854 N.E.2d 326 (4th Dist. 2006) ("The testimony of an accomplice witness has inherent weaknesses, and the trier of fact should accept it 'only with caution and suspicion'... 'Nevertheless, the testimony of an accomplice witness, whether corroborated or uncorroborated, is sufficient to sustain a criminal conviction if it convinces the jury of the defendant's guilt beyond a reasonable doubt,'" quoting *People v. Tenney*, 205 Ill. 2d 411, 429, 793 N.E.2d 571 (2002)).

Some ways to challenge the co-defendant's testimony include questioning the co-defendant regarding:

- any deal made by the co-defendant with the prosecution;
- whether co-defendant believes that his testimony will assist him in any pending cases, even without a specific plea agreement;

- co-defendant’s bias against client;
- co-defendant’s own behavior during the offense; and
- co-defendant’s prior record.

11.3.4 Impeachment

Impeachment refers to various means of discrediting the witness’s credibility. In other words, it is a way of demonstrating that the witness should not be believed. Impeachment typically arises on cross-examination. Additionally, impeachment is usually not effective and may not be permitted by the court if it is not capable of being perfected. This means that, if the witness denies the matter for which he is being impeached, the defense attorney must be able to “complete” or “perfect” the impeachment by some other means, generally by using another witness or document.

Example



One of David’s teachers testifies on direct that she saw David pull a gun out of his pocket and wave it in the air. In a previous statement to the police, she stated that she saw David reach into his pocket and pull out what looked like a white sock, but she could not see what was in the sock. The defense attorney asks the teacher, “Isn’t it true that the only thing you saw in David’s hand was a white sock?” The teacher denies this. The defense attorney then asks, “Isn’t it true that you told Officer Brown that you saw David reach into his pocket and pull out what looked like a white sock, but you could not see what was in it?”

If the witness admits that she made this statement to Officer Brown, the impeachment has been perfected. If she denies making the statement, the defense must call Officer Brown to testify as to what the teacher told him.

The following is a checklist of potential areas of impeachment that the attorney should consider exploring in cross-examining prosecution witnesses:

- **Did the witness make a prior inconsistent statement?**
The use of prior inconsistent statements as a method of impeachment involves questioning the witness regarding a prior statement that is inconsistent with what the witness testifies at trial. The above is an example of a prior inconsistent statement. Depending on certain factors, prior inconsistent statements can be used both for impeachment purposes (to damage the witness’s credibility) as well as for substantive evidence (for its truth). *See* 725 ILCS 5/115-10.1.
- **Did the witness add to his account of the events?**
Witnesses sometimes embellish their account of events by adding facts that they did not recount when they first described them. For example, a witness

who gave officers a generalized description of the offender (tall, light skinned and with short hair and a jean jacket) may testify to additional descriptive facts (5'11, white pants, an earring in his left ear and a limp). Because each little bit of impeachment diminishes the credibility of the witness, attorneys should impeach the witness with these omissions.

- **Does the witness have a prior adjudication or conviction that would damage his credibility?**
A witness's prior adjudications of delinquency are admissible in delinquency and criminal trials, subject to certain restrictions. In particular, under 705 ILCS 405/5-150 and *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971) the witness's prior adjudications are admissible for impeachment where the witness testifies at trial, pursuant to the rules of evidence applicable in criminal trials. Illinois courts have interpreted this to mean that a witness's prior adjudications of delinquency are admissible where: 1) the offense would be admissible to attack the credibility of an adult; and 2) the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. *People v. Kerns*, 229 Ill.App.3d 938, 940, 595 N.E.2d 207 (4th Dist. 1992) (quoting Fed. R. Evid. 609(d) and *Montgomery*, 47 Ill. 2d at 517. This means that the prior adjudication's probative value must outweigh its prejudicial effect. *Montgomery*, 47 Ill. 2d at 517. Similarly, an adult witness with a prior conviction also is subject to *Montgomery's* requirements.
- **Even if the witness has no prior convictions or adjudications, has the witness displayed wrongful conduct in the past that is admissible to damage his or her credibility?**
The term "prior bad acts" (also known as "other crimes") refers to arguably wrongful conduct by the defendant or a witness, which the opposing party attempts to introduce at trial in order to damage the defendant or witness's credibility. In Illinois, prior bad acts may not be introduced against a defendant to show his propensity to commit crimes, but can be used for other reasons, such as to demonstrate intent, motive, *modus operandi*, identity or absence of mistake. *People v. Lopez*, 371 Ill.App.3d 920, 936, 864 N.E.2d 726 (1st Dist. 2007). However, where a defendant seeks to introduce other crimes evidence against a witness, the standards are somewhat relaxed. In such cases, the test is whether the evidence has "significant probative value" to the defense. This is particularly true where the defense introduces *exculpatory* other crimes evidence to show that someone other than the defendant committed the offense. *People v. Turner*, 373 Ill.App.3d 121, 131, 866 N.E.2d 1215 (2d Dist. 2007).
- **Is there evidence that the witness has a reputation for untruthfulness?**
In Illinois, a witness may testify to another witness's reputation for untruthfulness. The proper procedure for doing so is to ask the witness whether he knows of the subject witness's reputation for truthfulness in the community. *People v. Brink*, 294 Ill.App.3d 295, 301, 690 N.E.2d 136 (4th Dist. 1998). For instance, a teacher may be able to testify regarding a child witness's reputation for truthfulness. *Id.* Defense attorneys considering this method of impeachment should be certain of the witness's reputation before taking this approach.

In short, there are many ways to challenge the prosecution's presentation of evidence, including thorough cross-examination, impeachment, and objections to improper evidence.

11.4 Motion for Directed Finding



Points to Remember

- *Motions for directed finding are raised by the defense attorney following the State's presentation of the evidence. The motion argues that, even assuming the truth of the facts presented in the State's evidence, the State has not demonstrated beyond a reasonable doubt that it could prove its case.*

Following the State's presentation of the evidence, the defense attorney may move for a directed finding. In such a motion, the defense argues that, even assuming the truth of the facts presented in the State's evidence, the State has failed to demonstrate that it *could* prove the defendant guilty beyond a reasonable doubt. *See generally People v. Connolly*, 322 Ill. App. 3d 905, 913-14, 751 N.E.2d 1219 (2d Dist. 2001); *People v. Borash*, 354 Ill. App. 3d 70, 79-80, 820 N.E.2d 74 (1st Dist. 2004); *People v. Cazacu*, 373 Ill. App. 3d 465, 473, 869 N.E.2d 381 (1st Dist. 2007).

Motions for a directed finding usually are made orally before the court. Defense counsel generally should argue such motions in every juvenile case for several reasons:

- To signal to the court that the State's evidence is not sufficient
- To gauge the court's assessment of the State's evidence
- To provide an opportunity to avoid putting on a defense case, if possible, particularly where the defendant will testify

11.5 The Defense Case



Points to Remember

- *Use discovery and investigation to decide which witnesses to call, and the purpose of calling each witness, but be flexible as the trial progresses in determining whether any or all of these witnesses are actually required.*

- *Use direct examination to elicit the witness’s story, but in doing so, use a persuasive organization, focus the witness on relevant facts and details, and to the extent if possible, avoid questioning the witness with regard to irrelevant areas on which the witness may be impeached.*
- *Object as needed during the State’s cross-examination and use redirect examination to rehabilitate the witness and to explain any important discrepancy elicited by the State during cross.*
- *Be aware of how to introduce evidence by laying the appropriate foundation, understanding the relevance of the evidence, and by anticipating any possible objection.*

If the defense is not successful in its motion for a directed finding, or if defense counsel does not make such a motion, the defense will have the opportunity to present its own evidence. As discussed in Chapter 7, the determination of whether and what type of evidence to put forward are highly strategic decisions.

11.5.1 Calling witnesses for the defense

Prior to the trial, defense counsel should have completed discovery and investigation and, therefore, should have a specific plan as to which witnesses she intends to call for the defense. Counsel also should have outlined the questions she plans to ask each witness and should have met with and prepared each witness to testify. However, counsel’s strategic plan for calling witnesses and presenting evidence for the defense should not be set in stone. Depending on the State’s presentation of evidence, defense counsel may decide that she does not need to call certain potential defense witnesses, or may decide to alter the order in which to present the witnesses. In general, it is wise to call the strongest witnesses first and last, when the fact-finder is most likely to remember their testimony. In other words, counsel must be flexible in the approach to presenting the defense witnesses.

11.5.2 Defense counsel’s role during the State’s cross-examination

During the State’s cross-examination of a defense witness, the defense attorney should be alert to any objectionable question posed by the State. Many of the objections discussed in section 11.3.1 are applicable here, but a few may be more particular to cross-examination:

1. Exceeds or goes beyond the scope of the direct examination. Attorneys are not permitted during cross-examination to exceed the scope of the direct; that is,

they generally cannot question the witness in areas not covered in the direct examination.

2. **Argumentative or badgering the witness.** Attorneys may ask leading questions, but they may not argue with the witness or ask the witness repeatedly the same question, hoping for a different answer.
3. **Improper impeachment.** As noted above in section 11.3.4, impeachment is a technique often used to impugn the witness's credibility. However, attorneys often conduct impeachment improperly. For instance, impeachment may be improper where a prior statement or testimony is not truly contradictory, where the State cannot perfect impeachment if the witness denies the contradiction, or where the State is not permitted to introduce the witness's prior adjudications or convictions because they do not satisfy statutory or legal standards.

11.5.3 Redirect examination

As noted in the previous section, following the cross-examination, the defense has an opportunity for redirect examination to address issues or questions that arose during the cross-examination. Redirect examination is generally short but can serve several important purposes, including rehabilitating a witness by allowing the witness to explain certain answers given during cross-examination or to clarify a few key points. Attorneys should not use redirect examination to cover every area attacked on cross-examination. Rather, attorneys should use redirect to address one to three significant points that can be resolved in the defense's favor by posing a few questions.

Redirect examination can be used to rehabilitate a witness who was impeached by the use of the witness's prior inconsistent statement. The simplest means of doing so is simply by asking the witness to clarify the inconsistency. Of course, counsel should not attempt this type of questioning if she is uncertain whether the witness can explain the discrepancy. This is likely an area that the attorney has covered during the witness's pre-trial preparation.

Example



On cross-examination, the State elicits a witness's prior inconsistent statement that he told the police that he saw "Big Red" at the video store at the time of the offense, but the defendant's name is Mikey. On redirect examination, counsel asks the witness to explain the discrepancy, and the witness states that he went to grammar school with Mikey, who was known as "Big Red" at the time, based on his affinity for chewing gum in class.

Another option for defense counsel to rehabilitate a witness is to use the witness's prior consistent statement. While the use of a prior consistent statement is generally prohibited on direct examination, it can be used to "rebut an express or implied charge...

of recent fabrication or improper influence or motive.” *People v. Silvestri*, 148 Ill.App.3d 980, 985-86, 500 N.E.2d 456 (1st Dist. 1986). Thus, where the prosecutor, by his questioning, implies that the witness is lying while testifying on the stand, defense counsel may ask the witness about a prior statement that corroborates the witness’s testimony on direct examination regarding the matter at issue. The rules governing the use of prior consistent statements are fairly rigid, so an attorney should be sure to have case law or statutory authority to present to the judge that supports her right to elicit this testimony.

11.5.4 Introducing evidence

In some cases, the defense may seek to offer tangible evidence (*e.g.*, a photograph). Attorneys must be intimately familiar with the rules of evidence and take a creative approach to finding ways to admit helpful evidence. To admit any type of evidence, attorneys must lay a foundation for the admission of the evidence. In other words, the attorney must demonstrate through the witness’s testimony that the evidence is relevant, authentic and admissible. *Lubet*, *Modern Trial Advocacy* at 308. Attorneys should know how to lay a foundation for the admission of evidence at trial. *Id.* at 314-82.

It should be noted that, as discussed in Chapter 13, if the State objects to the admission of certain evidence or testimony, and the objection ultimately is sustained, the attorney should consider asking the court to allow the attorney to submit an offer of proof. As noted in Chapter 13, an offer of proof puts in the record the nature of the proof which the attorney was prevented from submitting. For more information regarding offers of proof and preserving the record on appeal, please see Chapter 13.

11.6 Closing Arguments



Points to Remember

- *Unlike the opening statement, closing arguments provide the attorneys with opportunity to argue the case and guide the fact-finder to the desired conclusion based on the evidence presented.*
- *Like the opening statement, the prosecution typically will argue first and last, and defense counsel has only one opportunity to respond to the State’s evidence.*
- *During the State’s arguments, defense attorneys should listen carefully to respond to particular arguments made by the State and should object as appropriate, move to strike any improper argument, and, where a jury is present, ask the court for a limiting instruction to ensure that the jury does not consider the improper argument.*
- *In cases where the State waives its initial closing argument, defense attorneys should include in their close their response to any anticipated State argument, but should avoid opening the door to any improper argument by the State.*

Closing arguments are the parties' final opportunity to sum up the evidence and their respective theories of the case. Unlike the opening statement, a closing argument may be argumentative and may include reasonable inferences or arguments based on the evidence. Additionally, attorneys may refer to or explain certain legal principles, although they cannot misrepresent the law. Unlike the opening statement, the prosecutor typically has two opportunities to argue in closing – once initially, and once in rebuttal. Conversely, defense counsel has only one opportunity to argue the case.

The prosecutor's argument

During the prosecutor's argument, defense counsel should be alert to objecting to any improper argument propounded by the prosecution. While prosecutors are generally granted great latitude in making closing arguments, it is not unfettered. *People v. Blue*, 189 Ill. 2d 99, 128, 724 N.E.2d 920 (2000). The following are common types of arguments made by the prosecution which, depending on the context, may be objectionable:

1. Misstating the evidence or going beyond the reasonable inferences drawn from the evidence (*People v. Jennings*, 254 Ill.App.3d 14, 19-20, 626 N.E.2d 265 (2d Dist. 1993); *People v. Albanese*, 104 Ill.2d 504, 519, 85 Ill.Dec. 441, 473 N.E.2d 1246 (1984)).

Example: arguing that fingerprints found at the scene matched the defendant's prints, when the prints were inconclusive.

2. Inflaming the jury's passions (*Blue*, 189 Ill. 2d 99, 128, 724 N.E.2d 920 (2000)).

Example: arguing that the defendant is a menace to society, like Al Capone, and that the jury has a duty to make sure he is kept in jail.

3. Misstating the law (*People v. McCoy*, No. 3-06-0274, 881 N.E.2d 621 (1st Dist. Jan. 22, 2008)).

Example: arguing in an accountability case that the State can prove its burden if the defendant was "just standing there."

