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A CHILD'S RIGHT TO COUNSEL: JUVENILE PUBLIC DEFENDERS

Jesse Kelley

INTRODUCTION

Juvenile public defenders represent youth charged with crimes through the juvenile court system. Each state has a process to provide access to counsel for allegedly delinquent youth who are unable to pay for a hired private defense attorney. Indigent defense provides juveniles with the constitutionally mandated access to counsel, even if they cannot afford it. Court-appointed lawyers who work on delinquency matters in the juvenile justice field can be labeled as juvenile public defenders, indigent criminal defense attorneys, or contract or “panel” attorneys. While often interchanged, the key difference is that public defenders are part of an organized, professional office while contract attorneys are independent practitioners and usually have their own private firm.

Enormous responsibility falls on each of these attorneys to diligently represent their young clients, but often these professionals are not adequately supported by the state. Supporting juvenile public defenders is necessary to ensure that justice and equitable outcomes are experienced by all young people in the juvenile court system. This policy study intends to highlight the many perils currently facing juvenile public defenders, how those disadvantages impact youth, what

obstacles COVID-19 added and what solutions states can undertake to ensure that young people facing delinquency have the best resources available.

BACKGROUND

The United States Supreme Court confirmed a juvenile's right to counsel via the Sixth Amendment to the Constitution. In 1963, *Gideon v. Wainwright* further declared that the defendant's right to counsel was assured in all criminal cases that might result in a term of imprisonment, including charges brought in both state and federal jurisdictions—regardless if the alleged crime was a felony or misdemeanor—and in *In re Gault* (*Gault*) this right was extended to juveniles in delinquency cases.¹

After the *Gault* decision, juvenile courts were required to include juvenile defense attorneys in the adjudication process for the first time. While the decision outlined right to counsel requirements, it did not address how these required shifts in juvenile court procedures would be financed. Costs, like hiring and training juvenile defense attorneys, can prove to be difficult for juvenile courts with limited resources. According to Georgetown Law School professor Wallace J. Mlyniec:

[J]uvenile indigent defense systems across the country are [...] [for the most part] chaotic, under-funded, disenfranchised, county-by-county hybrids of public defenders, appointed counsel, [and] contract attorneys, [supplemented by] the occasional law school clinical program or non-profit law center.²

This patch-work system of representation leads to many problems both for the attorney and for their client. While the *Gault* decision made substantial progress for juvenile access to counsel, moving forward steps must be taken to ensure that representation is comprehensive and equitable.

PROBLEMS FACING JUVENILE PUBLIC DEFENDERS

Many states, counties and municipalities have limited monetary resources to devote solely toward juvenile access to counsel; however, additional problems exist for juvenile public defenders. Specifically, lawyers in the juvenile system are notoriously overworked and underpaid and many lawyers who undertake work in the juvenile court system need additional training to be successful advocates.

Willingness and Overwork

The Bureau of Justice Statistics reviewed the caseloads of local public defenders' offices and found that in 2007 about

73 percent of county-based public defender offices exceeded the maximum recommended limit of cases received per attorney.³ Sadly, the report highlighted that “children represented by overworked attorneys receive the clear impression that their attorneys do not care about them and are not going to make any effort on their behalf.”⁴ Over the last decade, high numbers of cases have not declined nor have conditions improved for overburdened public defenders and their clients.⁵

While a willingness to undertake the work of indigent defense is ostensible, simple economic principles reveal that low wages make this an untenable pursuit. And, if lower wages persist and state budgets do not include enough funds for raises and to hire additional staff, there will continue to be a shortage across the country. As of 2018, lawyers who defend indigent clients had an annual income of about \$47,500 in their first year out of law school; that amount increases to about \$64,000 over five years.⁶ However, many of these same attorneys have significant student loan debt. Indeed, the average law school graduate leaves school with \$100,000 of debt.⁷ It would be difficult for almost anyone in this situation to continue to pursue a career as a public defender instead of working in a higher-paying, private firm.⁸

For those who are willing to accept low wages and provide indigent juveniles with access to quality counsel, high caseloads can quickly cause fatigue. According to a report from the Justice Policy Institute, “national standards recommend that public defenders handle no more than 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals per year.”⁹ However, only 21 percent of state-based public defender offices and 27 percent of county-based public defender offices have enough attorneys to handle their caseloads.¹⁰

Of the types of indigent defenders, panel—or contract—attorneys are some of the most overburdened. These attorneys operate private practices but also accept indigent cases or cases that pose conflicts of interest for public defender’s offices. In fact, juvenile cases in many states are often exclusively handled by these contract defense lawyers.¹¹ Unfortunately, contract lawyers may not have experience nor interest in juvenile defense, which can have unintended consequences for a juvenile defendant’s case.

