

Contracts for Appointed Counsel in Juvenile Delinquency Cases: Defining Expectations

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Her work on this article was made possible through the John D. and Catherine T. MacArthur Foundation's Juvenile Indigent Defense Action Network, part of its Models for Change Initiative, discussed at greater length in the section III.A. *Research on California Juvenile Delinquency Contracts*. This work was greatly enhanced by the assistance of Corene Kendrick, Mamie Yee, and Kelly Hoehn in obtaining and analyzing contracts and other materials governing appointed delinquency counsel in California. The author can be reached at the Youth Law Center, 200 Pine Street, Suite 300, San Francisco, California 94104. Telephone (415) 543-3379, ext. 3911. Fax: (415) 956-9022. Email: sburrell@ylc.org. Website: www.ylc.org

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I. Introduction

Defense attorneys play a critical role in assuring justice for youth coming before the juvenile court. Delinquency representation requires specialized knowledge in criminal and juvenile law, as well as adolescent development. It requires expertise in trial skills, motion and appellate practice, delinquency-specific ethical rules and dispositional services. Mastery of substantive sub-specialties, such as adjudicative competence and mental defenses, is also vital.¹ The constitutional right to counsel means little if appointed counsel systems are not set up to provide these essential elements in delinquency representation.² Therefore, appointed counsel systems must ensure that youth have qualified juvenile defense attorneys, and provide those attorneys with the resources necessary to perform their constitutional, statutory, and ethical duties.

While considerable attention has been focused on assuring the adequacy of attorney performance in the adult criminal justice system,³ much less has been given to juvenile

¹ State of California, Administrative Office of the Courts and State Bar of California, *Effective Representation of Children in Juvenile Delinquency Court* (2004) [hereinafter *Effective Representation*]; see also American Council of Chief Defenders Statement on Caseloads and Workloads, *Representing Juveniles Has Become More Complex and Requires More Attorney Time*, 7-8 (Aug. 24, 2007), available at <http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCDSELOADSTATEMENTsept6.pdf>.

² *In re Gault*, 387 U.S. 1 (1967), established the right to counsel for youth in juvenile delinquency proceedings.

³ These issues have received heightened attention during the current administration. The Department of Justice sponsored a *National Symposium on Indigent Defense: Looking Forward, Looking Back 2000-2010* in Washington, D.C. on February 18-19, 2010 and has unveiled its Access to Justice Initiative. Attorney General Eric Holder has specifically singled out legal representation for juveniles as a priority issue. United States Department of Justice, *Attorney General Eric Holder Speaks at the National Association of Counties Legislative Conference* (Mar. 7, 2011).

representation.⁴ Even less attention has been given to representation of juveniles by appointed counsel other than public defenders. This article examines juvenile delinquency representation through the lens of California appointed counsel contracts. It is one of the first articles to explore the significance of contracts as a factor in quality of delinquency representation.

The article begins with a discussion of the importance of competent representation for juveniles in delinquency cases. It then delineates the elements of competent delinquency representation, and analyzes California contracts for appointed counsel with an eye to whether those elements are present. The article concludes by offering an overview of what is needed to strengthen appointed counsel contracts.

II. Why Is Specialized Delinquency Representation Important?

Competent representation in juvenile proceedings is important to the young person and her family, the juvenile justice system, and the community at large. Even a relatively minor offense exposes youth to life-changing consequences. Because juveniles have not yet developed mature judgment, delinquency representation requires counsel to have special skills both in the defense of the case and in working with young clients. Competent representation is needed to preserve the integrity of the justice system, prevent wrongful conviction, and reduce unnecessary incarceration. The

The National Legal Aid and Defender Association's "Gideon Alerts" provide a running account of news and challenges in relation to access to counsel issues. Available at <http://nlada.net/category/subject/gideon-alerts> (last visited Sept. 8, 2011).

⁴ The pioneering work on quality of juvenile representation began only fifteen years ago with Patricia Puritz, Sue Burrell, Robert Schwartz, Mark Soler, & Loren Warboys, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (American Bar Association, 1995). Since the creation of the National Juvenile Defender Center in 1999, this work has greatly expanded, influencing work in individual jurisdictions and in the national policy arena.

adequacy of delinquency representation has a direct impact on systemic costs for unnecessary incarceration, court challenges, and ultimately, whether the young person will succeed in the community.

Popular notions hold that the consequences of juvenile proceedings are benign. The opposite is true. Juveniles adjudicated even for misdemeanor offenses may suffer incarceration, educational disruption, and stigma. In more serious cases, youth face lengthy incarceration (up to age 25 in California),⁵ permanent criminal records (DNA),⁶ registration (for gang or sex offenses),⁷ and use of juvenile adjudications for future sentencing enhancement.⁸ Youth processed through the delinquency system also face a range of consequences affecting their ability to move forward in their lives. Areas of potential impact include employment, joining the military, admission to college, immigration status, living in public housing, or obtaining other benefits.⁹ Additionally, if the case is prosecuted in criminal court, adult penalties may be imposed.¹⁰ In many states, including California, juveniles tried as adults may still receive imprisonment for life without the possibility of parole.¹¹ With these far reaching consequences, the assistance of competent, properly resourced counsel may literally change the course of a young person's life.

The quality of delinquency defense is also critical

⁵ CAL. WELF. & INST. CODE § 607(d) (West 2011).

⁶ CAL. PENAL CODE §§ 296(a)(1), 296(a)(3), and 296.1(a)(2) (West 2011).

⁷ CAL. PENAL CODE §§ 186.30 (gang), 290.008 (sex offender) (West 2011).

⁸ CAL. PENAL CODE § 667.5 (West 2011).

⁹ See, e.g., American Bar Association, Criminal Justice Section, Commission on Homelessness and Poverty, Standing Committee on Legal Aid & Indigent Defendants, Report to the House of Delegates, No. 102A (2010), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102a.authcheckdam.pdf (last visited Sept. 8, 2011) [hereinafter *Commission on Homelessness*].

¹⁰ CAL. WELF. & INST. CODE § 707.1 (West 2011).

¹¹ CAL. PENAL CODE § 190.5(b) (West 2011).

because the clients are young. The United States Supreme Court has long recognized that juveniles “often lack the experience, perspective, and judgment” to recognize and avoid choices that could be detrimental to them.¹² Brain science and research on adolescent development have established that children are biologically and developmentally different from adults. The research informs our understanding of the impact of immaturity on judgment, impulse control, and peer influences.¹³ This body of knowledge has been applied by the Court in its holdings that juveniles’ lack of mature judgment must play a role in mitigating the sanctions imposed on them.¹⁴ Recently, age has become a relevant consideration in deciding whether a child is “in custody” for purposes of giving *Miranda* warnings.¹⁵

The very characteristics that make immaturity a relevant consideration in other areas of the justice system also create special challenges for lawyers representing juveniles. Developmental immaturity, for example, may have a dramatic impact on young people’s ability to participate in the defense of their case.¹⁶ Researchers have found that adolescents in court proceedings may yield inappropriately to adults because they think they have to or may have difficulty communicating with their lawyers.¹⁷ Additionally, youngsters lack the ability

¹² *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982).

¹³ See MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, Adolescent Legal Competence in Court, Issue Brief 1 (undated), available at http://www.adjj.org/downloads/9805issue_brief_1.pdf.

¹⁴ *Graham v. Florida*, 130 S.Ct. 2011, 2302 (2010); *Roper v. Simmons*, 543 U.S. 551, 572-573 (2005).

¹⁵ *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2404-2406 (2011).

¹⁶ See Thomas Grisso, Lawrence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci, & Robert Schwartz, *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333 (2003), 356-357.

¹⁷ Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles’ Adjudicative Incompetence*, 13 PSYCHOL., PUB. POL’Y, & L. 87, 95-9 (2007).

to apply legal concepts to their own situation, are unable to weigh the risks and long-term consequences of various options, and suffer from a sense of invulnerability that impairs judgment.¹⁸ The presence of these developmental characteristics makes skilled, knowledgeable legal representation essential to assure fairness and appropriate treatment of youth in juvenile court proceedings.

The justice system has its own interests in competent juvenile defense. Skilled, knowledgeable and vigorous representation is essential to assure justice and the integrity of the system. When an attorney fails to vigorously defend the case, the likelihood of wrongful conviction increases.¹⁹ There is a greater likelihood of false confessions and unconstitutional guilty pleas.²⁰ Further, even if youth are properly adjudicated, inadequate representation means that courts are less likely to receive the kinds of information needed to make wise dispositional decisions. When counsel does not investigate and advocate for appropriate alternatives to confinement, or non-custodial services that address the young person's individual needs, youth may spend a longer time in custody.²¹ This has a substantial fiscal impact.²² In

¹⁸ *Id.* at 99-100.

¹⁹ Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 289-92 (2007); and see National Legal Aid & Defender Association and The Constitution Project, National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, 46-7 (2009), available at http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied_%20Right%20to%20Counsel%20Report.pdf [hereinafter *Justice Denied*].

²⁰ Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL'Y, 545 (2009).

²¹ See Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, 23 (Annie E. Casey Foundation 2011).

²² The cost of failing to aggressively pursue release or "step down" to a non-secure setting adds up quickly. As of 2008, the average daily cost of detention and treatment in California juvenile halls was \$238 or \$86,870 per year. Edward Cohen & Jane Pfeifer, *Costs of Incarcerating Youth with Mental Illness (Final Report)*, 9, (prepared for the Chief Probation Officers

addition, youth whose needs are not properly addressed are more likely to commit more crimes and penetrate further into the justice system, with additional costs to the system and the community. The cumulative effects of inadequate representation are experienced primarily by poor children, and youth of color.²³

Inadequate representation results in additional expense when cases must be appealed or a writ must be filed to undo the injustice.²⁴ The costs for appellate counsel, court processes, and investigation are substantial, and again, the youth may be forced to remain in custody throughout the appellate process. Moreover, when the appointed counsel system itself is inadequate, the costs of systemic reform are considerable and the potential for litigation is very real.²⁵ The right to competent representation is a constitutional right.²⁶ The failure of public systems to fulfill that right is receiving

of California and the California Mental Health Directors Association 2008), *available at* <http://www.epoc.org/php/Information/Papers/Costs%20of%20Incarcerating%20Youth%20with%20Mental%20Illness.pdf>. At the disposition phase, placement in a high level group home costs \$9,146 per month or \$105,528 per year. (California Department of Social Services, *Foster Care Group Home Provider Listing Programs Classified at RCL 13 and 14 Statewide* (Sept. 1, 2011), <http://www.childsworld.ca.gov/res/pdf/GH1314.pdf> (last visited Sept. 8, 2011).) Commitment to the Division of Juvenile Facilities costs close to \$200,000 year per youth per year. (California Governor's Budget Detail 2011-2012, Proposed Budget Detail, *Summary of Adult and Juvenile Per Capita Cost Ratios*, http://www.ebudget.ca.gov/pdf/GovernorsBudget/5210/5225_fig1f.pdf (last visited Sept. 8, 2011).)

²³ Majd, *supra* note 20, at 568-74.

²⁴ See *In re E.S.*, 171 Cal. App. 4th 1219 (Ct. App. 2009) (reversing judgment after extensive appellate proceedings regarding ineffective assistance of counsel where trial attorney failed to investigate potential exculpatory evidence in intra-familial sex offenses).

²⁵ *Justice Denied*, *supra* note 19, at 104-30; The Spangenberg Group, Contracting for Indigent Defense Services (Indigent Defense Series No. #3) at 5-7 (Bureau of Justice Assistance Apr. 2000) [hereinafter *Contracting for Indigent Defense Services*].

²⁶ *Strickland v. Washington*, 466 U.S. 668, 686-689 (1984); *People v. Ledesma*, 729 P.2d 839, 867 (1987).

increased attention in California and nationally.²⁷

Given the tremendous individual and systemic costs at stake, juvenile defense systems should be designed around the elements of competent representation. Lawyers representing youth in delinquency cases must be assured of having adequate resources to provide each element. Contracting agencies must also have the means to assure that their obligation to provide legally adequate counsel is fulfilled. A primary means of achieving these goals is through contracts, creating a legally enforceable agreement based on mutual obligations between the attorneys and the system employing them. The article turns, now, to an examination of California's system for appointed delinquency counsel.