4. Unfairly shifting the burden to the defendant to prove innocence (*People v. Mitchell*, 123 Ill.App.3d 868, 876, 463 N.E.2d 864 (1st Dist. 1984)).

Example: asking the jury, "If the defendant is innocent, where is his evidence explaining his whereabouts on the night of the offense?"

5. Commenting on the defendant's failure to testify (*People v. Howard*, 147 Ill. 2d 103, 146-47, 588 N.E.2d 1044 (1991)).

Example: telling the jury "If the defendant didn't mean to shoot that boy, he would have gotten up here and told you it was an accident."

Objecting to the prosecutor’s improper closing argument is important because the failure to do so can lead to the forfeiture of the issue on appeal. Additionally, if the prosecutor repeats the argument, defense counsel should object again and, where a jury is present, should request that the jury be instructed to disregard the argument (or ask that the court issue any other appropriate instruction). Doing so will preserve the issue for appeal and highlight the impropriety of the prosecutor’s repeated efforts to circumvent the rules.

The defense’s closing argument

As noted in the previous section, the restrictions regarding the prohibition against using the law in argument during the opening statement does not apply to the closing argument. This *is* the time to argue the case fully, explicitly and persuasively. Where the opening statement may be viewed as an outline or guide to the theory of the case, the closing statement is its vivid depiction. The contrast between opening and closing arguments is apparent from the examples below:

Example



Opening statement.

The evidence will show that the eyewitness provided the police with two different versions of what she saw at the time of the offense.

Example



Closing statement.

The State has only one eyewitness who could place my client at the scene of the offense, but was she credible? She changed her story at least two times when she talked to the police, and told you a different story when she was here in court. In fact, she admitted that the police pressured her to say she saw a gun. Her statement that she saw a gun in David’s hand simply isn’t believable.

In closing argument, the attorney can tell the fact-finder what it should infer from the evidence and discuss how the details support that inference.

In fact, an effective closing argument ties together all of the evidence that the fact-finder has seen and heard, discounts the State’s evidence, and explicitly tells the fact-finder what to conclude from the evidence (the juvenile defendant is not guilty). Ideally, closing draws upon the theory and theme stated in the opening statement, but does so more persuasively, clearly and with more detail than the opening statement.

Some tips for crafting and delivering an effective closing argument include:

- Using an outline format rather than writing an argument word for word, in order to avoid the temptation to read from a piece of paper.
- Organizing the argument to be most effective – by issue, by witness, or some other format that is persuasive.

- Making sure that the closing argument, like the opening statement, tells a story.
- Highlighting undisputed facts, credible witnesses and fair inferences that support your theory of the case.
- Using details as needed to explain inferences, a witness's behavior and other aspects of the evidence that may not be clear. *Example: "How do we know that Ms. Young couldn't be sure of what she saw? It was dark, it was rainy outside, she wasn't wearing her glasses, and she told the police two different versions of what happened."*
- Providing reasons or motivations for actions where reasonably they can be inferred from the evidence.
- Explaining the point or conclusion that can be drawn from the cross-examination, and filling in any gap left by the witness. *Example: "During direct examination, the witness denied knowing that the defendant was from a rival gang, but on cross-examination, he acknowledged that he knew the client's nickname and that he had seen him in the presence of rival gang members." In this case, argue that even though the witness claimed he did not know of the defendant's gang affiliation, he revealed that he did on cross-examination.*
- Commenting on the State's failure to produce evidence, particularly where the State suggested in the opening statement that it would produce certain evidence.
- Using the law and jury instructions (if applicable), in a limited fashion, to highlight gaps in the State's burden of proof with respect to the charges.
- Using tone, pace of speech and volume to focus the fact-finder on portions of the argument, to convey the timing of events, and to ensure the argument is understandable.
- Using visuals and exhibits, although in jury trials, attorneys may need to seek court approval to use certain visuals or display evidence during argument.

There is no single way to construct and deliver the closing argument, but an organized, cogent and persuasive argument can do much to win the case.

Summary

Attorneys should be well-prepared in advance of the trial, be organized and effective in determining the order and presentation of the defense's witnesses and evidence, and be flexible in their approach to presenting evidence in order to address any issue that arise during the trial. They also should be prepared prior to trial to cross-examine all of the State's witnesses, but be able to alter their prepared questions for such witnesses at the trial after listening to the State's direct exam. Additionally, attorneys should object as appropriate and preserve for appeal any improper evidence or testimony that ultimately is admitted despite the attorney's best efforts.



Chapter 11 Checklist

- ✓ Always deliver an opening statement to the court, informing the fact-finder of the defense's theory of the case, and persuasively indicating that the evidence will support its theory.
- ✓ During the State's direct examination of its witnesses, be prepared to object to any improper questioning by the attorney or commentary by the witnesses, and be alert to any areas that should be addressed in cross-examination.
- ✓ In crafting the cross-examination of a witness, use short leading questions requiring "yes" or "no" answers, ask questions only pertaining to relevant areas of inquiry, and try ask questions to which the answer already is known.
- ✓ Use impeachment to discredit the witness. Impeachment may be used with respect to the witness's prior inconsistent statements, prior adjudications or convictions, prior bad acts or reputation for untruthfulness.
- ✓ Whenever possible, argue a motion for directed finding to suggest to the court that the State's evidence is insufficient, gauge the court's view of the evidence and avoid presenting evidence for the defense.
- ✓ Organize witnesses and evidence, as well as the direct examination of individual witnesses, to provide the maximum impact.
- ✓ Craft the direct examination with open ended questions that focus on relevant issues, convince the fact-finder of the witness's credibility and avoid unnecessary areas of potential impeachment.
- ✓ Use redirect examination to reestablish the witness's credibility with respect to important issues by countering the State's questions or by giving the opportunity to explain any discrepancy.
- ✓ Be aware of how to properly lay the foundation for the introduction of evidence and prepare responses to potential objections in advance. Have case law to support arguments.
- ✓ Use the closing argument to explain why the facts and applicable law demonstrate that the State has failed to satisfy its burden to prove the juvenile defendant guilty.

Chapter 12

Disposition



Disposition is the sentencing phase of the juvenile proceeding, which may either follow a guilty plea or an adjudication. Disposition provides the most marked difference between adult and juvenile proceedings. Arguably, a major advantage of being in juvenile court as opposed to criminal court is the juvenile system's range of dispositional options. Therefore, to the extent possible, attorneys should take advantage of the juvenile court system by thoroughly researching the potential dispositions to obtain the best possible outcome for the juvenile.

12.1 The Need for Dispositional Advocacy in Illinois



Points to Remember

- *Zealous advocacy during the dispositional phase of delinquency proceedings is essential to obtaining a fair and appropriate outcome for the juvenile.*
- *A contested dispositional hearing requires that the attorney offer a dispositional plan for the child in order to provide the court with a complete picture of the dispositional options.*

Zealous advocacy during the dispositional phase of the juvenile proceeding can make an enormous difference to the juvenile. A contested hearing where the defense attorney provides extensive information regarding the child's background and potential for success in a variety of dispositional settings, allows the judge to make a decision based on more complete information with careful consideration of the individual child. Additionally, because judges may admit a wide range of evidence at the dispositional hearing, defense attorneys have the opportunity to be creative in the type of evidence they submit to support a particular disposition for the child. 705 ILCS 405/5-705 (1) ("All evidence helpful in determining these questions, including oral and

written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purposes of the trial.”) Attorneys should prepare thoroughly for, and participate, in, dispositional proceedings.

12.2 Preparing for the Dispositional Hearing



Points to Remember

- *Attorneys should work with the child, his or her family, and relevant experts to investigate facts relevant to disposition, develop a dispositional plan, and be prepared to execute the plan should the court agree to it.*
- *Attorneys should consider preparing a dispositional hearing packet, including a memorandum and expert reports, evaluations and other useful information regarding the dispositional plan.*
- *Attorneys should prepare the client and his parents to meet with the probation officer*
- *Attorneys should meet also with the probation officer to determine whether the officer is in agreement with the attorney’s proposed plan or to convince the officer of the merits of the plan.*

The key to success at the dispositional hearing is to persuade the court to think of the child as a unique person. Unfortunately, some judges simply view the child in terms of his offense and background. Therefore attorneys should prepare thoroughly for dispositional hearings, with an eye toward showing the child as the unique individual that he is.

12.2.1 Developing a dispositional plan

Once the attorney is aware of the potential dispositions available in a particular case based on the applicable charges and relevant statutory provisions,²⁰ she should, develop a dispositional plan. This should be done with the assistance of a social worker or other expert familiar with relevant medical, psychological, educational, social and community organizations and networks in the area, as well as with the child and his parents (who may also testify at the dispositional hearing). In developing the plan, it is crucial to discuss the potential options with the child in order to advocate for the child’s expressed desires for disposition. Depending on the attorney and the child’s relationship with the probation officer, the dispositional plan also may be developed after discussion with the probation officer, and incorporate his recommendations. Ideally, such a plan should take into consideration the following:

- Child’s own assessment of his needs and desires regarding an appropriate disposition;
- Family support available to the client;
- Medical, psychological or psychiatric conditions requiring treatment or therapy;
- Educational requirements, including learning disabilities and areas in which the child may need additional academic support, based on input from the child, his parents and the child’s teachers;
- Community organizations and institutions that can assist with particularized needs of the child, such as after school activities, anti-gang support, etc.;
- Available residential placement facilities, if needed;
- Child’s background, seriousness of the offense, and other aggravating circumstances about which the court may be concerned;
- Probation officer’s assessment of the child and the officer’s recommendations for disposition; and
- Child’s inclination and demonstrated ability to comply with services.

A carefully crafted dispositional plan tailored to the child’s needs and desires and taking into account the court’s and the probation officer’s concerns, can provide the court with a reasonable alternative to incarceration or other more restrictive or punitive dispositions. Additionally, the attorney should attempt to craft several alternative plans to ensure that the court is provided the greatest possible range of options to consider.

In crafting a dispositional plan, the attorney should be realistic with respect to the client’s needs, desires and abilities. It is not beneficial for the attorney to create an onerous plan that will be impossible for the child to complete. Therefore, a pragmatic approach taking into account the child’s wishes and capabilities, is essential to developing a successful dispositional plan.

The attorney should consider preparing a packet of materials supporting the dispositional plan in advance of the hearing. Such a packet may include:

- A memorandum in support of the plan, with citations to statutes, case law, articles and other materials as appropriate;
- Positive letters or report cards indicating the child’s progress in school;
- Letters from any organization or agency where the child has stayed or served or where the child participated in activities or sports;

- Letters from any agency or organization where the child may be placed as part of the plan, indicating the child’s eligibility for the program and acceptance to it;
- Letters from family members or community members addressing the child’s accomplishments, positive behavior, and potential for rehabilitation;
- Letters from staff at the detention facility or other facility where the child was detained, indicating his good behavior or progress while there and, if possible, recommending that the child should be placed at a less restrictive facility;
- A letter from the client indicating his remorse for the incident and desire to rehabilitate himself and comply with the dispositional plan; and
- A “day in the life of the child” narrative, explaining to the court what the child will be doing from the time he wakes up until the time he goes to sleep.

Given the relatively relaxed evidentiary rules applied in dispositional hearings, such a packet can be presented to the court prior to the dispositional hearing to allow the court to review the materials contained in it in advance of the hearing.

12.2.2 Preparing to implement the plan

The attorney should be prepared to implement the dispositional plan if it is approved by the court. As such, the attorney may need to take the following steps:

- Confirm that any potential service providers or placement agencies will be able to accommodate the child at the time of disposition.²¹
- Confirm that the child meets the agency’s or organization’s requirements and that it appears to be a good fit for the child by visiting the agency or organization, providing them with necessary paperwork regarding the child (after obtaining appropriate releases from the child), verifying the available programs and services offered and their appropriateness for the child.
- If the court permits and the agency or organization allows, obtain an order to allow the child (if detained, on home confinement or electronic home monitoring) and his parents to visit the facility and meet with the staff, or obtain an order to allow the agency or organization to meet with the child where he is being detained.



Note

The disclosure of the client’s medical, psychological and psychiatric and educational records is a sensitive matter. Attorneys should release confidential client records only after obtaining a release from the child and should assess whether any information in such records is potentially harmful to the child.

12.2.3 Working with probation officers

Prior to the disposition, the child and his parents likely will meet with a probation officer, who will prepare a social investigation report. The report will be based on the information provided by the child and others familiar with the child's background, as well as other information regarding the child's history of contacts with the juvenile court. The child and his parents' cooperation will be required and expected by the juvenile court judge, so it is essential that the lawyer prepare the client and the parents for the meeting with the probation officer. Some tips for preparing the child and his parents for this meeting include:

- Telling the child and the parents to treat any discussions with the probation officers as if they are conversations with the juvenile court judge and that they are not confidential;
- Conducting a mock interview with the child and his parents to prepare them for their meeting with the probation officer. The attorney should ask questions she believes the probation officer will ask, listen to the answers and make suggestions where warranted on how to better answer the probation officer's questions;
- Telling the child and his parents to cooperate with the probation officer and answer his or her questions fully without discussing the offense;
- Cautioning the child and his parents against discussing the current offense. While there may be some benefit to expressing remorse or sadness for the complainant and taking responsibility for the offense, if the child intends to appeal on grounds of his innocence, then the child and the parents should avoid discussing the offense. The child may say he is doing so on the advice of his attorney; and
- Encouraging the child and his parents to emphasize positive changes or accomplishments of the child prior to the offense and during juvenile court proceedings, particularly where such accomplishments suggest the child's amenability to a less restrictive placement.



It is essential that the lawyer prepare the client and the parents for the meeting with the probation officer.

After the probation officer meets with the child and parents, the attorney also should meet with the probation officer prior to the dispositional hearing. Such a meeting can be beneficial in many ways. It can give the attorney a preview of the probation officer's testimony, give the attorney an opportunity to become aware of the officer's concerns in advance of the hearing, and also provide the attorney with an opportunity to address the officer's concerns, such that the officer may be less inclined to make more negative findings or recommendations.

