

NATIONAL CONFERENCE  
*of* STATE LEGISLATURES



# Indigent Defense, Counsel & Other Procedural Issues

Juvenile Justice Guide Book for Legislators



## Introduction

The American legal system is adversarial in nature; it relies on ardent advocacy from skilled attorneys to argue for the positions of their clients. The quality of representation provided plays a key role in the outcome of court decisions. Indigent juveniles rely on states for legal assistance at their delinquency proceedings, a right guaranteed to them by the 1967 U.S. Supreme Court case *In re Gault*.

To protect this right, states face the challenge of determining how to offer adequate legal counsel in light of financial and human resource limitations.

Past efforts to protect a child's right to an attorney have not always led to the desired results. The 1993 American Bar Association (ABA) report, *America's Children at Risk: A National Agenda for Legal Action*, examined deficiencies in America's juvenile defense systems and recommended structural improvements for overwhelmed attorneys. Recommendations included limited caseloads, early case involvement, comprehensive initial training, continued education, an increase in support staff

and hands-on attorney supervision. These measures require both increased resources for juvenile defenders and attorney-client interaction before the initial court appearance. Although this report is now 17 years old, the issues it identified remain relevant for improving juvenile representation.

State lawmakers are in a position to decide what legislative measures are appropriate to provide indigent juveniles with legal defense. Policy decisions on procedures for indigence determinations, limitations on waiver of counsel, juvenile competency evaluations and allocations of attorney resources all have an impact on the quality of representation.





### Determination of Indigence

Most states appoint counsel to youths only upon a determination that they qualify as indigent, and the application process for receiving counsel varies from state to state. An “indigent defendant” is someone who has been arrested or charged with a crime punishable by imprisonment and who lacks sufficient resources to hire a lawyer without suffering undue hardship. In at least one state—Michigan—the juvenile court must appoint an attorney to represent a youth regardless of indigence status, but this is not the norm.



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## Obtaining Court-Appointed Counsel

Many states—such as Florida, Delaware, Georgia and Tennessee—require administrative fees to submit an application to apply for court-appointed counsel. Florida charges \$40, Delaware \$100, Georgia \$50 and Tennessee \$50. Some consider these fees prohibitive to youths who have very little money, while others regard these fees as small and necessary to cover costs associated with providing legal defense. Each of these states has a mechanism to waive its fees if they would be prohibitively expensive to the defendant.

Once a state receives an application for juvenile indigent counsel, state appointed decision makers must rule on the submission. In Alabama, the presiding judge determines indigence, while Georgia leaves it to the public defender's office or any other agency providing the service. Other states, including Florida, assign the task to the clerk of the court. Most—if not all—states use these mechanisms or some combination thereof to make the indigence determination.

During the assessment, the decision maker considers numerous factors, some statutorily enumerated, others included in administrative codes. Most states use a combination of objective rules such as a percentage of the federal poverty guidelines (\$22,350 for a family of 4 in the year 2011) and more subjective standards such as “substantial hardship” to guide the decision. Florida, Georgia and Texas use both of these standards for making indigence assessments.

A key factor in these determinations is whether the evaluator uses the parents' or the juvenile's finances as the basis for their assessment. In most states—including Maine, Massachusetts and Kentucky—the court considers the parents' financial status. Georgia law also considers the parents' finances, but allows the child's finances to be used if a conflict of interest exists between the parent and the juvenile. In at least one state—North Carolina—the child is presumed fiscally indigent unless they or their parents hire private counsel.

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Texas will presume indigence if certain factors are met, including whether the parents are incarcerated or receive food stamps.

### ***Waiver of Counsel***

Although it is every child's right to be represented by an attorney, lack of understanding and appreciation for that right have caused many to decline it. Children tend to distrust adults—especially strangers



such as a lawyer—they meet because they are in trouble. As a result, children nationwide often waive their right to counsel without truly understanding the consequences.

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According to the National Juvenile Defender Center, juveniles who waive counsel are more likely to enter guilty pleas without offering arguments or mitigating circumstances to the court and more likely to be sent to detention facilities.

