



Children's Rights Litigation Committee
Spring 2010

American Bar Association
Vol. 12, Issue 3

The Paradox of Education in America: Integrating Systems for Children with Disabilities

By Judge Steven C. Teske and Judge Brian Huff

We're a nation in paradox when it comes to taking care of our children. It's an indictment of communities across the country when, on one hand, we promulgate laws to promote the education of children with disabilities, and, on the other, we fail to safeguard them from incarceration on relatively minor school offenses that are likely a manifestation of their disabilities. Currently, a disproportionate number of children with

education-related disabilities, eligible for special education services under the Federal Individuals with Disabilities Education Act (IDEA), are in the juvenile justice system. Worse is the disproportionate number of children with disabilities currently incarcerated in juvenile facilities. For example, studies reveal that approximately 70 percent of incarcerated children have disabilities.¹ It's time to evaluate our policies with an eye toward removing these contradictions so that

children with disabilities are not disrupted from their educational services and placed in a juvenile justice system that only leads to additional, avoidable risk factors for these children.

The juvenile courts in Jefferson County, Alabama (Birmingham), and Clayton County, Georgia (a suburb of Atlanta), used a multi-integrated systems approach to significantly reduce the number of school

Continued on page 12

Representing the Status Offender: The Need for a Multi-Systemic Approach

By Marlene Sallo and Sarah Darbee Smith

Status offenses are unique to juveniles, meaning that only juveniles can be charged with or adjudicated for conduct that, under the law of the jurisdiction in which the offense was committed, wouldn't be a crime if committed by an adult.¹ Status offenses include truancy, incorrigibility, running away from home, using vulgar language, and drinking. These behaviors tend to be the result of a poor family environment or school or community problems, and they present attorneys with a multitude

of challenges. Research indicates that risk factors for potential truancy include push-out policies, unsafe school environments, academic problems, a lack of parental involvement in education, substance abuse, and chronic health problems.²

Petitions for status offenses have historically subjected youth to juvenile court jurisdiction and detention as a form of protective supervision. Detained status offenders were frequently adjudicated and committed to an institutional

setting. Studies have shown consistently poor outcomes for institutionalized youth due to lack of services within institutional facilities. In 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJJPA), which mandated the deinstitutionalization of status offenders as one of its core protections. The emphasis on deinstitutionalization of status offenders in the JJJPA was premised on the understanding that youth who misbehave but haven't committed

Continued on page 16

IN THIS ISSUE

- 2 Message from the Chairs
- 3 The Absence of a Parent-Child Evidentiary Privilege
- 6 Practice Tips for Representing Parents in Child Protection Cases

CHILDREN'S RIGHTS

COMMITTEE COCHAIRS

LAUREN GIRARD ADAMS

lgirardadams@yahoo.com

SHARI SHINK

Rocky Mountain Children's Law Center
sshink@mail.law.du.edu

ALFREDA D. COWARD

One Voice Children's Law Center
alfredacoward@hotmail.com

COMMITTEE DIRECTOR AND NEWSLETTER EDITOR

CATHERINE KREBS

Children's Rights Litigation
1348 Massachusetts Ave. SE
Washington, D.C. 20003
(202) 547-3060
Krebsc@staff.abanet.org

EDITORIAL BOARD

JENNIFER BAUM

Child Advocacy Clinic
St. John's University School of Law

RICH COZZOLA

Children's Law Project,
Legal Assistance Foundation of
Metropolitan Chicago
Chicago, Illinois

CINDY ALBRACHT-CROGAN

Cohen Kennedy Dowd & Quigley, P.C.,
Phoenix, Arizona

JOHN EVERETT ESQ.

Kettering, Ohio

JANICE MERILUS

Ben-Ezra & Katz, PA
Ft. Lauderdale, Florida

ABA PUBLISHING

JASON HICKS

Associate Editor

ANDREW O. ALCALA

Art Director

Children's Rights (ISSN 1936-9670) is published quarterly by the Children's Rights Committee, Section of Litigation, American Bar Association, 321 N. Clark Street, Chicago, IL 60654, www.abanet.org/litigation. The views expressed within do not necessarily reflect the views or policies of the American Bar Association, the Section of Litigation, or the Children's Rights Committee.

Copyright 2010 American Bar Association. All rights reserved. For permission to reprint, contact ABA Copyrights & Contracts, 321 N. Clark Street, Chicago, IL 60654; fax: (312) 988-6030; email: copyright@abanet.org.

To change your address or be removed from the mailing list, please contact Catherine Krebs (contact info above).

www.abanet.org/litigation/committees/childrights

MESSAGE FROM THE CHAIRS

The Children's Rights Litigation Committee is spending the next few months thinking about how to better involve its members in the work of the committee. We are considering a change to our subcommittee structure and the creation or elimination of some subcommittees. Current subcommittees include child welfare, juvenile justice, education, immigration, and newsletters. The newsletter editorial board and the education subcommittees are the most active. We'll be talking to our members to find out what they want. Do you want opportunities to be involved in the committee? Is this best accomplished through substantive subcommittees, such as child welfare, or through administrative ones, such as a website editorial board? We would also like to hear your creative ideas for opportunities for members to get involved.

We'll provide a survey for members through our membership listserv; be sure to take a few minutes to answer it. If you don't receive the committee's monthly listserv messages, which include important information, such as free CLE training and alerts about recently decided children's law cases, please contact the committee director, Cathy Krebs, at krebsc@staff.abanet.org.

As we mentioned in the last edition of the newsletter, our new webmaster has been working hard to keep our website fresh and exciting, and we've been thrilled with the results. We're pleased to announce that the links to past programs have all been updated, and you're now able to listen to them at no cost. Program topics include dealing with child witnesses, best practices for representing unaccompanied minors, representing children charged with sex offenses, and interviewing and counseling a child client. To listen to any of these programs, please visit <http://www.abanet.org/litigation/committees/childrights/materials.html>.

We look forward to hearing your thoughts in the upcoming survey.

Lauren Girard Adams, Shari Shink, and Alfreda D. Coward, Children's Rights Litigation Committee cochairs.

Children's Rights on the Web

- View our directories of leadership and subcommittee listings
- Find additional resources
- View our newsletter archive
- Plan to attend committee events

Visit the Section of Litigation Children's Rights Committee Website

www.abanet.org/litigation/committees/childrights



The Absence of a Parent-Child Evidentiary Privilege

By Hillary B. Farber

It may be startling to learn that in 45 states and in federal court, the government can compel testimony about communications and observations between a parent and his or her child. Only Connecticut, Minnesota, Idaho, Massachusetts, and New York have a privilege that bars a parent or child from being forced to divulge confidences or testify against the other.¹ There are accounts of parents compelled to testify against their children, sometimes resulting in parents going to jail as a result of their refusal to betray the child's trust. For instance, Arthur and Geneva Yandow were subpoenaed to appear before a Vermont grand jury to testify against their 25-year-old son. Both parents protested. "I can't betray my son," Arthur Yandow told the judge. "I couldn't live with myself . . . I'd lose him forever . . . I'd be the instrument of destroying my family and my son," Geneva Yandow said. With no legal remedy to guard against this invasion of familial privacy, the judge declared the Yandows in contempt of court and jailed them. Only after their son was indicted were the Yandows released. They spent 41 days in jail.²

The Yandow case is just one instance of parents being placed in the dilemma of betraying their child's trust or bearing the consequences of defying the rule of law. Some parents may choose to exercise a third option: testify falsely. Any one of these outcomes supports the establishment of a testimonial privilege for parents and their children.