12.3 Advocacy at the Dispositional Hearing



Points to Remember

- *Attorneys should use their opening and closing arguments and the testimony of their witnesses to advocate for the desired dispositional plan.*
- *Attorneys should call mitigation witnesses and present evidence. Such witnesses and evidence may include expert evaluations or reports, testimony by teachers and family members, and information regarding the child's performance in pretrial detention or other activities.*
- *Attorneys should be prepared to counter the State's witnesses and the probation officer's recommendations by cross-examining them regarding any evidence in aggravation; challenging the probation officer's expertise, knowledge and methodology; and noting inaccuracies in testimony or in the social investigation report, as well as by objecting to improper testimony or evidence.*
- *Even if the court does not adopt the defense's dispositional plan, the attorney should advocate for the adoption of special conditions that may be beneficial to the client, including treatment or additional educational opportunities.*

The dispositional hearing occurs after the conclusion of the trial. Typically, the prosecution and defense are permitted to present evidence and testimony, the court reviews the social investigation report, and the probation officer indicates his recommendations for an appropriate disposition. Additionally, the child may or may not testify. The evidentiary rules at a dispositional hearing also are fairly relaxed. *See generally* 705 ILCS 405/5-705. Because this hearing often provides the only opportunity for the minor to advocate for a particular dispositional plan, attorneys should be zealous in taking advantage of this opportunity to obtain the best possible disposition for the child.

12.3.1 Advocating for a particular dispositional plan

Depending on the circumstances of the particular case, the defense attorney may advocate for a dispositional plan to which all of the parties agree, or may have the agreement of only the probation officer, or may not have the agreement of any of the parties. While it is desirable for all of the parties to agree to a particular plan, defense attorneys must place the needs and desires of their juvenile clients first and foremost, and must advocate for the best possible dispositional plan for the child. Additionally, unlike the situation in adult criminal court, juvenile cases often have a range of dispositional options available, many of which do not involve incarceration. Therefore, it is particularly important that defense attorneys prepare for and argue for a desirable disposition.

With respect to arguing for a specific plan, there may be several different avenues of argument for that plan during the course of the hearing, depending on whether the plan also is supported by the prosecution or by the probation officer. The attorney should advocate for the plan in her opening and closing arguments, and should use testimony and evidence to demonstrate why a specific plan is desirable.

As noted in section 12.2.1 *supra*, the attorney should have prepared in advance of the hearing a dispositional packet for the court to consider in determining the disposition. At the hearing, defense counsel can move to admit the dispositional packet in its entirety, and defense witnesses can testify to the materials contained therein, if relevant to their testimony. In cases where there is no agreement among the parties regarding the disposition, or where the probation officer disagrees with the defense's proposed dispositional plan, a dispositional packet can provide a strong counterpoint to the social investigation and help ensure that the court does not rely on the probation officer's recommendations alone.

12.3.2 Calling mitigation witnesses and presenting evidence in mitigation

As in any hearing, particularly where the defense's proposed dispositional plan is contested, it is useful for the defense to call helpful witnesses who can testify to the child's positive behavior and amenability to the proposed dispositional plan and to present other relevant evidence.

With respect to other evidence the attorney may consider presenting in mitigation, much of this evidence may be included in the defense's dispositional memorandum and packet, discussed above. As appropriate, the witnesses should discuss materials or evidence relevant to their particular testimony.

In other words, the list of potential mitigation witnesses and evidence is broad. Attorneys therefore, should, think creatively about the witnesses they may call in mitigation to support their proposed dispositional plan. Additionally, attorneys may consider hiring a mitigation specialist or expert to assist in the formulation and preparation of mitigation evidence if the child faces commitment to the Department of Juvenile Justice or a

lengthy period of probation, or where the potential mitigation evidence is particularly complex.

Given the broad nature of the dispositional hearing, with sufficient notice to the State the court likely will provide the defense with some flexibility in allowing evidence relevant to the dispositional decision. If, however, the court does not permit the introduction of certain relevant evidence, the attorney should object and make an offer of proof or other similar record of the evidence barred by the court. This will allow an attorney on appeal to challenge the court's ruling, particularly if the ultimate disposition is excessive or unfair to the child.

12.3.3 Challenging the State's witnesses, the probation officer and the social investigation report

When there is no agreement among the parties regarding the dispositional plan, the defense attorney should not only present mitigating evidence, but also should be prepared to challenge the State's evidence in aggravation, as well as the probation officer's report and recommendations. The attorney should request the probation officer's social investigation report in advance of the dispositional hearing, should verify the accuracy of the report with the child and his parents, and should determine whether the probation officer may have overlooked certain facts or failed to take mitigating circumstances into consideration.

Defense attorneys should not take the facts, recommendations and conclusions in any plan or report as something that must be relied upon or taken at face value. Rather, attorneys should examine these documents and consider insisting that the State call witnesses to testify about the reports the State intends to use. Pursuant to 705 ILCS 405/5-705, a minor has the right to a "fair opportunity" to contest the reports used by the court in issuing a disposition. 705 ILCS 405/5-705 (2).

As in the adjudication hearing, it is proper for the defense attorney to cross-examine the State's witnesses, as well as the probation officer. The prosecution also may introduce other evidence, such as the child's prior record of delinquency findings, any record of disciplinary violation in school and while the child was in pre-adjudication detention, or any evaluations conducted that demonstrate the child is not amenable to rehabilitation. The dispositional hearing offers the defense attorney an opportunity to challenge the probation officer on the basis of his recommendation, qualifications or other relevant factors, as well as challenge any other State witness on whose reports and conclusions the court may rely.

As is the case with preparing to cross-examine witnesses at the adjudication hearing, attorneys must prepare carefully to cross-examine witnesses at the dispositional hearing. This includes requesting reports or information on which the witnesses will rely, speaking to the witnesses prior to the dispositional hearing, and preparing for potential objections (although this may be limited in a dispositional hearing). *See* Chapter 11, *supra*. While it may not be appropriate to cross-examine the victim's family, who likely will testify regarding the impact the offense has had on their family, it may be appro-

appropriate to cross-examine the victim or witnesses to the occurrence regarding certain facts of the offense, or regarding the nature or extent of the victim's injuries, if there is an indication in medical reports or even from certain aspects of the victim's testimony that the injuries were not as severe as suggested by the victim. Some other suggestions for countering the State's potential evidence in aggravation include:

- Questioning a teacher regarding the amount of individual interaction she had with the child, the circumstances of any particular disciplinary incident or violation, the teacher's experience in dealing with children with the child's particular educational level and ability, physical or mental health issues, and the teacher's or school's policies for handling children like the minor defendant, and any efforts that the child made to rectify the situation;
- Questioning a detention officer or staff member regarding his training or experience in handling children at the detention facility, the precise circumstances of any disciplinary violations, the daily routine of children kept in the detention facility, and the conditions of the facility; and
- Questioning the probation officer regarding the circumstances of the child's purported failure to comply with certain restrictions, the length of time during which the probation officer interacted with the child prior to the infraction, and any effort the child made to rectify the situation.



...the defense attorney should not only present mitigating evidence, but also should be prepared to challenge the State's evidence in aggravation, as well as the probation officer's report and recommendations.

The attorney should review the social investigation report prior to the proceeding (the probation officer generally provides the attorney with the social investigation report prior to the dispositional hearing), and the attorney should challenge the probation officer and the social investigation report with regard to the following areas:

- Officer's experience in investigating such reports generally;
- Inaccurate or incomplete facts;
- Positive facts regarding the child that the probation officer did not consider or did not include in the report;

- Officer's methodology, including who the probation officer spoke with and for how long, why the officer did not speak with other relevant individuals, and whether the probation officer researched options other than the recommended disposition;
- Officer's experience in dealing with particular issues pertinent to the child, including substance abuse, mental or physical health issues, social or familial problems, school issues, and the officer's familiarity with relevant research, articles, etc., regarding the same; and
- Available alternatives to the officer's recommendation.

The attorney should be prepared to object to certain types of evidence that may be presented in aggravation at the hearing. These may include:

1. inaccuracies in the social investigation report or in any of the witnesses' testimonies;
2. unnecessarily inflammatory questions posed by the prosecutor or disparaging comments or statements regarding the minor by the State's witnesses;
3. the introduction of information regarding arrests of the minor for other offenses, where the offense is not supported by credible and reliable testimony regarding the purported offense. While arrests and station adjustments are admissible in juvenile disposition hearings (*see In re A.J.D.*, 162 Ill.App.3d 661, 664, 515 N.E.2d 1277 (4th Dist. 1987)), attorneys should challenge factual inaccuracies regarding the arrest and should be prepared to cross-examine witnesses who testify regarding a minor's prior arrests;
4. the introduction of unreliable hearsay statements. Even though hearsay is admissible at the dispositional hearing, counsel should challenge second and third-hand information and then cross-examine the witness regarding the purported statement by the minor; or
5. the imposition of a registration requirement in sex offense cases.

In short, defense attorneys should be prepared to challenge aggravating evidence that may lead the court to require a more restrictive placement or incarceration for the minor than that which the defense has proposed.

12.3.4 Requesting special conditions or orders

The court may not necessarily adopt the dispositional plan proposed by the minor, but may issue a more general order regarding disposition, or may impose a disposition that is more restrictive than that requested by the juvenile's attorney. Such a dispositional order may include conditions to be imposed on the minor, including requirements to at-

tend school, stay away from the victims, and checking in with a probation officer. Other conditions may include:

- Family counseling or therapy
- Individual therapy or treatment
- Special courses in vocational disciplines or to assist in obtaining a GED
- Drug or substance abuse treatment

However, even where the juvenile's specific dispositional plan is not adopted by the court, the defense attorney should seek to limit the conditions imposed by the court and, after the dispositional hearing, work with the probation officer to identify good and appropriate programs that may be helpful to the client. If the attorney is considering requesting the imposition of special conditions as part of the dispositional order other than those ordered by the court, the attorney should be aware that any additional requirement to the child's disposition could be harmful to the child by creating another requirement or obligation that the child must fulfill in order to complete the disposition. Therefore, counsel should be strategic in requesting these types of conditions, should do so only after careful consultation with the child, and, whenever possible, should use such special conditions as a means to circumvent more restrictive and less rehabilitative conditions that the court may be inclined to impose.

12.4 After the Disposition



Points to Remember

- *Attorneys should be prepared to discuss in detail with the child and his parents any dispositional outcome, the child's obligations under the court's order, and any effort the attorney intends to undertake to challenge the disposition.*
- *Attorneys should move to reconsider the disposition if they believe that the dispositional order was excessive, unfair or otherwise improper.*
- *Attorneys should ensure that the notice of appeal and appropriate post-dispositional motions have been filed.*
- *Attorneys should consider asking the court to order that the Department of Juvenile Justice or the probation officer report to the court periodically regarding what they are doing to address the child's education, social and mental needs.*
- *Attorneys should follow up with the child and his family, as well as the probation officer, placement agency, Department of Juvenile Justice and any other service provider, to continue to ensure that the child's needs are being met.*

Despite the attorney's best efforts, the court may order a disposition that the attorney did not request and seems excessively restrictive in the attorney's view. If this is the case, the attorney should challenge the disposition immediately and on appeal.

12.4.1 Discussing the disposition with the child and his parents

Particularly where the disposition is not what the defense requested or hoped to receive, the imposition of a sentence can be devastating to the child. In such cases, the attorney should determine how the child feels about the court's order, review the hearing with the child and discuss why the attorney believes the court reached the decision, and make sure that the child clearly understands his obligations under the court's ordered disposition. The attorney also should advise the client that there may be serious consequences to the child's failure to comply with the court's orders, particularly where the client is not incarcerated. The consequences may include a revocation of the probation, placement or other similar disposition; or even incarceration. The attorney also should ensure that the client and his or her parents are aware if the attorney plans to challenge the disposition.

12.4.2 Moving to reconsider the disposition

If the attorney or the client believes that the disposition was improperly reached or unfair, the attorney may seek reconsideration of the disposition. To do so, the attorney should file a motion to reconsider the disposition, stating the reasons the attorney believes the disposition was unfair. While such motions typically are not required in delinquency cases in order to preserve the child's right to appeal the issue to a reviewing court (*see In re M.Z.*, 296 Ill.App.3d 669, 672, 695 N.E.2d 587 (4th Dist. 1998)), the motions may be useful in convincing the court that it reached the incorrect decision. However, given the Juvenile Court Act's specifications regarding the types of sentencing orders appropriate in certain cases, challenges to the court's dispositional orders are not as common as they are in adult criminal cases. Nonetheless, attorneys should request reconsideration whenever they believe doing so is appropriate. Some grounds for asking that the court reconsider the disposition are:

- The disposition was excessive based on a proper weighing of aggravating and mitigating factors;
- The child was sentenced beyond the maximum term of the court's jurisdiction (21 years of age);
- The child was improperly sentenced based on the statute's requirements (per 705 ILCS 405/5-710); or
- The child received a longer sentence than an adult would have for the same offense.

The attorney should argue the motion and, if unsuccessful, should consider filing a notice of appeal. Notices of appeal are discussed in greater detail in Chapter 13.

12.4.3 Post-dispositional representation

Following the disposition, attorneys often assume that, aside from filing an appeal, there is nothing further that they can do to represent the child and that their duties on the case have come to a close. These assumptions, however, are both incorrect and can be irreparably harmful to the child. Rather, the attorney can and should continue to assist the child, post-disposition, in the following ways:

- Ensure that the notice of appeal and/or any appropriate post-dispositional motions have been filed and that the child's right to appeal has been preserved. *See* Chapter 12 at 12.1.2 (citing 725 ILCS 5/116-1 (discussing motions for a new trial), Ill. Sup. Ct. R. 605(a) (discussing jurisdictional requirements for filing notice of appeal), Ill. Sup. Ct. R. 606(a) (discussing perfection of appeal rights) and *In re J.T.*, 221 Ill. 2d 338, 346-47, 851 N.E.2d 1 (2006)).
- Consider asking that the juvenile court require that the Department of Juvenile Justice and probation officer report back to the court periodically regarding the steps they have taken to meet the child's educational, social, and health related needs.
- Continue to follow up with the child, his parents and family, the probation officer, Department of Juvenile Justice and other service providers to ensure that the child's needs continue to be met, and to be aware of any circumstances that arise to interfere with the child's compliance with the dispositional plan.
- If appropriate, ask the court to review the child's progress on a periodic basis to determine whether the child's sentence should be discharged and the case closed.

Summary

Dispositional hearings often have a great impact on the court's ultimate sentencing decision. Without proper advocacy by the defense attorney, courts often rely upon the probation officer's recommendations, without considering alternative options that would better serve the child. Attorneys therefore, should, prepare far in advance for a dispositional hearing, develop a plan for disposition after seeking input from the child, his or her family and relevant experts, and advocate for the best possible disposition for the child. The attorney should follow-up with the child and service providers, post-disposition, to ensure that the child's rights are protected and that he is successful in serving his sentence.



