

BROKEN CONTRACTS:

REIMAGINING HIGH-QUALITY
REPRESENTATION OF YOUTH
IN CONTRACT AND APPOINTED
COUNSEL SYSTEMS

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INTRODUCTION

The background of the slide is an abstract, fluid pattern of wavy lines. The colors transition from a deep, dark blue at the top to a vibrant purple in the middle, and finally to a bright, glowing orange-yellow at the bottom left corner. The overall effect is one of dynamic movement and energy.

In 1967, the United States Supreme Court issued its landmark ruling in *In re Gault*,¹ affirming that children in delinquency court are entitled to many of the constitutional protections that apply to adults in criminal court. Chief among these constitutional protections is the right to counsel:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child “requires the guiding hand of counsel at every step in the proceedings against him.”²

The *Gault* Court left it to states to determine how to implement the ruling and ensure the constitutional rights of young people. Many states further delegated the responsibility to counties, and even to individual courts. This has created a patchwork of approaches and systems for ensuring appointed counsel, meaning that the protection of children’s constitutional right to counsel varies greatly depending on where in the country—and even where within a state—a child faces delinquency charges.

Some states and counties have organized public defender offices. Public defender systems generally employ full- or part-time attorneys who earn salaries and work within an office management system. Many require their employee attorneys to attend regular training relevant to their defense practice and have experienced attorneys that serve as supervisors and mentors to newer public defenders.

Most young people who face delinquency charges, however, are not represented by salaried public defenders. All states and counties use private lawyers to represent some youth in delinquency court, through an assortment of contracts, court appointments, and assignment systems. These private lawyers are often solo practitioners or members of small firms who are paid flat

fees or hourly rates to represent children in delinquency court. They do not benefit from the structure, management, oversight, training, mentorship, or support of a salaried public defender system.

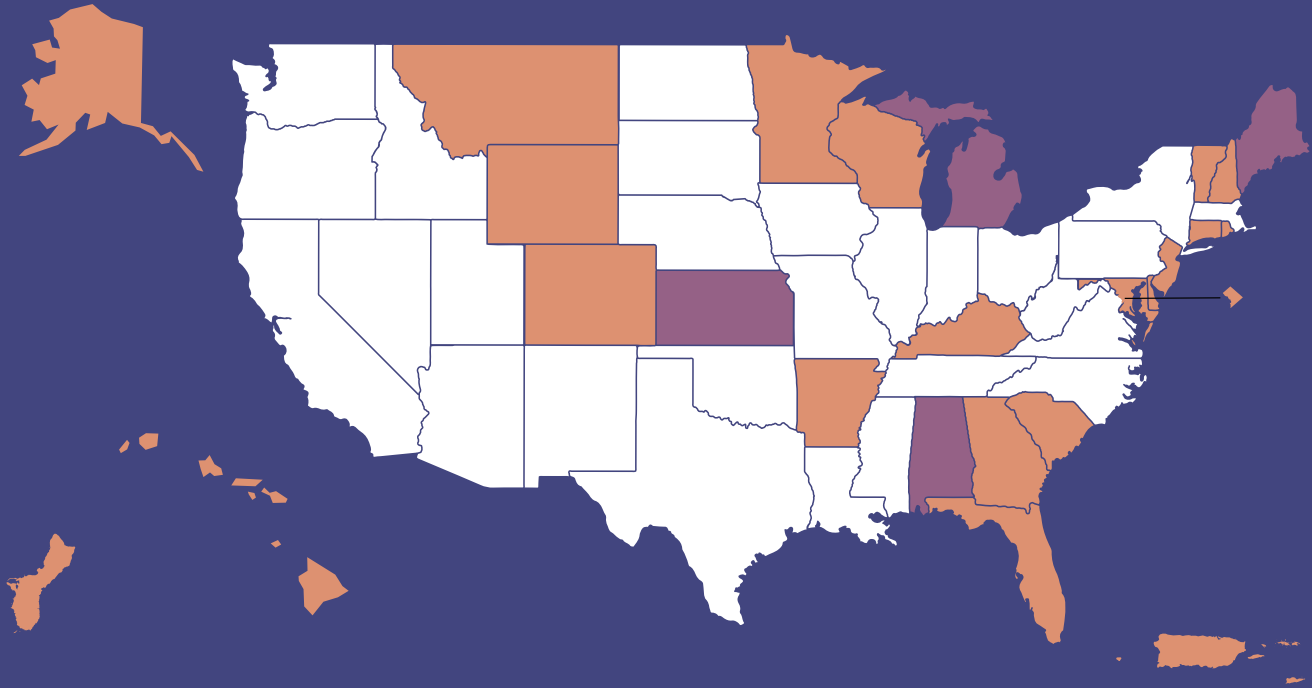
No comprehensive data exists regarding how many young people are represented by public defenders or contract, appointed, or assigned counsel in delinquency courts. To create a sense of what types of attorneys represent youth, NJDC conducted a review of statutes and court rules governing the appointment of counsel in all 50 states, DC, Guam, and Puerto Rico.


The appointment-of-counsel process in juvenile court defies easy categorization across states. The map on the following page illustrates the *primary* juvenile defense system structures used to appoint or assign defense attorneys to youth in delinquency courts in each state.

With more than 3,000 counties in the United States, each operating juvenile justice systems in a variety of ways, state generalizations can never capture the full picture of what is happening county-by-county. Nonetheless, having a sense of where salaried public defender systems predominate and where contract or panel attorney systems predominate can be useful.

¹ *In re Gault*, 387 U.S. 1 (1967).
² *Id.*

WHO ARE THE LAWYERS THAT REPRESENT YOUTH IN DELINQUENCY COURT?