III. Appointed Delinquency Counsel in California

While a majority of young people in California delinquency cases are represented by attorneys from county-operated public defender offices, a substantial number have an appointed attorney other than a public defender.²⁸ Data for 2010 indicate that 20,588 youth were represented by non-public defender appointed counsel, 52,750 by public defenders, and 4,880 by private counsel.²⁹

The employment structure for non-defender appointed

²⁷ See, e.g., *Justice Denied*, *supra* note 19; California Commission on the Fair Administration of Justice, Report and Recommendations on Funding of Defense Services in California (Apr. 2008), available at <http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf>.

²⁸ County public defenders work for a county department, and the attorneys employed are salaried public employees. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 272 (2009), available at <http://www.cwsl.edu/content/benner/Benner%20%20Presumption%20of%20Guilt.pdf%203-24.pdf>.

²⁹ Criminal Justice Statistics Center, Cal. Dep't of Justice, *Juvenile Justice in California 2010*, "Defense Representation 2009," Table 18, at 26 (2011), <http://ag.ca.gov/cjsc/publications/misc/jj10/preface.pdf> (last visited Sept. 20, 2011).

attorneys varies greatly.³⁰ Some operate as part of a panel.³¹ Others work in offices that contract with a particular jurisdiction to handle juvenile cases.³² In still others, the attorneys take individual case appointments at the request of the court.³³ In some places, court-appointed attorneys take only cases the public defender cannot handle; in others, they are the primary source of counsel.³⁴ What almost all appointed counsel systems have in common is that they operate under a contract. These contracts provide a valuable window into the expectations communicated to appointed counsel and to the conditions under which they must perform.

This article is offered with the premise that clearly defining the parameters of representation helps lawyers to understand what is expected of them. Additionally, doing so provides a base from which proper compensation may be determined, and gives a framework for oversight. By incorporating the elements of competent representation, contracts may be scrutinized and adjusted as needed to assure that lawyers are being paid to do what is needed, and that they have necessary support services. Properly drawn contracts will help to ensure that clients' rights are protected, and that the court has the information needed to make well-founded and appropriate decisions. This will reduce wrongful

³⁰ See generally, Majd, *supra* note 20, at 546-48.

³¹ See Administrative Office of the Courts, Center for Families, Children and the Courts, *Juvenile Delinquency Court Assessment 21-28* (2008) [hereinafter *Delinquency Court Assessment*]. While only San Mateo County, California uses an assigned counsel panel of private attorneys as its primary method of providing appointed counsel, many counties use panels of attorneys in private practice in cases where the public defender or other appointed counsel entity is unable to take the case. Benner, *supra* note 28, at 272.

³² *Delinquency Court Assessment*, *supra* note 31, at 21-28.

³³ For example, in Mendocino County, California, attorneys do not work under a contract. Attorneys wishing to take appointments submit a resume to the court and after appointment, simply submit a bill at the end of the case. (Telephone call between the author and Benjamin Stough, Court Executive Officer, Mendocino County Superior Court (June 11, 2010), and see Superior Court, County of Mendocino, Local Rules (effective July 1, 2011), 16.17(a) Representation of Parties).

³⁴ Benner, *supra* note 28, at 272.

convictions and unnecessary incarceration. Properly drawn contracts will also make it more likely that youth who do come within the jurisdiction of the court receive the right services to move successfully forward in their lives.

The article now explores the essential areas of juvenile delinquency representation we would expect to find in appointed counsel contracts as determined by a group of experienced California juvenile practitioners. It then describes the author's study of actual appointed counsel contracts in California and presents the results of that study.

A. *Research on California Delinquency Counsel Contracts*

This article and the research supporting it were prompted by the work of the Juvenile Indigent Defense Action Network ("JIDAN"), launched by the John D. and Catherine T. MacArthur Foundation ("the Foundation").³⁵ JIDAN³⁶ is a national project aimed at increasing the capacity

³⁵ The importance of competent legal representation has been a core value of the John D. and Catherine T. MacArthur Foundation's multi-state Models for Change Initiative to reform juvenile justice systems across the country. In 2008, the Foundation launched the Juvenile Indigent Defense Action Network (JIDAN), recognizing that the integrity of the system depends upon zealous, knowledgeable, and skilled representation. JIDAN is designed to support improved juvenile defense policy and practice in a total of eight states. Along with Massachusetts, Florida, and New Jersey, plus four other states involved in the MacArthur Models for Change Initiative (Illinois, Louisiana, Pennsylvania, and Washington), the California JIDAN team works with staff at the National Juvenile Defender Center to coordinate the work. Further information about the Juvenile Indigent Defense Action Network is available at <http://www.modelsforchange.net/about/Action-networks/Juvenile-indigent-defense.html> (last visited Sept. 8, 2011).

³⁶ The California JIDAN team is led by Sue Burrell of the Youth Law Center, with representation from Audrey Fancy and Leah Wilson, Center for Families, Children and the Courts of the Administrative Office of the Courts; Cyn Yamashiro, Center for Juvenile Law & Policy, Loyola Law School, Los Angeles; Winston Peters, Office of the Los Angeles County Public Defender; Patti Lee, San Francisco Office of the Public Defender; Jonathan Laba, Office of the Contra Costa County Public Defender; Elizabeth Calvin, Human Rights Watch; and Corene Kendrick, formerly at

of juvenile defense counsel to provide competent representation. Toward that end, the California JIDAN team has worked to create a juvenile defense community across the state, and to provide it with training, practice materials, trial and appellate support.³⁷ The team has also called for increased awareness of what is involved in competent delinquency representation.³⁸ As that work was developed, the Foundation asked the California team to focus on appointed counsel contracts. The rationale was that individual practitioners and the systems that contract with them will benefit from better clarity about what is involved in juvenile delinquency representation. That, in turn, will help to assure competent representation. Accordingly, the Foundation asked the team to determine what should be included in appointed counsel contracts, and to develop guidance for local jurisdictions. This article is the result of that work.

The team approached this task with several guiding principles. First, contracts for delinquency counsel should include a clear outline of the role of counsel and expectations for representation. Second, contracts should include the specific elements of practice that distinguish delinquency practice from criminal, dependency or other legal practice. Third, contracts should provide compensation for all of the components required for competent representation. And finally, there should be a quality assurance process for evaluating and improving the work of appointed counsel

the Youth Law Center, currently at the Prison Law Office. While the principles discussed in this article were a focus of team discussion, the article was written by the author alone and the views expressed do not necessarily represent the position of individuals or organizations represented in the California JIDAN team.

³⁷ The California JIDAN work has used the Pacific Juvenile Defender Center as the locus of this work. Through JIDAN, the Center has developed a web site that includes a resource bank, an expert list for dozens of subjects, a statewide list of juvenile defense counsel, and access to statewide listservs for trial and appellate support. See www.pjdc.org.

³⁸ See Sue Burrell, *Juvenile Delinquency: The Case for Specialty Training*, Daily Journal (Jan. 14, 2010); Sue Burrell, *Juvenile Defense Attorneys Speak Out*, Daily Journal (Jan. 15, 2010).

systems.

On-the-ground research began with obtaining information about appointed counsel representation in California. In June 2010, the Youth Law Center sent Public Records Act³⁹ requests to the county administrative officers and juvenile court judges in the state's fifty-eight counties. The requests asked for contracts and other documents describing the terms of employment and compensation for appointed counsel in delinquency cases. All but two counties responded. In some cases, the response simply furnished the current contract, and in others additional information about the appointed counsel system was provided. In a few cases, county counsel and/or the juvenile court judge called the Youth Law Center to explain their county's system. The latter responses tended to be from smaller counties that have a very informal appointment system. In one county, for example, the judge appoints attorneys known to him. If the judge thinks that they do not do a good job, the attorneys no longer receive appointments. Nevertheless most counties use contracts, and this article is based on an analysis of those contracts.

In preparation for the analysis of the California documents, the team identified the elements experienced juvenile practitioners would want to see covered in appointed counsel contracts for juvenile delinquency cases. These included statutory requirements, constitutional case law, rules of professional conduct, and practice standards.⁴⁰ Particular attention was given to delinquency-specific issues that

³⁹ CAL. GOVT. CODE § 6250 et seq. (West 2011).

⁴⁰ National Legal Aid & Defender Association, Criminal Courts Assistance Project, American University Justice Programs Office, Model Contract for Public Defense (2000); American Bar Association, Model Rules of Professional Conduct (2000); American Bar Association, Ten Principles of a Public Defender Delivery System (2002); State Bar of California, Rules of Professional Conduct (2010); State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006), *available at* <http://calbar.ca.gov/LinkClick.aspx?fileticket=fwTzyTmupEY%3D&tabid=2326> [hereinafter *Guidelines on Indigent Defense Services*].

distinguish this practice from criminal law, dependency or other areas of law.⁴¹

Once these materials were amassed, the contracts were analyzed with an eye to key elements of delinquency representation. Whether and how the contracts handle the ethical obligations specific to delinquency cases was considered. The contracts' definition of the scope of work was scrutinized, especially with respect to activities that distinguish juvenile from adult or dependency representation. Thus, contracts were examined for specific provisions recognizing the right to representation prior to the initial court hearing ("early stage representation"), and post-dispositional ("post-sentencing") representation, as required by California law. Contracts were reviewed to see if they require experience and/or training as a condition of appointment. Provisions for compensation were analyzed to see if they adequately cover the elements of competent representation, and whether the compensation discourages counsel from obtaining investigators, experts and consultants. And finally, the contracts were reviewed to see if they include meaningful provisions for oversight and quality assurance.

The team recognized that inadequate representation may still occur even when these elements are included in contracts. It agreed, nonetheless, that defining expectations for individual counsel and the system that employs them provides a base from which to assure that competent representation occurs. The next section of the article presents the results of the California contract analysis.

⁴¹ National Juvenile Defender Center & National Legal Aid & Defender Association, *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Systems* (2d ed. 2008) [hereinafter *Ten Core Principles*]; Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards, Standards Relating to Counsel for Private parties* (1980); Institute of Judicial Administration and American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996); National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Delinquency Cases* (Reno, NV, 2005), and portions of *Guidelines on Indigent Defense Services*, *supra* note 40, at 21-4.

B. Characteristics of California Appointed Delinquency Counsel Contracts

The analysis of California contracts for appointed delinquency counsel reveals troubling deficiencies. The contracts fail, as a whole, to include the basic elements of competent delinquency representation.⁴² Some have well-drafted provisions with respect to particular elements but, in general, the contracts fail to address basic elements of delinquency representation. Moreover, the structure for compensation in many counties raises serious questions about whether delinquency attorneys are compensated for providing services they are ethically and legally bound to provide.

The vast majority of counties use generic contracts that are used for criminal, dependency, delinquency, mental health and other kinds of cases requiring appointed counsel. This results in contracts that provide little guidance for lawyers in the distinct setting of delinquency cases. For example, most contracts contain reference to the California Rules of Professional Conduct applicable to all lawyers. At the same time, only about a fourth of the contracts reference the specific ethical duties of delinquency counsel to represent the expressed interests of the client or to maintain confidentiality.⁴³ With respect to scope of work, only a handful include “early stage representation,” even though juveniles are legally entitled to receive it.⁴⁴ Few of the contracts specifically mention the California court rule on

⁴² The contracts and other materials furnished in response to the Public Records Act requests are on file with the author. The findings discussed in this section are summarized in Table 1, and are discussed at great length in pertinent sections of the article.

⁴³ These are key elements of delinquency representation. *Ten Core Principles*, *supra* note 41; *See, Majd, supra* note 20, at 553-54.