Congress has never considered a parent-child privilege aimed exclusively at shielding parents from testifying against their minor child, or applying only in criminal cases.³ Federal Rule of Evidence 501 acknowledges the federal courts' authority to continue to develop evidentiary privileges in federal criminal trials, "governed by the principles of the

common law as they may be interpreted . . . in the light of reason and experience."⁴ The last common-law privilege to be recognized under F. R. Evid. 501 protects communications between patients and their psychotherapists from involuntary disclosure.⁵ The Supreme Court has denied certiorari in four cases that could have sanctioned a parent-child privilege under F. R. Evid. 501.⁶ Courts and lawmakers in some states that have rejected a parent-child privilege on grounds that the proposed privilege was too broad have shown receptivity toward an evidentiary privilege for minor children and their parents.⁷ Despite sentiment to the contrary, this past year the Oregon legislature rejected a bill that would have provided a testimonial privilege for communications between parents and children in criminal proceedings.⁸ The South Dakota Supreme Court declined to find a parent-child privilege under the state constitution in a case involving a mother subpoenaed to testify against her minor child in a delinquency case.⁹

The juvenile justice context best illustrates the dichotomy in the handling of parent-child communications. Children are encouraged, in some instances even required, to communicate candidly with their parents; at the same time, there is no legal protection that would shield information shared between them from government compulsion. Compelling disclosure of parent-child communications reveals the tension between the government's need for probative evidence of a crime and respecting the unique role parents play when their child is being prosecuted for a crime.¹⁰ Nevertheless, the juvenile justice system depends upon the engagement of parents to assist their children in navigating through a complicated and potentially punitive system. Parents are the conduits through which professionals will be retained to assist

children. Accurate and truthful information from children better equips the parents to seek the appropriate services. In conferring with professionals such as lawyers, doctors, and therapists, children aren't particularly good self-reporters. Parents often intervene to provide the details necessary for the professional to gain a full understanding of the child. Moreover, parents typically pay for the professional services rendered on behalf of their child.¹¹ In light of the absence of a parent-child privilege, professionals may not be able to share as much information with the parent as they might wish. This is an unnecessary dilemma if all parties involved want full disclosure so that the parent can provide the utmost emotional, intellectual, and financial support to the child.

Moreover, the juvenile justice system assigns parents important functions, not unlike those assumed by an attorney. The law encourages parents to be present before a custodial interrogation to advise the child as to whether he or she should speak to police. In most jurisdictions, parents are mandated to be present at all proceedings, and many courts require parents to sign off that they are informed as to the plea arrangement upon which their child has agreed. Parents routinely function as counselors to their children, helping them make important legal decisions. In many instances, children waive their right to counsel, and as a result, parents, satisfactorily or unsatisfactorily, perform many of the functions that would otherwise be fulfilled by a lawyer.¹² Empirical research indicates that when a parent doesn't feel that the circumstances warrant retaining a lawyer for the child, children overwhelmingly waive counsel.¹³

Every existing legal privilege applies to relationships characterized by trust and confidentiality. Federal common law

recognizes privileges between lawyers and clients, spouses, psychotherapists and patients, and clergy and penitent, and states have expanded the list with privileges for persons such as domestic-violence counselors and journalists. Community values are reflected in the relationships the law recognizes as deserving of a legal privilege. Could there be any question that parents provide guidance, nurturance, and advice that closely parallels, perhaps even surpasses, the role of an attorney, a psychotherapist, or a spiritual counselor?

International views on the acceptance of a parent-child testimonial privilege could prove influential with U.S. courts and lawmakers. The prevailing view in civil-law countries favors the exclusion of family members being forced to divulge confidences between one another. Italian law recognizes a testimonial privilege for "lineal relatives" of the parties in both civil and criminal cases, unless the cause of action concerns one's familial status, family relations, and certain other family-related matters.¹⁴ The German Code of Criminal Procedure provides that a person who is or was lineally related (or related by marriage) to the accused may refuse to testify.¹⁵ The French Civil Code prohibits parents and children from testifying against one another in a dispute.¹⁶ Sweden protects communications among a broad group of family members.¹⁷ Russia expressly prohibits close relatives such as spouses, siblings, parents, and children from being forced to testify for or against one another. Under Japanese law, any person may refuse to give testimony when there is the fear that such testimony may result in criminal prosecution or conviction against one's spouse, blood relatives, and relatives by affinity within the second degree of kinship.¹⁸ In the Philippines, a filial privilege is recognized in the rules of evidence, which precludes any person from being compelled to testify against his parents, children, or other direct descendants.¹⁹

Among the common-law countries, only Australia restricts the compellability

of parents and their children to testify against one another. Although the Australian legal system borrows heavily from English common law, it breaks ranks with its common-law counterparts over the testimonial exemption for parents and children.²⁰ Four of the six Australian states have statutorily created testimonial exemptions that apply to parents and

Compelling disclosure of parent-child communications reveals the tension between the government's need for probative evidence of a crime and respecting the unique role parents play when their child is being prosecuted.

their children, two of which predate the Australian federal law.²¹ The court uses a balancing test to assess the appropriateness of compelling the witness to testify. If the court finds that the nature and extent of the harm to the witness and/or the parent-child relationship outweighs the desirability of admitting the evidence, the court will exclude the witness from testifying. Otherwise, the proposed witness shall be competent and compellable to testify against the accused.

Parents' rights and responsibilities are deeply embedded in American culture. Normatively, an expectation of familial privacy extends to parent-child communications. The reality that the information shared between the parties is not

legally protected from government intervention would constitute an unpleasant shock for most parents. Indeed, it's worthwhile to question whether the absence of a testimonial privilege between parents and children is sensible and fair in a society that places great emphasis on the importance of strong parent-child relations.

Hillary B. Farber is an assistant professor of law and criminal justice at Northeastern University in Boston, Massachusetts.

Endnotes

1. IDAHO CODE ANN. § 9-203 (2003); CONN. GEN. STAT. ANN. §§ 46b-138a (West 2009); MINN. STAT. ANN. § 595.02 (West 2003); MASS. GEN. LAWS ANN. ch. 233 § 20 (West 2004).
2. Barry Siegel, *Choosing Between Their Son and the Law*, L.A. TIMES, June 13, 1996, at 1.
3. See Parent Child Privilege Act introduced by Rep. Robert Andrews (D-NJ) in 1998, 1999, 2001, 2003, and 2005.
4. FED. R. EVID. 501. See also Trammel v. United States, 445 U.S. 40, 47 (1980).
5. Jaffee v. Redmond, 518 U.S. 1 (1996).
6. See *In re Grand Jury (Doe)*, 103 F.3d 1140 (3d Cir.), cert. denied, 520 U.S. 1253 (1997); grand jury proceedings of *John Doe v. United States*, 842 F.2d 244 (10th Cir.), cert. denied, 488 U.S. 894 (1988); *United States v. Davies*, 768 F.2d 893 (7th Cir.), cert. denied, 474 U.S. 1008 (1985); *Three Juveniles v. Commonwealth*, 455 N.E.2d 1203 (Mass. 1983), cert. denied, 465 U.S. 1068 (1984).
7. A majority of lawmakers sympathetic to the concerns attached to compelling parental testimony against one's child agreed that the scope needed to be further limited. Nevertheless, the legislative history reveals no meaningful attempt to revise legislation to bring about large-scale support for a parent-child privilege.
8. See Two Bills Supporting Oregon Parents Pass the Senate, http://www.salem-news.com/articles/march202009/senate_bills_3-20-09.php (last visited Nov. 6, 2009).
9. *In re O.F.*, 773 N.W.2d 206 (S.D. 2009).
10. See Hillary B. Farber, *Do You Swear to Tell the Truth, the Whole truth and Nothing but the Truth against Your Child?* 43 LOY. L.A. L.

REV. (forthcoming 2010).

11. This differs from adult clients in the sense that adults seek guidance from any number of sources and are solely responsible for the costs they incur.

12. Waiver of counsel among juveniles is significantly higher than their adult counterparts. See ABA JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY REPRESENTATION IN DELINQUENCY PROCEEDINGS, <http://www.njdc.info/pdf/cfjfull.pdf> at 44 (last visited Mar. 11, 2010). In a 2002 indigent juvenile defense assessment, experts estimated that in one county in Virginia, 50 percent of youth waived counsel regardless of the seriousness of the offense. See ABA ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND

QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 23-4 (2002).

13. See Donna Bishop and Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In re Gault*, 60 RUTGERS L. REV. 125, 146-47 (2007) (discussing parental influence on a child's decision to waive Miranda rights). See also A CALL FOR JUSTICE, *supra* note 12, at 45.

14. Art. 247, Code of Civ. Proc.; Art. 199, Code of Crim. Proc.

15. German Crim. Proc. Code, ch. VI, § 52.

16. C. PR. CIV. 248 § 336 (G. Koch trans. 1963).

17. "A spouse, former spouse, relative by blood or by marriage in direct lineal ascent or descent, or brother or sister of a party, or a person so related by marriage to a party that one

of them is, or has been, married to a brother or sister of the other, or a person correspondingly related to a party, is not obliged to testify."

SWEDISH CODE OF JUD. PROC. 141 (Anders Bruzelius & Krister Thelin eds., rev. ed. 1979).

