

# ACHIEVING EXCELLENCE IN DETENTION ADVOCACY:

## Guidelines for Juvenile Defenders to Provide Zealous Advocacy at Initial Detention Hearings

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

These guidelines are designed to assist defenders in assessing their advocacy at the traditional, three-part initial hearings held in most jurisdictions: 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.

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 defenders with the information necessary to identify practice gaps. Please contact NJDC with questions, suggestions, and technical assistance needs to move ahead. We look forward to working with defenders to enhance detention practice at JDAI sites.

Consider the three most recent cases in which you represented a child at an initial detention hearing. For each of these cases, consider the following questions. Use these questions to think about which elements of detention advocacy you regularly provide to your child clients. The more of the above elements you can provide in each case, the more effective your advocacy will be.

## I. PRACTICE ISSUES

### MEETING YOUR CLIENT

#### *Establishing the Attorney-Client Relationship*

- Did you meet with your client prior to the detention hearing?
- Did you meet in a private location where your conversations could not be overheard?
  - Did you speak with your client at any time without parents, guardians or any other people or parties present?
- Did you ascertain your client’s expressed legitimate interests with respect to detention?
  - 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?
- Did you also discuss the following with each client using age-appropriate language:
  - attorney-client confidentiality rules
  - your ethical duty to zealously advocate for the expressed legitimate interests of your client, even when the child’s expressed interest conflicts with your sound legal advice or with your own personal judgment about what might be in the child’s best interests
  - if client is detained, how client is doing in detention
  - whether there is any evidence of harassment or mistreatment of the client in detention

- 
- o client's right to remain silent
  - o information relevant to the detention decision under your state's law, including whether the client has a prior record, the client's school attendance and performance, the client's home life, and, in jurisdictions that require them, what the results of the client's drug test will be
  - o the possible levels of detention (i.e., secure versus non-secure), and the client's opinion on possible alternatives to detention
  - o specific reasons that argue against detaining this child (vulnerability, age, special needs, health concerns, suicidal, etc.)
  - o client's objectives for your legal representation
  - o what the client should expect at the upcoming hearing, including an explanation of the purpose of the hearing and of the roles of each of the institutional actors (i.e. the judge, the prosecutor, and the probation officer) involved
  - o client's choice about whether to admit or deny the charges (plead guilty or not guilty)
  - o client's version of events to prepare for the probable cause hearing, to get names, contact information, descriptions, or hang-out locations of potential witnesses, and/or to begin investigation planning
- Did you give the client your contact information and explain how s/he can reach you?
  - Did you bring and get the client's signature on the appropriate release forms to allow you to subpoena the client's educational, medical, mental health, and other records?
  - If you are not appointed with enough time to meet with each client individually, do you enlist the aid of a social worker, law student, or legal intern to interview clients for you before their hearings while you are appearing in court?

## PREPARING FOR THE HEARING

### *Knowledge of Applicable Detention Law and Alternatives*

- Are you aware of the current case law, statutes, and court rules that define when a child can be detained in your jurisdiction?
- Are you 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?
- Are you aware of the current community-based alternatives to detention?

### *Taking a Comprehensive Client History*

- Did you learn about the client's histories in the following areas (see Sample Detention Interview Form):
  - o education
  - o extracurricular activities, hobbies, and other strengths
  - o special needs
  - o mental health and health issues, including the names and doses of any prescribed medications
- Did you consider, in consultation with your client, family members to whom the client could be released?
- Did you consider, in consultation with your client, community-based services that the client believes could help the client stay in the community?
- Did you consider, in consultation with your client, other community-based programs besides family members to whom the client could be released?

- 
- Are you aware of other family and community contacts willing to participate in the child's release plan in ways besides allowing the client to be released into their custody?
    - Did you contact these people and/or programs before the hearing?

#### *Preparing Your Client's Family*

- Did you explain the purpose of the hearing to the child's family?
- Did you explain your role as the child's counsel to the child's family?
- Did you talk with the client's family before the hearing to ascertain whether they were willing to have the client released to them?
  - If the parent or guardian would not allow the client to return home, did you 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 would not allow the client to return home, did you explore with the parent or guardian other people to whom the client could be released?
  - If the parent or guardian did not want the client to return home, did you explain to the parent or guardian the potential effects and consequences of detention?
- If the parent or guardian did not come to the hearing, did you try to contact the parent or guardian to ascertain why the parent or guardian did not attend the hearing, and whether the parent or guardian will allow the client to return home?
- If the parent or guardian did not come to the hearing, did you explore having the parent or guardian appear by phone?
- Did you prepare the parent or guardian for the possibility that the court will solicit the views of the parent or guardian in open court concerning your client's school behavior, home behavior, and overall social functioning?