⁴⁴ California juveniles have a statutory right to appointed counsel at several “early” points in the proceedings, including at the law enforcement detention stage, the point of being taken to a detention center, and at the initial probation officer interview. CAL. WELF. & INST. CODE §§ 625, 627(b), 627.5 (West 2011); CAL. PENAL CODE § 825 (West 2011). These rights are also embodied in a substantial body of case law interpreting the state and federal constitutions.

scope of delinquency representation,⁴⁵ and only one fourth reference counsel's post-dispositional duties⁴⁶ in juvenile court. Fewer than half of the contracts have experience requirements for appointment, and some appear to require only a bar card. Few counties require specific training as a condition of appointment, and a disappointingly small number have ongoing training requirements that exceed State Bar requirements. Disturbingly, most of the contracts compensate appointed counsel on a flat fee rate for the case, or a lump sum based on exceedingly low per case assumptions that would not cover even a fraction of the work required for competent representation in the simplest case. Fewer than half the counties use hourly compensation or fee schedules for delinquency representation. Also, some counties require counsel to pay investigative and other support services out of their own pocket. Others require prior approval for payment or only compensate for some of the services; which has the potential to create a disincentive to use those services. While most of the contracts provide some form of oversight, the scope of oversight is often quite limited. These findings are summarized in **Table 1**, and are more fully discussed in the

⁴⁵ Rule 5.663 of the California Rules of Court, Responsibilities of Children's Counsel in Delinquency Proceedings, was enacted in 2004 "to ensure public safety and the protection of the child's best interest at every stage of the delinquency proceedings by clarifying the role of the child's counsel in delinquency proceedings." CAL. R. CT. 5.663. The rule provides children with the right to have "[their] interests represented by counsel at every stage of the proceedings, including postdispositional hearings." *Id.* It defines the scope of work for California delinquency representation as "defending the child against the allegations in all petitions filed in delinquency proceedings and with advocating, within the framework of the delinquency proceedings, that the child receive care, treatment, and guidance consistent with his or her best interest." *Id.* It is not, however, all-encompassing, expressly excluding from counsel's duties "assum[ing] the responsibilities of a probation officer, social worker, parent, or guardian; . . . provid[ing] nonlegal services to the child; or . . . represent[ing] the child in any proceedings outside of the delinquency proceedings." *Id.*

⁴⁶ CAL. R. CT. 5.663(c); see CAL. WELF. & INST. CODE § 634.6. (West 2011).

pertinent sections of this article.⁴⁷

⁴⁷ This analysis was prepared using the responses to Public Records Act requests sent to California county administrative officers and juvenile court judges in June 2010, described in section (III.A). Some of the responses failed to provide materials responsive to particular elements of the requests. We were unable to determine whether this means that the county simply does not consider a particular element in appointing delinquency counsel, or whether that element is addressed through extrinsic means not reflected in the county's response. For example, some counties may not include years of experience in written contract requirements, but in fact may only contract with attorneys who have extensive delinquency experience. Also, we were probably overly generous in counting certain generic inclusions in contracts (for example, the duty of confidentiality to clients) as meeting the requirements for certain key elements, even though this language did not fully explain the unique ethical duties of delinquency counsel. Accordingly, the chart is valuable in reflecting overall patterns in the materials received, but should not be relied upon for precise information about county appointed counsel systems for delinquency counsel.

Table 1: Characteristics of Appointed Delinquency Counsel in California⁴⁸

Elements That Should be in Delinquency Counsel Contract	Counties with Element in Contract 58 counties in CA, 56 responded
Ethical Duties: Duty of Confidentiality to Client Requirement Explicitly Stated	15
Scope of Work: Early Appointment Explicitly Stated (e.g., lineups, interrogation)	5
Scope of Work for Delinquency Representation: California Rules of Court Rule 5.663 Explicitly Referenced (previously numbered Rule 1479)	5
Scope of Work: Mention of Post-Disposition Duties Other than Rule 5.663 (e.g., review hearings, revocations)	13
Experience Requirements for Appointment Beyond Being a Member of Bar Explicitly Stated	20
Training Requirements for Appointment Explicitly Stated	7
Ongoing Training Requirements Beyond State Bar's Minimum CLE requirements	14
Hourly Compensation in Delinquency Cases	14
Fee Schedule for Delinquency Cases	6

⁴⁸ Again, this table was compiled through an analysis of responses to a Public Records Act request sent to county administrative officers and presiding juvenile court judge in every county in June 2010. Some of the counties that responded did not provide information pertaining to certain elements, so fewer than 56 counties are represented in some categories.

IV. What Should be Included in Appointed Counsel Contracts?

California is surely is not the only place where appointed delinquency counsel contracts fall short. Accordingly, the article now turns to a discussion of what should be included in contracts for delinquency representation, and why each element is important. These contract elements can be adapted and included as an attachment irrespective of whether the contract is for an individual attorney, a panel of attorneys, or a contract office. Likewise, if the jurisdiction uses a generic contract for all appointed counsel, the elements could be written into a template for delinquency case and incorporated by reference into the contracts for delinquency appointments. Since this is intended to be a practical, achievable set of elements, it includes provisions that are required by law, that are well-recognized in professional standards, or that are currently in use in California.

A. Ethical Obligations and Role of Delinquency Counsel

Most appointed counsel contracts in California require delinquency attorneys to adhere to the rules of professional conduct for the jurisdiction. Typically such rules require counsel to have skills, training and background reasonably commensurate with their responsibilities, so as to be able to perform in a timely, competent and professional manner.⁴⁹ Unfortunately, the specific ethical duties and role of delinquency counsel are addressed in only a few of the California contracts.⁵⁰ Further, despite widespread confusion over ethical duties, only about one fourth of the California contracts include a requirement that counsel maintain confidential communications with the client, and those provisions are typically part of a boilerplate set of

⁴⁹ State bar of California, Rules of Professional Conduct, *supra* note 40, R. 3110; American Bar Association, MODEL RULES OF PROF'L CONDUCT, *supra* note 40, R. 1.1.

⁵⁰ Table 1, *supra* note 48.

requirements used in multiple kinds of cases.

Contracts for delinquency attorneys should require counsel to demonstrate adequate skills specifically in relation to delinquency cases. This includes knowledge and comprehension of the purposes and goals of the delinquency proceedings; juvenile law, criminal law, and court rules; relevant case law; and appellate practice.⁵¹ (Specific skills and knowledge will be discussed in the Subpart “C. *Scope of Work.*”) In addition, contracts should clarify delinquency counsel’s ethical duties to the client. Many attorneys taking delinquency case appointments have worked in dependency court (which focuses on the “best interests” of the child) or in other practices. This may cause confusion in relation to their understanding of ethical duties to delinquency clients. This problem is compounded by the frequent use of generic contracts that cover many kinds of cases and clients. For this reason, contracts should specify that delinquency counsel must:

1. Zealously represent the expressed interests of the juvenile client. Delinquency counsel plays a role similar to counsel in criminal court – providing the client’s voice in the proceedings. Counsel does *not* represent the “best interests” of the child, or the interests of the parents.⁵²

2. Vigorously assert the statutory and constitutional rights of the juvenile client. The delinquency system has

⁵¹ Robin Walker Sterling, in collaboration with Cathryn Crawford, Stephanie Harrison, & Kristin Henning, *Role of Juvenile Defense Counsel in Delinquency Court*, 13-14 (National Juvenile Defender Center, 2009).

⁵² *Id.* at 7-11; *Ten Core Principles*, *supra* note 41, at 1-2; American Bar Association, *MODEL RULES OF PROF'L CONDUCT*, *supra* note 40, at R. 1.2. For example, the Private Defender Program in San Mateo County, California, handles criminal, dependency, mental health, and delinquency cases, but a section of its Attorney Manual clarifies delinquency counsel’s duties to represent the child not the parents, and the duty to maintain confidentiality of communications with the client. The Manual also recognizes the need for counsel to maintain good relationships with parents and to maintain good lines of communication with them. (Private Defender Program of the San Mateo County Bar Association, *Attorney Manual: Policies and Procedures for Independent Contractor Attorneys* § 5.3.2.1 (Jan. 2010).

evolved into an adversarial system with far reaching consequences for youth. While there are surely occasions for collaborative work with other players in the system, counsel's role is to protect the constitutional and statutory rights of individual clients.⁵³

3. Provide representation that assures treatment in accordance with the holistic purposes of juvenile court law, using the services of experts and consultants to accomplish this. States have a variety of juvenile court purpose clauses, with some retaining the traditional rehabilitative model, others incorporating a restorative justice model, and a few with some other variation.⁵⁴ Whatever the particular state's juvenile purpose clause, it surely differs from the adult criminal court purpose of punishment.⁵⁵ Appointed counsel contracts should include the goals of the particular purpose clause and counsel's role in assuring that they are fulfilled.

Contracts should clarify that fulfilling the juvenile court purpose clause requires counsel to use a holistic approach in evaluating and advocating for their clients' needs. This may require counsel to secure special education services for youth with disabilities, or to work with psychologists and social workers.⁵⁶ It is counsel's duty to assure that all

⁵³ American Bar Association, MODEL RULES OF PROF'L CONDUCT, *supra* note 40, at R. 1.3; R.W. Sterling, *supra* note 52, at 13-21; *Ten Core Principles*, *supra* note 41, at 1-2.

⁵⁴ California's juvenile court purpose clause retains the rehabilitative goals of care, treatment and guidance in accordance with the individual child's needs, with a concomitant recognition that accountability and public safety may be considered in providing these things. CAL. WELF. & INST. CODE § 202 (West 2011); CAL. R. CT. 5.663(b), *supra* note 45. A discussion of purpose clauses and their effect on practice is included in Joseph B. Sanborn, Jr. & Anthony W. Salerno, *The Juvenile Justice System: Law and Process* 4 – 11 (Oxford Univ. Press, 1st ed. 2005).

⁵⁵ In California, as in other states, the purpose of criminal court is punishment. CAL. PEN. CODE § 1170(a)(1) (West 2011).

⁵⁶ Although Rule 6.663, *supra* note 45, stops short of saying that juvenile defense counsel must actually represent youth in other kinds of proceedings, the Administrative Office of the Courts and State Bar guidance for the rule calls for counsel to actively facilitate and to represent clients in collateral proceedings when possible. *Effective Representation*, *supra* note 1. The guidance calls for "examining the

significant needs of the youth have been brought to the attention of the juvenile court. Counsel is responsible for requesting additional evaluations and expert witnesses needed to assist the court.⁵⁷ Accordingly, contracts should address the need to work with other experts and consultants, and the compensation structure should provide funding for this to occur without diminishing the attorney's compensation. Holistic representation is not a new concept. Unfortunately though, it is not well-implemented in some jurisdictions. Accordingly, it may be wise to specifically include some of the kinds of experts and consultants counsel would predictably engage, including, for example, psychiatrists or psychologists, education experts, social workers, investigators, gang experts, or experts in adolescent development.⁵⁸

interests of the client beyond the scope of the juvenile proceedings and informing the court if the client has any other interests that may need to be protected by the institutions of other administrative or judicial proceedings.” *Id.* It calls, further, for counsel to “[c]onsider, when possible and appropriate, representing the client in related collateral matters, such as dependency cases and placement, educational, or other administrative hearings.” *Id.* In practice, some public defender offices employ social workers, educational specialists or immigration specialists to assist the attorneys, some allow attorneys to actually handle the representation, and others reach out to non-profit advocacy groups in the community for help. “Juvenile defenders are expected to perform resource advocacy such as securing special education services for those who need it, likewise, with those who qualify for Regional Center services. [In California, Regional Centers coordinate delivery of services to people with developmental disabilities.] Administrative law court advocacy is sometimes required in dealing with recalcitrant school districts and other agencies. Psychosocial assessments at intake by licensed clinical social workers are becoming the norm. Indigent defense providers should be trained and they must often lead a multidisciplinary team in this new era.” State Bar of California, Guidelines on Indigent Defense Services, *supra* note 40, at. 21-22; *See Ten Core Principles*, *supra* note 41, at 2; R.W. Sterling, *supra* note 52, at 20-21.

⁵⁷ National Council of Juvenile and Family Court Judges, *supra* note 41, at 137.

⁵⁸ State Bar of California, Guidelines on Indigent Defense Services, *supra* note 40, at. 21-22.

B. Period of Representation

The California contracts provide little guidance on the period of representation contemplated under the agreement at the front end and the back end of the case. With respect to the front end, juveniles are legally entitled to appointed counsel from the very moment of being taken into custody being taken into custody⁵⁹ until the termination of juvenile court jurisdiction.⁶⁰ Sadly, only a few of the contracts for appointed counsel explicitly provide for early stage representation⁶¹ and only about one fourth provide for post-disposition representation.⁶²

Contracts should cover not only the typical situation in which counsel is appointed at the initial court hearing, but also those when the child is entitled to appointed counsel at an earlier point in the case. This would include, for example, counsel's representation of a child who asserts her *Miranda*

⁵⁹ California juveniles have a statutory right to appointed counsel at the law enforcement detention stage, the point of being taken to a detention center, and at the initial probation officer interview. CAL. WELF. & INST. CODE §§ 625, 627(b), 627.5, CAL. PENAL CODE § 825, *supra* note 44.