18. Code of Crim. Proc., Art. 147. A person who has the relationship prescribed in the preceding article with one or more of the accomplices or codefendants may not refuse to give testimony on matters relating only to the other accomplices or codefendants. *Id.*, Art. 148.

19. Revised Rule of Evidence, R. 130, § 25. Parental and filial privilege.—(20a)

20. See Evidence Act, 1995, s. 18 (Austl.).

21. See Evidence Act, 1929, s. 21 (S. Austl.); Evidence Act, 2008 s18(2) (Victoria).



Reach Your Potential

- *Litigation News* Website and Monthly Emails
- *Litigation* Magazine
- Litigation Podcast
- Meetings & CLE Calendar
- Cutting-Edge News and Analysis
- Newsletter Archive back to 2002

Go to www.abanet.org/litigation

Practice Tips for Representing Parents in Child Protection Cases

By Jeremy Evans and Debra Rothstein

It's due to the adversarial nature of the legal system that parents and children are often pitted against each other in contested litigation that questions what is in the children's best interest. The quality representation of parents in juvenile or family court cases involving allegations of abuse, neglect, and dependency is the initial defense against a termination of parental rights case that may follow. Practitioners must strive to perfect their legal skills in courtroom presentation and their knowledge of the multidisciplinary aspects of this practice to ensure parents have their constitutional rights to family integrity protected. In addition, competent representation protects the intact family, an entity that is not itself represented. Attorneys must provide the parent client complete commitment to the case and strict adherence to the highest standards of professional responsibility. Anything short of this level of representation works to the detriment of the client and the family.

The constitutional right to family integrity is detailed in a long history of Supreme Court cases,¹ and is a right belonging to both parents and children. This right, which sustains families as the foundation of society, is clearly expressed in *Duchesse v. Sugamcan*, 566 F.2d 817, 825 (2d Cir. 1977).

Here we are concerned with the most essential and basic aspect of family privacy—the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parents and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972), and of the children in not being dislocated from

the 'emotional attachments that derive from the intimacy of daily association,' with the parent. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 97 S. Ct. 2094 at 2110.

Those who engage in representing parents are quick to observe that the majority of abuse, neglect, and dependency cases brought to the court's attention involve neglect and not abuse,² and involve families who are economically below the poverty guidelines.³ This isn't because low-income parents are inherently more abusive or neglectful than parents at higher income levels;⁴ it's well known that child abuse/neglect crosses income strata. One reasonable explanation is that poor families lack the insulation and protection, child-care assistance options, and alternatives that money can buy. The fact that poor families are so often suspect may be testimony to our suspicions that poverty itself is abusive to children. It takes time and resources to investigate and provide services to families whose parenting skills are being questioned. For some underfunded social-service providers, the most expedient alternative to protect the child is to remove the child from the home. Experience has proven, however, that except in the most extreme situations, removal should be the last resort, and then viewed as a short-term rather than a long-term solution.⁵

When suspicion of inadequate parenting gives rise to court intervention, parents face a powerful team of adversaries that include state-funded investigators, prosecutors, and caseworkers. To accusers not used to the reality of poverty, the parent's deprived lifestyle is incriminating in and of itself. Allegations of inadequate parenting often reflect value judgments regarding different lifestyles, rather than situations of abuse and neglect. The parent's attorneys must make sure they point out bias and prejudice in the prosecutor's case, and they

must make sure that they themselves don't get lulled into believing the false premise that poverty alone can be the basis for state intervention.

It's certainly not always the case, but some people who have lived in American poverty for generations appear unclean and unwell. Their pallor and physical appearance reflect years of inadequate diet. They are used to being questioned, their lives scrutinized by welfare workers and other benefit-program providers. They have unmet emotional needs because they were not nurtured as children; they have been called failures by family members, teachers, service providers, and the court. Often, the lack of quality education is a significant barrier to the parent's ability to problem-solve during times of crisis.

Social workers are not family advocates. They must be child advocates. Even if they want the parent to succeed, they cannot advocate for the parent because they must report on the parent to the court to serve the child's best interests.

Parents face many challenges in abuse and neglect cases. Treatment plans are sometimes already written before parents are asked for any input into their needs. The parents are told that if they don't immediately change their lifestyle, they'll see their children adopted by better, more successful families. Parents are told to go to parenting skills classes and counseling; told to secure a better home, a job, job training, a GED or higher education; told to stay away from abusive boyfriends and anyone with a criminal record; and forbidden to bring gifts to their children lest it be construed as a bribe. Children's protective services won't transport parents to see their children. Parents frequently aren't told about their right to file a complaint if they feel aggrieved by the quality or manner of children's services' intervention.

Lawyers for parents are incredibly important. Not only does their zealous advocacy meet constitutional due-process

requirements, but also they ensure that the parent doesn't have to face the enormity of state intervention without assistance. Zealous advocacy for parents can ensure that improper removal of children is rectified at the first hearing, and that treatment for parents is targeted to their needs and provided in a timely way, thus ensuring that children can be placed at home more quickly. There is no question that some families fail, that some parents abuse and neglect their children and should face criminal as well as civil sanctions, that children must absolutely be protected from such horrors, and that, in some cases, termination of parental rights is the appropriate remedy. However, even when children can't go home, parents' lawyers might be able to preserve family relationships through open adoptions. We must protect the children and, if at all possible, protect the biological family for the children. Families are the foundation of society. When even one family fails, and we haven't exhausted every effort to preserve it, we're having a hand in our own destruction as a society.

The Attorney/Client Relationship

It seems clear that the representation of parents involves establishing a team approach to cases. The parent provides the facts, and the attorney provides the legal knowledge of administrative regulations, statutory provisions, and the systemic "how-to" knowledge to advance the client's goals. This attorney/client team approach is axiomatic to practitioners, but to many clients, the attorney, especially if court-appointed, is viewed as being on the other team—the state's team—with little commitment to the parent client. The attorney needs to emphasize that this is the client's case and that the attorney is on the client's side.

When representing a parent, it's important to present a professional approach to the client's case. The attorney should be mindful of displaying professional courtesy to the client. The simple acts of good eye contact and a firm handshake are

helpful in asserting a trustworthy relationship. The next step is taking time for a thorough initial interview and being prepared for client counseling sessions. The attorney needs to be current on the status of the case, both procedurally and substantively. At a minimum, the attorney should review all case documents (including child protective service agency records and medical, mental health, and school documents where relevant) and talk with the social workers, guardians ad litem (GALs), court-appointed special advocates (CASAs), and other professional service providers in preparing to talk with the client about pos-

When even one family fails, and we haven't exhausted every effort to preserve it, we're having a hand in our own destruction as a society.

sible options for going forward.

While it seems obvious that attorneys must know their clients' goals (what the client aspires toward, would be content with, and would settle for), it's not obvious to every attorney that a client's goal can change, and sometimes for reasons that aren't case-based. It's important for attorneys not to assume a parent wants to be the 24-7 caregiver. Sometimes clients are pushed into that position by family members or societal pressures. At an appropriate time, when the attorney/client relationship has progressed sufficiently for a candid discussion of options, the attorney, in a non-judgmental manner, must present possible case outcomes that include custody responsibilities being placed with an appropriate family member or friend and releasing the child for adoption. Sometimes

the presentation of these options provides the client with the necessary support to give them due regard as the case proceeds. The client may be able to push aside external pressures and say he or she is not opposed to the state's case or action. Many parent and child advocates believe that if open adoption were available by statute, more parents would relinquish parenting obligations rather than defend against termination of parental rights cases that sever the parent/child relationship as though it never existed.

Maintaining contact with the client is critical for the parent's attorney. For some clients, there are barriers to keeping in touch, and those should be explored at the initial meeting. For some clients, previous experiences with court-appointed attorneys haven't been positive, and there are few incentives for keeping in touch. The attorney should, of course, give the client his contact information, including business cell phone number, and then inquire as to all possible ways to contact the client, including alternative phone numbers and mailing addresses, which are especially necessary when an immediate response is required. When contacting clients by mail when a response is required, attorneys should include return-addressed and stamped envelopes.

In this practice, it's important to make the client's ability to keep in contact as easy as possible. If the client becomes absent and phone numbers or addresses are no longer current, the attorney should contact the child protection worker, or GAL, to obtain a case progress report. While the attorney shouldn't say, "my client seems to have disappeared," these resources will provide information regarding the current status of the case and client whereabouts if known. If the client is incarcerated, the attorney should see the client in person to hear from the client what has happened. Again, the attorney, in a nonjudgmental manner, must inform the client how the incarceration realistically impacts the child protection case, and should also offer the client whatever options there are to mitigate the impact. Sometimes that means

filing the appropriate pleadings to facilitate custody being awarded to an appropriate family member or friend. That may also mean requesting the court to allow the parent to write to the children.