#### *Obtaining Discovery*

- Did you request, receive and review the risk assessment instrument (RAI)?
- Did you discuss the RAI score with the intake probation officer?
- Did you request, receive and review the police reports in your client's case?
- Did you request, receive and review a copy of your client's prior delinquency, truancy, and/or dependency history?

#### *If the client decided to plead at the initial hearing*

- If your client decided to accept a plea at the initial hearing, did you discuss, in age-appropriate language:
  - the fact that, because the client is pleading at the initial hearing, you have not been able to do adequate investigation, so that the client can make a fully-informed decision about whether to plead
  - the advantages and disadvantages of pleading, including the potential maximum and minimum penalties, including any fines and community service requirements, the strengths and weaknesses of the government's case, and potential dispositions
  - the finality of the plea
  - that the plea takes the place of the trial, and so there will never be a trial in the client's case if s/he pleads
  - that pleading guilty may not be the only way to secure release
  - the long-term collateral consequences of a guilty plea
  - whether your client understood that s/he did not have to plead, and that it is the client's constitutional right to go to trial, no matter what the client's parents, police officers, judge, or any other adult might have told the client

- 
- o whether your client was coerced in any way to plead
  - o whether your client was clearheaded enough to make the decision to plead
  - o that, though the client can consider others' advice, the decision to plead belongs to the client alone
  - o the client's right to hold the government to its unshifting burden to prove guilt beyond a reasonable doubt
  - o the client's right to present evidence, to introduce documents, and to cross examine the government's witnesses and to call witnesses on his or her own behalf
  - o the client's right to testify at trial if s/he wished, and that, if the client chose not to testify, it could not be held against him or her
  - o whether your client understood that s/he has a right to counsel on appeal
  - o the expungement process

## REPRESENTATION AT THE HEARING

### *Defender Arguments at the Hearing*

- If the detention hearing was not scheduled within the time required by your jurisdiction's statute or rules, did you file a motion to have your client released?
- If you were not able to speak with the client before the detention hearing, due to untimely appointment to the case or any other reason, did you request that the case be continued for a few hours to allow you to consult with the client?
- If you did not receive the RAI before the hearing, did you raise this point at the hearing?
  - o If no one except the intake probation officer had access to the RAI before the hearing, did you raise this point at the hearing?
- If you did not receive or were not afforded an opportunity to review your client's prior record before the hearing, did you raise this point at the hearing?
- If you did not receive or were not afforded an opportunity to review the police reports in your client's case, did you raise this point at the hearing?

### *Probable Cause Hearing*

- If the government sought to detain your client, did you marshal all available evidence to argue against a finding of probable cause?
  - o If the jurisdiction has probable cause hearings where testimony is taken, did you cross examine the government's witnesses, and use the witnesses' testimony to argue against probable cause?
  - o If the jurisdiction has probable cause hearings where testimony is taken, and you calculated that you had little to no chance of winning the probable cause hearing, did you use the probable cause hearing as a tool for discovery?
  - o If the jurisdiction has probable cause hearings in which the court determines probable cause based on an officer's affidavit, did you 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?
  - o Did you argue to hold the prosecution to the required burden and standard of proof?

### *Detention Hearing*

- Did you argue that detention cannot be imposed unless the relevant statutory criteria, as explicated by current case law, were met, and did you argue against a finding that the criteria were met?

- 
- Did you argue that your client should be placed in the least restrictive environment possible?
  - Did you introduce research on the risks and harmful effects of detention for children?
  - Did you present and argue for a detention alternative, tailored and responsive to the judge's concerns about the individual client, 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?
  - If the jurisdiction allows the presentation of evidence to support arguments in aid of the detention decision, did you call witnesses or introduce other evidence to support your arguments against secure detention or in favor of alternatives?
  - Did you advocate for your client's expressed legitimate interests, even when the child's expressed legitimate interest conflicted with your reasoned legal advice or with your own personal judgment about what might be in the child's best interests?

#### *Making a Record*

- At the end of the hearing, did you request that the judge prepare and issue written findings and an order?