⁶⁰ CAL. R. CT. 5.663(c), *supra* note 45; *see* CAL. WELF. & INST. CODE § 634.6, *supra* note 46.

⁶¹ The contracts from Fresno County and Madera County, California reference appointment at the law enforcement detention stage; the Napa County, California contract references appointed counsel at lineups; and the Orange County and San Mateo County, California contracts contain broader pre-arraignment provisions. Copies of the contracts are on file with the author.

⁶² Fresno County, Riverside County, San Bernardino County, San Francisco County and San Mateo County include post-disposition representation in contracts or operative documents through reference to the court rule on scope of delinquency representation. *See* CAL. R. CT. 5.663(c), State Bar of California, Guidelines on Indigent Defense Services, *supra* note 40, at 22. The other counties refer to specific post-disposition activities (e.g., probation violation hearings, modifications, reviews, or general post-disposition representation) in describing the scope of work under the contract. Those counties include the five that cite the court rule or *Guidelines* and Amador County, Butte County, Lake County, Los Angeles County, Merced County, Monterey County, Napa County, Riverside County, and Siskiyou County. Copies of the contracts are on file with the author.

rights during a law enforcement investigation or appears in a lineup.⁶³ It would also enable counsel to meet with the child, family probation officer, and/or prosecutor prior to the initial hearing. This will bring representation under the contract into line with statutory and constitutional rights.⁶⁴ The *Juvenile Delinquency Guidelines* of the National Council for Family and Juvenile Court Judges specifically call for juvenile court systems to provide a mechanism enabling counsel for youth to begin active representation of the client before the initial court hearing.⁶⁵

Contracts should also provide for continuing representation during the entire period the youth is under juvenile court jurisdiction – unless relieved by the court.⁶⁶

⁶³ For example, contracts for Napa County, California, and Siskiyou County, California, provide for representation in “police lineups and prestatement counseling.” Napa County Agreement No. 6849-1: Juvenile Conflict Public Defender Services (2009) [hereinafter *Napa County Agreement*]; Siskiyou County Agreement for Conflict Public Defender Services (2010), on file with the author. Orange County, California provides a more open-ended provision for early representation: “Intervention prior to appointment on cases where professional judgment deems such intervention desirable...” Superior Court of California, County of Orange, Legal Representation of Indigent Minors in Juvenile Court Proceedings (2007), on file with the author.

⁶⁴ CAL. WELF. & INST. CODE §§ 625, 627(b), 627.5; CAL. PENAL CODE § 825, *supra* note 44. *And see, Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment right at custodial interrogation stage); *United States v. Wade*, 388 U.S. 218, 226 (1967) (Sixth Amendment right “at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial”).

⁶⁵ National Council of Juvenile and Family Court Judges, *supra* note 41, at 78.

⁶⁶ CAL. WELF. & INST. CODE §634.6, *supra* note 46; *Ten Core Principles*, *supra* note 41, at 2; R.W. Sterling, *supra* note 52, at 19-20. Thus, Riverside County, California, specifies that counsel “shall perform or cause to be performed all professional legal services reasonably and legally required to be performed from the time of appointment, at every stage of the proceedings, including postdispositional hearings until relieved by the court or upon substitution of counsel.” Contract to Provide Legal Services [between Riverside County and Burns and Oblachinski] (July 15, 2008) (on file with the author) [hereinafter *Riverside Co. & Burns & Oblachinski*].

This must be clearly stated in contracts because many appointed counsel may come from the adult criminal system, where representation typically ends at the time of sentencing. In contrast, because the goal of delinquency proceedings is to provide services that address the child's needs,⁶⁷ there is a duty of post-disposition representation.⁶⁸ Counsel has a duty to make sure the court's orders are implemented, and to pursue modifications when needed. California has a court rule clarifying these duties.⁶⁹ In some jurisdictions, counsel may also be expected to handle any appeal, and in others, counsel is only required to file the notice of appeal. To avoid confusion of a contracted counsel's expectations, these duties should be included in the contract, as well.

The California Administrative Office of the Courts *Juvenile Delinquency Court Assessment 2008* found that only about half of delinquency contract attorneys maintain frequent contact with clients. It also found that those with more limited delinquency caseloads have even less frequent post-dispositional activity.⁷⁰ The Assessment concluded that knowing the scope of the court's expectations would allow defense attorneys to better comply with the requirements for post-disposition representation. It recommended that: "Courts should develop or clarify local protocols that set forth their expectations of defense counsel in the post-dispositional period regarding status reports, child visits, legal advocacy and other activities."⁷¹ Contracts should incorporate such

⁶⁷ CAL. WELF. & INST. CODE § 202, *supra* note 55.

⁶⁸ National Council of Juvenile and Family Court Judges, *supra* note 41, at 169.

⁶⁹ CAL. R. CT. 5.663, *supra* note 44. The rule was originally adopted as Rule 1479, effective in 2004, and was renumbered in 2007. The Judicial Council's Family and Juvenile Law Advisory Committee recommended adoption of the rule specifically to "clarify the extent of a child's counsel's responsibilities in delinquency proceedings." The Committee observed that, "By consolidating relevant statutory provisions, the rule helps to ensure protection of the child's interest at every stage of the proceedings." State of California, Judicial Council, *Judicial Council Meeting, Minutes of February 27, 2004, Meeting*, San Francisco, California, at 8.

⁷⁰ *Delinquency Court Assessment*, *supra* note 31, at 26.

⁷¹ *Id.* at 108.

protocols where they exist or clarify post-disposition duties as described in the next section.

C. Scope of Work

Only a few of the California appointed counsel contracts reference the court rule on scope of delinquency representation, and most fail to describe other delinquency-specific activities.⁷² This is a troubling omission because delinquency cases call for an extensive set of activities that differs in some respects from the scope of work in criminal or dependency cases. The differences stem from the distinct purposes of juvenile court intervention, the juvenile court statutory scheme, and the fact that the clients are adolescents. The prevalence of generic contracts creates problems on multiple levels. First, appointed counsel have little or no guidance on what is expected of them in delinquency representation. Second, counsel may have difficulty justifying the need for compensation for normal components of delinquency representation that are not spelled out in the contract. And third, the failure to clearly define scope of representation in contracts deprives court systems of a natural place to reflect changes in law and practice over time.

There are two ways to define the scope of work. The simplest is to incorporate by reference the practice standards used in the jurisdiction or that have been promulgated by a respected professional organization. For example, as this article is being written, the Los Angeles Superior Court is finalizing local practice guidelines for its delinquency court. When they are completed, it will be easy to incorporate those standards into appointed counsel contracts for Los Angeles County. Also, the National Juvenile Defender Center is in the final stages of promulgating its Juvenile Defense Standards. They will be released by the MacArthur Foundation's Models for Change/JIDAN consortium in early 2012.⁷³ A number of

⁷² CAL. R. CT. 5.663(c), *supra* note 44, Table 1, *supra* note 48.

⁷³ The National Juvenile Defender Center is simultaneously developing the standards as well as model training for delinquency counsel. This is

jurisdictions have already issued standards⁷⁴ that could be adapted for incorporation into contracts.

Another way to address concerns of a contracted counsel's scope of work is to explicitly identify and define the expectations for appointed counsel in the body of the contract. This can also be accomplished by with an attachment incorporated by reference into the contract.⁷⁵ The following

discussed in the section on *Training Requirements for Delinquency Counsel*. For further information, please contact the National Juvenile Defender Center at "inquiries@njdc.info" or telephone (202) 452-0010.

⁷⁴ Superior Court of the District of Columbia, Family Court. Attorney Practice Standards for Representing Juveniles Charged with Delinquency or as Persons in Need of Supervision (2004), available at <http://www.dccourts.gov/dccourts/docs/0413a.pdf>; Florida Guidelines of Practice for Attorneys Who Represent Children in Delinquency Proceedings (2006) available at [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/6EE3463C7A8637CC85257344005EA8DE/\\$FILE/Standards.FLLawyers.GAL.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/6EE3463C7A8637CC85257344005EA8DE/$FILE/Standards.FLLawyers.GAL.pdf?OpenElement); Georgia Public Defense Council, State of Georgia Performance Standards for Juvenile Defense Representation in Indigent Delinquency and Unruly Cases (2004), available at <http://juveniledefender.org/regional/resources/state-georgia-performance-standards-juvenile-defense-representation>; New York State Bar Association, Standards for Attorneys Representing Children in Juvenile Delinquency Proceedings (2009), available at <http://www.nysba.org/Content/NavigationMenu28/Publications/StandardsforAttorneysRepresentingChildreninJuvenileDelinquencyProceedingsJune2009/09LGStandardsFinal.pdf>; Ohio Public Defender Commission, Standards of Representation of Clients in Juvenile Delinquency Proceedings (undated), available at http://opd.ohio.gov/Juvenile/Jv_Standards.htm; Juvenile Defenders Association of Pennsylvania, Performance Guidelines for Quality and Effective Juvenile Delinquency (2010), available at http://www.pajuvdefenders.org/file/juvenile_performance_guidelines.pdf; North Carolina Commission on Indigent Defense Services, Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level (2007); Oregon State Bar Board of Governors. Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases, *Specific Standards for Representation in Criminal and Juvenile Delinquency Cases* (Revised, May 2006).

⁷⁵ For example, the Administrative Office of the Courts contract template for dependency attorneys, used in 20 California counties, sets forth the duties expected of counsel in some detail. State of California, Administrative Office of the Courts, State of California Standard

topics should be addressed in the scope of work:

Establishing and maintaining a confidential attorney-client relationship, including visiting clients at home or wherever the child is held, maintaining communication with family members while still preserving the privileged attorney-client relationship with the child; and if the court takes jurisdiction, engaging family members in case planning to the extent possible.⁷⁶

Conducting thorough, continuing, and independent investigations and interviews at every stage of the proceedings; including obtaining needed education, mental health, social study and other relevant records; and utilizing the services of professional investigators, social workers, mental health experts, educational experts, fitness (transfer/waiver) experts, interpreters and other consultants needed to prepare and defend the case.⁷⁷

Seeking informal resolution of the case, diversion or dismissal in the interest of justice in appropriate cases.⁷⁸

Challenging secure detention and advocating for placement in the least restrictive alternative setting.⁷⁹

Raising competence, capacity and other mental health issues when supported by the child's condition or history.⁸⁰

Agreement, *Scope of Services and Service Levels*, (Draft 9-09) (2009).

⁷⁶ See R.W. Sterling, *supra* note 52, at 11-13.

⁷⁷ This may include social workers to assess the family situation and to offer dispositional options; educational experts to make sure clients are in the right educational placement and that special education IEPs are addressing client needs; and mental health experts to assess competence, fitness for juvenile court, the admissibility of confessions, capacity to commit a crime, insanity and intent, and dispositional advice. These services are integral to the defense of the case. Regular, unimpeded access to ancillary services is essential to competent representation. State Bar of California, *Guidelines on Indigent Defense Services*, *supra* note 40, at 21-23; National Council of Juvenile and Family Court Judges, *supra* note 41, at 78; See Benner, *supra* note 28, at 324-27.

⁷⁸ R.W. Sterling, *supra* note 52, at 22.

⁷⁹ *Id.* at 15-16.

⁸⁰ For example, the San Mateo County, California Private Defender Program specifically mentions counsel's duty to raise competence,

Litigating and trying the case, including challenging allegations of “unfitness for juvenile court (transfer/waiver), filing motions (including discovery, suppression of evidence or admissions).

