

ACHIEVING EXCELLENCE IN DETENTION ADVOCACY:

A Diagnostic Tool for Team Leaders to Evaluate Defense Representation at Detention Hearings

Prepared by NJDC for the Annie E. Casey Foundation’s
Juvenile Detention Alternatives Initiative

This diagnostic tool is designed to assist JDAI Team Leaders in determining the effectiveness of defense counsel at arraignment, the probable cause determination, and the detention hearing. In some jurisdictions, these are all collapsed into a single hearing. Because many jurisdictions still allow children to waive their right to counsel and/or plead at the initial hearing, some questions allude to these practices.

Team Leaders who conduct both in-court observation *and* in-person interviews of juvenile defenders will get the most accurate picture of

current practice. This tool is divided into two main sections. The first presents a series of questions about juvenile defense practice. The second section reviews policy and system procedures that may be impacting practice. Taken together, these two sections should provide Team Leaders with the information necessary to identify gaps and areas ripe for improvement.

Please contact NJDC with questions, suggestions, and technical assistance needs to move ahead. We look forward to working with Team Leaders to enhance detention practice in JDAI sites.

I. PRACTICE ISSUES

ACCESS TO COUNSEL

- Are youth represented by counsel at detention hearings?

Appointment of Counsel

- Is counsel appointed *prior* to the detention hearing?
- On average, how much time does defense counsel have to prepare?
- When does counsel first meet with the client?
- Where does counsel first meet with the client?
- Is there a presumption of indigence applied to youth in delinquency proceedings?
- Is parents’ income considered when determining whether a youth in delinquency court is indigent?
 - o Are fees to receive juvenile indigent defense services assessed?

Waiver of Constitutional Rights

- Are youth permitted to waive counsel without first consulting an attorney?
 - o Do judges conduct individual waiver colloquies, using age-appropriate language, to determine whether each youth who waives counsel is doing so knowingly, voluntarily and intelligently? (*see* Sample Colloquy in Appendix A)

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- Are youth permitted to plead at the initial hearing?
 - Do judges conduct individual plea colloquies, using age-appropriate language, to determine whether each youth who pleads is doing so knowingly, voluntarily and intelligently? (*see* Sample Colloquy in Appendix B)
 - If judges take pleas in groups, do defenders object?
 - If youth are represented, does the defender thoroughly discuss the plea with the client?
 - If youth are represented, does the defender thoroughly review the rights to be waived?
 - If youth are represented, does the defender thoroughly discuss collateral consequences of the plea with the client?
 - If unrepresented youth are permitted to plead at the initial hearing, do defenders make themselves available to advise the youth concerning the consequences of a delinquency finding, including the detention possibilities, before the youth pleads?
 - Are unrepresented youth more likely to plead than represented youth?
 - Is the threat of detention one of the main tools prosecutors use to bargain for pleas at the initial hearing, whether the prosecutor is bargaining with represented or unrepresented youth?

Ongoing Communication

- Does the defender give the client contact information and explain how the client can reach the defender?
- If in line with the client's expressed interests, does the defender give the client's family contact information and explain how the family can reach the defender?
- Does the defender explain the defender's role to the client's family?

QUALITY OF REPRESENTATION

A. GENERAL

Duty to Represent Client's Expressed Interests

- Does the defender consult with the juvenile client?
- Does the defender clearly explain the defender's role and duty of confidentiality to the client?
- Does the defender advocate for the juvenile client's expressed views and interests at all stages?
 - If the jurisdiction has detention team meetings, in which parties decide their positions on the child's detention status outside of the courtroom, does the defender advocate zealously for the child's expressed interest both in this meeting and in court before the judge?

B. PREPARING FOR THE HEARING

Client Interview

- If appointed ahead of time, does the defender meet with each child before the detention hearing?
 - If appointed ahead of time, does the defender meet with each child out of the presence of that child's parent or guardian?
- Does the defender bring and get the client's signature on the appropriate release forms to allow the defender to subpoena the client's educational, medical, mental health, and other records?
- If the defender is not appointed with enough time to meet with each client individually, does the defender enlist the aid of a social worker, law student, or legal intern to interview clients before their hearings while the defender is appearing in court?

Taking a Comprehensive Client History

- Does the defender take from the client and/or receive from the government information comprising a complete client history, including information about the client's strengths and skills, as well as the client's prior delinquency, truancy, and dependency record, special health needs, mental health needs, and family history? (see Sample Client Interview Form in Appendix C)
- Does the defender consider, in consultation with the client, people to whom the client could be released, as well as community-based services that the client believes could help him stay in the community?
- Does the defender get the names, phone numbers, and other contact information for these potential community-based options?
 - Does the defender contact potential community programs to ascertain whether they are willing to take the client pending trial?
 - Or does the defender rely solely on the recommendation of the probation officer?
- Is the defender aware of other family and community contacts willing to participate in the child's release plan in ways other than being a placement resource?
 - Does the defender contact these people and programs to ascertain whether they are willing to participate in the child's release plan?
- If the defender is not able to take a comprehensive detention hearing history because the defender is appearing in court, does the defender enlist the aid of a social worker or legal intern to take the information and pass it to the defender before the child's detention hearing?