The need to contract private attorneys may be due to the lack of a federal mandate which outlines how states should fund public defense. Exacerbating the problem, most public defender’s offices rely on state funding, and in 19 states that funding responsibility shifts to the counties.¹²

For example, a review of cases in Los Angeles County found that juveniles who were represented by contract attorneys were more likely to be transferred to adult court to face

their charges. Specifically, the study found that 25 percent of juvenile clients represented by contract attorneys were transferred, compared to 15 percent of clients represented by public defenders.¹³ The contracted lawyers closed cases almost twice as quickly as lawyers in the public defender’s office, they filed fewer motions and conferred with experts less often.¹⁴ These results might be due to a lack of interest on the part of the contracted attorney, or they could be indicative of a lack of training, experience and expertise in juvenile law.

Experience and Expertise

As previously mentioned, low salaries for public defenders can make it difficult to retain attorneys which results in high turnover rates and fewer experienced attorneys. Further, despite its importance, many public defenders do not receive training, adequate continuing education or other forms of professional development.¹⁵ According to the National Juvenile Defender Center (NJDC): “[A]n environment in which defenders have access to sufficient resources, including investigative and expert assistance, as well as specialized training, adequate and equitable compensation, and manageable caseloads” is ideal.¹⁶

Additionally, COVID-19 has impacted a public defender’s ability to interact with their clients and has altered the norms of representation. Normally, a public defender’s job is 75 percent interactive: from visiting clients in jails and prisons to meeting with their families and with prosecutors on their behalf.¹⁷ While technology has attempted to fill the gaps caused by COVID-19 restrictions, the lack of experience negotiating representation via teleconference has created challenges. As Todd Oppenheim, a public defender in Baltimore, Maryland, described: “Asking public defenders to work remotely is like asking an NFL team to train in a swimming pool.”¹⁸

Thus, juvenile public defenders are simultaneously attempting to gain valuable experience in juvenile court—with little to no adequate training—while navigating new technologies that have limited the main function of their role: advocacy, human connection and intervention.

IMPACTS

Additional support is needed for juvenile public defenders to obtain necessary resources and build expertise, as these current deficiencies are negatively impacting youth within the criminal justice system. When lawyers are forced to navigate quickly from case to case, or have to rely solely on videoconferencing or telephone calls for communication, it is nearly impossible to dedicate the proper amount of time and consideration to each young person’s case.

Time Versus Access to Counsel

Many young people accused of a crime do not receive timely access to legal representation. A 2013 report raised serious concerns that “the interests of many young people in juvenile court are significantly compromised, and that many children are literally left defenseless.”¹⁹

When a juvenile is assigned a public defender, high caseloads decrease the amount of time that the two can communicate. These large caseloads contribute to a “meet and plead” system that can result in grave incidents of attorney error and can end in unfavorable outcomes for the justice-involved young person.²⁰ In a “meet and plead” situation, cases are resolved by entering a guilty plea during the initial court hearing, usually with minimal preparation by the defense and negligible conversation with the accused. Overburdened defense attorneys have made mistakes resulting in wrongful convictions or disproportionate sentences which ultimately distorts and endangers individuals’ right to counsel.²¹

Specific guidance from The American Bar Association requires that a defense attorney provide proper representation to their client, saying:

In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client [...] such study should include discussion with the client and an analysis of relevant law, the prosecution’s evidence, and potential dispositions and relevant collateral consequences.²²

However, as caseloads increase, meaningful time with each client decreases.

In 2016, the Texas Indigent Defense Commission (TIDC) undertook a legislatively mandated study to review the appropriate amount of time that should be spent per case to achieve reasonably effective representation for juveniles. Information about the amount of time spent on actual cases was provided by 17 private practice attorneys and 46 public defense attorneys representing six juvenile public defender offices across the state of Texas.²³ Ultimately, the TIDC developed a set of juvenile guidelines for the state of Texas as a tool to define the point at which caseloads become excessive. For misdemeanor offenses, the minimum recommended time was 598 minutes, while the recommended minimum for felony offenses ranged from 1,164 minutes to 4,154 minutes.²⁴

Right to Private Communications Curtailed Due to COVID-19

Juvenile public defenders first interact with their client in a courtroom setting—often for an initial appearance—and use that time to begin to work on the case. Due to COVID-19 concerns and precautions, one-on-one, in-person meetings

between an accused youth and their appointed defender are less likely to occur. While some courts are using video streaming services to continue to hold hearings, this change does affect an individual’s right to counsel and in turn the right for that meeting to be private.

The basic principle underlying every attorney-client relationship is that communications are privileged, or confidential. This means that attorneys are not allowed to share their client’s oral or written statements with anyone—including prosecutors, employers, friends or family members—without explicit consent from their client first. However, the new normal of working and giving legal advice via videoconference and other electronic means has introduced a new layer of risk to the privacy of client data and therefore to attorney-client privilege, too.