Chapter 12 Checklist

- ✓ Solicit the input of the client and his parents, as well as experts such as social workers, medical professionals, mental health experts, substance abuse experts and mitigation experts to assist in crafting a dispositional plan.
- ✓ Prepare to advocate zealously at the dispositional hearing.
- ✓ Prepare the client and his parents to meet with the probation officer, and meet with the probation officer after this, to assess the probation officer's recommendations and/or convince the officer to go along with the defense's dispositional plan.
- ✓ Prepare the client and his parents for the dispositional hearing and for any potential testimony they may give.
- ✓ Put together a dispositional hearing memorandum and packet of information including evaluations, school reports and other information that the judge should consider in adopting the defense's dispositional plan.
- ✓ Present mitigation evidence and testimony, including testimony of the child's family, community members, teachers, detention personnel and relevant experts.
- ✓ Challenge the State's evidence and witnesses, as well as the probation officer and the social investigation report, by carefully crafting cross-examinations of the witnesses, challenging the evidence in aggravation, objecting to improper evidence, and contesting the basis for the probation officer's recommendations, and by pointing out any inaccuracy in the social investigation report.
- ✓ Request the imposition of special conditions that are helpful to the client, if any, particularly if the court does not adopt the defense's dispositional plan.
- ✓ After the dispositional hearing, discuss the outcome and the hearing with the child and his parents to ascertain their feelings and to ensure that they understand the child's obligations.
- ✓ File a motion to reconsider the disposition, if appropriate.
- ✓ Follow up with the child, his family, the probation officer, placement agencies, the Department of Juvenile Justice, and other service providers, to ensure that the child continues to receive appropriate services, and to be aware of any situations that arise that may compromise the child's success in serving his sentence.
- ✓ Consider requesting that the court order the probation officer and the Department of Juvenile Justice to report periodically to the court regarding the efforts made to meet the child's needs, and to consider the continued appropriateness of the child's sentence.

Chapter 13

Appeals



Juveniles convicted in delinquency proceedings have a right to an appeal. Therefore, all criminal defense lawyers, including those who represent juveniles in delinquency cases, owe it to their juvenile clients to consider the road ahead and protect their juvenile clients' appellate rights in the event that they lose at trial. Attorneys who represent clients on appeal also should be familiar with the applicable rules for filing appeals and should make sure they have the necessary expertise for preparing and arguing appeals in juvenile cases.

13.1 Preparing for Appeal: What You Can Do During and After the Case to Preserve your Client's Right to Appeal



Points to Remember

- *Juveniles have a right to an appeal.*
- *In order to create the best possible record on appeal, most, if not all motions, should be in writing.*
- *Attorneys representing juveniles in delinquency court should preserve the record on appeal by raising objections orally and in writing and by filing detailed post-trial motions raising those issues.*
- *During the course of pre-trial and trial proceedings and after, juvenile defense lawyers should confirm the record is complete by making sure transcripts are accurate and that all motions are in the file.*
- *Attorneys should ensure that the child understands he has the right to an appeal, and attorneys should err on the side of filing a notice of appeal.*

The juvenile defense lawyer's role in protecting and preserving the child's appellate rights is particularly crucial. Under Illinois's statutory scheme and well-established case law, in order to preserve many issues for appeal, they must be raised before the trial court and then raised post-trial in a motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988). However, the Illinois Supreme Court has held that a motion for a new trial is not technically required in delinquency cases (*In re W.C.*, 167 Ill. 2d 307, 327, 657 N.E.2d 908 (1995)). Nonetheless, filing a motion for a new trial, even in a delinquency case, may be advisable for many reasons, as discussed in section 13.1.2, *infra*. Even where the juvenile defense lawyer does not know if there are meritorious appeal issues or believes that there are no issues to appeal, the lawyer still should preserve the child's appeal rights in the event that the child wants to appeal. The lawyer should err on the side of protecting the child's right to do so. Accordingly, the lawyer should take several steps to ensure the child's appellate rights, both during the trial proceedings and afterward.

1. Confirm the record on appeal is complete by ensuring that all written motions and documents are in the court file and all court proceedings are transcribed;
2. Object to any error at trial, orally and in writing, and err on the side of raising an objection rather than keeping silent;
3. File a post-trial motion in order to preserve the juvenile's appeal rights (in cases where the child is sentenced in adult criminal court), to state objections raised at trial in greater detail, to clarify any ambiguity in the trial record regarding those objections, and to raise any other potential issue for appeal;
4. File a motion to reconsider or reduce the sentence; and
5. Consider other methods of clarifying or preserving the record, such as an offer of proof or by supplementing the record with relevant documents or exhibits.

13.1.1 During the proceedings

A trial lawyer's role in preserving a juvenile defendant's appellate rights begins long before the end of the case. Trial lawyers should be aware of potential appellate issues that are unique to juvenile defendants. Some of these issues are as follows:

1. The parents were not properly notified or served with the petition or amended petition (*see* Chapter 4, § 4.3.2b, citing *In re J.W.*, 87 Ill.2d 56, 429 N.E.2d 501 (1981), *In re C.H.*, 277 Ill.App.3d 32, 660 N.E.2d 545 (3d Dist. 1995) and 705 ILCS 405/5-525);
2. The child should not have been allowed to waive counsel at the detention hearing, arraignment, or other proceeding (*see* Chapter 2, § 2.1, citing 705 ILCS 405/5-170(b));
3. The court erred in finding the child or his family not indigent;

4. There was insufficient evidence of probable cause to arrest (*see* Chapter 5 § 5.1.3, citing 705 ILCS 405/5-501);
5. The court erred in failing to appoint an expert or, alternatively, counsel erred in failing to procure an expert;
6. The court erred in denying a motion to suppress statements because the statements were involuntary, the minor could not understand his *Miranda* warnings, the minor was kept in custody for too long, the minor was not permitted to see a parent or a youth officer (*see* Chapter 4, § 4.1.2, citing *Miranda v. Arizona*, 384 U.S. 436 (1966); *Smith v. Illinois*, 469 U.S. 91 (1984));²²
7. The child was not fit to stand trial or disposition, or was otherwise not competent (*see* Chapter 3, generally);
8. The court erred in denying a motion to sever the child's trial from that of a co-defendant;
9. The child's rights under the Confrontation Clause of the United States Constitution were violated or the State failed to comply with statutory requirements for hearsay testimony (725 ILCS 5/115-10, *et seq.*; *Crawford v. Washington*, 541 U.S. 36 (2004));
10. The child was not proven guilty beyond a reasonable doubt;
11. The court erred in disposition because it failed to consider the least restrictive placement, the disposition order was excessive, or the disposition order called for a sentence or punishment that exceeded the child's 21st birthday and therefore was beyond the juvenile court's jurisdiction (705 ILCS 405/5-710; *see also*, 705 ILCS 405/5-755);
12. The child was required to register as a sex offender for a term which exceeded his 17th birthday, or was not permitted to petition for termination of the registration (730 ILCS 150/1 *et seq.*);
13. The court erred in transferring the child to adult court or in applying the extended juvenile jurisdiction statute (*see generally*, Chapter 9, citing 705 ILCS 405/5-130, 705 ILCS 405/5-802, 705 ILCS 405/5-805, 705 ILCS 405/5-810);
14. The child was improperly denied a jury trial (*i.e.*, in particular proceedings where the child is permitted to request a jury trial) (*see In re G.O.*, 191 Ill.2d 37, 727 N.E.2d 1003 (2000)); or
15. The child unconstitutionally was required to submit a sample of his DNA (730 ILCS 5/5-4-3; *but see, In re Lakisha M.*, 227 Ill.2d 259, 882 N.E.2d 570 (2008) (finding statute not unconstitutional).

Adapted from Elizabeth Calvin, Sarah Marcus, et al., *Juvenile Defender Delinquency Notebook*, Ch. 12 (2d ed. 2007).

In addition to being aware of potential issues for appeal, juvenile defense lawyers should take steps to protect the client's ability to appeal his adjudication and disposition. Thus, lawyers should strive to create a complete record, and use objections, motions and offers of proof to preserve issues for appeal.

A complete record on appeal

At the outset, lawyers should be aware of the necessity of creating a complete record. The record on appeal refers to all documents filed in the juvenile court, as well as all transcribed proceedings. Thus, the lawyer should ensure that all relevant discussions and rulings before the court are transcribed, and that important motions and objections are made in writing. The attorney also should review her notes and the court reporter's transcripts to ensure their accuracy. Such errors are often difficult or nearly impossible to correct on appeal. See Ill. Sup. Ct. R. 329 (specifying that the "record on appeal shall be taken as true and correct unless shown to be otherwise and corrected in a manner permitted by this rule," and that material inaccuracies may be corrected by stipulation of the parties or by the reviewing court, and further that any dispute over whether the record accurately discloses what occurred before the trial court must be settled by that trial court).

Objections, offers of proof and motions

Objections

Throughout the proceedings, attorneys should not hesitate to object to proffered testimony or adverse rulings, and to consider putting key objections in writing so as to better preserve them. Defense lawyers must remember that, on appeal, appellate attorneys are limited to raising issues that appear in the record (including transcripts and court filings); thus, it is important to be as clear as possible in preserving possible appellate issues by objection.

Example



The attorney becomes aware that the State's witness, Leslie Jenkins, is going to testify that Joe Z., the defendant's friend, told the witness that the defendant had drugs in his backpack after school one day. The attorney first files a written motion (a motion in limine) objecting to the testimony, based on hearsay. It is denied. On direct examination, the State asks Jenkins if she had a conversation with Joe Z. about the defendant. The defense attorney objects. The court asks the attorney for the basis of the objection, and the attorney states that she is objecting because the testimony is hearsay.

The attorney also should ask the court for the basis of any ruling in order to make the record as clear as possible and to allow the attorney an opportunity to further address the issue in the event that the court's reasoning or conclusion may be altered.

Example



In the previous example, the judge denies the motion in limine and overrules counsel's objection. It is incumbent upon the attorney to ask, "Your honor, may I have the basis for the court's ruling." If, for instance, the judge then responds, "It's not hearsay if the witness testifies," the attorney now has a tangible erroneous ruling to appeal.

Offers of proof

Even when a judge prevents attorneys from presenting certain evidence or testimony, attorneys should make every effort to put the omitted evidence or testimony on the record, possibly by way of an offer of proof. An offer of proof tells the appellate court the substance of the evidence or testimony that the court did not allow. The offer of proof is crucial to the appellate attorney's ability to challenge an improper objection, because it allows the attorney to explain how the defendant was harmed by the court's ruling. In other words, without the offer of proof, the appellate court must guess at the substance of the prohibited evidence and, therefore, can only speculate about how the defendant was harmed by the court's ruling.

Example



Leslie Jenkins is allowed to testify regarding Joe Z.'s statement, despite the defense attorney's objection. On cross-examination, defense counsel begins to ask Jenkins about a prior inconsistent statement she made in June 2007 in which she said that Joe Z. said he saw drugs in someone else's backpack and not the juvenile defendant's. The State objects, and the State's objection is sustained. Counsel then tells the court, "Judge, I'd like to make an offer of proof. If I ask Ms. Jenkins if she had spoken to my defense investigator, Micky Malone about this statement, Jenkins would testify that she met with Malone on March 6, 2008, in Malone's office, and that at that time, she told Malone that Joe Z. told her in June 2007 that he saw someone named Andy, who was not the defendant, with the drugs in his backpack."

Motions

Oftentimes, defense attorneys are aware of a crucial piece of evidence that is potentially objectionable or may form the basis for an issue on appeal. In such cases, an attorney should not wait until trial to object to the evidence; rather the attorney can file a motion prior to the trial, to bar the evidence or prevent its admission.

Example



The police took a statement from the juvenile defendant after the juvenile asked to see a lawyer. The prosecution turns over a detective's notes regarding the child's statement. The child's lawyer files a motion to suppress the statement, based on the police's continued questioning of the child after his request to have an attorney present. The lawyer also requests a hearing on the motion.

Example



Counsel learns that the State intends to introduce at trial the hearsay statement of a witness who was questioned by the police and that the witness will not testify at trial. Counsel files a pre-trial motion arguing that the statement is hearsay and inadmissible under Crawford v. Washington and the Confrontation Clause because the questioning of the witness was conducted by a police officer and, therefore, is testimonial.

Additionally, the attorney should ask the court to clarify the legal and factual basis for any ruling on objections or motions in order to create a sound foundation for raising the issue on appeal. Additionally, as in the example above, even where the court already may have ruled on a motion pretrial, the attorney should continue to object and raise the issue in a post-trial motion in order to preserve unambiguously the issue for appeal.

Defense attorneys in juvenile court should strive to create a clear and complete record and should not hesitate to object or raise important issues for the court, particularly where such issues may form the basis for an appeal.

13.1.2 After the trial and disposition

Filing a motion for a new trial

In the event the juvenile is found guilty, filing a motion for a new trial should be an essential tool for any zealous advocate to consider after consultation with the juvenile and analysis of possible benefits and detriments. Following the trial, attorneys should file a motion for a new trial within 30 days of the adjudication to raise any error that occurred in the trial. 725 ILCS 5/116-1. Illinois law generally requires that an attorney file a motion for a new trial in order to preserve an issue for appeal. *See People v. Enoch*, cited *supra*. While the Illinois Supreme Court has held that a motion for a new trial is not technically required in delinquency cases (*In re W.C.*, 167 Ill. 2d 307, 327, 657 N.E.2d 908 (1995)), attorneys should file such post-trial motions regardless. There are several reasons to do so:

- A motion for a new trial helps ensure that errors are preserved, particularly where the attorney may not have objected clearly to an error during trial or where the record regarding a particular objection is muddled.

- A motion for a new trial can flag important possible appellate issues for the appellate attorney.
- A persuasively written post-trial motion may convince the trial court to grant a new trial.

Checking the record

Attorneys representing children in delinquency proceedings also should confirm that the record is complete in that the court file contains all motions, all transcripts have been ordered, all exhibits are in the court file or have been impounded, and all transcribed proceedings are accurate. There are two major parts of the record – the common law record (all documents that are filed with the juvenile court) and the report of proceedings (all transcripts of the proceedings).

The common law record should contain:

1. Charging document (indictment or information, if applicable);
2. Petition of wardship;
3. State and defense motions for discovery;
4. Motion to suppress statements or suppress evidence;
5. Any other motions *in limine* or pretrial motions;
6. Exhibits (from hearings, trial or disposition);
7. Jury instructions and verdict forms (for instance, in EJJ or transfer cases);
8. Motion for a new trial;
9. Order of sentence, probation or disposition;
10. Motion to reconsider or reduce sentence; and
11. Notice of appeal

Additionally, attorneys may seek to supplement the record with additional information that arises after the conclusion of the trial. Such information may include post-trial motions, additional exhibits or documents submitted as part of the dispositional hearing, and other similar information. Taking these steps prior to the appeal will greatly assist the appellate attorney in preparing the appeal.