Preparing the Client's Family

- Does the defender explain the purpose of the hearing to the client's parent or guardian?
- Does the defender explain the defender's role as the child's counsel to the child's family?
- Does the defender ascertain whether the client's parents will allow the client to return home?
 - If the parent or guardian will not allow the client to return home, does the defender explore with the parents realistic conditions under which the parent or guardian might allow the child back in the home?
 - If the parent or guardian will not allow the client to return home, does the defender explore with the parent or guardian other people to whom the client could be released?
 - If the parent or guardian does not want the client to return home, does the defender explain to the parent or guardian the potential effects and consequences of detention?
- If the parent or guardian does not come to the hearing, does the defender try to contact them to ascertain why they are not attending the hearing, and whether they will allow the client to return home?
- If the parent or guardian does not come to the hearing, does the defender explore having the parent or guardian appear by phone?
- Does the defender prepare the parent or guardian for the possibility that the court will solicit the views of the parent or guardian in open court?

Obtaining Detention Hearing Discovery

- Does the defender request, receive and review the police reports in the client's case?
- Does the government regularly turn over, and/or does the defender request, receive and review the client's complete court history and all available records before the hearing?
- Does the government regularly turn over, and/or does the defender request, receive and review the client's completed risk assessment instrument (RAI) before the hearing?
- Does the defender make it a point to speak with intake probation about the RAI score?

Knowledge of Applicable Detention Hearing Law

- Is the defender aware of applicable current case law on detention?
- Is the defender aware of the statute or court rule that defines when a child can be detained in your jurisdiction?
- Is the defender aware of current research on the harmful effects of detention, both generally and specifically with respect to the places where the client is likely to be held?

C. REPRESENTATION AT THE HEARING

Defender Arguments at the Hearing

- If the defender has not met with the child due to untimely appointment of counsel, does the defender state that issue at the detention hearing and request a brief continuance?
- If the detention hearing is not scheduled or held within the time limits required by law or court rule, does the defender file a motion for the child's release?
- If the defender did not receive or was not afforded an opportunity to review the client's RAI before the hearing, did the defender raise this point at the hearing?
- If no one except the intake probation officer had access to the RAI before the hearing, did the defender raise this point at the hearing?
- If the defender did not receive or was not afforded an opportunity to review the client's prior record, did the defender raise this point at the hearing?
- If the defender did not receive or was not afforded an opportunity to review the police reports in the client's case, did the defender raise this point in the hearing?

Probable Cause Hearing

- Is the defender aware of the required burden and standard of proof for probable cause, and does the defender hold the prosecution to its burden?
- Regardless of the particular jurisdiction's type of probable cause hearing, does the defender marshal available evidence to argue against a finding of probable cause?
 - If the jurisdiction has probable cause hearings where testimony is taken, does the defender cross examine the government's witnesses, and use the witnesses' testimony to argue against probable cause?
 - If the jurisdiction has probable cause hearings in which the court determines probable cause based on an officer's affidavit, does the defender try to argue against probable cause based on, *inter alia*, a deficient attestation, a lack of evidence concerning one or more of the elements of the charged offense, or an insufficient nexus between your client and the offense?

Detention Hearing

- Does the defender make arguments related to current case law and the statutory criteria for imposing detention, and argue that the child cannot be detained unless the required criteria are met?
- Is the defender aware of and arguing current research on the harmful effects of detention, both generally and specifically with respect to the places where the client is likely to be held?
- Is the defender aware of each child's individual strengths and needs, and how these are relevant to the detention decision?
- Does the defender present and argue for a detention alternative, complete with specific names and contact information of people willing to be involved in the youth's release conditions, and detailed representations concerning how the youth will be monitored?

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- If the jurisdiction allows the presentation of evidence in aid of the detention decision, does the defender call witnesses or present evidence to support arguments on behalf of the child – even if the court’s tradition is not to call witnesses or present evidence?

D. AFTER THE HEARING

Keeping the Client and the Client’s Family Informed

- If the child is released, does the defender thoroughly and clearly explain the conditions of release to the child and family and provide information about how to satisfy the conditions?
- If the client is released, does the defender answer the client’s questions about the hearing, and preview the next steps in the case for the client and the client’s family?
- If the client is released, does the defender get contact information for the client, including the client’s name, address, phone number, and similar information for the client’s relatives and friends?
- If the client is released, does the defender schedule the next meeting with the client before the client leaves the court building?
- If the client is detained, does the defender make sure that the client’s family knows where and how to visit the client?
- If the client is detained, does the defender give the client the date and time of the next time the defender will visit?
- Regardless of the client’s detention status, does the defender explain, in detail and with age-appropriate language, the next steps in the case?