Parents' attorneys must be skilled in working with clients from diverse socioeconomic and cultural backgrounds. Knowing the dynamics of the client population one serves is crucial to quality representation. There is no excuse for not being proactive in becoming educated about, and working toward understanding, the clients one represents.

The attorney can prevent unwarranted demands on the parent and help ensure the client has everything he or she and the children need to improve their circumstances.

Case Planning

Parents need to be included in the agency's case planning, the formulistic listing of services the agency will provide the parents and children, and the treatment the parents and children must receive before reunification can occur. Such planning is focused on the child's needs for healthy, well-functioning parents. However, such plans sometimes include demands for treatment compliance that aren't relevant to what brought the family to the court's attention. For example, a parent shouldn't be assessed for substance abuse or domestic violence victimization if there is no evidence of these issues in the case. A parent addicted to cocaine shouldn't be sent to individual counseling before he is in appropriate treatment for substance

abuse, as counseling will not otherwise be effective. If individual counseling for the parent is required, the issues to be pursued through such counseling should be clear to the parent and the counselor. For many people, engaging in group counseling is more productive than trying to figure out the subtleties of a one-on-one approach, so group, instead of individual, therapy should be arranged. The parent has the right to ask for specific services the agency might not have considered, such as budgeting services or help in securing habitable, affordable housing. Siblings not placed together should be visiting each other. Parents should have phone contact when the children are of appropriate age. Parents should make sure the agency quickly delivers school records to new schools if the children have been moved out of their school districts, and that already scheduled medical or dental appointments are kept. The advocacy of an attorney on all of these issues is essential.

Because the case plan becomes an order of the court and the parent's non-compliance can be sanctioned, it's imperative that the parent's attorney attend the case-planning meeting. The attorney can prevent unwarranted demands on the parent and help ensure the client has everything he or she and the children need from the agency to improve their circumstances through the agency's involvement. The attorney can make sure the agency doesn't require the parent to be involved in redundant services, the parent can secure transportation to the services, and the number of services is realistic in the time frame for completion. This is especially true if the parent is employed. Care should be taken that the parents not be overwhelmed with the magnitude of what they're told they must accomplish. Attorneys should be present to help them through this case-planning process.

Early in the representation, the attorney should write the agency social worker assigned to the client's case and demand to be notified, along with the client, of every administrative meeting the client is to attend. This will include the case-planning

meetings discussed above, as well as family case conferences. Family case conferences are scheduled to allow the parent client, any supportive family and friends the parent wants to attend, and the social worker and other involved service providers an opportunity to discuss the strengths and weaknesses of the parent's parenting efforts, and help plan to better the family's functioning for the health and safety of the child. Here, as in case-planning conferences, unless the parent's attorney is present, the client can make admissions of poor parenting adverse to his or her goal of reunification. There is no reason parents' attorneys should not be in those meetings to protect the client's interests.

The child welfare agency also holds administrative semiannual reviews at the six-month point in the case designed to allow parents and providers to evaluate the progress toward reunification and the solutions needed to eradicate any barriers in the way. This is an opportunity to amend the existing case plan, acknowledge what the parents have accomplished that can be removed from the planning document, agree to liberalize a parent's contact with his or her child, and otherwise collaborate and facilitate reunification. It's clear that it's important for the attorney to attend these administrative meetings with the parent. It is, of course, even better for the attorney and client to have communicated before the meeting so the attorney is up to date and can advise the client in advance on how to approach difficult issues if questioned. As stated previously, the attorney should demand the agency notify him or her, as well as the client, of the meetings sufficiently in advance so that calendars can be adjusted.

Case Strategy

Following adjudication of abuse, neglect, or dependency and disposition resulting in the children's temporary removal from the parents, it's often the best strategy toward the client's goal of reunification to urge the client's cooperation with social workers and to comply with court-ordered treatment plans. Parents' attorneys must explain that

this is a strategy, and does not reflect the attorney's personal belief about the client's behavior. Like clients in other crisis-fueled cases, the parent client here must have faith that the attorney is on his or her side in preserving the family. Again, as in other areas of practice in which the attorney must learn how to manage the client's emotional turmoil, the attorney here must have an understanding of how a client's level of emotional distress or type of diagnosis or mental illness can influence the client's rational thinking and processing abilities. The attorney must learn how to best communicate with the client through these barriers. Parents' attorneys must be educated in many other disciplines, such as the substance abuse assessment and treatment issues that can impact the client and the case. It's imperative that attorneys attend CLE or other professional training that explains not only medical and mental health issues clients may face, but also how to communicate and best represent the client when these issues surface.

In advocating the parent's position in the case, the attorney should be persistent in reflecting what the parent wants. Attorneys should keep reminding the court that the child is not only bonded with the parents, but also with grandparents, aunts, uncles, and cousins, and, when appropriate, the court should see these relatives in the courtroom. In addition, the social workers, GAL, and CASA should know of the bond. Attorneys should consider requesting bonding assessments early in the case to verify the connectedness between the child and parents, and to keep family integrity the centerpiece of the case. In addition, attorneys should press forward with demands for increases in parenting time, transportation to such visits, and arrangements for the child to visit the parents in the family's home.

It's the attorney's professional responsibility to evidence respect for the client, represent the client's interests throughout the proceeding, and allow the client as much dignity as possible. The attorney should demand respect for the parent's rights from the other parties as well. State

intervention can be productive for a family in need when help is provided by children's services providers who have genuine regard for the family despite concerns about how it's functioning. Social workers or other service providers who denigrate the parents in front of the children or harm the parent/child relationship can't be tolerated. When this occurs, parent's attorneys should advise the client of the option of filing a formal administrative complaint, sometimes called a grievance, with the children's protective services agency, allowed by most state administrative regulations that govern such agencies, and request a different social worker if the problem can't be otherwise resolved. Parents' attorneys should advise the GAL and the CASA and request assistance in monitoring and preventing the behavior. The court should also be made aware of the parent being undermined by the state, and a request should be made that the court remind the state that, per appropriate state statutes, the goal is reunification if at all possible. Case-workers are not to engage in tactics meant to diminish the possibility that the family will survive.

Discovery and Advancing the Case

Parents' attorneys should, by appropriate discovery requests, access the social service agency's records. The request for records should include, at a minimum, the social worker's notes (except for privileged communications with his or her attorney), referrals to providers, evaluation and assessment reports regarding the parent or child, and all correspondence. When assessments or reports are secured, attorneys need to follow up with the individual service providers as well to understand fully the context of the reports. Attorneys should, of course, know how to analyze the myriad of medical, mental health, and substance abuse reports and evaluations so that they may challenge the results when necessary—or question the interpretation of the reports that the agency offers. Attorneys should also obtain the child's education records, monitoring how the child is doing

in school as a reflection on how he or she is doing away from home and his or her home school. Attorneys should point out to the court how many different foster homes, schools, and service providers the child has experienced while in the agency's care.

An attorney should communicate quickly with children's services, the GAL, and CASA if there are any concerns about a child's placement. The attorney should demand an investigation and report as soon as possible. If the agency fails to respond, the attorney should file for an emergency hearing to ensure the child's safety through

It's the attorney's responsibility to evidence respect for the client, represent the client's interests throughout the proceeding, and allow the client as much dignity as possible.

the court's immediate attention to the concerns. The agency might try to characterize this action by the parent on the child's behalf as an unjustified move by a parent unhappy with the state's intervention or as an attempt to deflect parental deficiencies by pointing fingers at the agency. That doesn't matter, as long as the parent's concerns are investigated. A parent's responsibility to his or her child continues no matter who has custody. The parent's attorney is in the position to make sure all other parties are fulfilling their responsibilities to the child while the child is in care. Children should be reunited with their families with as little

trauma from their time in someone else's home as possible.