After the disposition

After disposition, juvenile defense attorneys should take steps to preserve their clients' right to appeal. If the attorney believes that grounds exist to challenge the minor's disposition, the attorney should attempt to do so by filing a motion to reconsider the disposition. *See* Ill. Sup. Ct. R. 605(a).

In order for the minor to appeal the verdict or sentence imposed, the juvenile must file a notice of appeal in the trial court within 30 days of the disposition or, if a motion to reconsider is filed, within 30 days of the court's ruling on the motion to reconsider the disposition. Ill. Sup.

Ct. R. 605(a); Ill. Sup. Ct. R. 606(a); *see also, In re J.T.*, 221 Ill. 2d 338, 346-47, 851 N.E.2d 1 (2006). The failure to do so can result in forfeiting the right to appeal. *J.T.*, 221 Ill. 2d at 346-47.

A juvenile has the right to appeal from a guilty plea, but like adult defendants, must comply with certain requirements as stated in Illinois Supreme Court Rule 604(d). *In re William M.*, 206 Ill. 2d 595, 599-600, 795 N.E.2d 269 (2003). As noted in Chapter 10, in cases involving a negotiated plea (*i.e.*, where the State agrees to recommend a specific sentence or range of sentence, or makes concessions regarding the sentence that will be imposed), the minor must file within 30 days a motion to withdraw the guilty plea and vacate the judgment. Rule 604(d), 605(c), 606. After his motion is denied, the minor then must file a notice of appeal within 30 days of the denial of that motion in order for the appellate court to consider the appeal, even when the minor simply wants to contest his disposition. Rule 604(d), 605(c), 606.

In cases involving an open plea (*i.e.*, where there is no agreement regarding the specific sentence involved), the minor may file either a motion to reconsider the disposition, or a motion to withdraw the guilty plea and vacate the judgment in order to preserve his appellate rights. Rule 604(d), 605(b), 606.

Pursuant to Illinois Supreme Court Rule 605(c), the juvenile court judge must inform a child of his right to an appeal. It is important for attorneys to recognize that the decision to appeal is one that ultimately rests with the child. Therefore, even if the attorney questions the merit of appealing a decision, she should still file a notice of appeal if the child believes there is any possibility that he might want to appeal. It is far easier for a child to dismiss an appeal after the notice is filed than to attempt to appeal after foregoing this right by failing to file a notice of appeal.

13.2 Filing the Appeal: A Basic Primer on the Direct Appeal Process



Points to Remember

- *File a notice of appeal within 30 days of the disposition or order denying reconsideration of the disposition.*
- *Consider whether you should appeal and whether the juvenile can be harmed by the appeal and discuss the options with the child; the decision is ultimately the child's.*
- *Be familiar with the rules governing the filing of an appeal, including the applicable format, page limitations and deadlines.*
- *Request oral argument in order to have an opportunity to address the appellate court's concerns, but be aware that in some Illinois appellate courts, oral argument is not usually granted in criminal or juvenile cases.*
- *Be prepared to discuss the decision and further options with the child, preferably in person.*

In Illinois, juveniles may be represented on appeal by either private counsel or the Office of the State Appellate Defender, which is appointed to represent indigent juvenile and adult defendants. *See* 725 ILCS 105/1 *et seq.* (State Appellate Defender Act).

A question that often arises is whether the juvenile defense attorney also should represent the juvenile client on appeal. On the one hand, the attorney's familiarity with the record and the issues which arose during the proceedings in the lower court can be indispensable in drafting the appeal. On the other hand, a new attorney can review the record with fresh eyes and may discover issues that the defense attorney never considered. Additionally, there may be practical considerations, such as the child's familiarity with the defense attorney, which can fuel this decision. A defense attorney should never recommend that she represent the client on appeal if she has no training or experience in drafting and filing appeals, particularly if the attorney has no one with such experience who can oversee her work. The skills required to represent a juvenile on appeal are fundamentally different than those required to represent a juvenile at trial and, thus, requires a different type of expertise. Additionally, a different appellate attorney can bring to light claims of ineffective assistance of defense counsel with objectivity and without hesitation; such claims would provide an irreconcilable conflict of interest for the defense attorney. Therefore, in advising children regarding their future appeals, defense attorneys should be aware of these concerns and advise juveniles accordingly.

13.2.1 Should the juvenile appeal?

The decision of whether or not to appeal belongs to the juvenile, with the assistance of a well-informed and objective attorney who can properly and fairly advise the child of his options. Attorneys therefore, should, make sure they communicate with their juvenile clients about the possible benefits or risks inherent in appealing. Attorneys should be prepared to appeal on behalf of their juvenile clients. Appeals generally are the last chance for a juvenile client to obtain relief, and there is usually little or no disadvantage to filing an appeal. The benefit of having a reviewing court consider the child's case is that the child may receive a new perspective from a court that is more readily prepared to apply the law and achieve a correct result in the child's case. However, because appeals sometimes are futile or moot in juvenile cases because the juvenile already has served his sentence by the time the appeal may be heard, a child who is serving a very short sentence may wish to dismiss his appeal, rather than pursue it. If the child is not indigent, the child might want to forego the cost of filing an appeal under such circumstances, or may simply want to terminate his association with the courts. However, the fact that the appeals process may appear lengthy should not necessarily deter a juvenile defendant from pursuing an appeal. The fact that the child has served his sentence does not necessarily render the child's appeal moot. *See People v. Jones*, 215 Ill.2d 261, 267, 830 N.E.2d 541 (2005) (probability that criminal defendant may suffer collateral consequences as a result of his conviction precludes a finding of mootness, even where the defendant already has served his sentence); *see also, In re Sturdivant*, 44 Ill.App.3d 410, 358 N.E.2d 80 (1st Dist. 1976) (juvenile's appeal of probation revocation moot because juvenile had completed his sentence, where there was no suggestion that juvenile had actually been released and in light of the possibility that an improper probation revocation could have a future sentencing hearing in case involving juve-

nile). Moreover, there may be ways to expedite the appeals process by way of motion in the appellate court or other means. Ill. Sup. Ct. R. 343(c).

Perhaps of greater concern is the situation where an appeal may actually *harm* the client. For instance, a sentence that does not conform to the statutory requirements and is, therefore, illegal, is void and may be changed at any time. *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445 (1995). Similarly, in cases where a juvenile is tried as an adult in criminal court, he may be subject to mandatory sentence increases for gun offenses. If the court failed to impose these add-ons to the child's sentence, they can be added *at any time*. See *People v. Hauschild*, 226 Ill. 2d 63, 871 N.E.2d 1 (2007) (affirming 15-year "add-on" unconstitutional for attempted first degree murder with a firearm).

The upshot of this type of precedent is that, in some cases, the minor may be better served by moving to dismiss his appeal, rather than pursuing it, particularly if it is a relatively weak issue. Drawing attention to the trial court's mistake could subject the juvenile to an increased sentence.

Additionally, because it is often difficult for children to grasp the concept of the risk of an increased sentence or certain consequences of an appeal, an appellate attorney representing a juvenile should be prepared to be patient and communicative with her juvenile client to help him fully appreciate these realities.

13.2.2 Filing the appeal

The filing of a notice of appeal triggers the appeals process. In Illinois, appeals from final judgments in delinquency cases are governed by Illinois Supreme Court Rules applicable in criminal cases and for filing appeals in civil cases (generally, Articles III and VI of the Illinois Supreme Court Rules). These rules contain the general rules for composing, formatting and submitting a brief on appeal to the Illinois Appellate Courts. Appellate attorneys should be intimately familiar with these rules and adhere to them. Additionally, the Illinois Supreme Court website at www.state.il.us/court is also a useful guide in preparing briefs. Appellate attorneys should consider finding ways to move to expedite appeals in delinquency cases in order to ensure that, given the sometimes lengthy appeals process, the appeal is not ultimately moot or futile.

The process for filing an appeal

After a notice of appeal is filed, the attorney must file a docketing statement, which includes a request to the clerk of the court to prepare the record on appeal. Ill. Sup. Ct. R. 312. Additionally, the attorney – whether private or appointed – should ensure that the record on appeal is complete and should supplement it with all necessary documents. After the docketing statement has been filed, the clerk of the juvenile court prepares and certifies the record on appeal. The clerk then may file the record on appeal in the reviewing court; or, to allow the appellate attorney to retain the record in order to prepare the appeal, may file a certificate in lieu of the record in the reviewing court.

Uncovering the issues and drafting the opening brief

Once the record is complete and has been certified, the attorney then should review the record to identify potential appellate issues. In order to do so, appellate attorneys should keep current with the case law, and regularly confer with colleagues and experts in juvenile delinquency law to make sure that they are aware of new issues. Additionally, it is worth noting that many issues that are appealable in adult criminal practice also are appealable in juvenile cases. The decision of which issues to ultimately raise on appeal is a delicate balancing act. On the one hand, attorneys should be mindful that the failure to raise an issue on direct appeal could result in its waiver down the road. On the other hand, attorneys are not permitted to raise frivolous issues, and should be aware that raising very weak issues may diminish the value of stronger issues in the brief.

Communication with the child is absolutely essential at this stage of the appeal. Assuming that the child has decided to pursue an appeal, he have a very different concept from the attorney of what can be raised on appeal or what claims may be meritorious. For instance, the child may want to pursue a claim on appeal indicating that he was innocent or that the State failed to prove his guilt beyond a reasonable doubt, but given the very high burdens applicable to such claims on appeal, raising such an issue may be futile or even frivolous in a given case. Complicated concepts, such as the standard of review on appeal and types of relief available, can be difficult for children to grasp. Again, the attorney must be able to discuss these concepts using clear and simple language and be prepared to help her client understand them. The appellate attorney also should listen to the child so that she can properly address the child's concerns. The appellate attorney also should remember that the decision to appeal or not appeal belongs to the child, although the decision of which particular issues to appeal belongs to the attorney.

Attorneys also should be cognizant that, in cases where the appellate attorney is not the same as the defense attorney, it is important for the appellate attorney to speak with the defense trial attorney to ensure that nothing is missing from the trial record, and to obtain the defense attorney's thoughts on any error which occurred in the court below. Additionally, juveniles themselves often offer surprisingly good insights into what went wrong during the proceedings, even if they cannot articulate them in legal terms. This is yet another reason that communication with the child is important at this stage.



*Many issues that are
appealable in adult
criminal practice also
are appealable in
juvenile cases.*

In drafting the opening brief on appeal, the attorney should be conscious and diligent about adhering to the relevant Illinois Supreme Court rules discussed above and local rules that may be applicable for formatting the brief. After the opening brief is filed, the State may file a response brief within 35 days (if it does not move for an extension). The appellant may also file a reply brief within 14 days of the response brief. Attorneys representing juveniles on appeal should avoid filing motions for extensions of time if at all possible, bearing in mind that juvenile dispositions are often shorter than adult dispositions and, for a child, the duration of a typical appeal can seem to be a lifetime.

Oral argument

If requested, the appellate court may grant oral argument. Ill. Sup. Ct. R. 352. However, few criminal or delinquency cases on appeal receive oral argument in certain appellate court districts, for example, the First District Appellate Court. Other judicial districts vary; some grant oral argument when requested and others are selective. If the attorney practices in a district where oral arguments are not freely granted, it usually is wise to request it in all or almost all cases on appeal. Oral arguments provide a unique opportunity to address the reviewing court's concerns; thus, they should not be passed over lightly. During oral argument, each party is given an opportunity to argue, and the appellate court judges may interrupt either side's argument with questions about the case or the issue at hand. Typically, the appellant sets the course for the argument by choosing from the issues she has raised in the briefs to argue before the court. Because time is very limited, the appellant may only be able to argue a few issues. However, while the appellant initiates the argument with the issues she believes the court wants to hear, appellate counsel should be prepared to discuss anything argued in the briefs, as the appellate court ultimately dictates which issues are important to the court; in other words, anything in the appellate brief is fair game for oral argument.

The decision

After oral argument, if one is granted, the reviewing court will decide the case. The appellate court may take six months or more to make a decision, assuming the case has not been expedited on appeal. As a result, attorneys should make sure that they inform their clients of these timelines, which can be long. Additionally, a decision may or may not be published. Illinois Supreme Court Rule 23 provides the criteria that the court uses to determine whether it will publish an opinion. The rule essentially establishes a presumption against published opinions, so most decisions will be by written order or summary order instead. Ill. Sup. Ct. R. 23. Rule 23 orders do not have precedential value and cannot be cited for this purpose. Ill. Sup. Ct. R. 23.

It is important to prepare the child for the possibility of a loss on appeal. Many clients – adults and children alike – think of the appeal as a magic solution to the trial court's errors. This is not the case. Given heavy burdens that apply to many issues on appeal, and the likelihood that the appellate court will defer to the trial court's decision, it is not easy to win on appeal. Win or lose, the attorney should plan to discuss the decision

with the child as soon as possible, either by attorney-client phone call or, if feasible, in person when the attorney receives notice that a decision is imminent. At this time the attorney should be prepared to discuss the next possible step or the consequences of the decision.

13.2.3 After the decision

Depending on the reviewing court's decision, there may be several possible next steps to the appeal. If the juvenile has won, the remedy may be a new trial, release, a reduction in the sentence or disposition or other similar remedy. In such cases, the attorney should advise the child as to whether he will have to return to court and when, and what the child should be prepared for at that time. If the client is incarcerated and appealing his conviction or sentence, then the appellate attorney may consider filing a motion for an appeal bond in the appellate court or Illinois Supreme Court (depending on which court has jurisdiction over the case) and requesting the client's release while the appeal is pending. Although such motions frequently are not granted, they are appropriate whenever the attorney believes that the issues on appeal are meritorious and that a successful result on appeal likely will result in either the client's release, a sharply reduced sentence, or a sentence that does not include incarceration.

If the juvenile has lost, there may be several ways for the child to continue to appeal the case. If the attorney believes the appellate court may reconsider its decision, particularly where the opinion or order reflects that the appellate court was mistaken about certain facts, clearly misunderstood the appellant's arguments, or overlooked key points or arguments in the appellant's brief, then the attorney may file a petition for rehearing within 21 days of the decision. Such petitions are governed by Illinois Supreme Court Rule 367. If the attorney believes that the decision raises an issue that the Illinois Supreme Court may consider, then the attorney may suggest filing a petition for leave to appeal in the Illinois Supreme Court. The Illinois Supreme Court has considered cases where there is a conflict in the law between appellate courts in different judicial districts, confusion in the appellate courts regarding Illinois Supreme Court precedent, or where the case raises the issue of the constitutionality of a statute. The petition for leave to appeal is a formal request for the Illinois Supreme Court to hear a case and must be filed within 35 days of the appellate court's decision, or within 35 days of the order denying the petition for rehearing or decision on rehearing. Ill. Sup. Ct. R. 315. The Illinois Supreme Court grants review in only a small number of cases, but this is still an option that an attorney should discuss with the client.