Challenging the Decision to Detain

- If the client is detained, does the defender file motions to reopen the probable cause hearing if the defender subsequently receives exculpatory information from the government, or motions to reconsider the detention decision if the defender learns of relevant favorable information (e.g., the charges are reduced or a new, community-based placement option emerges)?
- If the child is detained and the detention decision appeared to be influenced by a lack of community resources, does the defender challenge this ground for the decision?
- If the child is detained and the detention decision appeared to be influenced by the parent’s unwillingness to allow the child to return home, does the defender challenge this ground for the decision and, in careful consultation with the client, consider filing a dependency petition?
- If the child is detained, does the defender file a motion to reconsider the detention decision?
- Does the defender file appeals from detention decisions?
- Does the defender file petitions for extraordinary writs (*habeas corpus*, *mandamus*, or prohibition) to seek the release of a child who is wrongfully detained?

II. POLICY CONSIDERATIONS

Team leaders can use the questions above to think about whether the defenders in your jurisdiction are providing zealous defense advocacy regarding all aspects of detention. Assess which elements of detention advocacy your defenders regularly provide to their juvenile clients, and which they do not.

For the elements of detention advocacy that defenders were consistently unable to provide to their juvenile clients: what are the barriers to their representation? How would you characterize those barriers? Are they systemic (e.g., excessive caseloads, inadequate compensation, insufficient supervision, insufficient non-legal resources like support staff, social workers, and experts), or technical (e.g., lack of training opportunities in juvenile-specific practice), or do they result from tradition (e.g., no one files motions to reconsider because no one ever has)? What are the sources of those barriers – your office, state laws or rules, local habits, your court system, or something else? What can you do to help defenders change or overcome those barriers?

Strengthening the Defender Community

Are there avenues available to you to help defenders work with, learn from, and share resources with each other? Consider whether the following might be useful in your jurisdiction. Could you, as a Team Leader:

- convene regular meetings for your defenders to have case reviews for detained clients?
- lead an effort to populate a pleadings bank with model motions to reopen the probable cause hearing or reconsider the detention decision?
- organize a twice-yearly resource fair so that defenders can learn about community-based detention alternatives?
- designate someone to keep a regularly-updated list of the current community-based alternatives to detention, and to make that list available to defenders?

Juvenile Court Policies and Procedures

Are there ways for you, as a Team Leader, to improve juvenile court policies and procedures for juvenile defenders? Could you, as a Team Leader:

- if counsel is not appointed prior to the detention hearing, help defenders devise a strategy to advocate for earlier appointment, or for initial hearings to be held in the afternoon so that defenders can interview clients in the morning?
- if youth are interviewed by intake probation officers before they have been afforded an opportunity to consult with an attorney, work with probation staff to ensure that youth are advised of their right to an attorney?

Ease of Communication

- ensure that detention facilities allow clients liberal and free telephone access to their attorneys?
- ensure that families of youths detained pending their initial hearing are able to convey social information crucial to the detention hearing to the defender?
- help arrange for a private space in the juvenile court building where defense counsel can meet privately with clients?

Representation at the Hearing

- work with prosecutors, judges, and probation officers to ensure that, during the probable cause hearing, defense counsel is given the opportunity to present evidence, to challenge the prosecution's evidence through cross examination, introduction of defense evidence, and to argue the evidence?

JDAI Process Issues

Additionally, are defenders meaningfully engaged in the JDAI process? Is there more that you, as a Team Leader, could be doing to help your defenders become engaged or participate meaningfully? Could you, as a Team Leader:

- make sure defenders are on the RAI subcommittee?
- talk with defenders' supervisors to give juvenile defenders time to participate in JDAI?
- organize training for defenders on reading or potentially challenging the RAI being used in each JDAI jurisdiction in which the defender practices?
- meet with the local juvenile defender unit (if there is one) to discuss the successes, challenges, and their overall views of the JDAI process?

This diagnostic tool can be adapted to the practices of your jurisdiction. For example, in some jurisdictions, criminal procedure does not apply at detention hearings. In others, defenders are not allowed to introduce evidence at detention hearings. NJDC is available to work with Team Leaders to adapt this tool, to ensure that it is effective and leads to meaningful practice reform and engagement of juvenile defenders in the JDAI process.

Thank you.

*For more information, please contact the National Juvenile Defender Center
at 202.452.0010 or at inquiries@njdc.info.*