#### *For jurisdictions in which juveniles can waive counsel or plead guilty at the initial hearing*

- Did you ask to be assigned to represent the child, at least to put on the record that the child's waiver of counsel and plea were entered without the benefit of counsel?
- Did you ask the court to inform the child that, should the child change his or her mind, you or your office would be available to represent him or her?
- Did you state for the record that you had not had a chance to investigate the matter or subpoena relevant documents before the client pled?

## **AFTER THE HEARING**

#### *Keeping the Client and the Client's Family Informed*

- If the client was released, did you thoroughly and clearly explain the conditions of release to the client and parents and provide information about how to satisfy the conditions?
- If the client was released, did you 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 was detained, did you make sure that the client's family knows where and how to visit the client?
- If the client was detained, did you visit the client within 48 hours of the detention decision?
- Did you schedule your next in-person meeting with the client?
- Did you discuss with your client, using age-appropriate language, what happened at the hearing, and answer any questions the client might have?
- Did you explain to your client, in detail and with age-appropriate language, the next steps in the case?

#### *Challenging the Decision to Detain*

- If the client was detained, did you file a motion to reopen the probable cause hearing in cases where you subsequently received exculpatory information?
- If the client was detained, did you file a motion to reconsider the detention decision in cases where you subsequently discovered favorable information (e.g., the charge is reduced, or a new placement option emerges)?
- If the judge's detention decision was influenced by a lack of community resources, did you challenge this basis for the decision?

- 
- If the judge’s detention decision appeared to be influenced by the parent’s unwillingness to allow the child to return home, did you challenge this ground for the decision, and consider, in careful consultation with you client, filing a dependency petition?
  - Did you inform your client of the right to appeal the detention decision?
  - If the client wished to appeal, did you follow the procedural steps needed to secure the right to an appeal?
  - Did you handle the appeal or transition the case to another attorney?
  - Did you consider petitioning for an extraordinary writ (*habeas corpus*, *mandamus*, or prohibition) to obtain the release of a client who was wrongfully detained?

## II. POLICY CONSIDERATIONS

Think about which elements of detention advocacy you did not or could not provide to your juvenile clients. If you could not provide a service, what were the barriers to your 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?

### *Drawing Strength from the Defender Community*

If you could have provided a service, but did not, what were the reasons? What barriers do you need to overcome, and how will you do so? What resources can help you to serve your clients better? Consider the following avenues. Can you, as defenders:

- keep and share a regularly-updated list of the current community-based alternatives to detention, with contacts at each facility and phone numbers?
- regularly update and share model motions to reopen, motions to reconsider, motions arguing the conditions of the local detention center?
- convene regular case review meetings with defenders in other jurisdictions?

### *Juvenile Court Policies and Procedures*

Are there ways for you, as a defender charged with protecting your clients’ due process rights, to improve juvenile court policies and procedures for your clients? Could you, as a defender:

- in jurisdictions where children are allowed to plead after waiving counsel, coordinate with your colleagues to make sure a defense attorney is present and ready to counsel a child who wishes to plead after waiving counsel before the child pleads?
- in jurisdictions where children are allowed to plead at the initial hearing, begin a practice of stating on the record you have not had a chance to investigate the matter or subpoena relevant documents before the client pled?
- if you were in the courtroom when a child waived the right to counsel, could you, before the waiver colloquy, ask the court for a brief pass to allow you or one of your colleagues to advise the child about the advantages and disadvantages of waiving counsel outside of the presence of the court and of the child’s parents?

---

*JDAI Process Issues*

As a defender, are you meaningfully engaged in the JDAI process? Could you, as a defender:

- organize, with the assistance of your Team Leader, training on the RAI in each of the jurisdictions in which you practice?
- make sure that defenders are on the RAI subcommittee?

Adapt this diagnostic tool to the practices of your jurisdiction: does your jurisdiction's statute hold that criminal procedure does not apply at detention hearings? If it does, what does that mean for you to advocate zealously at detention hearings? Does your jurisdiction's statute forbid the introduction of evidence at detention hearings by defenders? If it does, brainstorm how you can get information that is favorable to your client before the court. NJDC is available to work with defenders to ensure that these guidelines lead to juvenile defenders' being engaged in both the JDAI process and meaningful reform of detention practice.

Thank you.

*For more information, please contact the National Juvenile Defender Center  
at 202.452.0010 or at [inquiries@njdc.info](mailto:inquiries@njdc.info).*