Summary

Although juvenile clients and attorneys would prefer not to think of the possibility of having to appeal an adjudication or disposition, attorneys should be mindful of this possibility while representing their juvenile clients throughout the pretrial, trial, and post-trial proceedings. To that end, attorneys should make every effort to ensure that the record is clear and complete, and communicate with the child regarding decisions that may affect the child's chances on appeal. Whether the juvenile defense attorney also represents the child on appeal, she should be familiar with potential issues for appeal and the rules governing the appeals process. Ultimately, the decision of whether to pursue an appeal rests with the child, but attorneys should inform children of the risks and benefits of this course of action so that the child can make the best decision possible.



Chapter 13 Checklist

- ✓ Preserve errors for appeal by objecting to them, using offers of proof, written and oral motions, and post-trial motions (filed within 30 days of the adjudication).
- ✓ Confirm the record on appeal is complete and contains all pleadings and documents filed in the court, all transcripts of proceedings before the trial court (ensuring that the transcripts are accurate) and supplemental information that should be made part of the record.
- ✓ File a notice of appeal within 30 days of the disposition or, if a motion to reconsider is filed, within 30 days of the denial of the motion to reconsider the disposition.
- ✓ If the defense attorney, consider whether you should file the appeal or if a different attorney (experienced in appeals) should do so in order to provide a “fresh” perspective and raise any issues relating to trial counsel's ineffectiveness.
- ✓ Be aware of the risks and benefits of filing an appeal, communicate them with your client, and allow your client to make an informed decision about whether he wants to file an appeal.
- ✓ Be aware of all rules applicable to the filing of briefs in the appellate courts, including those relating to formatting the briefs and applicable deadlines.
- ✓ Request oral argument and be prepared to argue your case and address the reviewing court's concerns.
- ✓ Be prepared to discuss the outcome and possible next steps with the client, preferably in person.

Chapter 14



Youth involved in juvenile delinquency proceedings may have attendant issues that a juvenile defense attorney should be aware of either to enhance her representation of her client or to provide her client with a referral. These issues may include: immigration, school discipline, special education, and expungement of juvenile records. A detailed examination of these issues is beyond the scope of this manual; instead this chapter will provide information about each subject with the hope of giving juvenile defense lawyers some background information on these issues and how they may affect their everyday practice.

14.1 Non-Citizen Clients

Non-citizen children may face severe consequences for their involvement with the juvenile justice system including: deportation, prohibition for applying for a green card or citizenship; loss of a visa or other type of lawful status; bar to re-entry (sometimes permanently); or detention in a secure facility. It is critical for juvenile defense attorneys to be aware of their client's legal status and the consequences that may arise from a finding of delinquency so they can appropriately advise their clients.

A non US citizen can fall into one of the following categories:

- **Asylee:** A person granted asylum due to a well-founded fear of persecution if returned to his country of origin.
- **Lawful/Legal Permanent Resident (LPR):** A child who has a green card.
- **Temporary Protected Status (TPS):** The Attorney General designates certain countries for a specified time period (generally 6-18 months) during which time children from these countries can legally enter the U.S.
- **Undocumented:** A child who is undocumented does not have any legal status in the United States (*i.e.*, the child entered the U.S. illegally). If this child is caught, he is then placed in removal proceedings whereby the Department of Homeland Security will try

to deport the child. With limited exceptions, a child who does not have lawful status in the U.S. cannot change his status.

- **Visa Holder:** A visa is a legal document that will permit a child to enter the United States on either a temporary or permanent basis. <http://www.immigrantjustice.org/resources/immigrants/glossary/a-guide-to-common-immigration-terms.html> (all definitions obtained from the National Immigrant Justice Center)

14.1.1 Impact of adjudications of delinquency on non-citizen clients with legal status in the United States

An adjudication of delinquency in a juvenile court proceeding is NOT considered a criminal conviction for immigration purposes, regardless of the nature of the offense. *Matter of Devinson*, Int. Dec. 3435 (BIA 2000), *Matter of Ramirez-Rivero*, 18 I&N 135 (BIA 1981), see also Sally Kinoshita and Katherine Brady *Immigration Benchbook for Juvenile and Family Court Judges* (Immigrant Legal Resource Center January 2005) available at <http://www.ilrc.org/resources/sijs/2005%20SIJS%20benchbook.pdf>. However “some immigration penalties do not depend upon a conviction.” *Id.* at 52 Some delinquency adjudications or “bad conduct” can trigger extremely harsh immigration penalties including inadmissibility²³ or deportability.²⁴ Offenses constituting “bad conduct” that will have harmful immigration consequences include:

- drug trafficking (any involvement in the transfer, passage or delivery of any controlled substance) (8 USC § 1182 (a)(2) (C));
- drug abuse or addiction (8 USC § 1182(a)(1)(A)(iv));
- violation of a protection order (8 USC § 1227 (a) (2) (E) (ii));
- sexual predator or any behavior showing a mental condition that poses a current threat to self or others including suicide attempt, torture or mayhem and repeated offenses linked to alcohol abuse (8 USC § 1182(a)(1)(A)(iii));
- prostitution (8 USC § 1182(a)(2)(D)); and
- false claim to U.S. citizenship (8 USC §§1182(a)(6)(C), 1182 (a)(6)(F))

Other adjudications of delinquency are considered to be a negative factor in discretionary decisions regarding a child’s legal status.

14.1.2 Undocumented Clients

If Immigration and Customs Enforcement (ICE) becomes aware that a client is a deportable non-citizen, it may file an immigration “hold” or “detainer” with a local law enforcement agency that has custody of the child. A detention or correctional facility may inform ICE of a child’s future release date in order for ICE to apprehend the child and initiate deportation proceedings²⁵. It is not uncommon for juvenile detention staff to allow ICE to enter a detention center and conduct interviews of children without informing the children’s lawyers. If ICE questions a client, the client should always request a

written notice of rights, which is called an I-770 Form, and indicates that the client is entitled to free legal services, judicial review and bond re-determination hearings.

14.1.3 What juvenile defenders should do to protect their non-citizen clients

1. Advocate against criminal court transfers. A conviction in adult court is considered a conviction for immigration purposes.
2. Be knowledgeable about possible immigration consequences for various charges or adjudications.²⁶
3. Push for the disposition or adjudication that will have the fewest immigration consequences.
4. Connect non-citizen clients with immigration attorneys and legal services.
5. Argue to exclude information regarding deportation from the disposition report.

14.1.4 Potential immigration benefits available to juvenile clients

An undocumented client may be eligible for certain immigration benefits. If a client falls under any of the following categories, the juvenile defense attorney should connect her client with an immigration attorney to help him adjust his status and/or obtain a green card:

1. **Special Immigrant Juvenile Status:** Available to children who are victims of abuse, neglect or abandonment in the U.S. or abroad (8 USC § 1101 (a)(27)(J) and INA §101(a)(27)(J)).
2. **Asylum:** Available to children who fear returning to their home country because of some type of persecution based on race, religion, political opinion, and/or membership in a particular social group or nationality that the government is unable or unwilling to control.
3. **U Visas:** Available to children who suffered substantial physical or mental abuse due to being a victim of a specified crime in the United States.
4. **T Visa:** Available to children who suffered from severe forms of human trafficking.
5. **Violence against Woman Act (VAWA):** Available to children (or women) who have been abused or subject to cruelty by a U.S. citizen or permanent resident parent. This status allows the child to file a petition on their own to obtain a green card.

Resources

- National Immigrant Justice Center <http://www.immigrantjustice.org/> (this agency provides free legal services to immigrants).
- National Immigration project: www.nationalimmigrationproject.org.
- Immigration legal resource center: www.ilrc.org.
- Defending Immigrants Partnership: www.defendingimmigrants.org.

- National Immigration Center: <http://www.immigrantjustice.org/client/programs/>.
- The Immigrant Children’s Advocacy Project: <http://www.immigrantchildadvocacy.org>.

14.2 School Disciplinary Hearings²⁷

Children involved with the juvenile justice system often face school disciplinary issues, some of which lead to school disciplinary hearings. Although the juvenile defense attorney is not responsible for representing the child in a school disciplinary hearing, she should be aware of what occurs during a school disciplinary hearing and how information from the hearing may be utilized in the representation of her client.

14.2.1 Due process and school disciplinary hearings

Suspensions and expulsions are the most extreme form of school punishments resulting in the student losing his right to attend school for a specific period of time. Students facing a school expulsion or suspension receive some form of disciplinary hearing, an administrative hearing which affords fewer due process protections than a proceeding in juvenile court.²⁸ In *Goss v. Lopez* the Supreme Court held “due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” *Goss*, 419 U.S. at 581. *Goss* did not specify the due process requirements for longer suspensions or expulsions, but did state that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.” *Goss*, 419 U.S. at 584.

14.2.2 Illinois provides students slightly more protections than *Goss*

In addition to the *Goss* requirements, the Illinois School Code also requires written notice to the parent or guardian following the decision to suspend a student, as well as a meeting with the parent or guardian if one is requested. 105 ILCS 5/10-22.6(b) An expulsion on the other hand can only occur “after the parents have been requested to appear at a meeting of the board, or with a hearing officer appointed by it, to discuss their child’s behavior.” 105 ILCS 5/10-22.6(a). Evidence that supports the expulsion is discussed during the meeting. The school board is required to give the student and parent/guardian an opportunity to present mitigating arguments. *Betts v. Board of Ed. Of City of Chicago*, C.A.7 (Ill) 1972, 466 F.2d 629.²⁹

Obtaining all of the necessary school disciplinary records

Pursuant to *Goss* and the Illinois School Code, when a child faces a school expulsion or suspension, a school disciplinary record is created (at the very least it will include written notice). In preparation for a juvenile court case, the attorney should obtain her client's entire school disciplinary record. If the juvenile court case arose from a school related incident, the disciplinary records can give the attorney critical details about the incident including: information about the victim (if a classmate), new avenues to explore, potential witnesses, and possibly statements that can be utilized for impeachment purposes. Even if the juvenile court case is unrelated to any school disciplinary issues, disciplinary records can give the attorney some insight into the child's school performance and behavior which may be relevant for mitigation or explanation of the client's action. School disciplinary records can generally be obtained with a signed release of information. The attorney should request the following disciplinary records from the school:

- copies of all the documents in the child's educational (including all report cards and test scores) and discipline file;
- written confirmation of the date and time of any disciplinary hearings;
- misconduct and incident reports and any notes associated with those reports;
- tapes and notes from any school disciplinary hearings that occurred;
- hearing officers' recommendations to the School Board regarding the discipline that should be imposed on the student;
- attendance records (may provide an alibi for the client); and
- teacher or school personnel notes regarding any school related incidents.



In preparation for a juvenile court case, the attorney should obtain her client's entire school disciplinary record.

14.3 Special Education Proceedings

An attorney should be aware of her client's special education needs in order to effectively advocate during detention, transfer, dispositional and post-dispositional proceedings. The Individual with Disabilities Education Improvement Act (IDEIA) of 2004, 20 U.S.C. §§1400, et seq., addresses the educational rights of children who have disabilities. Under the IDEIA, state's must provide a free appropriate public education (FAPE) to all children with impairments (as defined by the statute) who reside in the state, including children who have been expelled or suspended from school or who are in a detention center. A child with a disability under

the IDEIA must have one or more of the following enumerated conditions: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities. 20 U.S.C. §1401(3)(A) A child with identified special education needs has the right to special education and related services in the least restrictive environment. 20 U.S.C. §§1400, et seq.

14.3.1 How a child becomes eligible for special education services

Eligibility for special education and related services requires that a child be evaluated and found to have a disability. If an attorney feels that her client has a disability, she should encourage her client's parents to request an evaluation in writing. 20 U.S.C.A. § 1414(a)(1)(B). Once the child is evaluated, an Individualized Education Program (IEP) team meets to discuss the evaluation and determine if the child is someone with a disability as defined under the IDEIA and whether the child requires special education and related services. Once the child is deemed eligible for special education services, the IEP team creates an Individualized Education Program, which must address each of the child's educational needs by providing for specialized educational and related services to help the child progress in school. 20 U.S.C.A. § 1414(d)(1)(A).

14.3.2 Using an IEP in Delinquency Proceedings

An attorney can rely on a current IEP to advocate for her client during court proceedings. The juvenile defense attorney should have her client sign a consent for release of information and request the following from the school:

- Individualized Education Program Plan;
- All notes and documents from the IEP meeting;
- All notes and results from any Manifestation Determination Review Hearings (was the child's behavior a manifestation of their disability-the review hearings may include possible admissions from school personnel);and
- Behavior Intervention Plans (a systemic plan to reduce problematic behavior or increase desired behavior).

An IEP can be utilized in juvenile court proceedings in the following ways:

1. **Use the client's IDEIA-eligibility to his advantage.** An IEP will describe in detail the client's impairment. A disability that impairs learning may evidence a client's inability to understand the Miranda warnings or that the client was not acting with the required intent when the delinquent act was committed.
2. **The client's IEP can help keep him in the community.** A client is entitled to all of the services described in the IEP regardless of his involvement in the juvenile justice system. At the detention and/or dispositional hearing, the attorney can rely on her client's IEP to argue that the client should stay in the community in order to receive special education and related services.

3. Use the IDEIA's protection in discipline cases. If a school related incident was the precursor to the child entering juvenile court and the school found that the client's behavior during this incident was a manifestation of his disability, this information can be used in mitigation.

14.3.3 Using the IDEIA to protect incarcerated children

Children who reside in a jail or a detention center still have the right to special education services. If a facility is failing to follow the child's IEP, the attorney should bring it to the attention of the facility and refer the parents to an educational lawyer who can request a due process hearing to help ensure that the educational needs of their client are met while incarcerated. The failure of a facility to meet a client's special education needs may also give grounds for arguing a client's release so that the client can receive his educational services as mandated by law.

Children between the ages of 18 to 21 who are incarcerated in an adult correction facility who had not been identified as a child with a disability or did not have an IEP prior to their incarceration have no rights to services or treatment under the IDEIA³⁰. In the appropriate cases, attorneys should encourage their client's parents to request an evaluation and potential IEP prior to his incarceration.