 *PRIMARILY* **SALARIED** PUBLIC DEFENDERS ACROSS THE STATE (WHETHER THEY WORK FOR A STATEWIDE AGENCY OR INDIVIDUAL COUNTY/JUDICIAL DISTRICT DEFENDER OFFICES), WHO ARE SUPPLEMENTED BY CONTRACT OR PANEL COUNSEL WHO CAN HANDLE CONFLICTS AND/OR OVERFLOW CASES

 *PRIMARILY* A COUNTY-BY-COUNTY CONTRACT OR APPOINTMENT SYSTEM *WITHOUT* **SALARIED** PUBLIC DEFENDERS

 THE STATE OR COUNTIES PROVIDE A COMBINATION OF SALARIED PUBLIC DEFENDERS, CONTRACT DEFENDERS, AND/OR PANEL ATTORNEYS

For purposes of this report and toolkit, we will use “contract counsel,” “appointed counsel,” or “assigned counsel” interchangeably to refer to attorneys who represent youth in delinquency court and who are neither salaried public defenders nor privately retained by the youth, regardless of the administrative mechanism used to appoint or assign the lawyer to represent youth.³

While talented lawyers practice in each type of defense system, studies that compare the results achieved by public defenders versus appointed counsel consistently find that people represented by appointed counsel fare worse than those represented by public defenders or retained counsel.⁴ States, counties, and courts must actively work to ensure children receive the same quality of representation regardless of the type of lawyer assigned to represent each youth, or risk violating *Gault*.

Access to counsel is more than simply placing a lawyer in the room. Failure to provide qualified counsel who can advocate effectively for a client can result in constructive denial of counsel.⁵ Specifically with respect to juvenile defense systems, the United States Department of Justice has pointed out that “where lawyers regularly fail to advocate for clients in a manner traditionally expected of effective counsel and/or where lawyers lack the structural support necessary to do their jobs, it is tantamount to the system’s failure to appoint counsel.”⁶

Fortunately, much can be done to improve appointed counsel systems and ensure young people’s constitutional rights are protected. This report and the accompanying toolkit provide policymakers and managers of appointed counsel systems with information and support to improve the quality of representation provided by appointed counsel.

The *Gault* decision promised all children the right to counsel under the U.S. Constitution. The quality of representation a child receives should reflect neither the county in which they live nor the system used to uphold their constitutional rights.

METHODOLOGY

In May 2018, the National Juvenile Defender Center (NJDC) convened more than 30 juvenile defense system experts from across the country for a full-day discussion of how jurisdictions operate delinquency contract counsel systems, how those systems could be improved, and the essentials of contract counsel systems that support attorneys who provide high-quality defense to young people.

From that convening, participants formed three working groups focused on subject areas identified as crucial to quality contract counsel systems: Leadership and Oversight, Contracts and Fees, and Data. Over the course of the following year, those working groups identified best practices and the resources contract counsel systems need to begin to improve their structures and the quality of representation provided.

The expertise of the convening participants informed this report, and the research, drafting, and editing done by the members of the working groups created the accompanying toolkit.

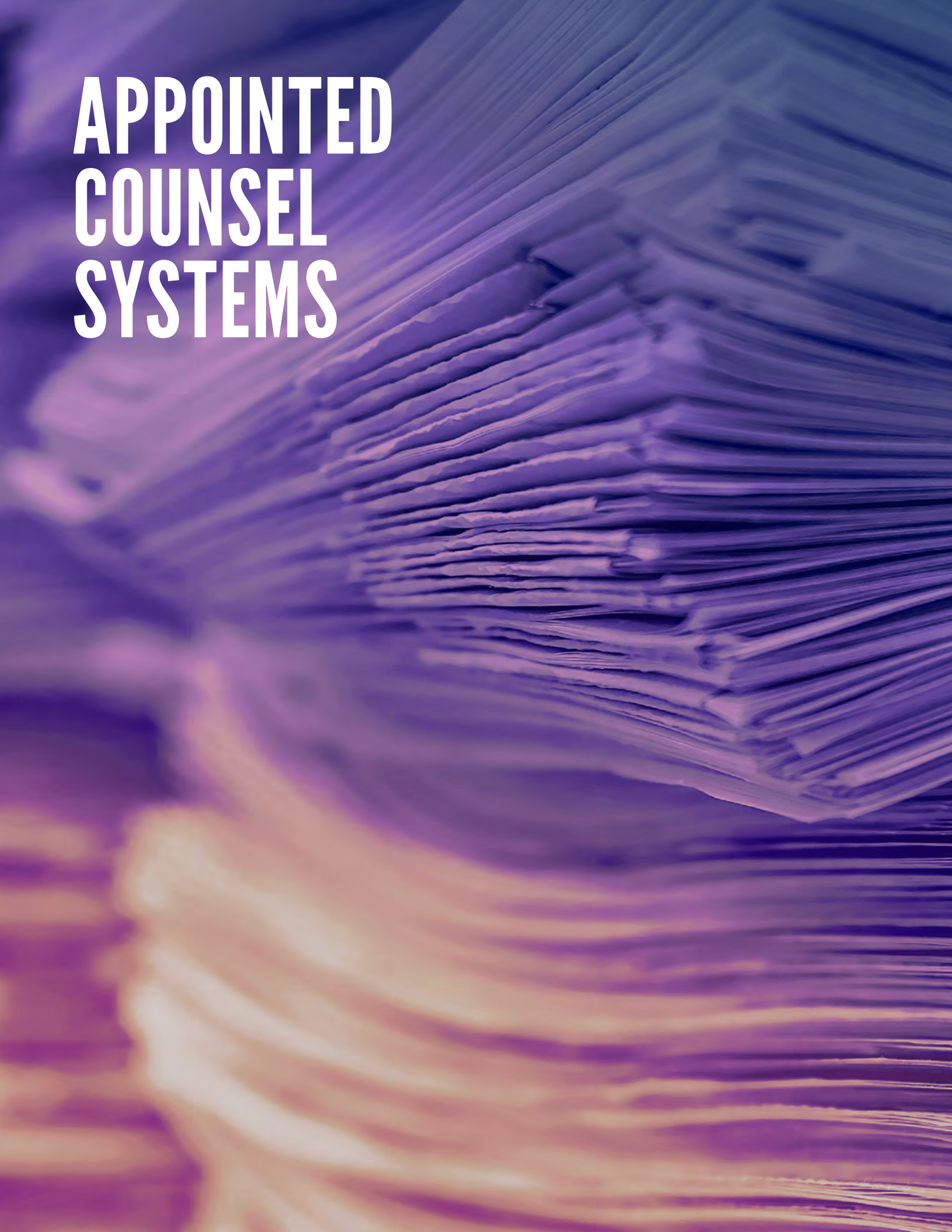
³ While some attorneys who are contracted to provide representation to youth are referred to as public defenders in their jurisdiction, if they are independent contractors who work outside of an agency’s supervisory and reporting structure, we consider them to be contract attorneys for purposes of this report. However, firms, non-profits, or other agencies that are contracted to provide exclusive, dedicated juvenile or public defense services and provide their employees with a salary to do so would be considered public defender agencies for purposes of this report. The key distinction is whether the individual attorneys are salaried employees within the management structure of a larger entity.