Parents' attorneys should advise the court of any problems in the parent/child relationship caused by the physical distance between them. When children are placed outside of their home county, transportation barriers can be insurmountable, and the parental bond suffers. Young children, especially, need frequent time with their parents to avoid bonding issues that can last a lifetime. Courts frequently side with the agency regarding childcare arrangements that are less than optimal, due to the practicalities of agency budgets or the difficulties of recruiting foster-care parents. However, this should not stop parents' attorneys from fighting for the children to be moved closer to the parents. An attorney might also argue for services to be provided to the parents sooner than planned so that the child is returned sooner than the agency anticipated. The attorney should make sure the client understands that the child might soon be home and make sure the client is prepared for this outcome. If the client isn't ready to assume parenting responsibilities and the child is returned, the results might be devastating for the parent—and certainly for the child.

Often, the parent's case planning requires him or her to submit to psychological testing. As with all treatment, the attorney should ensure that testing should actually be provided given the history of the case. If testing does occur, it may allow the agency to plan treatment according to the client's needs. However, they also serve the purpose of providing certification of an emotional or mental illness or deficiency, which could be adverse to the client's case. Of course, qualified mental health professionals can differ as to the meaning of test results in terms of parenting. Parents' attorneys should consult experts to help explain flaws, if any, in state-provided psychological exams and to offer their own diagnosis. In addition, consideration must be given to advising parents not to submit to such tests, especially if indications are that the state

is intending to file for termination of parental rights. Once in the case, parents' attorneys should also strategize with the client and consider revoking all authorizations that allow for unlimited release of information. Limited releases can be signed as needed, and as beneficial to the client's case. It might, for example, be beneficial for the parent to sign a limited release for his or her therapist to advise the children's services agency of the appointment dates kept by the client so as to keep the agency informed of the client's commitment to rehabilitation and the goal of reunion.

Contact should be made with any mental health expert involved with the client to offer insight into the case from the parent's perspective. A psychologist or other qualified mental health expert with an understanding of the case and no predisposition against the parent may be able to devise a treatment plan based on the client's needs, using available community resources and determine that, using this plan, the children should be returned home within a reasonable period of time.

Parents' attorneys have to be thoroughly familiar with community resources available for treatment. Local newspapers occasionally report new services available to help parents in crisis, which may be the key to reunion. It's important for attorneys to be aware of the network of agencies and how to access needed services from resources other than the agency if agency services seem biased or are not provided.

If support payments were set by a court or administrative proceeding, and the amount set is based on alleged income the client filing never had, the attorney must take action to adjust the amount in accordance with the parent's true ability to pay.

Conclusion

Cases of abuse, neglect, and dependency may allege such parental failures as having a dirty house, an unclean child, and an improper diet, as well as a failure to thrive, inadequate attention to a child's medical needs, vaccination records that aren't up to date, inadequate or substandard housing, transiency, substance abuse, and

family violence. Taken as a whole, these allegations may appear overwhelming. The allegations may appear to evidence a clear case of poor parenting, and sometimes, parent attorneys are themselves persuaded that the child would be better off without the parent. Sometimes, parent advocates fall into the trap of thinking that if the parents really wanted the children back, they'd be consistent in visiting, be ambitious in accomplishing the treatment plan goals, or just do something to show they want their children back other than just saying they want to be a family. This thinking by parents' attorneys is, of course, dangerous to the client's case, as it fails to take into account the very real immobilizing affect the state's intervention often has on parents. Not enough has been written about how to challenge child protective services' cases. However, it's clear that with quality representation, families have remained whole. In preparing for litigation, be assured that parents don't have to be perfect to be successful:

The fundamental liberty interest of natural parents in the care, custody and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

Attorneys who practice in this field, who are committed to the parent client's goal, who understand the diverse dynamics of child-protection cases, and the immensity of what is at stake, provide parents with an invaluable opportunity to succeed and to meet the child's best interest in preserving the family.

For more information about representing parents, visit the The National Project to Improve Representation for Parents Involved in the Child Welfare System, a project of the ABA Center on Children and the Law, at <http://www.abanet.org/child/parentrepresentation/home.html>.

Jeremy Evans is an attorney in private practice in Butler County, Ohio, specializing in criminal and juvenile law, and is the chair of the Butler County Bar Association's Juvenile Law Committee.

Debra Rothstein is a senior attorney with the Legal Aid Society of Southwest Ohio, LLC, practicing in juvenile and family law.

Endnotes

1. It has been recognized in numerous cases that family integrity is an interest of the very strongest type. See, e.g., *Stanley v. Ill.*, 405 U.S. 645 (1972); *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816 (1977); *Santosky v. Kramer*, 455 U.S. 745 (1982). These cases derive from the same body of case law as *Meyer v. Neb.*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Griswold v. Conn.*, 381 U.S. 479 (1965); and *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977). Although it sometimes permits the state to intrude in family matters, the Constitution of the United States quite properly recognizes that the right of a person to raise his or her own family is an interest of profound and fundamental importance.

(Some citations omitted.)

2. Neglect is the most common form of child maltreatment. Three times as many children are victims of neglect (63.2 percent) as are victims of physical abuse (18.9 percent). Another 9.9 percent are recorded as victims of sexual abuse; 4.9 percent emotional and psychological maltreatment; and 16.9 percent other. U.S. DEP'T. OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD MALTREATMENT 2003, 34-35 (2005). The percent of children neglected includes those who are neglected and medically neglected.

3. Research indicates that children who live in families with annual incomes less than \$15,000 are 22 times more likely to be abused or neglected than children living in families with annual incomes of \$30,000 or more. U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L CTR. ON CHILD ABUSE & NEGLECT, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3). (Sept. 1996).

4. This higher rate can be attributed to the stress that poverty places on parents and to the increased likelihood that child abuse and neglect will be detected, reported, and substantiated in low-income homes that are more closely supervised

by social services and law enforcement agencies. DAVID SHIPLER, *THE WORKING POOR: INVISIBLE IN AMERICA*. (2004).

5. The foundation of much of our current understanding regarding the needs of children rests on the work of Goldstein, Freud and Solnit. Separation from his or her parents for any significant time has damaging effects on a child, even when the parents are minimally supportive of the child's needs. GOLDSTEIN, FREUD & SOLNIT, *BEFORE THE BEST INTEREST OF THE CHILD 6-12* (1979); Wald, *State Intervention of Behalf of 'Neglected' Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *STAN.L.REV.* 623 (1976); GOLDSTEIN, FREUD & SOLNIT, *supra*, at 20. "Even when placed in good environments, which is often not the case, they suffer anxiety and depression from being separated from their parents, they are forced to deal with new caretakers, playmates, school teachers, etc. As a result they often suffer emotional damage and their development is delayed." Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children*, 78 *MICH.L.REV.* 645, 662 (1980).



THE BENEFITS OF MEMBERSHIP

Maximize Your Time

Convenient CLE by phone

Call from anywhere. Every second Tuesday of every month top lawyers and judges tell you what they know. Latest topics keep you at the top of your field.

Litigation Series CLE Teleconferences

www.abanet.org/litigation/programs

Section of Litigation members get special pricing on all programs.

ABA Section of Litigation
AMERICAN BAR ASSOCIATION

The Paradox of Education in America

(Continued from page 1)

referrals to the juvenile court, including referrals for children with disabilities. A review of the literature generally recommends that juvenile courts address this problem through better intake and screening of referrals to 1) continue or defer pending the outcome of the special education due process and disciplinary proceedings, 2) divert minor offenses into informal supervision programs, or 3) dismiss the case in the interest of the child and community. These are excellent recommendations, but they don't go far enough to address the systemic issues giving rise to the inherent contradictions that hurt children by merely making a referral to the juvenile justice system, or worse, by placing handcuffs on them. This article discusses the role of juvenile judges, attorneys, and other stakeholders in making system changes that eliminate ineffective policies and practices that defeat the objectives of special education laws.

The School-to-Prison Pipeline and Special Education

Understanding the problem with referring children with disabilities to the juvenile court requires a reexamination of the purpose of a juvenile justice system and its systemic characteristics. The juvenile court was created to treat the criminal conduct of children differently from that of adults. The behavioral sciences, most recently adolescent brain research using magnetic resonance imaging, support the notion that children are biologically wired to exhibit risk-taking behaviors, impulsive responses, and poor judgment. This research shows that the frontal lobe of the brain, which filters emotion into logical response, is not fully developed until about age 21.² Adolescents, therefore, are more capable than adults of learning from their mistakes, because they are still in a cognitive structuring phase. In other words, it's neurologically normative for adolescents to make poor decisions, which may include breaking the law.