Resources

For more information on this area of advocacy please see:

- *Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System* by Joseph B. Tullman Joyce A. McGee (University of the District of Columbia School of Law, 1998) available at http://www.law.udc.edu/programs/juvenile/pdf/special_ed_manual_complete.pdf.
- Wrights Law: <http://www.wrightslaw.com/idea/law.htm>.
- National Education Association: <http://www.nea.org/specialed/>.
- Dignity in schools project: www.dignityinschools.org/.
- Equip for Equality: <http://www.equipforequality.org/>.

If you are interested in representing a child in a school expulsion hearing please see the following training video on school expulsion hearings: http://www.illinoisprobono.org/index.cfm?fuseaction=home.dsp_Content&contentID=4493.

14.4 Conditions in the Department of Juvenile Justice

Post-dispositional advocacy, especially for clients who are incarcerated, can help ensure that clients are being held in a safe environment where all of their needs are met. A child facing incarceration as part of his sentence will be sent to one of the eight Illinois Youth Centers, run by the Department of Juvenile Justice.³¹ Only the Illinois Youth Center at Warrenville houses females.

Throughout the United States, including Illinois, correctional facilities are often unsafe, unsanitary and fail to provide even the most basic medical, mental health and educational services to the children in their care. Due to the risk of harm that these facilities may pose to children, attorneys should try to stay actively involved in their client's case post-disposition.

An attorney's advocacy during and after the dispositional hearing can ensure that her client not only receives all of the necessary services, but that he also lives in a safe environment. Listed below are some steps an attorney can take to help advocate for her client:

1. During the dispositional phase, if the client ordered to the Department of Juvenile Justice, the attorney should ensure that the order includes all of the necessary services that her client is entitled to receive (including special education services) while in the facility.
2. If it is possible, attorneys should become familiar with the administrators at the Department of Juvenile Justice Centers.
3. Attorneys should keep in regular contact with their detained clients.

If an attorney learns of unsafe conditions or of the failure of the facility to provide appropriate services to the children in its care, the attorney should try to bring this information to the attention of the judge. A juvenile defense attorney may be able to utilize this information to advocate for the release of her client due to a lack of services and or substandard conditions.

Resources

- The report, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, provides a comprehensive toolbox of laws and advocacy strategies that can be utilized by juvenile defenders. This full report is available at <http://www.njdc.info/publications>.
- In 2002 an agreement was reached in *Jimmy Doe, et. al. v. Cook County*, No. 99 C 3945, WL 1069244 (N.D.Ill., Nov. 22,1999) which was brought on behalf of a class of children detained at the Juvenile Temporary Detention Center in Cook County due to substandard conditions and services. According to the agreement, the detention facility must provide safe and clean living conditions for the children. Additionally, county officials promised to improve the physical and mental health services, social programming, discipline and grievance systems and security. For more information on this lawsuit contact the ACLU of Illinois at 312-201-9740.
- The John Howard Association of Illinois provides critical public oversight of the state's prisons, jails, and juvenile correctional facilities. The Association promotes fair, humane, and effective sentencing and correctional policies, addresses inmate concerns,

and provides Illinois citizens and decision-makers with information needed to improve criminal and juvenile justice. <http://www.john-howard.org/>.

14.5 Expungement of Juvenile Records³²

At the close of every case, an attorney should inform her client on how to expunge his juvenile records. The Juvenile Court Act provides a mechanism for expunging law enforcement and/or juvenile court records. Once a juvenile record is expunged, the child can say he was never arrested, found delinquent, nor convicted of a crime. Expungement of juvenile records, therefore, allows a person to apply for certain licenses and loans and obtain certain jobs, college scholarships, and public housing. While not every client will be able to get his record expunged, a juvenile defense lawyer should be aware of the expungement process and inform her clients of this right.

14.5.1 Qualifying for expungement

A child's record may be expunged if it falls into one of two categories.

Category 1

When the child is seventeen years old or all juvenile court proceedings relating to the child have been terminated, whichever is later, 705 ILCS 405/5-915(1) the child may petition to expunge his record if any of the following are true:

1. The child was arrested and never charged;
2. The child was arrested, charged but found not delinquent;
3. The child was placed on supervision and successfully completed the term of supervision; or
4. The child was found delinquent for a Class B or C Misdemeanor or a petty business offense. 705 ILCS 405/5-915(1)(a)-(d).

Category 2

A child's whose case does not fall into the first category can still have his record expunged except if the offense is (1) first degree murder or (2) a sex offense which would be a felony if committed as an adult. 705 ILCS 405/5-915(2). In order to get his record expunged, the child:

1. Must have had no convictions since his seventeenth birthday;
2. Must be at least 21 years old; and
3. At least five years must have passed since the conclusion of the child's last proceeding in juvenile court or since the child's commitment to the Department of Juvenile Justice, whichever is later. 705 ILCS 405/5-915(2).

14.5.2 The expungement process

A child who qualifies for an expungement can complete all of the necessary paperwork on his own. If a juvenile defense attorney has the time and resources, she can assist her client with the process. Information regarding the steps to expunge a juvenile record can be obtained by contacting the Illinois Office of the State Appellate Defender. The Office of the Appellate Defender can provide assistance for juveniles who want to expunge their records by answering any questions and determining if the youth qualifies for expungement.

Resources

- For assistance in expunging a record, attorneys or youth can contact the Children and Family Justice Center at 312.503.0396.
- Illinois Office of the State Appellate Defender <http://www.state.il.us/DEFENDER/>.
 - » 1st Judicial Office: (312) 814-5472
 - » 2nd Judicial Office: (847) 695-8822
 - » 3rd Judicial Office: (815) 434-5531
 - » 4th Judicial Office: (217) 782-3654
 - » 5th Judicial Office: (618) 244-3466
- Instructions to expunge a juvenile's record: <http://www.state.il.us/DEFENDER/juvexp.html>.

Appendix



This collection of documents is designed to serve as a resource for juvenile defense attorneys. These documents can be utilized as models that serve a particular purpose or as inspiration for creative, innovative efforts on behalf of juvenile clients. Please note that although the authors shepardized the cases contained in all of the documents at the time of publication, the law is constantly evolving and cases cited may no longer be the most appropriate and may not be good law. It is imperative that attorneys utilizing any of these documents conduct their own research to ensure that the all cases cited are good law and are on point with respect to the issues being raised in their case. These documents are not comprehensive for all juvenile cases and attorneys may need other documents, motions or memoranda in preparing their own cases. (This collection of documents can be found on the included disc and our website at www.iljuveniledefenders.org)

1. Interview Forms

- a. Initial Client Interview Checklist
- b. Initial Client Interview Form

2. Forms/Documents to Utilize Shortly after Getting Appointed on a Case

- a. Authorization to Release Information Forms
 - i. Blank Authorization Form for Release of Information
 - ii. Court File Records Release
 - iii. Department of Children and Family Services Records Release
 - iv. Department of Juvenile Justice Records Release
 - v. Medical Records Release
 - vi. School Records Release
- b. Letter to Preserve 911 Tapes
- c. Notice of Representation and Declaration of Rights

3. Legal Research

- a. Standard of Self-Defense in Illinois
- b. Elements of Charged Offense (murder and lesser included offenses)
- c. Elements of Offenses (aggravated battery, aggravated battery with a firearm and attempted murder)

4. Organizational Tools for Pre-Trial and Trial Preparation

- a. Blank Investigation Witness List
- b. Discovery Index
- c. Sample Trial Notebook

5. Discovery Related Correspondence

- a. Letter informing police department of motion to inspect the police station
- b. Letter confirming telephone conversation with police officer to inspect police station
- c. Letter requesting a forensic psychologist to conduct an evaluation
- d. Letter to school following up on their failure to turn over subpoenaed information
- e. Letter to retain gun expert
- f. Letter for victim's school records

6. Detention and Probation Related Motions

- a. Habeas Corpus
 - i. General Motion to Release from Detention Center (alleging violation of 40 hour rule)
 - ii. Fact Specific Motion to Release from Detention Center (alleging violation of 40 hour rule)
- b. Motion to Release
 - i. Motion for Temporary Release from the Detention Center
 - ii. Motion to Release from Custody (no immediate and urgent necessity)
 - iii. Motion to Release from Custody (detained for over 10 months and no immediate and urgent necessity)
- c. Motion to Alter Conditions
 - i. Motion to Alter Conditions of Probation
 - ii. Motion to Alter Pre-Trial Custody Status
 - iii. Motion to Permit Travel Out of State
- d. Motion to Authorize Family Visits at the Detention Center
- e. Motion to Reduce Bond

7. Discovery (motions, memoranda, and subpoenas)

a. Motions

- i. Motion for Discovery
- ii. Minor Respondent's Answer for Discovery
- iii. Supplemental Motion for Discovery
- iv. Motion to Compel Discovery
- v. Motion to Disclose Identity of Material Witness
- vi. Motion to Disclose Addresses of Previously Identified Witnesses
- vii. Motion for Issuance of a Rule to Show Cause (failure to respond to a subpoena)
- viii. Response to Motion to Quash Subpoena Duces Tectum (photographs of police officers) and Protective Order for Photographs of Police Officers
- ix. Motion to Compel Production of Probation File
- x. Motion for Order to Inspect Police Station
- xi. Motion for Order Allowing Defendant to Inspect Mental Health Records of Witness
- xii. Motion for Order Allowing Defendant to Issue Subpoenas (to hospital, police and school) and Order to Comply with Subpoenas
- xiii. Motion for Order for the Department of Juvenile Justice to Provide Reports to the Court
- xiv. Motion for Order for Fingerprint Testing of Gun and Order for Fingerprint Testing of Gun
- xv. Motion for Order Granting Access to School (in order to investigate scene of incident)
- xvi. Motion for Order to Depose Police Officers
- xvii. Motion for Order to Photograph a Client in the Detention Center
- xviii. Motion for Order to Inspect all Weapons and Bullet Casings
- xix. Motion for Order to Inspect Physical Evidence
- xx. Motion for Order for the Production of Victim's School Records and Order for Victim's School Records
- xxi. Motion for Order to Declare Defendant Indigent and Order to Declare Defendant Indigent

b. Subpoenas

- i. Examples of documents that should be subpoenaed³³
- ii. Witness Subpoena
- iii. Subpoena Duces Tectum (sample blank evidence subpoena)

c. Memoranda of Law

- i. Memorandum of Law in Support of Motion to Disclose Identity of Material Witness
- ii. Memorandum of Law in Support of Disclosure of Police Officer's Office of Professional Standards Records

8. Motions to Suppress

- a. Evidence
 - i. *Terry* Stop
 - 1. Motion to Suppress Evidence and Quash Arrest (due to a lack of reasonable and articulable suspicion for a *Terry* stop)
 - 2. Motion to Suppress Evidence and Statement (due to a lack of reasonable and articulable suspicion for a *Terry* stop)
 - ii. Motion to Suppress Drugs Found During Search at School
 - iii. Motion to Suppress Drugs Due to Lack of Probable Cause for the Search
- b. Identification
 - i. Motion to Suppress Identification (defendant wearing handcuffs during show up)
 - ii. Motion to Suppress Show up Identification by the Police Officer
 - iii. Motion to Suppress Out of Court Identification and to Preclude In-Court Identification Due to Suggestive Police Line-Up
- c. Statement
 - i. Motion to Suppress Statement (made at home while handcuffed, surrounded by police officers and without *Miranda* warnings)
 - ii. Motion to Suppress Three Statements (given to school officials, police officer and assistant state's attorney)
 - iii. Motion to Suppress Statement (made without *Miranda* warnings and presence of a parent)
 - iv. Motion to Suppress Statement Regarding Death of Son (four interrogations, interrogations not taped, no presence of parent, client had lack of sleep and food)
 - v. Motion to Suppress Statement (due to a lack of a knowing, voluntary and intelligent waiver of client's Fifth Amendment privilege against self-incrimination)
- d. Multiple Suppression issues
 - i. Motion to Quash Arrest, Suppress Statement and Suppress Identification
 - ii. Motion to Suppress Evidence and Statement (due to illegal search)
- e. Memorandum in Support of Motion to Quash Arrest and Suppress Identification

9. Motion to Quash Arrest

- a. Motion to Quash Arrest (arrest based on hot tip; lacked probable cause)
- b. Motion to Quash Arrest (arrest based on information from confidential informant)

10. Motions to Exclude Evidence/Motions *in Limine*

- a. Motion *in Limine* Regarding Gang Membership and Activity
- b. Motion to Preclude Evidence of Gunshot Residue
- c. Motion to Prohibit Testimony of Confidential Informant

11. Experts/Investigators/Social Workers

- a. *Frye* Motions
 - i. Motion to Reconsider *Frye* Hearing
 - ii. Motion for *Frye* Hearing (expert on shaken baby syndrome)
- b. Motion for Appointment of Expert/Investigator
 - i. Motion to Appoint Forensic Psychiatrist
 - ii. Motion to Appoint Private Investigator
- c. Motion for Funds
 - i. Motion to Provide Funds for Firearms Expert
- d. Motion to Allow Expert Testimony
 - i. Motion for Expert Testimony (on the effects that drugs have on making an identification)
 - ii. Motion to Allow Expert Testimony (on the reliability of eye witness identification)

12. Motions Affecting Trial Date and Judge

- a. Motion to Advance and Reset Due to Investigation
- b. Motion to Recuse
- c. Motion to Sever
- d. Petition for Substitution of Judge

13. Children in Criminal court

- a. Automatic, Presumptive or Discretionary Transfer Memoranda and Motions
 - i. Motion to Transfer to Juvenile Court
 - ii. Memorandum in Support of Motion to Transfer to Juvenile Court
 - iii. Motion to Declare Transfer Back to Adult Court Unconstitutional
 - iv. Reply to State's Motion to Declare Transfer Unconstitutional
 - v. Motion to Extend Order of Stay of Transfer to Adult Jail
- b. Reply to State's Request for Extended Juvenile Jurisdiction
- c. Affidavit (against transfer to criminal court)

14. Expungement

- a. Notice and Proof of Service to Expunge
- b. Petition to Expunge (Category 1)
- c. Petition to Expunge (Category 2)
- d. Order to Expunge

15. Miscellaneous

- a. Proof of Service
- b. Dispositional Report
- c. Proposed Stipulation for 911 Tapes

Endnotes



- 1 Cathryn Crawford is currently a Program Officer for Juvenile Justice, Human & Community Development Program at the John D. and Catherine T. MacArthur Foundation.
- 2 As noted in section 5.1.1, Senate Bill 2118, which was signed into law on August 15, 2008, and which requires the appointment of counsel for any child detained in custody as soon as a petition is filed in juvenile court, provides for the appointment of counsel prior to the child's first court date, in advance of the detention hearing. S.B. 2118, 95th Gen. Assemb. (Ill. 2008). The term "petition" refers to the legal document or charging document that requests a juvenile court declare the child a ward of the court because the child is delinquent. By declaring the child a ward of the court, the court then has the authority or jurisdiction over the child. The "petition" also may be referred to as a "petition of wardship."
- 3 Section 5-710 was amended effective June 1, 2008, to provide that juveniles who are found guilty may be placed in the guardianship of the Department of Children and Family Services, but only if the delinquent minor is under 15 years old or, if an "independent basis of abuse, neglect, or dependency exists." 705 ILCS 405/5-710 (1) (a) (iv).
- 4 In this age of computerized record keeping, the question arises as to whether records can ever be expunged, or whether all records will be stored somewhere. No Illinois cases or statutes directly address this issue, but section 5-915 specifies that "[u]pon entry of an order expunging records or files, the offense, which the records or files concern shall be treated as if it never occurred." 705 ILCS 405/5-915(4). That provision further states, however, that the information pertaining to an expunged offense may be maintained "if the information is kept in a manner that does not enable identification of the offender. This information may only be used for statistical and bona fide research purposes." *Id.* at 5-915(6).
- 5 The American Bar Association has issued an opinion requiring that all attorneys representing indigent defendants in criminal matters must provide their clients with "diligent and competent" representation and should not allow an excessive workload to prevent them from so doing. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 06-441 (2006). The opinion specifies that supervisors in defender offices have the responsibility to monitor attorneys' workloads to ensure that the attorneys can represent their clients in a competent matter. *Id.*
- 6 For purposes of ease and clarity, throughout the Illinois Juvenile Defender Practice Notebook clients are referred to as "he" and attorneys are referred to as "she".
- 7 While the standard enunciated in *Drope* has been applied to juvenile proceedings, it is not specific to the development of children and adolescents, nor to their age.