⁴ See Cyn Yamashiro et al., *Kids, Counsel and Costs: An Empirical Study of Indigent Defense Services in the Los Angeles Juvenile Delinquency Courts* (Loy. Law Sch. L.A., Working Paper No. 2013-9, 2013); Miriam S. Gohara et al., *The Disparate Impact of an Under-funded, Patchwork Indigent Defense System on Mississippi’s African Americans: The Civil Rights Case for Establishing a Statewide, Fully Funded Public Defender System*, 49 How. L.J. 81, 88-89, 94-95 (2005); Radha Iyengar, *An Analysis of the Performance of Federal Indigent Counsel* (Nat’l Bureau of Econ. Research, Working Paper No. 13187 2007); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012); Thomas H. Cohen, *Who is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. JUST. POL’Y REV. 29 (2014); Michael Roach, *Explaining the Outcome Gap between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard* (2010).

⁵ *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010) (“Actual representation assumes a certain basic representational relationship It is very basic that “[i]f no actual ‘Assistance’ ‘for’ the accused’s ‘defence’ is provided, then the constitutional guarantee has been violated. To hold otherwise ‘could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel. The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.” (quoting *United States v. Cronin*, 466 U.S. 648, 654-655 (1984))).

⁶ DEPT OF JUST. STATEMENT OF INT. IN N.P. et al., v. Georgia, 15, https://www.justice.gov/sites/default/files/crt/legacy/2015/03/13/np_soi_3-13-15.pdf.

APPOINTED COUNSEL SYSTEMS



APPOINTED COUNSEL SYSTEM STRUCTURES

States and counties employ numerous structures, to widely varying degrees, for managing and appointing attorneys who provide representation outside of a salaried public defender system:

ALTERNATIVE DEFENSE AGENCIES:

Some states and localities have alternative defense counsel agencies that manage non-public defender attorneys. These agencies generally are staffed by salaried government employees who select, manage, oversee, and provide supportive resources to non-salaried assigned counsel. Of these various appointed counsel structures, alternative defense agencies generally provide the greatest amount of oversight and management of appointed counsel.

INDEPENDENT CONTRACTS:

Some juvenile defense attorneys enter into a formal contract with a court, defender agency, county, or other governmental entity to receive appointments to represent youth in delinquency proceedings. The contract may allow appointment on a case-by-case basis, for a certain percentage of cases, or by some other metric, and may provide payment based on cases accepted, hours worked, or predetermined flat fees. The key, however, is that the individual lawyer has a written contract to provide such services.

APPOINTMENT LISTS OR PANELS:

In what is perhaps the most common appointed counsel structure, a court or an appointment entity maintains a panel or list of attorneys who may receive appointments in individual cases. There are often minimum qualifications to become a member of the panel or list, but there is not a binding written contract. Payment is usually based on defined rules for reimbursement of services rendered.

DISCRETIONARY JUDICIAL APPOINTMENTS:

In the least formal systems, a judge will simply select an attorney to provide representation in a particular case. The attorney has no formal contract or list membership and has met no minimum qualifications to receive the appointment, beyond a license to practice law in that jurisdiction. There is typically no oversight of attorney performance beyond the judge who made the appointment.

Regardless of the structure or combination of structures used to manage appointed counsel, changes can be made to improve management and oversight, increase the qualifications and training of appointed counsel, and improve the representation of youth facing delinquency charges and their case outcomes.

DIFFERENCES BETWEEN PUBLIC DEFENDER & APPOINTED COUNSEL SYSTEMS

SYSTEMIC SUPPORTS

While most public defender offices across the nation face overwhelming caseloads and inadequate funding, a salaried public defender's practice generally benefits from the resources and support their office provides. A reasonably resourced public defender office can allow individual public defenders to focus on representing their clients, by providing administrative, human resources, technology, and other support. Better-resourced offices may employ investigators, social workers, paralegals, and other staff to enhance a defender's legal practice.

Public defenders in structured systems are generally salaried employees who receive paid leave time and other benefits and are covered by governmental or agency liability insurance or indemnification. Because they are salaried employees, these public defenders are usually paid for all the time they spend on cases and other work, including time spent traveling, performing administrative tasks and, importantly, conducting investigations and attending training.