Researching programs and services that meet individual client’s needs, being knowledgeable about funding and eligibility for those services, advocating for alternative dispositions, and demanding contested disposition hearings when appropriate.⁸¹

Investigating and advocating for the interests of child clients in areas that, if addressed, would assist the child in rehabilitation, including school/special education issues, mental health assessment and treatment, immigration, cross-over child welfare or status offender matters, conditions of confinement, or personal injury.⁸²

Filing rehearing motions, extraordinary writs, and appeals needed to protect the client’s statutory or constitutional rights.⁸³

Advising the client of direct and collateral consequences of juvenile court involvement and any rights to record sealing.⁸⁴

Providing post-disposition representation, including regular contact to maintain the attorney client relationship and monitoring implementation of the client’s court-ordered treatment plan;⁸⁵ active representation at all review or violation hearings; pursuit of appellate challenges, modification hearings and advocacy needed to address treatment deficiencies or make needed adjustments to the

capacity, and mental health issues. Private Defender Program of the San Mateo County Bar Association, Attorney Manual, *supra* note 53, §5.3.2.2.

⁸¹ *Id.* at 17-19.

⁸² *Id.*

⁸³ *Id.* at 14-19.

⁸⁴ *Id.* at 23.

⁸⁵ State of California, Administrative Office of the Courts, Effective Representation of Children in Juvenile Delinquency Court, *supra* note 1; *See* R.W. Sterling, *supra* note 52, at 19-20.

court orders;⁸⁶ assuring that clients sixteen years of age or older receive transition age and independent living services.⁸⁷

Moving for termination of jurisdiction or dismissal of the case when the goals of court intervention have been met, or the interests of justice require it.⁸⁸

These elements of delinquency counsel's scope of work are required by law or are well-recognized in professional standards. They help to clarify the specialized and complex responsibilities involved in representing juveniles. Delinquency-specific scope of work should be an essential part of appointed counsel contracts.

⁸⁶ The duty to bring problems in placement or other settings to the attention of the court and to pursue needed modifications is recognized by the State Bar of California *Guidelines on Indigent Defense Services Delivery Systems*, *supra* note 40, at 21: "Pursuant to Senate Bill 459 and California Rules of Court, rule 1479 [now renumbered rule 5.663], the ambit of the defender's role has been extended tremendously. Previously, such defender's responsibility terminated at the time of disposition. In contrast, now the defender must monitor how juvenile clients are faring in the Division of Juvenile Justice of the California Department of Corrections and Rehabilitation (formerly, California Youth Authority (CYA)) and whether they are receiving services intended and are in the programs expected, and if not, to vigorously advocate for these things to occur and return the juveniles back to court for a different placement or more explicit court orders. The same obligation now also exists for juvenile defenders regarding clients sent to camp, other placements, or released on probation." (Bracketed reference added.) Thus, the San Mateo County, California, Private Defender Program provides for monitoring of "how juvenile clients are faring in the Division of Juvenile Justice of the Department of Corrections and Rehabilitation (formerly, California Youth Authority (CYA)) and whether they are receiving services intended and are in the programs expected, and if not, calls for attorneys to advocate vigorously for these things to occur and return the juveniles back to court for a different placement or more explicit court orders. The same obligation now exists regarding clients sent to camp, other placements, or released on probation." Private Defender Program of the San Mateo County Bar Association, Attorney Manual, *supra* note 53, § 5.3.3.3.

⁸⁷ CAL.WELF. & INST CODE § 16501.1(f) (16) (West 2011).

⁸⁸ CAL.WELF. & INST CODE § 782 (West 2011).

D. *Qualifications of Delinquency Counsel*

Lawyers are not fungible. Personal injury cases are not best handled by elections law specialists. Divorces are not best handled by admiralty lawyers. And similarly, no one should want children in delinquency cases to be represented by someone whose only qualification is a bar card.⁸⁹ Unfortunately, fewer than half of the appointed counsel contracts for California counties have background or experience requirements for counsel in delinquency cases.⁹⁰ Appointed counsel contracts should require relevant experience, or a specified mentoring or clinical path, for court appointed counsel. The experience requirements should be as high as possible to attract experienced attorneys. However, they should also be sufficiently flexible to allow the system to bring in promising attorneys who are capable of quickly coming up to speed with training and supervision.

For example, a contract may require a specified number of years of practice in a defender's office, or in a practice in which a substantial amount of the attorney's practice was dedicated to delinquency defense. If the experience was in adult public defender work, eligibility to take delinquency appointments would need to be coupled with training in juvenile delinquency law. Dependency practice may also be used to qualify, but it should be coupled with additional training in criminal and juvenile delinquency law.

Some California counties do have these kinds of qualifications written into contracts. For example, San Diego County requires three years of law practice with specified experience in juvenile or criminal matters, or two years on the delinquency panel, or one year in the juvenile public defense,

⁸⁹ American Bar Association, Standing Committee on Legal Aid and Indigent Defendants, Criminal Justice Section, Section of Litigation, National Legal Aid & Defender Association. Report to the House of Delegates, Recommendation, Resolution 107 (adopted by the House of Delegates August 9, 2005) [hereinafter *Report to the House of Delegates*].

⁹⁰ Table 1, *supra*. Some of the contracts require only that appointed counsel be a member in good standing of the State Bar, and others leave qualifications totally up to the contract administrator. Copies of the contracts are on file with the author.

plus specified training requirements.⁹¹ Santa Clara County, California, requires three years of legal practice with at least six months practice in delinquency, with waiver possible based on having handled ten trials and at least four delinquency cases through disposition; or having served one year as a prosecutor, public defender or county counsel in delinquency cases.⁹² Sacramento County, California has four grades of juvenile attorneys requiring ten years of criminal law experience and the handling of at least 60 felony juvenile cases (20 tried to completion) for homicide cases, and at the bottom rung, membership in the State Bar for six months, and representation in at least three delinquency cases for misdemeanor cases.⁹³ San Francisco County, California, has a complex system of requirements pertaining to five classes of delinquency cases, including having handled a specified number of contested jurisdictional hearings on the merits and involving examination of witnesses, handling specified numbers of motions in delinquency cases, meeting the qualifications to serve on the adult criminal law felony trial, percentage of practice dedicated to juvenile law practice, having a working knowledge of criminal law, and having specified appellate law experience.⁹⁴ Other counties similarly require a specific amount of law practice, with an additional requirement for delinquency or criminal practice. A few contracts include requirements for having handled a certain number of trials or cases through disposition.⁹⁵

Where supervision and other needed resources are

⁹¹ County of San Diego, Office of Assigned Counsel, Court Appointed Attorneys' Contract, Attachment A, Criteria for Admittance to Office of Assigned Counsel Class Panels (effective January 1, 2009), http://www.sdcounty.ca.gov/oac/docs/OAC_Panel_Attorney_Contract.pdf [hereinafter *County of San Diego*].

⁹² Independent Defense Counsel Office of Santa Clara County Policies and Procedures (undated), on file with the author.

⁹³ Sacramento County Conflict Criminal Defenders: Qualifications of Juvenile Indigent Defense Panel Attorneys (undated) (on file with the author) [hereinafter *Qualifications of Juvenile Indigent Defense*].

⁹⁴ Bar Association of San Francisco, Application for Delinquency Law Panel (2009-2010) (on file with the author).

⁹⁵ Contracts are on file with the author.

available, attorneys should also be able to qualify for appointments by alternative means. For example, attorneys could qualify by completing a program of supervision or mentoring program with a senior delinquency attorney as specified by the contracting agency.⁹⁶ The contract would need to delineate a substantial program of supervision over a period of time, coupled with stringent training. In jurisdictions with a strong law school clinic for juvenile delinquency practice, contracts could provide a fast track to practice for graduates of the clinical program.⁹⁷

In addition to these basics, contracts should have more stringent requirements for appointment in more serious and complex cases. This includes cases in which the youth may be transferred to adult court, where sex offender registration may be at issue, where a youth's immigration status is an issue, or where other challenges exist that require higher levels of skill and experience.⁹⁸

⁹⁶ By analogy, the draft California dependency guidelines offer two alternative paths for counsel to gain the experience needed before they are qualified to take cases on their own. The first path would provide for supervision of attorneys by a legal services organization, a governmental agency, or a private law firm that has been approved by the presiding juvenile court judge. The second path is mentorship. On this path, counsel would need to have at least six months of experience in the practice of law, and would provide representation under the supervision of a court-approved mentor counsel. (Administrative Office of the Courts, Qualifications and Training Standards: Counsel for Parties in Dependency Proceedings (undated draft) (on file with the author).

⁹⁷ For example, the Loyola Law School Center for Juvenile Law & Policy provides a full academic and clinical program for in juvenile delinquency (<http://www.lls.edu/juvenilelaw/clinic.html> (last visited Sept. 28, 2011)). Its students represent youth in delinquency cases under the supervision of clinical faculty. In jurisdictions that have this kind of program, this experience should be considered among the possible qualifications for delinquency case appointments.

⁹⁸ San Francisco County, California, for example, limits appointments according to the complexity of the case, with increasingly stringent experience requirements for attorneys at each level. Bar Association of San Francisco, Application for Delinquency Law Panel (2009-2010), *supra* note 95.

E. Training Requirements for Delinquency Counsel

While it is essential for contracts to require relevant experience, it is just as important to require appointed counsel to have delinquency-specific training. Delinquency law is constantly evolving, and as is evident from the *Scope of Work* section, competent representation requires a series of skills that cannot be learned through experience alone. Disappointingly, a 2009 survey of California delinquency counsel found that 47% of panel and contract attorneys had no specific juvenile training when they began to represent children in delinquency cases, and that of those who did have some training, 48% had a day or less.⁹⁹

Given the extensive knowledge required to provide competent representation, contracts for delinquency counsel should require a specified amount of training before someone may be appointed.¹⁰⁰ The amount of training should be as great as is realistic to expect, and certainly enough to assure

⁹⁹ MacArthur Juvenile Indigent Defense Action Network/Pacific Juvenile Defender Center, Survey of California Juvenile Defense Counsel: Training and Networking Issues, Los Angeles County Public Defender Juvenile Division 27th Annual Spring Juvenile Delinquency Conference, Los Angeles, March 28, 2009 (unpublished data) (on file with the author); MacArthur Juvenile Indigent Defense Action Network/Pacific Juvenile Defender Center, Survey of California Juvenile Defense Counsel: Training and Networking Issues, January 24, 2009 CPDA Juvenile Defense Seminar, Monterey (unpublished data) (on file with the author) [hereinafter *Training and Networking Issues*].

¹⁰⁰ In fact, California Rules of Court, Standards of Judicial Administration, Standard 5.40(d)(4) requires the presiding juvenile court judge to ensure that “all court-appointed attorneys meet minimum training requirements as a condition of their appointment to juvenile court matters.”

http://www.courtinfo.ca.gov/cms/rules/index.cfm?title=standards&linkid=standard5_40 (last visited Sept. 8, 2011.) Thus, San Bernardino County requires new appointed counsel to be certified by the court as competent to represent children in delinquency matters, and certification requires at least eight hours of training or education in juvenile law, including “Juvenile case law and statutes, the Rules of Court, Judicial Council forms, motions, trial techniques and skills, and writs and appeals.” (Superior Court of California, County of San Bernardino, Local Rule 1692.4 at 83)

that every attorney taking court appointments has the knowledge to competently represent a child in his or her first case.

Some jurisdictions may be fortunate enough to already have a training package for attorneys joining a contract panel or otherwise beginning to take court appointed cases. If so, the contract may simply require the attorney to complete the requisite training package or program.¹⁰¹ For jurisdictions lacking such ready-made reference points, the best way to determine the amount of and components of required training is to catalog the knowledge and skills every practitioner must have to provide competent representation.¹⁰² For example, every juvenile delinquency attorney must be knowledgeable about:

¹⁰¹ In Sacramento, California, for example, application to the Indigent Defense Panel requires attorneys to have specified levels of experience, and to have attended varying amounts of panel training programs or trial skills training depending on the level of the attorney. New attorneys must also watch videotapes of panel trainings before being assigned their first case. (Sacramento County Conflict Criminal Defenders: Qualifications of juvenile Indigent Defense Panel Attorneys, *supra* note 94.) San Diego, County California requires specified experience and has a requirement that attorneys taking appointments have 12 hours of training in the relevant area in the past year and that they watch the five hour California Public Defender's Association Delinquency Seminar video tape, or have completed six hours of juvenile delinquency training in the past year. *County of San Diego*, *supra* note 92. San Francisco County, California, requires that applicants to the Delinquency Law Panel have at least 10 hours of continuing legal education in juvenile law or related issues in the preceding year. (Bar Ass'n of San Francisco, Application for Delinquency Law Panel (2009-2010), *supra* note 95.