- 8 “The quality of representation, and a child’s meaningful opportunity to be heard in delinquency proceedings, can be dramatically enhanced through early and timely appointment of counsel. Appointment of counsel should occur as far as possible in advance of the first court appearance in order to allow meaningful consultation between counsel, the child, and the child’s family.” Cathryn Crawford, *et al.*, *An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceeding*, at 71 (Fall 2007).
- 9 The Illinois legislature has passed a bill amending 705 ILCS 405/5-415, which was signed by the Governor. Intended to improve the advocacy at detention hearings, Senate Bill 2118 modifies 705 ILCS 405/5-415 in three ways: first, it requires the appointment of counsel as soon as a petition is filed for any child held in custody; second, it requires that a minor be given an adequate opportunity to consult with an attorney before a hearing; and third, it allows counsel for the minor to file a motion requesting more time (beyond the 40 hours) to prepare for the detention hearing.
- 10 In light of the enactment of Senate Bill 2118 into law, lawyers should weigh the benefit of asking for more time--beyond 40 hours--to prepare for the detention hearing against the need to hold a hearing expediently within that time period.
- 11 The Illinois Supreme Court is currently considering whether subsequent court proceedings are void for lack of jurisdiction when the state fails to or otherwise notify one of the minor’s parents with an amended petition that adds a new charge as required by section 5-530 of the Juvenile Court Act in *In re M.W.*, No. 1-05-3127 (Feb. 16, 2007) (unpublished order under Rule 23), *appeal allowed*, No. 104519 (Sept. 26, 2007).
- 12 It should be noted that the Juvenile Court Act previously provided that a party was required to raise the issue of defective service at the beginning of delinquency proceedings or the issue was waived on appeal. *See* 705 ILCS 405/1-15 (West 1991). The Illinois Supreme Court found this provision unconstitutional. *In re C.R.H.*, 163 Ill.2d 263, 644 N.E.2d 1153 (1991); *In re K.C.*, 323 Ill.App.3d 839, 753 N.E.2d 314 (1st Dist. 2001).
- 13 In some counties (particularly in Cook County) it is often common practice to waive these fees in juvenile and criminal cases, particularly where the witness is a police officer or agent, or where the witness lives within the county. *Martinez v. County of Stephenson*, 268 Ill. App. 3d 427, 644 N.E.2d 1210 (2d Dist. 1995) (Fees and Salaries Act does not entitle witness to receive any fees from county where he is summoned from within county where case is tried). In other counties (*i.e.*, McLean County), these fees are not typically waived. Courts have held that a party need not pay the witness’s fee if the witness is compensated by his employing agency (*ie.* the police department). *See Anderson v. City of Rockford*, 324 Ill. App. 648, 651, 59 N.E.2d 327 (2d Dist. 1945) (municipal officers not entitled to witness fees or arrest fees because they were already compensated for performing these duties); 1978 Ill. Atty. Gen. Op. 102, 1978 WL 17604 (Ill.A.G. 1978) (police officer should not receive witness fee for testifying against arrestee).
- 14 Where a petition is dismissed on jurisdictional grounds, no petition exists – thus, the attorney need not file a written demand for trial in order to require the State to re-file within a certain amount of time (120 days under 705 ILCS 405/5-601 in a delinquency case, and 120 days (if in custody) or 160 days (if on bail or recognizance) under 725 ILCS 5/103-5. However, where the charges are dismissed on the State’s request that they be stricken with leave to reinstate (“SOL”) such that the charges are still “pending,” the attorney should demand trial. *See People v. Decatur*, 191 Ill.App.3d 1034, 548 N.E.2d 509 (1st Dist. 1989).
- 15 Defense attorneys should use discovery motions as a means of requesting information from the prosecution as early as possible in the case. Discovery motions are discussed in greater detail in Chapter 6, and are not covered in this chapter.
- 16 The Illinois Supreme Court recently held that it is proper for officers to arrest a motorist when they have probable cause to believe that the motorist violates the law, even if the State law provides that a violation of that law requires only that the police issue a summons and not arrest the motorist. *Virginia v. Moore*, 128 S. Ct. 1598 (2008).

- 17 When arguing that a child's statement should be suppressed based on the fact that it was not voluntarily made or that the child lacked the ability to understand *Miranda* warnings, attorneys should be aware of and use pertinent research to support their arguments. In particular, long standing research has shown that younger juveniles (below 14 years old) lack the ability to understand the *Miranda* warnings given to them and thus, cannot waive these rights intelligently, knowingly and voluntarily. Grisso, Thomas, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. Law. Rev. 6 at 1166 (Dec. 1980); *see also*, Grisso, Thomas, Laurence Steinberg, *et al.*, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law and Hum. Behav. 4 at 356 (Aug. 2003) (noting that recent studies showing that adolescents aged 15 and younger "are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants," are consistent with prior research showing that children 14 years old and younger were significantly impaired in their ability to comprehend *Miranda* warnings, when compared with their older counterparts).
- 18 The declarant's presence in court and testimony at trial is, however, relevant to the issue of whether the witness is subject to cross-examination regarding the statement under 725 ILCS 5/115-10, thus satisfying the Confrontation Clause.
- 19 It bears noting that in *In re Beasley*, the Illinois Supreme Court held that Rule 402 is not technically applicable in juvenile proceedings, such that juvenile court judges are not required to provide to the minor all of the admonitions contained in that rule. *In re Beasley*, 66 Ill. 2d 385, 362 N.E.2d 1024 (1977); *see also*, *In re A.G.*, 195 Ill. 2d 313, 320-21, 746 N.E.2d 732 (2001) (distinguishing Rule 402 from Rule 604(d)). Nonetheless, minors are entitled to due process in guilty plea proceedings and the court must ensure that the child's plea is made "knowingly and voluntarily." *Beasley*, 66 Ill. 2d at 391-92; *In re A.G.*, 195 Ill. 2d at 320. Since Rule 402, in conjunction with 705 ILCS 405/5-605(a), provides a nice guideline for the application of due process protections whenever a child is considering entering into a plea, it is often followed and invoked by attorneys practicing in juvenile court. Moreover, it is good practice to request a plea conference or "402" conference whenever the minor is considering entering into a plea agreement in order to gauge the court's willingness to concur in any plea agreement and to help ensure that the minor is fully informed of the consequences of entering into the plea.
- 20 *See* 705 ILCS 405/5-710 (listing various types of available dispositions, depending on the offense). Attorneys should be aware that, in juvenile cases, children in juvenile court can be sentenced to the Department of Juvenile Justice for a term until the child is 21 years old. *Id.*; 705 ILCS 405/5-750; *In re K.S.*, 354 Ill.App.3d 862, 864, 822 N.E.2d 526 (5th Dist. 2004). However, with some exceptions, incarceration in the Department of Juvenile Justice is imposed for an "indeterminate" amount of time, meaning that the judge does not impose a sentence of incarceration for a particular term of years, but simply sentences the child to be incarcerated in the Department of Juvenile Justice. *Id.*; 705 ILCS 405/5-750; *In re K.S.*, 354 Ill.App.3d 862, 864, 822 N.E.2d 526 (5th Dist. 2004). The child may be discharged by the Department of Juvenile Justice, which then petitions the juvenile court for an order terminating the child's custodianship. 705 ILCS 405/5-750(6).
- Any sentence imposed on a juvenile for a particular offense cannot exceed the maximum sentence that would be applied for the same offense if the offender were an adult. 705 ILCS 405/5-710; *In re K.S.*, 354 Ill.App.3d at 863-64. Certain offenses carry sentences with a defined mandatory minimum. *See e.g.*, 705 ILCS 405/5-750(2) (specifying that the minor who is at least 13 years old and is adjudicated delinquent of first degree murder, must be committed to the Department of Juvenile Justice until his 21st birthday) and 705 ILCS 405/5-815(f) (minors adjudicated as "habitual juvenile offenders" must be committed to the Department of Juvenile Justice until their 21st birthday).
- 21 In many cases, fiscal constraints may hinder the implementation of an attorney's desired dispositional plan. For instance, there may not be funding to send the child to a therapeutic day school. Nonetheless, the attorney should advocate for the dispositional plan that she and the client believe would best serve the child. If the court agrees that the plan is appropriate, it can order that the placement occur.
- 22 The State has the right to appeal from an order dismissing the prosecution or charges, or that has the effect of quashing an arrest or search warrant or suppressing evidence. Ill. Sup. Ct. R. 604(a)(1).

- 23 Ineligible to get any kind of immigration status.
- 24 Vulnerable to losing current immigration status.
- 25 Although ICE is the agency that picks up the child, the child will then be transferred to the Office of Refugee Resettlement (ORR).
- 26 Please see Immigration Legal Resource Center at www.ilrc.org for more information.
- 27 A special thank you to the Chicago law firm of McDermott Will and Emery who conducted the research and helped write this section.
- 28 Student discipline is subject to the constitutional requirements for seizure of a property right, which stems from a student's property interest in education. In *Goss v. Lopez*, the Supreme Court held that students have a property right in receiving a public education (*Goss*, 419 U.S. 565,573 (1975)). The Court held that because Ohio provided schooling for its residents and considered that to be a property interest, the students could not lose their right to attend school without some sort of hearing (*Goss*, 419 U.S. at 574).
- 29 Although an expulsion can deprive the student the right to attend school for up to two years, due process rights in a school expulsion hearing do not require "appointment of counsel at public expense; process to compel the attendance of witnesses; proof of the charges beyond a reasonable doubt; and a unanimous decision (*Linwood v. Board of Ed. Of City of Peoria, School Dist. No. 150 Peoria County*, 463 F.2d 763, 770 (1972)); nor does it require that the child be furnished "with a list of the names and addresses of the witnesses who are to testify" (*Linwood v. Board of Ed. Of City of Peoria, School Dist. No. 150 Peoria County, Id.*
- 30 20 USCA § 1412 (b)(ii); *see also Special Education Advocacy Under the Individuals with Disabilities Education Act (IDEA) for Children in the Juvenile Delinquency System* by Joseph B. Tulman Joyce A. McGee (University of the District of Columbia School of Law, 1998) available at http://www.law.udc.edu/programs/juvenile/pdf/special_ed_manual_complete.pdf citing *see, e.g., State of Conn. v. State Dept. of Ed.*, 699 A.2d 1077 (Superior Court 1997); *State of Wisconsin v. Trent N.*, 26 IDELR 434 (Wisc. Ct. App.1997) (EQ- this and the other 'IDELR' cites did not come up in Westlaw); *Alexander S. v. Boyd*, 876 G. Supp. 773 (D.S.C. 1995); *Donnell C. v. Illinois* 829 F. Supp. 1016 (N.D. Ill. 1993); *In re G.C. v. Coler*, 673 F. Supp. 1093 (S.D. Fla. 1987); *Andre H. v. Ambach*, 104 F.R.D. 606 (S.D.N.Y 2985); *Green v. Johnson*, 513 F. Supp. 965 (D.Mass. 1981); *In re Marc. A.*, 21 IDELR 341 and 21 IDELR 1079 (N.H. 1994) and *In re John K.*, 216 Cal. Ct. App. 1985)
- 31 Illinois Youth Center Chicago; Illinois Youth Center Harrisburg; Illinois Youth Center Joliet; Illinois Youth Center Kewanee; Illinois Youth Center Murphysboro; Illinois Youth Center Marquette; Illinois Youth Center St. Charles; Illinois Youth Center Warrenville. http://www.ipcsa.org/2007_DIRECTORY.doc
- 32 Information obtained from the Illinois Office of the State Appellate Defender. <http://state.il.us/defender/exp.html> and 705 ILCS 405/5-915.
- 33 This list is not exhaustive for all juvenile cases and attorneys may need to file other subpoenas in preparing their individual cases.

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The Children and Family Justice Center (“CFJC”) of the Bluhm Legal Clinic at Northwestern University School of Law provides clinical and interdisciplinary training in children’s law to Northwestern law students through representation of children in juvenile court. The CFJC offers effective, multidisciplinary, and comprehensive legal representation for indigent adolescents, serving the whole child in the context of their family and community. The CFJC advocates for justice for children and their families through legal practice, pedagogy, policy development, and improvements of the administration of justice.

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The mission of the National Juvenile Defender Center (NJDC) is to ensure excellence in juvenile defense and promote justice for all children. We believe that all youth have the right to zealous, well-resourced representation and that the juvenile defense bar must build its capacity to produce and support capable, well-trained defenders. We work to create an environment in which defenders have access to sufficient resources, including investigative and expert assistance as well as specialized training, adequate, equitable compensation, and manageable caseloads.

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