Salaried public defender offices usually have a managerial hierarchy that allows more experienced attorneys to oversee and manage less experienced attorneys. Public defenders can benefit from the availability of in-house mentors and co-workers who also practice juvenile delinquency or criminal defense law. These supervision and feedback mechanisms are crucial to helping attorneys develop theories, hone arguments, anticipate opposition, prepare alternatives, and improve their practice.

Finally, salaried public defenders are often able to specialize. Juvenile delinquency defense is a demanding, evolving field. Like adult criminal defenders, juvenile defenders must master criminal laws and criminal court rules and procedures. But to provide competent juvenile delinquency representation, they must also be trained in juvenile law, juvenile court rules and procedures, adolescent development, communicating with children, alternative placements, and other systems that impact court-involved children, such as the child welfare, education, and mental health systems. Public defenders who devote their full-time employment to juvenile defense are able to become the specialized defenders young people need and deserve.

By stark contrast, appointed counsel are usually solo practitioners or members of small firms who benefit from none or few of the systemic supports available in structured public defender systems. Many appointed counsel function as attorney, investigator, paralegal, law clerk, and administrative staff. Appointed counsel must also cover their overhead costs, including office rent, supplies, technology, legal research tools, and liability insurance.

Often, appointed counsel systems only pay counsel for specific case-related work. In these systems, attorneys may not be compensated for time spent traveling, which may hinder an attorney's ability to investigate a case or visit their client; performing administrative tasks, which

are vital to a robust motions practice and filing appeals; or attending relevant training, which is critical to providing competent representation in juvenile court.

Appointed counsel are rarely able to become juvenile delinquency defense specialists. The nature of operating a solo practice or small law firm demands that most appointed counsel take on a range of clients and cases, including appointments in the child welfare or adult criminal systems and retained cases in these and other fields.

QUALITY OF REPRESENTATION

Given the vast differences between the resources available to public defenders and appointed counsel, it is perhaps not surprising that studies have found that children represented by appointed counsel tend to fare worse than those represented by public defenders or retained counsel.⁷

A study of case outcomes in two Midwestern juvenile courts found that children represented by private attorneys were less likely to have their case dismissed and more likely to be placed in secure confinement after adjudication, than children represented by public defenders.⁸

A survey of data from counties that record the type of counsel children receive in juvenile court shows similar results.⁹ Sixty-six percent of children represented by appointed counsel were adjudicated, versus 55 percent of children represented by public defenders. Of children adjudicated, 48 percent of those represented by appointed counsel were removed from their homes as a disposition, versus 40 percent of those represented by public defenders.

Numerous studies comparing outcomes for adults represented by public defenders and court-appointed counsel in criminal courts have also found that people represented by public defenders receive better outcomes than those represented by appointed counsel.¹⁰

CAUSES OF OUTCOME DISPARITIES

Researchers have identified several issues that contribute to the disparate outcomes achieved by public defenders and assigned counsel, including financial pressures caused by low compensation rates, which cause attorneys to take on more cases than they can ethically handle; lack of funding for investigators, experts, and other specialists; and conflicts of interest caused by the judicial oversight of many appointed-counsel systems.¹¹

Researchers also point to the competency of assigned counsel versus public defenders, noting that assigned counsel often lack the subject-specific legal training available to public defenders¹² and practice in isolation, without the input of other lawyers.¹³

This isolation increases the risk of a variety of human errors, such as overlooking a key issue in a case, overestimating the strength of a defense theory, or underestimating the strength of the prosecution's evidence. It also makes it more difficult to keep current with new strategies, current case law, and developments in scientific evidence.¹⁴

Fortunately, these issues that contribute to disparate outcomes can be addressed by making changes to the structures that manage the appointment, assignment, and contracting of private attorneys to represent children in delinquency court.

⁷ See sources cited, *supra* note 4.

⁸ Lori Guevara et al., *Race, Legal Representation, and Juvenile Justice: Issues and Concerns*, 50 CRIME & DELINQ. 344 (2004).

⁹ See *Case Flow of Formal Juvenile Court Cases by Type of Representation*, JUVENILE JUSTICE GEOGRAPHY, POLICY, PRACTICE, & STATISTICS, <http://www.jjgps.org/juvenile-defense#national-outcomes?option=0&race=-1&offense=-1> (last visited Oct. 2, 2019).

¹⁰ See sources cited, *supra* note 4.

¹¹ Anderson & Heaton, *supra* note 4.

¹² George W. Burruss Jr. & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 JUST. Q. 37 (2002).

¹³ Anderson & Heaton, *supra* note 4.

¹⁴ Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel*, AM. BAR ASS'N, 27 CRIM. JUST. _ (2012).

THE ECONOMIC MODEL OF THE APPOINTED COUNSEL SYSTEM

When considering reforms to improve a contract counsel system, it helps to understand the economic theory behind the system and guard against its inherent shortcomings. Publicly funded defense counsel systems are single-payer systems, known as monopsonies.¹⁵

When there is a single buyer paying for a service in an economy—in this case, a county or local government—that buyer dictates the price of services, and the lawyers must agree to the government’s terms if they want the work. Such price setting, however, creates a “perverse sorting mechanism,” grouping lawyers based on efficiency, not quality. Ultimately,

those [defense lawyers] who remain in the market long-term would tend to be the most efficient ones—those who can provide adequate-quality work for the low rates, whether they achieve this efficiency legitimately (through superior ability, innovation, etc.), or illegitimately (through cutting corners, covering up their reduction in quality, overbilling and double billing, and so forth).¹⁷

Those who are skilled performers, but less efficient under the parameters of the system, are pushed from the market. Moreover, those providing services in such a system become dependent upon the single buyer, leading to a tendency to perform at a status quo, rather than to innovate, improve, or develop greater skills, since there is no financial incentive to do so.¹⁸

In the context of a governmental monopsony purchasing legal services for poor defendants, we would therefore expect to see a shortage of lawyers willing to take court appointments, or a shortage of lawyers working in a public defender’s office. Moreover, an analysis based on monopsony effects would predict that the few

lawyers who do represent indigent defendants would carry an overwhelming caseload and therefore have to spread their time thinly between clients.¹⁹

Finally, because the buyer—the government—is not the recipient of the services—the indigent person needing defense who has no alternative but to accept the appointed lawyer who is provided—failures or inadequacies in service are liable to go unaddressed, unless those failures directly affect court operations.