Attorneys have a duty not only to protect privileged information, but more broadly to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”²⁵ Attorneys should take steps to minimize the risk of accidental or unauthorized disclosure of confidential attorney-client conferences—regardless of what medium of communication is being used. As specifically related to videoconferencing, attorneys should understand and make use of the many privacy settings that are offered like password-protected meetings and settings that limit screen-sharing actions.

While some video conference providers allow users to record meetings, it is unwise to take advantage of this option. When meetings are recorded on these services they can be collected and stored by these third parties.²⁶ In other words, video conferencing companies would have a permanent record of everything that was discussed during a privileged client meeting. In theory, that information could be subpoenaed, or the third party could simply decide to share it with others depending on their terms of service. For that reason alone, it is best practice to avoid recording attorney-client videoconferences through third-party applications.

Finally, videoconferencing technology could lead to inadequate representation. When a client and their attorney are not able to privately communicate through the course of a court proceeding, the accused youth may have questions that go unanswered or concerns that are never addressed. Meaningful and private counseling is a critical part of any judicial proceeding and without a mechanism to allow for constant deliberation between a juvenile and their attorney, there is no way to ensure the client has access to zealous representation.

SOLUTIONS

Primarily, juvenile public defenders need additional support, resources and training so that they can provide quality representation to their juvenile clients. Additionally, finding ways to divert young people away from the justice system before an arrest can allow more space and time for those clients who do need the resources offered by an indigent defender.

Additional Resources and Training

Additional resources are needed to maintain caseloads at a reasonable level for judicial officers, attorneys and probation officers. Both probation officers and defense attorneys have expressed a need for more resources to enable them to implement court-ordered dispositions and case plans, including accessing services in the community for the youth they work with.²⁷

For example, the Committee for Public Counsel Services (CPCS) in Massachusetts created a training and certification model for juvenile public defenders. Many juvenile justice advocates and defenders point to CPCS as a leader in juvenile defense due to the standards placed on lawyers, the training requirements and the approaches taken with young people.²⁸ The process for certifying and training lawyers who work with juveniles in Massachusetts is one of the most strenuous in the country. The state is also unusual in that it requires lawyers to get experience in adult criminal court before they are permitted to work with juveniles.²⁹

Since 2011, private attorneys in Massachusetts must have at least a year of criminal defense practice and undergo eight hours of training before they can be appointed to represent juveniles. For public defenders to be hired as CPCS staff, the requirement is three years. As other jurisdictions look to support juvenile public defenders, this Massachusetts model could be a helpful guideline to establish best practices for training attorneys to work with justice-involved youth.

Pre-arrest Diversion Programs for Youth

Every year, more than a million young people are arrested in the United States, and the vast majority—95 percent—of those arrests are for non-violent offenses.³⁰ Many of these justice-involved youth are not prosecuted because the charged offense was so trivial. However, a juvenile record originates as soon as a young person is arrested. Even if there is no formal case adjudication, the arrest record can be problematic for a young person for years to come.³¹

In addition to the creation of a harmful arrest record, detaining a juvenile during a pandemic can lead to an increased risk of contracting COVID-19 inside of a secure facility. Since the onset of the virus, outbreaks have been reported in juvenile detention facilities in 35 states, the District of Columbia and

Puerto Rico.³² Therefore, decreasing the risk of exposure to COVID-19 would require reducing the number of incarcerated young people.

Currently, about 70 percent of youth housed in detention facilities are there for non-violent offenses.³³ Providing options other than arrest can keep young people record-free and reduce juvenile public defender caseloads. And, because of the high number of non-violent juvenile offenders, there is negligible threat to public safety. One possible solution is the creation of pre-arrest diversion programs, which help keep young people out of the justice system and in their communities.

For example, Miami-Dade County, Florida instituted a civil citation program that enabled officers to cite youth for minor offenses rather than arrest them.³⁴ Instead of being processed through juvenile court, the program expects youth to perform community service. Furthermore, it provides the young person with individualized services like mental health and substance abuse treatment or vocational and educational support, as needed.³⁵

Supporters of this type of citation program report finding that recidivism is lowered and that there are substantial savings tied to lowering the number of young people formally processed through juvenile court.³⁶ Part of that cost-benefit appears in favor of the juvenile public defender. As more youth are removed from the system in favor of pre-arrest diversion, public defenders would be free to spend a more appropriate amount of time counseling each client they are representing. In addition, pre-arrest diversion programs may help the juvenile justice system focus more on its primary goal of rehabilitation while reducing the burdens of overworked public defenders.

CONCLUSION

Young people who enter the justice system need sophisticated and dedicated counsel. For juvenile public defenders to be best equipped to serve their clients, they need additional resources. Solutions should include incorporating advocacy training and instituting pre-arrest diversion programs for youth.

ABOUT THE AUTHOR

Jesse Kelley oversees R Street's criminal justice and civil liberties policy implementation efforts across the United States at both the federal and state levels. Earlier in her career, she worked as a criminal defense attorney in Alabama, where she represented mostly indigent clients.

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