The American Bar Association believes juvenile waiver of counsel should be completely prohibited, but most states that ban waiver only do so in limited situations. Iowa, for example, bars a child’s ability to waive his or her right to counsel depending upon factors like the child’s age and the potential consequences of the proceedings against them.

If a state does not want to completely bar juvenile waiver of counsel, the ABA recommends other measures, including requirements that a juvenile meet with an attorney prior to waiver, as is required in California, Colorado and Indiana. The ABA also recommends that states procedurally require all waivers to be submitted in writing in open court;

that the waiver be renewed at each later stage of court proceedings; and that, if the right to counsel is waived, stand-by counsel be appointed and a full inquiry be made into the youth’s capacity to make the choice.

Adhering to these suggestions, Louisiana law allows juveniles to competently waive their right to counsel after consultation with an attorney, parent or caretaker, and after the court explains the rights and the consequences of waiver to both the child and his or her guardian. The law also completely prohibits waiver when a child is in a proceeding that can result in placement in a mental hospital, psychiatric unit or substance abuse facility, when the child is charged with a felony delinquent act, or when a court ruling affects probation or parole revocations.

### ***Competency to Stand Trial***

To stand trial in the United States, defendants must be deemed mentally competent to understand the nature of the charges brought against them. Although mental sufficiency has generally focused on mental illness and developmental disability, increased attention is being given to juvenile incompetence based upon emotional and mental immaturity. Research conducted by the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice found that many children, especially under age 15, may not be capable of participating competently with their attorneys at their own trials.

An attorney's ability to effectively represent a client can be greatly affected by how they are able to relate to, and gather facts from, their client. The MacArthur study found that children were less able to understand the nature and purpose of their trial, less likely to give their attorney necessary information, and less able to view their situation rationally. As a result, the MacArthur report recommends an expanded definition of competence for juveniles that takes social and cognitive development into account.

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Some states have incorporated these and similar ideas into their statutes. Florida's juvenile competency law, for example, allows either the court or a present attorney to make a motion for a determination of the child's competency. If an evaluation of the youth is ordered, the subsequent report must consider the child's ability to rationally understand the charges and potential punishments. It must also assess the

child's capacity to participate meaningfully with the attorney in preparing his or her case.

Similarly, a 2010 California law requires a child to have a rational and factual understanding of the proceedings against him or her. The law also requires that a child development expert apply “accepted criteria” in evaluating the child in question.

## Challenges to Providing Adequate Juvenile Defense

According to the American Bar Association, excessive workloads for attorneys representing the indigent can limit the quality of their counsel. The ABA guidelines for assessing whether legal representation is being negatively affected include whether enough time is being given to client interviews; whether factual investigations can be conducted, and whether sufficient preparations are made for pretrial hearings and trials.

According to the National Juvenile Defender Center, attorneys who practice juvenile defense generally take on a high number of cases, lack access to experts, and have little to no staff assistance with administrative and investigative tasks. The pressures caused by these conditions leave juvenile defenders little time to build relationships with their clients, which can negatively affect their representation.

A survey of juvenile court judges conducted by the National Juvenile Defender Center found that judges often want more background information on a child's education needs, medical and psychological

evaluations and family characteristics. This factual information can be determined by investigations and client interaction.

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Reports issued by many states—including Maine, Ohio and Virginia—have found that late attorney involvement and low ancillary resources have caused problems for juvenile representation. In a 2009 New Jersey Supreme Court case, *State ex rel. P.M.P.*, potential ways to address these issues were identified. It held that the right to counsel in delinquency proceedings attaches when a complaint is filed and a judicially approved arrest warrant is obtained. This early presence may allow attorneys more time to investigate a child’s history, factual circumstances of the crime, and to develop an appropriately tailored strategy with dispositional alternatives.



## Conclusion

Juvenile crime is a challenge for states in many respects, and the administration of indigent defense is no exception. At each step in the process—from indigent counsel application fees to adjudications—states balance the child’s rights and needs against their ability to finance and administer representation. State options to address juvenile defense include making it more difficult for juveniles to waive counsel, changing processes for determining indigence and increasing juvenile defender resources to better ensure complete and competent counsel.

For references and additional resources, please see the **References, Glossary & Resources** section.



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