While many of these problems within indigent defense systems are caused or exacerbated by the artificially low rates of pay all too common in contract counsel system, funding levels alone cannot fix the problems inherent in a monopsonist system. Reforms to the underlying structure of appointed counsel systems are necessary to counteract these innate failings of the delivery model.

“One way to counteract this effect is through command-and-control regulation of the quality of representation—that is, forcing providers to meet minimum guidelines.”²⁰ Additionally, an entity dedicated to overseeing the implementation of and ongoing adherence to these guidelines is necessary.²¹

The key components that follow and the toolkit that accompanies this report aim to address the structural deficiencies inherent in the appointed counsel system of providing constitutional defense services to young people.

¹⁵ Dru Stevenson, *Monopsony Problems with Court-Appointed Counsel*, 99 IOWA L. REV. 2273, 2280 (2014).

¹⁶ *Id.* at 2280.

¹⁷ *Id.*

¹⁸ *Id.* at 2281-2.

¹⁹ *Id.* at 2283.

²⁰ *Id.* at 2289.

²¹ *Id.*

KEY COMPONENTS OF EFFECTIVE APPOINTED COUNSEL & CONTRACT SYSTEMS

To ensure youth receive effective, quality representation, there must be consistent standards, oversight, and leadership for defenders. The key components offered below can be applied to any contract, appointment, or assignment mechanism that governs non-public defenders assigned to represent children in delinquency court.

INDEPENDENT APPOINTMENT OF DEFENDERS

Effective oversight of contract counsel begins with leadership that is separate from political and judicial influence.²² As the United States Supreme Court has recognized, the defense attorney's "principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation."²³

Just as it is "the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages,"²⁴ that obligation extends to appointed counsel not operating with a public defender system.²⁵ The validity of a criminal or delinquency court system is based on "the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate."²⁶

Every appointed defense attorney, just like private counsel, "works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client."²⁷ That judgment cannot be influenced by any third party, including the court, simply because that entity pays for the representation.²⁸

Given this requirement of defense independence, the American Bar Association's Criminal Justice Standards call for appointed counsel systems to "be designed to guarantee the integrity of the relationship between lawyer and client.... The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel and contract-for-service programs."²⁹ The ABA recommends that defense appointment systems be managed by independent boards, which "should not include prosecutors or judges."³⁰

If appointment in a particular case is determined by a single judge or group of judges who preside over that attorney's individual cases, there is a lack of defense independence. In such cases, appointments are not made by an independent entity tasked with ensuring quality defense of youth, but by someone who, by the nature of their position, has divided responsibilities and interests. The judge's role is to act as the trier of fact, arbiter of legal arguments and motions, protector of individual rights, and manager of court efficiency and decorum. In each of these roles, judges have an interest in the progression and outcomes of the adversarial processes that come before them.

²² See Sue Burrell, *Contracts for Appointed Counsel in Juvenile Delinquency Cases: Defining Expectations*, 16 U.C. DAVIS J. JUV. L. & POL'Y 314, 367 (2012) ("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.").

²³ *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979).

²⁴ *Polk Cty. v. Dodson*, 454 U.S. 312, 321-22 (1981).

²⁵ *Ferri*, 444 U.S. at 204.

²⁶ *Polk Cty.*, 454 U.S. at 322.

²⁷ *Id.* at 321.

²⁸ MODEL RULES OF PROF'L RESPONSIBILITY r. 1.8(f). (AM. BAR. ASS'N 2018).

²⁹ CRIM. JUST. STANDARDS, Standard 5-1.3(a) (AM. BAR. ASS'N 1992).

³⁰ CRIM. JUST. STANDARDS, Standard 5-1.3 (b) (AM. BAR. ASS'N 1992).

Zealous defense representation is sometimes slow, often lacks transparency, is regularly adversarial, and is not always intended to make the work of the county or the court easy. It is inevitable that stakeholders—even judges—will become frustrated at times by effective defense practice. In order to ensure independence of the defense and to allow attorneys to act according to their ethical obligations to vigorously defend their clients, appointments cannot be made by someone involved in the proceedings. “Defense attorneys who must keep watch over their shoulder, worried that their zealous advocacy may affect funding for their cases or the likelihood of future appointments, cannot be considered independent.”³¹

In jurisdictions where judges are elected, this adds an even greater concern for the independence of defense counsel. Examples of attorneys contributing to judicial campaigns and then being appointed to defend people in that judge’s courtroom are, unfortunately, not as rare as one would hope.³² Even if there is no actual collusion, the appearance of impropriety calls the entire system into question.³³

OVERSIGHT OF CONTRACT SYSTEMS

Appointment of attorneys to represent youth in delinquency proceedings must be done in such a way as to ensure independence, while also ensuring quality controls. The best way to create such a balance is through managed contract systems that require attorneys to agree to a set of conditions, expectations, and obligations in order to receive appointments to delinquency cases. Where fixed-term contracts are not practicable, at a minimum, jurisdictions should use panel appointment systems that have a clear written set of expectations and obligations for attorneys who represent youth in delinquency hearings. In either case, terms of contract or panel membership should be finite, have minimum qualification requirements, clearly articulate a pay structure, provide for some measure of quality control, and have clearly established renewal criteria.

