

**NUTS AND BOLTS OF
JUVENILE LAW
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**ETHICAL PRE-TRIAL
CONSIDERATIONS**

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ETHICAL PRE-TRIAL CONSIDERATIONS

It is well settled law that a juvenile has a constitutional right to counsel in most juvenile proceedings.¹ In the seminal case *In re Gault*, the United States Supreme Court held that it is unconstitutional to adjudicate a child and remove him from the home without representation by an attorney. 387 U.S.1 (1967). The Supreme Court reached this result by comparing such a juvenile proceeding to the seriousness of a felony prosecution of an adult. In making this comparison, the Court specifically stated 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. 387 U.S. at 36. To sum it up, the Court borrowed a quote from *Powell v. Alabama*, 287 U.S. 45 (1932), - the child “requires the guiding hand of counsel at every step in the proceedings against him.”

The Texas Family Code goes further than the Supreme Court by statutorily mandating that not only does a juvenile have a right to counsel in adjudication and “removal” cases, but a juvenile also has a right to counsel “at every stage of proceedings” under Title 3. **Tex.Fam.Code §51.10(a)**. The Family Code also states that although the right to counsel can be waived under certain circumstances- there are also certain circumstances where the right cannot be waived. **Tex.Fam.Code §51.10(b)**.

One area that has been problematic in regard to the right to counsel is first detention hearings for juveniles. In 2001, the Texas Legislature enacted Section 51.101 as part of the Fair Defense Act in an effort to address the question of appointment of counsel and the duties of appointed counsel. Section 51.101 provides:

- (a) If an attorney is appointed at the initial detention hearing and the child is detained, the attorney shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.
- (b) If there is an initial detention hearing without an attorney and the child is detained, the attorney appointed under Section 51.10(c) shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court. Release of the child from detention does not terminate the attorney's representation.
- (c) The juvenile court shall determine, on the filing of a petition, whether the child's family is indigent if:
 - (1) the child is released by intake;
 - (2) the child is released at the initial detention hearing; or
 - (3) the case was referred to the court without the child in custody.

¹ Excerpts of this paper come from Chapter 8 of Texas Juvenile Law, 7th Edition (Robert Dawson 2008).

(d) A juvenile court that makes a finding of indigence under Subsection (c) shall appoint an attorney to represent the child on or before the fifth working day after the date the petition for adjudication or discretionary transfer hearing was served on the child. An attorney appointed under this subsection shall continue to represent the child until the case is terminated, the family retains an attorney, or a new attorney is appointed by the juvenile court.

(e) The juvenile court shall determine whether the child's family is indigent if a motion or petition is filed under Section 54.05 seeking to modify disposition by committing the child to the Texas Youth Commission or placing the child in a secure correctional facility. A court that makes a finding of indigence shall appoint an attorney to represent the child on or before the fifth working day after the date the petition or motion has been filed. An attorney appointed under this subsection shall continue to represent the child until the court rules on the motion or petition, the family retains an attorney, or a new attorney is appointed.
Tex.Fam.Code §51.101.

Section 51.101 essentially divides juvenile cases into two categories – juveniles that are detained and juveniles that are released. The reason for the division is obvious. Juveniles that are detained need the assistance of counsel immediately so that counsel can attempt to secure their release and begin investigation and preparation of a defense. The underlying rationale in this division of categories is that if a juvenile is detained, a petition to adjudicate will most likely be forthcoming, whereas if a juvenile is released there is more of a question as to whether the case will be handled judicially or non-judicially.

Most counties routinely provide representation for juveniles at detention hearings. Such representation generally comes from the public defender or an “attorney of-of-the-day” program. However, Section 51.101(a) provides that if an attorney is appointed to represent a detained juvenile, **the attorney shall continue to represent the juvenile**. As a result, many ethical issues arise when the appointed attorney merely acts as a “stand-in” for the initial detention hearing.²

When the Juvenile Court utilizes an “attorney-of-the-day” program or appoints a “stand-in” for the initial detention hearing, some of the ethical issues that arise are:

- The duty to accept representation only if competent to handle juvenile matters – What if the “stand-in” attorney is a family law attorney who has never handled a juvenile matter?
- The duty to investigate – If the attorney does nothing other than the initial hearing, what if a witness disappears or if the crime scene disappears or changes in between the initial detention hearing and when a new attorney takes over?

² Brian Fischer has written a paper entitled “Ethics in Juvenile Proceedings” which covers the special obligations of defense counsel in juvenile cases. Rather than re-writing his paper, I refer you to it in the context of the special issues that arise when attorneys merely act as a “stand-in” at initial detention hearings.

- The duty to represent your client zealously – What if the attorney misses an opportunity to participate in the grand jury process? What if the Court orders psychological or psychiatric evaluations?
- The duty to provide effective representation – What if the client testifies or talks about the crime? What if the client has physical evidence of the crime?

How does defense counsel resolve these issues? Staying on the case and fulfilling one's ethical duties is what Section 51.101(a) contemplates and strives to achieve. But is this realistic? If it is not realistic, what other options are available to the defense attorney appointed to handle the initial hearing?

- Request the Juvenile Court to make the record clear if another attorney will be appointed.
- Request the Juvenile Court to make the record clear if the juvenile's family is going to retain an attorney.
- If another attorney is appointed, request permission to withdraw immediately.
- Request that no psychological or psychiatric evaluation be performed until the attorney issue is resolved.
- Communicate with the juvenile and the juvenile's parents about your role and basic information about the juvenile process.
- Request that the prosecutor postpone grand jury presentment until the attorney issue is resolved.