¹⁰² The National Juvenile Defender Center has recommended that, as a minimum, juvenile defense counsel receive training in the following specialized issues: child and adolescent development; racial, ethnic and cultural understanding; communicating and building attorney-client relationships with children and adolescents; ethical issues and considerations of juvenile representation; competency and capacity; role of parents/guardians; sexual orientation and gender identity awareness; transfer to adult court and waiver hearings; and zero tolerance, school suspension and expulsion policies. *Ten Core Principles*, *supra* note 41, at 2-3. The Center's forthcoming JTIP - Juvenile Training Immersion Program will provide an even more comprehensive set of training recommendations. *See supra* note 74, and *infra* note 106.

State juvenile law, relevant criminal law, the rules of evidence, rules of court, and case law relevant to delinquency practice;

Ethical duties of delinquency counsel, the purpose of juvenile court, and the scope of his or her employment;

Juvenile court motion practice, writs, and appellate review;

Adolescent development, and mental health defenses for juveniles;

Direct and collateral consequences of juvenile court involvement;

Rehabilitative resources available in the community and how to obtain needed services for clients; and

Post-dispositional duties and strategies for post-disposition advocacy.¹⁰³

This is surely a skeletal list, but it should be clear that training on even these issues will require a chunk of time. As a point of reference, an academic juvenile law course at a law school probably requires twenty-four to thirty-six hours of classroom time, with additional hours of outside reading and preparation. This would not generally include other essential criminal law or trial practice subjects.¹⁰⁴

¹⁰³ The State Bar of California *Guidelines on Indigent Defense Service Delivery Systems* specify that contract counsel “should receive training in understanding child emotional and brain development, substance abuse, mental health issues and educational rights issues, such as special education and educational accommodation. With the scope of representation continually expanding, counsel shall be encouraged to exceed the mandatory minimum training required by the State Bar with special emphases on training in areas of juvenile practice.” State Bar of California, *Guidelines on Indigent Defense Services*, *supra* note 40, at 23.

¹⁰⁴ The dearth of training requirements for lawyers representing children is starkly contrasted by the comprehensive requirements for law enforcement officers who, after all, will be the subject of counsel’s discovery, motions and cross examination. In California, law enforcement officers must have 664 hours of training to obtain a peace officer certificate under Commission on Peace Officer Standards. The 664 hour course includes 560 hours of instruction, plus 104 hours of testing. The Regular Basic Course includes criminal law, property crimes, crimes

Developing training requirements for delinquency counsel will soon become easier as the National Juvenile Defender Center releases its comprehensive training program for delinquency counsel.¹⁰⁵ The Juvenile Training Immersion Protocol (JTIP) will be released by the MacArthur Foundation's Models for Change/JIDAN consortium in early 2012.¹⁰⁶

Contracts should also include annual training requirements to assure that appointed counsel stays current

against persons, general criminal statutes, crimes against children, sex crimes, juvenile law and procedures, controlled substances, laws of arrest, search and seizure, presentation of evidence, people with disabilities, gang awareness, crimes against the justice system, weapons violations, and cultural diversity/discrimination. Post Administrative Manual D-1-3(d) (3), and Minimum Content and Hourly Requirements: Regular Basic Course Requirements (Regular Basic Course (RBC) – Standard Format, July 1, 2010), <http://www.post.ca.gov/regular-basic-course-training-specifications.aspx> (last visited Sept. 8, 2011), and Post Administrative Manual, available at http://lib.post.ca.gov/publications/pam/section_d.pdf (last visited Nov. 2011).

¹⁰⁵ The National Juvenile Defender Center's Juvenile Training Immersion Protocol (JTIP) is a companion project to be released with the national practice standards referenced in note 74, *supra*. The Protocol will vastly increase the availability of high quality training materials for delinquency counsel. The curricula will include: Overview of the Juvenile Justice Process; Role of Juvenile Defense Counsel; Managing the Juvenile Caseload; Interviewing and Counseling the Child Client; Interviewing the Youth's Collateral Contacts; Adolescent Development; Dealing with Difference; Representing Juveniles Before the Detention Hearing; Warrants, Arrest, Interrogation; Detention Advocacy; Probable Cause Hearings; Negotiation; Theory of the Case; Investigation; Pretrial Discovery Practice; Guilty Pleas; Mental Health Challenges, Competency and Fitness to Stand Trial; Challenging Transfer or Waiver to Adult Court; Principles of Motions Practice; Challenging Juvenile Statements; Challenging Identification Testimony; Fourth Amendment; Opening Statement; Cross Examination; Direct Examination & the Defense Witness; Use of Documents and Exhibits; Impeachment; Evidence & Objections; Hearsay & Objections; Use of Experts; Motion for Judgment of Acquittal/Directed Verdict; Closing Arguments; and Special Challenges on the Juvenile Docket. (June 2011) (Draft i-iii) (on file with the author).

¹⁰⁶ For further information about the Juvenile Training Immersion Protocol (JTIP), please contact the National Juvenile Defender Center at "inquiries@njdc.info" or telephone (202) 452-0010.

with juvenile law and practice.¹⁰⁷ For example, contracts may include a requirement that, within one year of being appointed as counsel of record in a delinquency matter, delinquency counsel shall complete a specified number of hours of education and training in specified areas.¹⁰⁸ If there

¹⁰⁷ The State Bar of California *Guidelines on Indigent Defense Service Delivery Systems* require that: "Indigent defense providers who are within their first year of practice of criminal law should complete a minimum of 21 hours of relevant classes or equivalent training dealing specifically with juvenile, mental health and/or criminal law during the course of that first year." The *Guidelines* provide, further, that "[e]xperienced indigent defense providers should also be expected to complete a minimum of 15 hours of relevant legal education classes or equivalent training dealing specifically with juvenile (dependency or delinquency), mental health and/or criminal law, on a calendar year basis." State Bar of California, *Guidelines on Indigent Defense Services*, *supra* note 40, at 18. Counties may also wish to impose annual training requirements. For example, San Diego, California requires panel attorneys (adult and juvenile courts) at least 12 hours of continuing legal education in criminal law each year. *County of San Diego*, *supra* note 92. Similarly, the Bar Association of San Francisco requires appointed Delinquency Law panel attorneys to complete 10 hours of continuing legal education per year in juvenile law or related issues. Bar Ass'n of San Francisco, *Application for Delinquency Law Panel (2009-2010)*, *supra*, note 95. Although it is rare, some counties provide additional perks to ensure training. For example, San Mateo County, California provides an individual education account for each panel attorney for each fiscal year to reimburse for training, continuing legal education and membership in educational organizations. Private Defender Program of the San Mateo County Bar Association, *Attorney Manual*, *supra* note 53, § 2.5.2. Similarly, Merced County requires its indigent services contract firm to "defray training expenses" to assure that attorneys obtain ongoing professional training at a level that does not fall below minimum professional standards. Merced County Contract No. 2003093: *Contract for Indigent Defense Services Between Merced County and the Law Firm Morse, Pfeiff & Garcia (May 20, 2003)*, on file with the author.

¹⁰⁸ For example, the San Mateo County, California, Private Defender Program requires panel members within their first year of practice to complete a minimum of 21 hours of relevant classes or training, and attorneys with more than one year of experience to complete 15 hours per year. Its manual refers to the State Bar *Guidelines on Indigent Defense Services Delivery Systems*, which calls for ongoing training that exceeds State Bar minimum requirements. There is also a separate requirement for delinquency attorneys to have 8 hours of training per year specifically in the area of juvenile delinquency. Private Defender Program of the San

are desired training providers or state certified trainers, contracts may also specify that the training must be obtained from the specified entities. The contract should require counsel to keep a record of all training attended as part of its quality assurance process.¹⁰⁹

F. Compensation

The preceding sections have focused on the importance of including key components of delinquency practice and attorney qualifications in appointed counsel contracts. However, those are empty requirements unless the contract also includes provisions that adequately compensate counsel for having the requisite qualifications and doing the expected work. Compensation must not be considered in a vacuum. It must be closely tied to the amount and complexity of work required to provide competent representation in each individual case.¹¹⁰

Mateo County Bar Association, Attorney Manual, *supra* note 53, §§ 2.5.3, 5.3.3.7.

¹⁰⁹ San Bernardino County, California, requires attorneys to be recertified for appointment every three years, and part of the process requires to provide evidence of having completed at least eight hours of training directly related to juvenile proceedings. (Superior Court of California, County of San Bernardino, Local Rule 1692.5 at 83.)

¹¹⁰ The National Legal Aid and Defender Association's longstanding guidance is that compensation must reflect the following factors: (1) the customary compensation in the community for similar services rendered by privately retained counsel to a paying client or government or other publicly-paid attorneys to a public client; (2) the time and labor required to be spent by the attorney; and (3) the degree of professional ability, skill and experience called for and exercised in the performance of the services. National Legal Aid and Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1985), Guideline III-10, http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts#threeonezero (last visited Oct. 4, 2011.). Compensation systems must also be designed to provide for parity of compensation between prosecutors and defense attorneys, between institutional public defenders and appointed counsel, and among jurisdictions. Benner, *supra* note 28, at 309-321; *Justice Denied*, *supra* note 19, at 61-64. Although this article focuses primarily on the delinquency specific aspects of compensation, the broader issues of parity

In California, the extent to which counties succeed in tying work and qualifications to compensation varies with the payment system used by the county. In some counties, counsel are paid by the hour, and there are separate provisions for ancillary services such as investigators and experts. In other counties, compensation is based on a fee schedule that pays counsel for each type of hearing or activity undertaken, again with separate provisions for ancillary services.¹¹¹ In still other counties, compensation is based on a flat fee per case, irrespective of the type of case. And finally, in some counties, compensation is provided as part of a lump sum awarded to an office or group of attorneys to provide representation in a certain number of cases or for a specified amount of time. The provisions for ancillary services in flat fee and lump sum contracts vary. Some counties handle all ancillary services through a case-by-case prior approval through the court.¹¹² Others require the contract program itself to handle requests for ancillary services, sometimes through a separate fund administered by the program.¹¹³ Others include the obligation to cover some or all ancillary services in the negotiated flat fee or lump sum.¹¹⁴

The contract system best designed to produce competent representation is one that does not place cost

are essential is assuring competent representation.

¹¹¹ The right to effective representation includes the right to ancillary services. They include the services of investigators, experts and others reasonably needed to prepare the defense. *People v. Blair*, 36 Cal.4th 686, 733-34 (2005).

¹¹² In Calaveras County, Glenn County, and San Francisco County, California, for example, contracts or program rules require attorneys to submit requests for appointment of experts. (Copies of the contracts are on file with the author.).

¹¹³ In Fresno County, Madera County and Riverside County, California, for example, there are separate funds to cover ancillary services. (Copies of the contracts are on file with the author.).

¹¹⁴ For example, Alameda County and Fresno County include investigator services in the lump sum contracts, and Los Angeles County requires counsel to cover investigators in their flat fee. (Copies of the contracts are on file with the author.).

containment before quality.¹¹⁵ Hourly rate compensation based on a fair hourly rate is the most likely system to produce competent representation because it is based on the work actually performed.¹¹⁶ While it is possible to provide competent representation under a flat fee or lump sum system, that can only happen if the fee or lump sum is based on an objective workload evaluation that takes into account the amount of time needed to do the things required for competent representation, and if there are provisions for individual situations in which additional resources are required. The danger is that flat fees and lump sums are negotiated, instead with an eye to cost cutting, and that the elements of competent representation are nowhere to be found in the discussion.¹¹⁷

At the very least, systems using flat fee or lump sum compensation must anticipate and provide for additional funding in serious and complex cases. Cases involving homicide or sexual assault cases may, for example, require substantial additional compensation. Similarly, additional compensation should be provided in cases where competence to stand trial or transfer to adult court are at issue.