Where statewide juvenile defense funding and structures exist, a juvenile defense oversight entity can ensure that juvenile defense delivery in contract systems operates cohesively across county lines. In states where funding and contracting happen at the district, county, or local level, an independent oversight entity should be created at those levels. In whichever case, the juvenile defense oversight entity should be responsible for:

- ◇ Developing juvenile defense contracts with specific compliance standards;
- ◇ Enforcing compliance standards;
- ◇ Eliciting contract counsel applications from knowledgeable, experienced attorneys;
- ◇ Evaluating applications and awarding contracts to the most qualified candidates;
- ◇ Managing assignments based on complexity of cases and collateral issues (immigration, sex offender registration, adult transfer, etc.);
- ◇ Supervising workloads with considerations for the complexity of each case;
- ◇ Creating standardized evaluation and data collection forms; and
- ◇ Overseeing assessment and continuous training.

³¹ TONY FABELLO ET AL., JUSTICE CTR. COUNCIL OF STATE GOV'TS, HARRIS COUNTY PUBLIC DEFENDER: PRELIMINARY REPORT ON OPERATIONS AND OUTCOMES (2012), 43, <http://tidc.tamu.edu/DGReportDocuments/212-13-D03%20HC%20PDO%20Report%20from%20Justice%20Center%2010-19-12.pdf>.

³² Neena Satija, *Harris County Juvenile Judges and Private Attorneys Accused of Cronyism: "Everybody Wins But the Kids"*, TEX. TRIB. (Nov. 1, 2018, 3:22 PM), <https://www.houstonpublicmedia.org/articles/news/2018/11/01/310201/harris-county-juvenile-judges-and-private-attorneys-accused-of-cronyism-everybody-wins-but-the-kids/>; *In re Lawrence*, 335 N.W.2d 456 (Mich. 1983) (finding that judicial misconduct where a judge improperly allowed appearances by, and assigned indigent criminal cases to, attorneys with whom he was formerly associated and with whom he had and still has financial ties); TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: FINDINGS AND RECOMMENDATIONS ON INDIGENT DEFENSE PRACTICES IN TEXAS 9 (2000), <https://www.texasappleseed.org/sites/default/files/185-FairDefense-ReportFindingsRecommendations.pdf>. (“A number of court-appointed attorneys commented that making political contributions to judges’ election campaigns was a requirement for getting on the appointment list. A larger number of attorneys stated that it was not clear to them that contributions were necessary, but they felt a need to make them just in case.”).

³³ See, e.g., *Lawrence*, 335 N.W.2d at 460 (“The extensive financial involvement with the named attorneys and the fact that there were 202 appointments to represent indigent criminal defendants definitely raise an appearance of impropriety and violation of the [judicial] canons.”).

STANDARDIZED PROFESSIONAL OBLIGATIONS

Fewer than half of U.S. states have guidelines or performance standards specific to juvenile defense, and those that do are not always applicable to attorneys in contract or appointed systems outside of the public defense system.³⁴ For juvenile defense counsel to fully and effectively represent youth, they should have contracts and oversight that hold them to the same ethical and professional standards as other juvenile defenders. The following minimum standards should be included in every juvenile defense contract:

- ◇ Specialized knowledge of juvenile court, especially the specific purposes and goals of delinquency proceedings;
- ◇ A commitment to ongoing continuing legal education specific to juvenile defense, such as, but not limited to, the science of adolescent development, educational issues impacting delinquency cases, and adolescent mental health issues;
- ◇ An awareness of the effect of both racial biases and socioeconomic class on youth involved in the juvenile justice system and a commitment to raise them where appropriate;
- ◇ Full, holistic representation from the point of interrogation, initial detention, and initial court appearance through post-disposition proceedings and until the client is no longer under court or state supervision; and
- ◇ Continuity of representation to promote positive relationships between counsel and youth clients without disruption.

Alternatively, some states make compliance with an identified set of specific juvenile defense standards a condition of every contract.³⁵ Clearly outlining these responsibilities can be achieved by incorporating NJDC's *National Juvenile Defense Standards* or similar standards into a contract for representation.³⁶

QUALIFIED COUNSEL

Qualifications for representing youth in delinquency proceedings should extend beyond mere membership in the state or local bar. An effective oversight entity should monitor the qualifications of contract counsel.³⁷ Oversight ensures contract counsel have the time, training, experience, and expertise to represent youth. Moreover, juvenile court should never be treated as “kiddie court” or a training ground for new attorneys.³⁸ Systems can ensure quality representation by requiring:

- ◇ Experience criteria that consider an attorney's years spent in adult criminal court, number of delinquency cases tried or observed, and representation in dependency cases;³⁹
- ◇ Programs that allow inexperienced attorneys to shadow or be mentored by senior juvenile defenders;
- ◇ Thorough evaluations that use a standard form to collect data on contract counsel performance;
- ◇ Prompt reviews and feedback for all contract counsel, regardless of experience level; and
- ◇ Training and professional development in juvenile law, adolescent development, implicit racial biases, and other issues impacting delinquency proceedings.

Just as an oversight committee should standardize professional obligations, it should also standardize the elements of quality representation. An effective oversight committee should create an application, a contract, a structure for data collection, and an evaluation form that can be used to effectively monitor appointments.

³⁴ For a list of states with guidelines or standards specific to juvenile defense, visit: <https://njdc.info/our-work/juvenile-defense-standards/>.

³⁵ See, e.g., MASS. COMM. FOR PUB. COUNSEL SERVS., ASSIGNED COUNSEL MANUAL: POLICIES & PROCS. (2019), <https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf> (Massachusetts' Committee for Public Counsel Services requires all contracted juvenile defense attorneys to commit to the agency's Assigned Counsel Manual, which includes performance standards governing the representation of juveniles and youthful offenders).