Despite this research, a phenomenon

has developed since the early nineties that has significantly increased the number of children and adolescents suspended, expelled, and arrested for minor school offenses involving disruption of school. This phenomenon is the result of school systems adopting a "zero-tolerance" approach to school discipline—an approach taken to fight the war against drugs. The problem was further compounded with the placement of police on school campuses. For example, in Clayton County alone, the number of referrals from the school system increased approximately 1,248 percent immediately after police were placed on campuses. Approximately 90 percent of these referrals were misdemeanors involving school fights, disorderly conduct (mouthing off), obstruction (not following the verbal command of a police officer), and disrupting school (throwing a wad of paper, shouting out in class).

During these same years, suspensions out of school increased, while, simultaneously, the graduation rates decreased to 58 percent by 2003. The data in Birmingham and Clayton County supported the research that suspensions and arrests increase the dropout rates.

Generally, suspensions and arrests are contrary to the ultimate goal of public school systems: graduation. The problem with zero tolerance is that it removes children from school, when school is the second-most-important protective factor against delinquency and other negative behaviors.³ More problematic are studies that show disciplining harshly with suspension, expulsion, and criminal sanctions, in most cases, increases the risk of delinquent conduct and dropping out of school.⁴ Despite the importance of education in protecting our children from negative behaviors, our educational systems, with the passive acceptance of juvenile courts, have created another paradox that compromises the health, education, and safety of our children. What a novel idea that keeping kids in school will increase their chances of graduation and

their success in adulthood.

It's not surprising that children with disabilities are more likely to be suspended, expelled, and arrested. For example, it's estimated that juvenile justice facilities are three to five times more likely to have youth with emotional disabilities than public schools have.⁵ If children without disabilities are expected, as the research shows, to be impulsive and make poor decisions that result in breaking the law, there is no question that children with disabilities are even more susceptible to rule infractions that lead to court referral. The two most common educational disabilities among children referred to the juvenile court are specific learning disability (LD) and emotional behavioral disorder (EBD).⁶ These disabilities can include symptoms that can place the child at a disadvantage within a school setting, which explains the need for special services. Children with learning disabilities often develop feelings of embarrassment about their disability and become frustrated and angry and act out against others. A number of children with EBD have experienced trauma in their childhood that makes it difficult for them to build or maintain relationships with peers and teachers, or it could cause them to suffer depression and phobias associated with personal or school problems. Such symptoms make children, who are already vulnerable to impulsive and irrational thoughts, easy targets for punishment when they act out.

Even assuming that courts have established appropriate intake and screening of referrals to ensure that cases are deferred pending disciplinary hearings, diverted, or dismissed in the best interest of the community, the emotional vulnerability of many of these children with disabilities demands measures that prohibit unnecessary referrals to juvenile court in the first place. It's not enough for these children that courts work to improve their intake and screening techniques, although it is extremely important. Additionally, repairs to a system that allows unnecessary referrals

are desperately needed so that no child with special needs will encounter the trauma of arrest and court referral. This requires the relevant stakeholders in the juvenile justice system to develop alternatives to suspension, expulsion, and court referral. For this to happen, there must be an individual with the influence to help stakeholders agree to make a systems change.

The Role of the Judge as an Agent for Change

A system is commonly defined as “a set of interacting components, acting interdependently and sharing a common boundary separating the set of components from its environment.”⁷ All systems have inputs in the form of demands and supports and a desired outcome. This definition, however, is not readily applicable to a “juvenile justice system” because it doesn’t have a “common boundary” as stated in the definition. To achieve the desired outcome of reduced recidivism, it’s imperative that effective treatment modalities be identified to address the causes of delinquent conduct. These causes, referred to as criminogenic needs, include lack of family support, poor performance in school, lack of prosocial activities, substance abuse, antisocial cognition (attitudes, values, and beliefs), and antisocial associates. These needs are served by different agencies in the community, including social services, mental health professionals, the school system, and juvenile court. Thus, the “juvenile justice system” is comprised of multiple systems that must work together to achieve a desired outcome. Paradoxically, these multiple systems possess their own policies, procedures, budgets, and regulations that oftentimes impede communication between them.

The prohibitive factor in establishing a method to reduce the referral of children with disabilities to the court is the lack of resources to treat such children outside the school. Consequently, schools tend to rely on punishers such as suspension, expulsion, and arrests to address disruptive behavior. Although schools may have a special-needs child appropriately placed, disruptions often occur, resulting from underlying issues at

home or outside school, and may require services not accessible to the school system. It’s essential that schools be linked to other community resources that can assess and provide interventions for the child and fam-

Our educational systems, with the passive acceptance of juvenile courts, have created another paradox that compromises the health, education, and safety of our children.

ily to reduce the risk of disruptive behavior.

Judicial leadership is the key to bringing all the relevant stakeholders together to develop a system in which schools may refer children with disabilities for further assessment and intervention as an alternative to suspension, expulsion, and arrest. Within this larger system we call juvenile justice, the court is the common denominator—the intersection of juvenile justice—and the juvenile judge is the traffic cop. Juvenile judges are incomparable agents for change within the juvenile justice system. All stakeholders in the system intersect with the court. This factor, coupled with the respect accorded judges, places judges in a unique position to bring together system stakeholders.

The Multi-Integrated Systems Approach: Creating Alternatives for Children with Disabilities

In Clayton County and Birmingham, the judges brought stakeholders—including educators, mental health professionals, law enforcement, prosecutors, treatment providers, social services, and the justice system—to the table to find ways to shift children,

especially those with disabilities, away from the court and into programs that better serve them. The judges asked the stakeholders to create a protocol that prevents the arrest and referral of children for minor school offenses. The stakeholders were also asked to develop alternatives to suspension, as well as for arrests. A neutral moderator was assigned to facilitate the discussions and move them toward a written protocol. After many months of meetings and discussions on a plethora of issues involving school and community safety, the purpose of IDEA, the role of campus police, the dynamics between school police and school administrators, the assessment of offenses worthy of referral to court, and many more, the multidisciplinary committee agreed to a written protocol.

The protocol called for a three-tier graduated response process that focused on certain misdemeanor offenses that made up the majority of the referrals. The first infraction required a written warning to the student and copies to the school and parent. The second infraction required a referral to a school conflict workshop or mediation. Since implementation, the police have modified the protocol allowing for greater discretion on the second infraction to issue a second warning. The police have been creative in developing their own alternatives at the second level such as school-based community service. Oftentimes, the officer will spend time counseling the child and speaking with the child’s parents. This interaction was seldom allowed before the protocol because the sheer quantity of referrals didn’t allow time to develop a rapport with students, and because arrests on campus caused police to spend time off campus transporting students and filing complaints. The lack of rapport was also grounded in the distrust students had for police due to the disproportionately harsh treatment they had been receiving for committing petty infractions.

Another protocol was developed that created a single point of contact for children with chronic disciplinary problems. As pointed out above, the “disconnect” between stakeholder agencies in the juvenile

justice system had to be connected. Understanding that school systems aren't designed to be "one-stop, one-shop" agencies that include mental health, social services, and other relevant needs, the larger system, working together to make the connection, must make their resources available. In fact, this is the way it was intended, with the communities creating agencies designed to address mental health and social service needs. In other words, it just doesn't make sense to expect a school system to treat all of a child's mental health and social needs when we have already created other entities to treat those needs. It's a waste of resources and a waste of taxpayers' money because it duplicates resources. A complex, disconnected system is inefficient, and worse, mystifying to youth and families that have to navigate this "non-system."

The single point of contact for a student with chronic disciplinary problems is a panel that meets regularly and consists of the deputy director of social services, a mental health counselor, a psychologist from the mental health department, the child's school social worker and counselor, and other approved treatment providers from the community. Staff of the juvenile court moderates the panel. The parent, and sometimes the child, is required to be present during the assessment. The panel develops an action plan that connects community resources and treatment modalities to the specific needs of the child and the family. The school social worker manages the action plan with assistance from court personnel.

Consequently, the two protocols together have reduced referrals to the court by 67.4 percent in Clayton County and 50 percent in Birmingham. In Clayton County, the protocol produced a residual effect on felony referrals, reducing them by 30.8 percent. (Birmingham only recently implemented the protocol and doesn't have longitudinal data.) Subsequent to implementing the protocol in 2004, the police requested and were granted permission to use the warning and other alternatives in certain "low level" felony cases such as terroristic threats (a child threatening harm

to another out of anger). This request by police shows a cognitive shift in handling school offenses on a case-by-case basis. This reduction in referrals also reduced the number of children detained in a secure facility by 86 percent. The protocol favorably impacted racial and ethnic disparity concerns by reducing the number of children of color referred to the court by 43 percent.