Some counties in California do have hourly rates specifically geared to delinquency. Other counties pay

¹¹⁵ *Contracting for Indigent Defense Services*, *supra* note 25, at 13 ; The Spangenberg Group, Questions and Answers Concerning Fixed Price Contracts for Indigent Defendants (American Bar Association, Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program (1996); *Report to the House of Delegates*, *supra* note 90.

¹¹⁶ The preference for hourly rate compensation assumes that hourly rate is reasonable in light of accepted professional standards; that fees are not artificially capped or cut by program administrators; and that separate compensation is provided for ancillary services.

¹¹⁷ Gerald Uelman, Executive Director of California's Commission on the Fair Administration of Justice has called the spread of low-bid, flat-fee private firms "a race to the bottom." K. De Sá, *Legal help for poor defendants called inadequate*, Mercury News, Apr. 18, 2008. See also Jonathon Shacat, *Proposal for Indigent Defense Concerns Lawyers*, Arizona Range News, Aug. 10, 2011, <http://www.willcoxangenews.com/articles/2011/08/10/news/news08.txt> (last visited Oct. 4, 2011).

delinquency counsel the same rates they pay criminal court counsel or dependency attorneys.¹¹⁸ Hourly rates range from \$65 per hour to \$140 per hour, with some counties scaling payments based on the difficulty of the case and/or the qualifications of the attorney.¹¹⁹

Other counties have a base rate per case and separately compensate counsel for each hearing or other activity involved in the case.¹²⁰ For example, San Diego County pays \$700 as the base for felonies, and has a schedule of additional rates for additional hearings. Their fee schedule includes counsel's participation in non-court activities that are relevant to defense of the case. This includes attending lineups, filing writs, and attending school attendance review board hearings. The San Diego County fee schedule is set forth in **Table 2**.¹²¹

¹¹⁸ For example, Contra Costa County, California pays the same rates to attorneys in adult and juvenile cases, but scales the hourly rates according to the seriousness of the offense. County of Contra Costa, Contract for Legal Representation of Indigents (Contract #C3167100), Criminal Conflict Program Attorney Fee Schedule, to be used for cases appointed July 1, 2008 through December 31, 2010 (on file with author).

¹¹⁹ The hourly rates presented are the rates reported in response to the June 2010 Public Records Act Requests to the counties. Alpine County pays \$90 per hour; Contra Costa County pays \$65 to \$140 per hour depending on the seriousness of the case; Humboldt County pays \$65 per hour; Kern County pays \$90 per hour for hearings, with additional rates for other activities; Lassen County pays \$70 per hour; Marin County pays between \$70 and \$95 per hour depending on the seriousness of the charges; Mendocino County pays \$65 per hour. Nevada County pays \$75 per hour; Plumas County pays \$70 per hour; Sacramento County pays between \$60 and \$90 per hour depending on the seriousness of the charges; San Francisco pays between \$66 and \$100 per hour depending on the seriousness of the charges; San Joaquin County pays \$75 per hour; Solano County pays \$75 per hour; and Stanislaus County pays \$75 for misdemeanors and \$85 for felonies. (Contracts are on file with author.)

¹²⁰ This approach is taken by Alameda County, Kern, Orange, San Bernardino, San Diego, San Mateo, and Santa Clara Counties. (Contracts are on file with the author.)

¹²¹ *County of San Diego, supra* note 92, *Exhibit G, Fee Documentation Schedule 2009* (effective January 1, 2009), http://www.sdcountry.ca.gov/oac/docs/OAC_Fee_Schedule_Jan_2009.pdf, (last visited Sept. 8, 2011).

Table 2: Fee Schedule Example (San Diego County)

<p><u>Felony</u> \$700: Flat fee \$250: Jurisdictional hearing full day \$175: jurisdictional hearing half day \$50: W&I 777(e) hearing (probation violation (PV)) \$50: Review hearing \$300: Flat fee when relieved prior to hearing</p> <p><u>Misdemeanor</u> \$225: Flat fee \$200: Jurisdictional hearing full day \$150: jurisdictional hearing half day \$50: W&I 777(e) hearing \$50: Review hearing \$75: Flat fee when relieved prior to hearing</p> <p><u>Juvenile Counseling</u> \$75: Counseling of minor who is involuntarily hospitalized</p> <p><u>SARB Hearing</u> \$50: School attendance review board</p> <p><u>Probation Violations</u> \$200: Base, PV heard independently, underlying case a felony [new petition] \$150: Jurisdictional hearing full day \$100: Jurisdictional hearing half day</p> <p>\$100: Base, PV heard independently, underlying case a misdemeanor [new petition] \$100: Jurisdictional hearing full day \$75: Jurisdictional hearing half day</p>

601 Truancy

\$125: 601 Truancy

707 Hearings (transfer to Adult Court)

\$45/hour (maximum \$1,700): Class III Base [all other felonies not covered by higher classes]

\$200: Hearing fees full day

\$150: Hearing fees half day

\$60/hour (maximum \$2,400): Class IV Base

[any felony that would constitute a strike, all crimes against the person, any attempts of these things]

\$65/hour (maximum \$2,700): Class V Base [murder, attempted murder, premeditated murder]

Other Payments

\$100: Lineup

\$400: Writ in any court

\$1000: Habeas, Base fee

\$400: Trial sessions full day

\$200: Trial sessions half day

\$50: Restitution hearing, felony, stipulated

\$100: Restitution hearing, felony, with testimony

\$150: Restitution hearing, felony, after first appearance with testimony, full day

\$100: Restitution hearing, felony, after first appearance with testimony, half day

\$50: Restitution hearing, misdemeanor

\$200: Witness Counseling, felony, full day

\$150: Witness Counseling, felony, half day

\$150: Witness Counseling, misdemeanor, full day

\$100: Witness Counseling, misdemeanor, half day

Additional payment for ancillary services when reasonable and necessary at specified rates.

However, contracts for other counties in California are disturbingly disconnected from the requirements of competent representation. In some counties, attorneys are compensated based on a per case amount that pays them only a few hundred dollars for the entire case. On one Los Angeles County panel, contract attorneys are paid \$319 per delinquency case, regardless of whether the case involves shoplifting or murder.¹²² Under the specific terms of the contract, this sum must cover:

[I]nvestigation of cases, interview and preparation time, all necessary court appearances, all progress reports and change of plan reports for juveniles, hearings, motions, court waiting time, and trials at the trial court level and for writ proceeding [sic] and the filing of any notice of appeal that may be required. . .including legal research, preparation of documents, secretarial and clerical support services, administrative services including payment of all attorneys, investigators, and other staff and travel.¹²³

Again, if counties use flat fees or lump sums for compensation, the amount must fairly compensate counsel for the work they are expected to do. That work must be defined

¹²² South Central Indigent Juvenile Panel Contract Amendment and Extension – Conflict Administrator Services at Compton Juvenile Court (Contract #71826 – SYN #54 of 10-20-98: November 1, 2010 through October 31, 2011.) Contracts for the other 8 panels in Los Angeles County pay flat fees of \$324 to \$345 per case. (Contracts are on file with author.) Los Angeles County pays appointed counsel for adults on an hourly basis, ranging from \$69 for misdemeanors to \$100 for the highest level felonies. (Los Angeles County Bar Association, Indigent Criminal Defense Appointments Program, <http://www.lacba.org/showpage.cfm?pageid=24> (last visited on Mar. 2, 2011).)

¹²³ Juvenile Delinquency Indigent Defense Representation at Compton Juvenile COURT (Contract between the County of Los Angeles and South Central Indigent Panel, October 20, 1998.) Identical provisions are contained in the contracts for all but one of the other 8 Los Angeles County panels. (Contracts are on file with the author.)

in terms of the elements of competent delinquency representation,¹²⁴ with compensation based on the expected amount of time needed to perform each activity.¹²⁵ **Table 3** outlines those activities in relation to an uncomplicated delinquency case.

¹²⁴ See sections IV.A. *Ethical Obligations and Role of Delinquency Counsel*, IV.B. *Period of Representation*, and IV.C. *Scope of Work*.

¹²⁵ See The Spangenberg Group, *Keeping Defender Workloads Manageable* 8-9, Indigent Defense Series No. #4, United States Department of Justice, Office of Justice Programs, Bureau of Justice Assistance (January 2001) [hereinafter *Keeping Defender Workloads Manageable*].

Table 3: Expected Attorney Activities in an Uncomplicated Delinquency Case

For purposes of determining per case compensation (if hourly rate compensation is not used), this is a sample list of basic attorney activities expected in an uncomplicated delinquency case. The system should assign an amount of time to each activity. The total hours should be multiplied by hourly compensation to reach per case compensation. The amount of time allotted for each activity will be different depending on the kinds of paralegal and other support services available to the attorney.¹²⁶

- Review charging papers, arrest report and any court file;
- Interview the client
- Interview the parents
- Obtain relevant records
- Contact witnesses, perform other relevant investigation
- File a discovery motion
- Research legal defenses
- Research, draft and file relevant motions (suppression of illegally obtained evidence, suppression of statements, etc.)
- Discuss possible plea agreements with the prosecutor
- Re-interview the client either to prepare for trial or advise the client in anticipation of a plea; communicate with parents
- Represent the client in arraignment and detention hearing
- Represent the client in adjudication or plea hearing
- Prepare for disposition hearing
- Represent the client in disposition hearing (with additional client and parent interviews for each hearing)
- Advise the client of direct and collateral consequences, appeal and sealing rights

¹²⁶ See also section IV.C. *Scope of Work*.

- Monitor post-disposition progress
- Assure that the client's needs are met with respect to education, mental health, social services and other issues related to delinquency case
- Represent the client in status hearings, violation hearings or modification hearings

This list expands in more complex cases such as those involving competence, mental defenses, transfer to adult court, expert testimony on other issues, and writs or appeals. Each expected activity should be factored into the compensation structure.

In addition, attorneys must be separately compensated for the costs of routine support services needed for competent representation. The courts have made it very clear that indigent defense compensation systems may not be structured in a way that places the attorney's financial interests potentially in opposition to the needs of the client.¹²⁷

Support services include the services of experts, investigators, social workers, interpreters and other consultants needed to prepare and present the case.¹²⁸ The law is clear, for example, that counsel must make an adequate investigation of the case before even determining a case strategy.¹²⁹ Thus, the expectations for investigation and use of consultants and experts should be spelled out in the

¹²⁷ *People v. Barboza*, 29 Cal.3d 375, 378–79 (1981). Even when the system itself is determined not to be deficient, counsel in an individual case may have a fee-related conflict that results in a violation of the Sixth Amendment right to effective representation. *People v. Doolin*, 45 Cal.4th 390, 419-22 (2009). See also, Benner, *supra* note 28, at 307-9.

¹²⁸ The State Bar of California's *Guidelines for Indigent Defense Services Delivery Systems* specifically addresses this: "To provide effective representation, juvenile practitioners should be provided with the necessary resources, including but not limited to, ancillary services such as investigators, social workers and other experts. These services are essential in light of the new requirements imposed upon juvenile defenders to ensure that the ordered services are being provided." State Bar of California, *Guidelines for Indigent Defense Services*, *supra* note 40, at 23.

¹²⁹ *Strickland*, 466 U.S. at 681; *In re E.S.*, 171 Cal. App. 4th at 1238.

contract, along with provisions for compensation separate from the attorney's rate. The same is true for other kinds of reasonably necessary ancillary services.¹³⁰ Also, contracts should provide for separate compensation for extraordinary expenses incurred in the case. This includes, for example, travel expenses incurred in interviewing interview witnesses, or experts or consultants whose cost exceeded the normal amount allowed under contract provisions.

This, too, was one of the more troubling findings in the analysis of California appointed counsel contracts. The use of investigative, social work and expert/consultant services falls squarely within the duties required of competent counsel in all cases. However, some contracts provide for payment beyond the attorney's base compensation only in extraordinary circumstances.¹³¹ Also, contracts that provide for separate payment of specified support services may still present difficulties if approval is not quickly and routinely given. Given the short time frames involved in juvenile cases and the undeniable possibility that counsel may be denied approval for reasonably necessary services, such requirements may interpose a barrier to competent representation.

A few counties have dealt with these issues by providing a fixed annual amount of money for ancillary services.¹³² That approach is better than requiring prior approval, but depends on the adequacy of the fund. The fund

¹³⁰ The constitutional right to effective assistance of counsel includes the right to reasonable necessary ancillary services such as experts and investigators. *Corenevksy v. Superior Court*, 36 Cal.3d 307, 319-320 (1984).