³⁶ NAT'L JUVENILE DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012), <http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>.

³⁷ See Burrell, *supra* note 22 at 344 (explaining that “experience requirements should be as high as possible to attract experience attorneys” while also allowing for “promising attorneys”).

³⁸ 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. POVERTY L. & POL'Y 543, 557-58 (2009).

³⁹ See Burrell, *supra* note 22 at 345.

JUST COMPENSATION & FUNDING

Oversight entities should ensure contract counsel are paid for the full scope of the work necessary to provide zealous representation for youth. State-level oversight entities can eliminate any disparity in contract counsel compensation among counties within the same state. Even without statewide oversight, however, district, county, or local oversight bodies can help ensure fairness and parity in defense system funding.

Contract counsel compensation should be proportional to the workload required for zealous representation of youth. When compensating contract counsel, states should consider the following:

- ◇ Pay-by-the-hour or similar billing systems often encourage more zealous representation since counsel are being paid for the full extent of their work;
- ◇ Separating budgets for necessary resources and supports—such as investigators, experts, paralegals, and social workers—prevent counsel from choosing between funding such resources from their own compensation or going without;
- ◇ Procuring funding from the state or judicial district can eliminate disparities in representation shaped by county wealth and budgetary restraints; and
- ◇ If state or judicial district money is allocated among a variety of counties, doing so through a need-based system accounts for less affluent areas that tend to have a higher percentage of youth clients who qualify for publicly appointed counsel.

DATA COLLECTION & ANALYSIS

The entity that manages and oversees an assigned counsel system should collect comprehensive data about cases, clients, outcomes, and attorney activities. Data is needed to evaluate the impact and effectiveness of the assigned counsel system and of individual attorneys, identify areas in need of improvement, support budget requests and policy reform efforts, ensure the efficient use of public funds, and improve the protection of children's constitutional rights.

In 2016, juvenile courts processed more than 850,000 juvenile delinquency cases nationwide.⁴⁰ Despite the enormous reach of the juvenile delinquency system, there exists no national data regarding the number of children represented by public defenders or contract counsel, or the outcomes each system achieves.⁴¹

The importance of collecting, analyzing, and using data in the juvenile court system is recognized by policymakers,⁴² judges,⁴³ and defenders⁴⁴ alike. Data is useful to all involved because it tells us what resources are being used, whether they are being used well, and what outcomes are being achieved.

Policymakers need comprehensive data to:

- ◇ Build fair and effective juvenile justice systems,
- ◇ Allocate sufficient resources to defense systems, and
- ◇ Ensure the efficient use of public funds.

In January 2018, the National Conference of State Legislatures (NCSL) released *Principles of Effective Juvenile Justice Policy*, designed to help state lawmakers “construct[] juvenile justice systems that are both fiscally responsible and improve outcomes on many important fronts....”⁴⁵ Five of the 12 principles urge lawmakers to use data, research, and evidence-based practices when

⁴⁰ SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2016 6 (2016), <https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2016.pdf>.

⁴¹ ANDREW WACHTER, M.S., JUVENILE JUSTICE GEOGRAPHY, POLICY, PRACTICE & STATISTICS INDEFENSIBLE: THE LACK OF JUVENILE DEFENSE DATA 1 (2015), http://www.ncjj.org/pdf/JJGPS%20StateScan/JJGPS_Indefensible_The_Lack_of_Juvenile_Defense_Data_2015_5.pdf.

⁴² NAT'L CONFERENCE OF STATE LEGISLATURES, PRINCIPLES OF EFFECTIVE JUVENILE JUSTICE POLICY (2018) [hereinafter *Principles*], https://comm.ncsl.org/productfiles/108957002/Juvenile_Justice_Principles_NCSL.pdf.

⁴³ TERI DEAL & ANDREW WACHTER, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES & NAT'L CTR. FOR JUVENILE JUSTICE 5 WAYS JUVENILE COURT JUDGES CAN USE DATA (2017), http://www.ncjj.org/pdf/Model%20Data%20Series/NCJFCJ_5_Ways_Data_R9.pdf.

⁴⁴ MAREA BEEMAN, NAT'L LEGAL AID & DEF. ASS'N, BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK: A TOOLKIT FOR DEFENDER LEADERS (2014), <http://www.nlada.org/sites/default/files/pictures/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf>.

⁴⁵ *Principles*, supra note 42 at iv.

crafting policies.⁴⁶ Two are focused on evaluating the system and tools used in the system to avoid disparate treatment of youth.⁴⁷

Principle 6 states: “Juvenile justice policies should promote fairness and protect youths’ due process rights,” and encourages lawmakers to “dedicate sufficient resources to indigent juvenile defenders to provide high-quality legal representation in delinquency proceedings....”⁴⁸

Principle 12 states: “Cross-branch oversight mechanisms should hold government systems accountable, monitor youth outcomes, encourage system improvements and invest in effective justice system practices,”⁴⁹ and encourages policymakers to “invest in data systems, training and other infrastructure that promote transparency and continuous quality improvement in juvenile justice system”⁵⁰ and to “provide access to high-quality data and analysis, and include performance review.”⁵¹

Without comprehensive data from contract counsel systems, policymakers cannot evaluate the fairness and effectiveness of juvenile court proceedings, ensure that children’s constitutional right to counsel is being protected, or monitor the use of public funds dedicated to courts and defense systems. Comprehensive data from contract counsel systems is needed to inform policymakers’ budgeting and efforts to improve the juvenile court system.