Attorneys advocating for children with disabilities should also engage judges outside the courtroom and in the chambers to encourage them to use their legitimate authority as judges to engage the community and bring stakeholders together.

Another incidental effect of the protocol is the reduction of serious weapons brought on campus. Under federal law, the police have no discretion involving serious weapons, yet the presence of such weapons fell 73 percent. School police attribute this to their increased presence on school campus and handling each offense on a case-by-case basis, leading to more amicable relationships between the police and children. This increase in rapport has led to more information shared with police about potential incidents involving weapons and gang-related issues. The supervisor of the school resource officers in Clayton County, Sgt. Marc Richards, stated, "Schools are a microcosm of the community. If you want to know what

is going on in the community, talk to the kids." But the kids must want to talk to you! Therefore, school safety can be enhanced if school policing focuses on intelligence gathering through student engagement by using positive approaches.

The multidisciplinary panel established as a single point of entry developed an array of treatment programs that include multisystemic therapy, functional family therapy, cognitive behavioral programming, wraparound services, and more. These alternatives resulted in a decrease in suspensions of 8 percent.

More importantly, the graduation rates increased during this time period by 20 percent, while felony rates fell 51 percent. This supports the theory that keeping children in school using alternative measures will increase graduation rates. It probably goes without saying that the more children graduate, the less juvenile crime appears in the community.

Finally, the protocols working together have reduced the number of children with disabilities referred to the court by 44 percent. A number of these children, however, have been assessed and are receiving treatment in the home and community to address the reasons for their referral.

Conclusion

Much has been said and written about how children with disabilities should be treated once they're referred to the juvenile court. The threshold question is whether these children should be referred to the court at all. Many children with disabilities are disruptive for reasons related to their disability, but this does not make the child delinquent. The beauty of the juvenile court is that the commission of a delinquent act doesn't necessarily make the child delinquent. Children are prone to make poor decisions and do things that break the law. This is their nature. The juvenile court should be reserved for children who scare us, not those who make us mad.

Judicial leadership is the key to getting the schools and police together to discuss alternatives to arrest. Judges should judge when on the bench, but engage the

community when off the bench. Attorneys advocating for children with disabilities should also engage judges outside the courtroom and in the chambers to encourage them to use their legitimate authority as judges to engage the community and bring stakeholders together. Zealous representation of child clients in the courtroom is essential, but such advocacy can be effective outside the courtroom as well.

The juvenile justice system is not a single entity, but a collection of different systems with the desired outcome of reducing recidivism. These different systems must be connected through an intermediary, preferably a multidisciplinary team, to assist schools with alternatives to suspension and arrest. It's not enough to wait for children with disabilities to come to the system when, in many circumstances, they shouldn't have been referred in the

first place. Effective advocacy eradicates this paradoxical system for our children, especially those with disabilities. Effective advocacy doesn't begin in the courtroom. It begins with leadership in the community advocating for systems change.

Steven C. Teske is a juvenile judge in Clayton County, Georgia. He was appointed to the bench in 1999. Brian Huff is a family court judge in Jefferson County, Alabama. He was elected to the bench in 2006.

Endnotes

1. P.E. Leone, B.A. Zaremba, & M.S. Chapin, Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention, 3 D.C. L. REV. 389 (1995).
2. J. Giedd et al., Brain Development During Childhood and Adolescence: A Longitudinal MRI Study, 2 NATURE NEUROSCIENCE 861 (1999).

3. U.S. DEP'T. OF HEALTH & HUMAN SERVS., REPORT OF THE SURGEON GENERAL'S CONFERENCE ON CHILDREN'S MENTAL HEALTH: A NATIONAL ACTION AGENDA (2002).

4. L.M.R. Mendez, Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT: DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE (Wald, J. & D. Losen, eds., 2003).

5. P.E. Leone & S. Meisel, Improving Education Services for Students in Detention and Confinement Facilities, 71 CHILD. LEGAL RTS. J. 2 (1997).

6. Sue Burrell & Loren Warboys, Special Education and the Juvenile Justice System, OJJDP JUVENILE JUSTICE BULL. (July 2000).

7. B. BOZEMAN, PUBLIC MANAGEMENT AND POLICY ANALYSIS (1979).

CONTROL HOW YOU RECEIVE YOUR MEMBER PERIODICALS

Manage your periodicals by linking to the Subscriptions Portal.

Select between print and electronic delivery options, if available.

www.abanet.org/esubscription



Representing the Status Offender

(Continued from page 1)

a criminal offense are better served by social-service programs in nonsecure environments rather than through secure detention.³ Under the act, states received federal funds if they complied with the JJDPDA's core requirements prohibiting the institutionalization of status offenders and contact between juvenile and adult criminal offenders. The 1980 reauthorization of the JJDPDA included an exception that allowed the secure detention of youth found guilty of a status offense and of violating a valid court order.⁴

Hundreds of thousands of youth are the subject of juvenile court status offender petitions on a yearly basis. Some begin in detention and remain in the juvenile justice system. Others are funneled into the mental health or social service system. Many status offenders become involved with all three systems. According to the *2004 Office of Juvenile Justice & Delinquency Prevention Fact Sheet*, juvenile courts in the United States formally processed an estimated 159,400 status offense cases. Between 1995 and 2004, the number of petitioned status offense cases that juvenile courts handled increased 39 percent, truancy cases increased 69 percent, curfew violation cases increased 38 percent, ungovernability cases increased 38 percent, and liquor-law violation cases increased 17 percent. During this time, truancy cases made up the largest portion of the petitioned status offense caseloads for juveniles of all races. Ungovernability cases made up the largest portion of the petition status offense caseload for African American juveniles.⁵

Given the consequences youth face in status offense cases and the emphasis on deinstitutionalization, it's essential that they receive zealous advocacy from their lawyers. Youth who enter the juvenile status offense system are often engaged in extreme conflict with their parents. Many times, these conflicts can't be

resolved without some intervention. Many youth who find themselves in juvenile court on status offenses are victims of maltreatment and live in chaotic and disorganized homes that may not promote school and community involvement. They tend to be youth that "fall between the cracks." Often, the attorneys assigned to these cases are in a position that allows them to step back and look beyond the facts presented in the petition to see the whole picture. Building a

Attorneys must be well versed in the language and particularities of mental health, social services, and, to some extent, the educational system in the jurisdiction in which they practice.

relationship with the client is paramount to understanding not only what's happening, but also the motivation behind the client's actions. When an attorney only asks, "Did this happen?" and not, "Why did this happen?" important pieces of the puzzle are lost.

While a strong attorney-client relationship is always preferred, it's especially crucial in these cases. Youth must be able to share honestly with their counsel what's going on at home, at school, and in the community so that *they* have input on the services that will benefit their families and prevent further involvement with the family courts. It's the "they" that is so important. Not every service

is appropriate for every situation, every youth, or every family, but the client knows what is, in essence, "wrong," and is, in many cases, desperate to fix what's broken. It's your job as the attorney to educate your client about the services that exist in a given community and help him or her put together a plan to propose to the court. Services only work when the youth and his or her family are invested in the outcome, so the youth must be involved in the entire process.

Attorneys charged with representing these youth must be aware of the services available within their communities. It's not enough for an attorney to have an adequate understanding of the legal processes involved with the juvenile justice system. Rather, attorneys must be well versed in the language and particularities of mental health, social services, and, to some extent, the educational system in the jurisdiction in which they practice. Knowledge must be both broad—attorneys must recognize which services would apply to a particular juvenile and/or family—and particular, because each town, county, or jurisdiction has unique services available to its children and families.

Most states allow courts to place youth out of their homes in relative or substitute care. It becomes incumbent upon counsel for these youth to present the court with viable alternatives. Alternative programs should meet the needs of the youth, family, and system as a whole, yet many state and county status offense systems lack programs, services, or resources to help youth and their families in critical need of assistance. Some jurisdictions lack options geared toward addressing the underlying emotional and behavioral needs of status offenders. As a result, youth are taken out of their homes even when they pose no threat to public safety, simply because they need treatment or services. Removal of children



THE BENEFITS OF MEMBERSHIP

Are You Missing Out?

If the ABA does not have your email on file, you could be missing out on important ABA Section of Litigation committee news and announcements. By registering your email address, you will be eligible to receive CLE program announcements, *Litigation News* monthly emails, the *ABA Journal*, and more from the Section and the ABA.