¹³¹ For example, in Tuolumne County, California counsel is required to cover all legal assistant, investigator, and other personnel necessary to the proper provision of services at the attorney's own expense, and for anything further must apply to the court for such services as an "extraordinary" cost. County of Tuolumne, Agreement for the Performance of Second Level Conflict Public Defender Services (Aug. 17, 2004) (on file with author.)

¹³² For example, San Bernardino County, California provides a trust fund for ancillary services, including investigators, experts, and social workers. Superior Court of California, County of San Bernardino Delinquency Contract (July 1, 2007).

could be exhausted by one or two cases with extensive consultant and expert expenses. Consequently, delinquency counsel could still find themselves without the ability to hire investigators, social workers, experts, or other necessary consultants, or having to apply for prior approval for routine expenses.

Other counties have provided a less perilous approach. For example, Napa County allows counsel to spend up to \$1500 on investigators or experts without prior approval, and then provides for additional funding for other “extraordinary expenses.”¹³³ This covers most expected ancillary services. It also saves counsel and the county the headache of going through an approval process for resources that should be granted as a matter of course.

Still other counties have managed this issue through including a fee schedule for expected support services (investigators, social workers, experts, interpreters) in the contract.¹³⁴ In some, a process for oversight of unwarranted expenditures is provided.¹³⁵ In this kind of system, contracts may still retain a prior approval requirement for unusual or extraordinary expenses. Another way to handle this is to allow attorneys to spend up to a certain amount per case without court approval.¹³⁶

¹³³ *Napa County Agreement*, *supra* note 64.

¹³⁴ San Diego County, California provides a fee schedule for ancillary services. *County of San Diego*, *supra* note 92; *Exhibit “F,” Allowable Rates for Ancillary Expenses Without County of Judicial Approval*; and *Exhibit “G” Fee Document Schedule 2009* (effective Jan. 1, 2009), http://www.sdcountry.ca.gov/oac/docs/OAC_Ancillary_Expense_Rates_-_Jan_2009.pdf; http://www.sdcountry.ca.gov/oac/docs/OAC_Fee_Schedule_Jan_2009.pdf (last visited Sept. 8, 2011.)

¹³⁵ *Id.* and Rules and Regulations of the San Diego Office of Assigned Counsel, *Appendix A to Panel Attorney Contract* (effective Jan. 1, 2009), http://www.sdcountry.ca.gov/oac/docs/OAC_Rules_and_Regs.pdf (last visited Oct. 3, 2011.)

¹³⁶ For example, Napa County, permits attorneys to spend up to \$1500 per case without court approval, *Napa County Agreement*, *supra*, note 64.

Whatever compensation system is used must pay counsel to do the things required for competent representation and preparation of the case.

G. Quality Assurance

Contracts should include provisions for quality assurance with respect to individual attorneys, and for the appointed counsel system itself. On an individual level, there should be periodic evaluations of delinquency attorneys, and the contract should indicate the nature of the evaluation. Contracts could provide, for example, for evaluation by an experienced delinquency counsel or consultants. Thus, the Alameda County speaks of the need to “assess the continued competence, skill level, diligence, integrity and professionalism of the member at the level required for the member’s current class classification.”¹³⁷ Contracts should also describe the process for handling any identified deficiencies in performance. A contract could specify, for example, that the attorney must undergo additional training, mentoring on “probation,” or even termination/non-renewal of the contract.¹³⁸ Many California counties do have contract provisions covering at least some of these elements.

¹³⁷ Rules and Regulations of the Alameda County Bar Association Criminal Court Appointed Attorneys Program (effective Jan. 12, 2010) (on file with the author) [hereinafter *Rules and Regulations of the Alameda County Bar Association*]. Placer County, California similarly requires systematic supervision and evaluation of staff performance conducted personally by the head of the contract attorney’s office, with regular formalized comments from judges, other defense lawyers and clients. Contract For Legal Representation of Indigent Persons in the County of Placer (undated) (on file with the author). Riverside County, California, require the contracting attorneys to annually evaluate the performance of subcontracting attorneys, including personal observation in a courtroom setting, review of participation in MCLE programs, and other characteristics such as involvement in efforts to improve the juvenile justice system in Riverside County. *Riverside Co. & Burns & Oblachinski, supra*, note 67.

¹³⁸ The Alameda County contract provides an extensive process for assessing and addressing performance problems. *Rules and Regulations of the Alameda County Bar Association, supra*, note 137 at 7-13.

The oversight system should also provide for regular review of attorney caseload and workload.¹³⁹ The process should also take into account the impact on workload of any non-delinquency cases being handled by the attorney.¹⁴⁰ In jurisdictions where this is an issue, the contract should specify maximum caseload or workload limits. The long existing national caseload standard for delinquency cases is 200 cases per year.¹⁴¹ The prevailing view is that it is more useful to employ a weighted workload measure that considers specified elements. These elements include the complexity of cases, the amount of time needed to complete various tasks, the availability of support services, and other factors that impact the amount of time involved in representation.¹⁴² However, as of now, there is no standardized measure for this. For that reason, contracting agencies must develop a framework that works for their jurisdiction. Workload should be determined in light of the activities expected of counsel in the scope of work section of the contract. This will help to ensure adequate representation of juveniles in court proceedings.

It is also critical that any system for appointed counsel provide an accessible mechanism for complaints or other

¹³⁹ For purposes of the discussion in this article, “caseload” refers to the number of cases a lawyer handles, and “workload” refers to the amount of effort, measured in units of time, for the lawyer to complete work on the caseload. *Keeping Defender Workloads Manageable*, *supra* note 126, at 1-3, 9. The distinction is very important in juvenile practice, because of the multiplicity of responsibilities counsel has even in a relatively simple case, and because of the duty of continuing representation in the post-disposition phase.

¹⁴⁰ *Contracting for Indigent Defense Services*, *supra* note 25; *Keeping Defender Workloads Manageable*, *supra* note 126; *Ten Core Principles*, *supra* note 41, at 2.

¹⁴¹ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Report on the Courts, Standard 13.12, at 186 (1973); ratified more recently in American Council of Chief Defenders Statement on Caseloads and Workloads (Aug. 24, 2007), http://www.nlada.org/DMS/Documents/1189179200.71/EDITEDFINALVERSIONACCD_CASELOAD_STATEMENTsept6.pdf (last visited Sept. 8, 2011).

¹⁴² Majd, *supra* note 20, at 543-83; *Keeping Defender Workloads Manageable*, *supra* note 126, at 8-9.

feedback from children, families, and court personnel.¹⁴³ Contracts should alert appointed counsel that there is such a process. It should convey that the contract administrator will investigate all complaints, provide a written response, and take prompt action to address deficiencies identified in the investigation. This action may include any needed corrective action or discipline of individual attorneys, or changes needed in the contract appointment system.

Having a meaningful system for oversight serves multiple goals. First, it helps to assure that youth are receiving the amount and quality of representation they are entitled to receive. Second, it provides a mechanism through which the system can respond to suggestions or complaints. Third, it gives a structure for due process when conflicts or complaints arise. And finally, it affords contract administrators with feedback needed to make needed adjustments or changes to appointed counsel programs. Each of these goals contributes to the quality of justice and the integrity of the juvenile justice system.

H. Independence of Contract Administration

Finally, the research for this project strongly suggests that administration of appointed counsel systems should be placed in an independent entity, and not the court or any agency closely tied to county fiscal operations. The importance of independence has been recognized by every entity that has scrutinized appointed counsel systems.¹⁴⁴

¹⁴³ See, e.g., court user comments in *Delinquency Court Assessment*, *supra* note 31, at 84-7. Some California counties have working complaint processes. For example, in Sacramento County, the Conflict Criminal Defender accepts complaints from any source, and has a process for informal or formal referral to the Peer Review Subcommittee within fifteen days, followed by extensive provisions for investigation, a formal hearing, findings and consequences. Policies and Procedures of the Sacramento County Bar Association's Indigent Defense Panel Committee and the Indigent Defense Appellate Committee, 16-21, available at <http://www.sacbar.org/pdfs/IDP%20Policies%20and%20Procedures.pdf> (last visited November 12, 2011).

¹⁴⁴ American Bar Association, Standards for Criminal Justice: Providing

While this issue was not part of the original research objectives, concerns were repeatedly expressed by juvenile delinquency counsel about perceived pressures in relation to the appointment system. Some attorneys expressed concern about being “kicked off” the panel for aggressive advocacy or speaking out about compensation.¹⁴⁵ Others complained about denial of requests for experts and other support services based on cost, not the merits of the application.¹⁴⁶ Still others asked us not to highlight the obligation to provide post-disposition representation because the county would not compensate them for providing it.¹⁴⁷ Attorneys also complained that some courts acquiesce in inadequate representation by attorneys who quickly plead their clients without investigation because that makes the courts run more quickly and easily.¹⁴⁸

Our system of justice can function properly only if each player has the ability to function without actual or perceived pressures that inhibit or thwart zealous representation. Attorneys must be able to investigate, hire experts, file motions, request contested hearings, force the prosecutor to prove every element of the case, pursue modifications of court orders, and challenge court rulings on appeal, without the fear of losing their livelihood. The best solution is to place the appointment process, compensation, and oversight in the hands of an independent entity such as a bar association.¹⁴⁹

Defense Services(1990); *Commission on Homelessness*, *supra* note 9, at 12; *Justice Denied*, *supra* note 19, at 160-161.

¹⁴⁵ These comments were offered in response to a survey of delinquency attorneys and contemporaneous interviews with the author, *Training and Networking Issues*, *supra* note 100.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*, see also M. Hennessey-Fiske, *Juvenile Justice Diverges in Court*, L.A. Times (June 14, 2010).

¹⁴⁹ In California, local bar associations handle delinquency counsel appointments in several counties, including Alameda, Sacramento, San Joaquin, and San Francisco. In Sacramento County, for example, indigent defense is handled by a twelve member Indigent Defense Panel, with a

V. Conclusion

The quality of legal representation plays a critical role in assuring justice for individual youth, reducing the societal costs of juvenile crime, and assuring the integrity of the justice system. With so much at stake, youth need legal assistance that is knowledgeable, skilled and zealous. Delinquency representation requires a complex set of specialized skills that includes knowledge of criminal and juvenile law, juvenile court procedure, trial and appellate skills, adolescent development, juvenile adjudicative competence, rehabilitative services, and collateral consequences of court involvement. The systems providing appointed counsel for young people in juvenile proceedings must be designed to provide this specialized legal representation.

Research into appointed counsel contracts in California reveals a disappointing lack of attention into these basic components of delinquency representation. The prevalent use of generic contracts for multiple kinds of cases means that cases are regularly handled without reference to critical issues such as post-disposition representation. The failure of many contracts to include qualifications for employment represents a missed opportunity for contracting agencies to obtain experienced, well-trained counsel and to provide ongoing training requirements and quality assurance. More importantly, counsel appointed under these contracts are left with little idea of what is expected of them, and no basis from which to negotiate resources and conditions of employment that are needed to provide competent representation. The contracts also provide a window into troubling deficiencies with respect to compensation, oversight, and lack of independence for appointed counsel.

Competent representation is most likely to occur if appointed counsel contracts include the elements that make

Qualifications Subcommittee, Education Subcommittee, and Peer Review Subcommittee. To assure independence, members of the Panel may not be employees of the County of Sacramento. *Qualifications of Juvenile Indigent Defense*, *supra* note 94, at 6.

juvenile delinquency representation its own specialty, and provide adequate compensation for each element. Appointed counsel systems are most likely to uphold the right to competent delinquency representation if attorneys are experienced and properly trained. The integrity of the system is most likely to be protected if appointed counsel systems operate independently and have meaningful oversight.

By including delinquency-specific ethical requirements, scope of work, experience, training, compensation, quality assurance and oversight, and independence of the appointment system, contracts will help to ensure that youth are represented by qualified counsel who know what is expected and that counsel are compensated for providing the full range of services required for competent representation. In this way, both the parties to the contract, and the youth whose lives are in the balance, will receive the benefit of the bargain.