Defense system managers need comprehensive data to:

- ◇ Provide oversight of contract counsel system and individual attorneys,
- ◇ Allocate resources,
- ◇ Track outcomes,
- ◇ Support policy efforts, including budget requests and system reform, and
- ◇ Improve representation and outcomes for youth.

Adopting standards and qualifications to govern a contract counsel system is a vitally important step in ensuring quality representation for children facing delinquency charges. But the performance of contract attorneys should be monitored more frequently than contracts are renewed, and many aspects of providing quality representation can only be evaluated by overseeing the representation an attorney provides on individual cases.

A comprehensive data system
can fulfill several needs for
contract attorneys, including:

CASE MANAGEMENT

DOCUMENT STORAGE

DATA COLLECTION &
REPORTING

TIME-TRACKING & BILLING

Data collection can provide defense system managers with the information needed to oversee attorney performance and address shortcomings before they result in the denial of children’s constitutional right to counsel.

Basic Data Every Defender Program Needs to Track: A Toolkit for Defender Leaders, by the National Legal Aid & Defender Association (NLADA), explains the importance of data in defense systems and provides guidance on collecting and using data to improve defenders’ representation of their clients.⁵² Defense system managers need data in order to answer the three most basic questions about the effectiveness of a contract counsel system:

1. What resources exist, and are they adequate?
2. What work are attorneys performing?
3. What outcomes are being achieved for clients?⁵³

⁴⁶ *Id.* (referring to Principle 1, 2, 4, 5, & 7).

⁴⁷ *Id.* (referring to Principle 5 & 10).

⁴⁸ *Id.* at vi, 13-15.

⁴⁹ *Id.* at 33-34.

⁵⁰ *Id.* at vii.

⁵¹ *Id.* at vii, 33-34.

⁵² See Beeman, *supra* note 44.

⁵³ See *id.* at 11.

NLADA explains, “At their core, defenders are advocates. Data can support advocacy efforts on multiple fronts, including individual client advocacy, advocacy for your program and advocacy for criminal justice policy that is fair, just and cost-effective.”⁵⁴ With comprehensive data about contract counsel systems, managers of those systems can have the objective information they need to properly allocate resources, identify trends in charging and sentencing, plan for budget and personnel needs, and support requests for changes in funding, resources, and policies.

Juvenile court judges need comprehensive data to:

- ◇ Ensure the protection of children’s constitutional right to counsel
- ◇ Measure the effectiveness of the contract counsel system,
- ◇ Identify opportunities for improvement, and
- ◇ Ensure the appropriate use of public resources.

In *5 Ways Juvenile Court Judges Can Use Data*, a model data brief from the Office of Juvenile Justice and Delinquency Prevention’s Juvenile Justice Model Data Project, juvenile court judges are encouraged to use data to “describe a court’s overall functioning, replacing anecdotes with objective answers.”⁵⁵ Comprehensive data about contract counsel systems and attorneys can give judges the information they need to objectively assess the performance of contract counsel in their courtrooms and avoid making decisions based on anecdotes, assumptions, and personalities.

Data is crucial to understanding the impact of juvenile court intervention in young people’s lives and ensuring best outcomes. “It’s impossible to know whether policies and practices are resulting in positive outcomes for justice-involved youth without collecting and analyzing data Understanding which youth succeed in which programs can help judges match youth with the response that is likely to produce the best outcomes.”⁵⁶

Data can also give judges a new viewpoint of what happens in their courtrooms and help them identify ways to improve the representation children receive and better use the system’s limited resources. “Data empowers court staff and stakeholders to suggest opportunities for new policies or practices that may be more efficient, lead to better outcomes, or ensure fairness.”⁵⁷

As the ultimate decision-makers in juvenile courts, juvenile court judges need high-quality, objective information about the systems and people that interact with the court and the young people brought before it. Among a judge’s most important responsibilities are ensuring fairness in their courtroom and protecting children’s constitutional rights. These are achieved through strong, effective juvenile defenders.

⁵⁴ See *id.* at 5.

⁵⁵ Deal & Watcher, *supra* note 43 at 1.

⁵⁶ *Id.*

⁵⁷ *Id.*



**“AMONG A JUDGE’S
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CONCLUSION

The background of the slide is an abstract composition. The upper half is dominated by deep purple and blue tones, featuring a stack of papers or documents that are slightly out of focus, creating a sense of depth. The lower half transitions into a warm, orange and yellow gradient, with horizontal, wavy lines that resemble liquid or smoke, adding a dynamic and artistic feel to the overall design.

Young people facing delinquency charges need and deserve full access to high-quality, zealous defense representation, regardless of where they live. Even in counties with public defenders, at least some of the attorneys appointed to represent youth in delinquency court are engaged through a contract or other court-appointment system. It is, therefore, imperative that policymakers, defense system managers, and stakeholders work together to elevate the quality of representation provided by contract attorney systems.

Defenders who work in contract or appointed systems generally lack supports inherent in public defender systems—structure, oversight, mentorship, and quality review—and are too often disadvantaged by pay structures that do not compensate them for all the time they spend on a case or the time it takes to obtain the specialized training necessary to provide competent representation in delinquency cases.

Fortunately, these shortcomings can be addressed within existing contract counsel system structures by adopting standards, formalizing contracts, instituting oversight, and reforming payment systems. The Toolkit accompanying this report contains resources for stakeholders who want to enhance their contract counsel systems and ensure that the quality of representation every child receives reflects not where they live but the demands of the Constitution and the promises of *Gault*.

TO ACCESS THE ONLINE TOOLKIT, PLEASE VISIT
[HTTPS://NJDC.INFO/CONTRACT-COUNSEL](https://njdc.info/contract-counsel).

For assistance with implementing reforms to your contract counsel system, please contact NJDC at 202-452-0010 or inquiries@njdc.info.

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