Log on to MyABA today to ensure your address is up to date.

www.abanet.org/abanet/common/MyABA



from their home will often lead to more negative outcomes, including reduced involvement in school and an increased likelihood of becoming more deeply involved in the juvenile justice system.⁶ Even in jurisdictions where services are minimal or limited, good counsel should work with the client to recommend creative alternatives to the standard terms of probation or the other remedial measures typically imposed in the area. Attorneys should work with other agencies, families, schools, and community-based programs to present judges with practicable and effective alternatives. If a youth leaves court with an order that's unique and individualized, the system is working. It's when we only look to what has become standard practice that we often fail.

Aside from placement in relative or substitute care, a majority of the states allows courts to place youth in secure detention for violating a court order.⁷ This makes it even more important that court orders are narrowly tailored and realistic. Additionally, when a court is considering secure detention, it's essential that the lawyer ensure that the JJDP's due process requirements were met and that the client was afforded post-detention safeguards under the act.⁸

When youth are involved in the status offense system, their communities are also affected by their behaviors. Many communities face increasing numbers of youth who enter court systems because of status offenses. Communities need to develop and implement family-focused programs to meet the wide range of needs of both the youth and their families with a common goal of preserving families and preventing youth from entering the delinquency or criminal justice system. Research shows that comprehensive intervention services that involve the entire family are the most effective in reducing the behaviors causing status offenses and poor academic achievement. Such services include Multi-Systemic Therapy (MST), School Transitional Environmental Program (STEP), Family

Integrated Transition (FIT) and Child Parent Centers.

School, child welfare, and juvenile justice systems must look outside the box and reach out to community stakeholders to help provide effective services before asking the court to get involved. A handful of states currently require the provision of precourt diversion and prevention services for alleged status offenders and their families. For example, New York⁹ and Florida¹⁰ statutes specify in detail the services that must be offered to families before a status offense petition may be filed. Court involvement is thereby limited to only those cases wherein voluntary services have been unsuccessful or exhausted. By providing services, these states have managed to reduce court costs and the filing of court petitions.

It's unrealistic to think that the problem of juvenile status offenders flooding our system is going to subside anytime soon. It's necessary, then, to provide the attorneys representing these youth with the tools to advocate effectively for their clients. Attorneys representing status offenders must familiarize themselves with the JJDP Act and its underlying purposes. The act should be used to support an argument for services or a treatment plan as an alternative to detention.¹¹ The request for services should be individualized to address the youth's emotional and academic needs. Attorneys must seek services that will help their status offender clients avoid future contact with the juvenile justice system. The ABA has recently published a guide for attorneys representing status offenders, entitled *Representing Juvenile Status Offenders*. This publication covers a variety of topics, from federal law to accessing diversion programs to adolescent development, and may serve as an excellent resource for attorneys charged with representing some of the system's most vulnerable youth.¹² By limiting this population's exposure to the criminal justice system, we're limiting the system's ability to create a population of children and families who will become all-too-

familiar faces in courtrooms and delinquency programs across the nation, and that truly is in the best interest of every child, everywhere.

Marlene Sallo is an attorney/trainer for the Children's Law Center at the University of South Carolina School of Law.

Sarah Darbee Smith is juvenile justice resource attorney for the Children's Law Center at the University of South Carolina School of Law.

Endnotes

1. 28 C.F.R. § 31.304(h).
2. What is Truancy?, National Center for School Engagement (Denver), available at <http://www.schoolengagement.org/TruancyPreventionRegistry/Admin/Resources/Resources/40.pdf>.
3. Reducing the Use of Detention for Status Offenses in Kentucky (Blueprint for Kentucky's Children June 2009). available at http://www.blueprintky.org/documents/09brief_StatusOffensesFinal2.pdf.
4. D. Steinhart. Status Offenses, 6:3 FUTURE OF CHILDREN (David & Lucille Packard Foundation Winter 1996). available at http://www.blueprintky.org/documents/09brief_StatusOffensesFinal2.pdf.
5. Anne L. Stahl, U.S. Dep't of Justice, Ofc. of Juvenile Justice & Delinquency Prevention. Petitioned Status Offense Cases in Juvenile Courts, 2004, OJJDP FACT SHEET 1-4 (2008), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/fs200802.pdf>.
6. Id.
7. Juvenile Status Offenses Fact Sheet, JJDP ACT BOOK, available at http://www.act4jj.org/media/factsheets/factsheet_17.pdf.
8. H. BENTON, S. BILCHIK, ET AL., REPRESENTING JUVENILE STATUS OFFENDERS 12 (ABA 2010). To order a free copy of this publication, visit www.abanet.org/child.
9. Family Court Act § 735 (New York).
10. FLA. STAT. § 984.12 (2009).
11. Supra note 8.
12. Id.

Features of the Store Include

- E-Products
- Special Discounts, Promotions, and Offers
- Advanced Search Capabilities
- New Books and Future Releases
- Best Sellers
- Podcasts
- Special Offers
- Magazines, Journals, and Newsletters
- Cutting-Edge CLE in Convenient Formats

Visit the ABA Web Store at www.ababooks.org

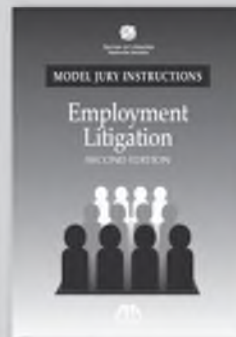
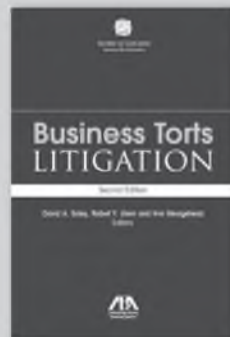
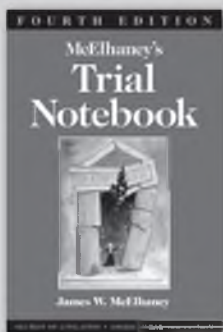
Over 150,000 customers have purchased products from our new ABA Web Store. This is what they have to say:

"The site is easily manageable."

"I found just what I needed and obtained it quickly! Thanks."

"This is one of my favorite online resources for legal materials."

"Brings everything that is important to my practice to my fingertips!"

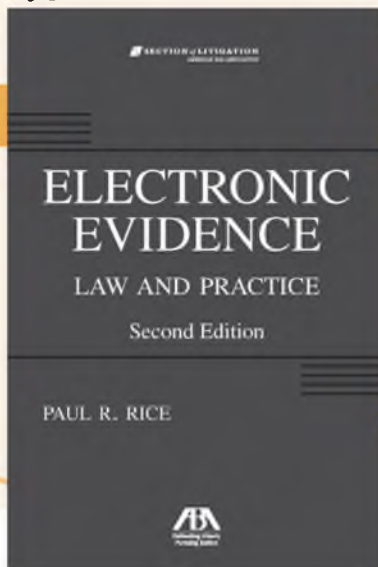


Don't hesitate. With over 2,000 products online and more being added every day, you won't be disappointed!

Section of Litigation
American Bar Association
321 N. Clark Street
Chicago, IL 60654-7598

Published in *Children's Rights*, Volume 12, Number 2, Spring 2010. © 2010 American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

New Edition!



Electronic Evidence: Law and Practice

Second Edition *By* Paul R. Rice

Electronic Evidence: Law and Practice explores the range of problems encountered with electronic communications from discovery to trial, and offers practical solutions to both existing and potential problems. It examines (1) the new discovery rules and how they relate to past practices, and (2) fundamental evidentiary issues governing the admissibility of electronic evidence. Particular emphasis is given to the unique problems evolving around the way in which parties are asserting the attorney-client privilege and judges are applying it to e-mail communications. *Electronic Evidence*

- Guides you through common initial problems in discovery and explains, with suggested forms, where materials can be found and how document requests should be worded.
- Examines the increased responsibility to preserve and produce electronic evidence in its various forms.
- Reviews the application of established rules of evidence to this relatively new type of evidence with case authority from both the state and federal courts.
- Gives special guidance to corporations on how best to manage document circulation within the company to minimize costs and preserve the privilege protection.

\$95.00 Section of Litigation
member price

\$120.00 regular price

2008, 510 pages, 6 x 9
ISBN: 978-1-60442-084-5
PC: 5310375

Call 1-800-285-2221

Online www.ababooks.org