



LONE STAR
JUSTICE ALLIANCE

Mitigation: New Techniques to Employ and Consider

Elizabeth A. Henneke



Mitigation is the process of humanizing a petitioner through fact-based storytelling.

Mitigation – Past, Present and Future

- Past – social history investigation
- Present – accomplishments during detention; programs completed, expressions of remorse, evidence of rehabilitation
- Future – Planning to come home

Conduct Interviews

- Client
- All available family (parents, guardians, siblings, aunts/uncles, grandparents, cousins, godparents)
- Client's children
- Friends
- Significant others
- School teachers, counselors, principals (and then some...)
- Mental health providers/therapist/psychologist
- ? Coaches
- ? Correctional officers
- ? Ministers, rabbis, imams
- ? Role models
- ? Employers
- ? Co-workers
- ? Fellow inmates
- ? Community leaders
- ? Foster parents

Collect Records

- [?] School records
- [?] Hospital/Medical Provider records
- [?] Mental health records
- [?] Social service records (DHS, food stamps, WIC, AFCD, welfare, SS, foster homes, etc)
- [?] Juvenile court/institutional records
- [?] Probation/parole records
- [?] Employment records

Records Con't

- Family photographs/home videos
- ☐ Pictures of the home environment/video
- ☐ Diplomas, school awards/achievements
- ☐ Correspondence between client and family (especially children!)
- ☐ Artwork, poetry, prose by client

Understand context

- Transmit findings from interviews and records to experts to assist in preparing psychological reports, social histories, and establishing admission eligibility for community placements

Create a plan and ideally implement it

You must know where the respondent is sleeping on his first night home.

- And at least have an idea of where he'll be on his 60th (or beyond the term in state-funded halfway house).
- Have a backup plan

Letters of support (& possibly testimony) from community-based programs that provide:

- Housing
- Job placement/training
- Behavioral health services
- Medical care
- Religious programming/support ?
- General life skills

But wait, isn't this what juvenile probation does when preparing a social history?

When might a mitigation specialist be appropriate?



Example One


Texas Juvenile Justice Department faces troubling news reports about riots in the Gainesville facility in 2019.

HOUSTON★CHRONICLE


LOCALTEXAS SPORTS NATIONELECTION 2020WEATHERBUSINESSPREVIEWRENEWFOOD & CULTUREOPINIONS

LOCAL // HOUSTON

Gangs, lack of guards spark teen riot at understaffed Texas juvenile prison

Keri Blakinger

| Feb. 19, 2019 | Updated: Feb. 20, 2019 8:11 p.m.



1 of 6

In this Friday, Oct. 28, 2016 photo, an SUV leaves the Gainesville State School in Gainesville, Texas. State officials blame longstanding problems at Gainesville State School in North Texas on the inability to hire and retain qualified staff to supervise hundreds of juvenile delinquents, many of whom suffer from severe mental health and ...

Photo: Jae S. Lee, MBR / Associated Press

Interviews: Information is subjective

Gangs, lack of guards spark teen riot at understaffed Texas juvenile prison

“Spurred by boredom, gang conflicts and anger over a lack of guards, teens at a North Texas juvenile prison **rioted** over the course of six days, assaulting officers and each other during a mass disturbance that boiled over during a football game.” Houston Chronicle, February 19, 2019

Statement From Camille Cain on the Houston Chronicle Story Regarding the Gainesville State School

“It is wholly inaccurate to describe the events at the Gainesville State School last year with the front-page headline ‘Gangs, lack of guards spark riot for 6 days at Texas juvenile prison.’ **There simply was no ongoing six-day riot. To be clear, there were a series of disturbances over the course of several evenings involving youth activating fire alarms in an effort to exit the dorms and cause disruptions. Each time this happened, staff restored order as quickly as possible, and at no time did the actions of the youth threaten to compromise the security of the facility.** I do not say this to minimize the seriousness of these events; I do it to set an inaccurate record straight. In fact, the Office of the Independent Ombudsman, who reports directly to the Office of the Governor and the Legislature, never uses the word ‘riot’ in the report that forms the basis of this reporting.” –Statement by Camille Cain, February 20, 2019

What do the documents say?

Independent Ombudsman for the Texas Juvenile Justice Department



First Quarter Report FY 19
September 1, 2018 to November 30, 2018

Gainesville State School

Gainesville State School is a TJJD secure facility with a current population of 164 male residents. The facility offers Alcohol, Drugs, Violent Offender, and Sexual Behavior treatment programs. Beginning on or about November 29, 2018, youth offenders in multiple dorms caused a major campus-wide disruption of facility operations. This disruptive behavior continued through

December 4th. The most significant disruption occurred in the evening hours of November 30th, where youth offenders in multiple dorms initiated a coordinated effort to activate fire alarms thereby releasing the internal and external door lock mechanisms resulting in multiple youth offenders fleeing apprehension and causing disruptions across the campus. Disruptions included youth on staff assaults, youth on youth assaults and destruction of property. TJJD Executive management took decisive action by mandating a facility wide shut down and assigning additional personnel from other facilities to support ongoing operations and prevent further disruptions. The OIO responded to the facility on December 12th and 13th and conducted a review of operations. Based

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upon interviews conducted with youth and staff, the OIO was able to identify 3 primary reasons for the campus wide disruptions: 1) gang-related conflicts; 2) boredom – lack of activities and continued or extended confinement in rooms; and 3) a form of protest to call attention to issues on campus. Examples of the issues on campus included case management issues, failure to respond to youth complaints (not grievances), feeling that no one was listening to their concerns, and staff shortages that youth felt negatively impacted them. The OIO will continue to monitor this situation more closely in the coming months.

Is there context?



Response to the Independent Ombudsman
First Quarter Report, FY 2019
January 23, 2019

The Texas Juvenile Justice Department (TJJD) has received the FY 2019 First Quarter Report from the Office of the Independent Ombudsman (OIO), and appreciates this opportunity to respond.

Significant Issues

TJJD agrees with the OIO's assessment of some of the reasons for these campus wide disruptions. The culture of the campus allowed for some gang-related youth activity, and the new facility administration is actively working on solving for the root cause of this gang activity. It is also believed that a lack of consistent structured programming and a desire by the youth to protest were major factors that led to the disruptions. The facility operated with minimal time for youth to engage in additional programming, and the youth were confined to their dorms for a larger portion of the day than is optimal. The Director of State Programs and the new Director of Facility Safety will conduct staff retraining focused on how to properly engage with our youth. There will also be a campus-wide training at Gainesville on more trauma-informed recreational activities to fill down time. This training is schedule for January 28-29, 2019.

Even with the significant issues identified in this quarterly report, TJJD continues to be encouraged by the trend of fewer youth complaints, specifically the downward trend of complaints regarding facility safety. This highlights the agency's efforts of increasing safety and security, which is key to helping the youth properly regulate their behavior and reactions to stress. These efforts are moving quickly but will take some time; we very much appreciate the insights provided by the OIO in helping us to focus on key issues.

And finally, are there any updates to the initial reports?

**Independent Ombudsman
for the
Texas Juvenile Justice Department**



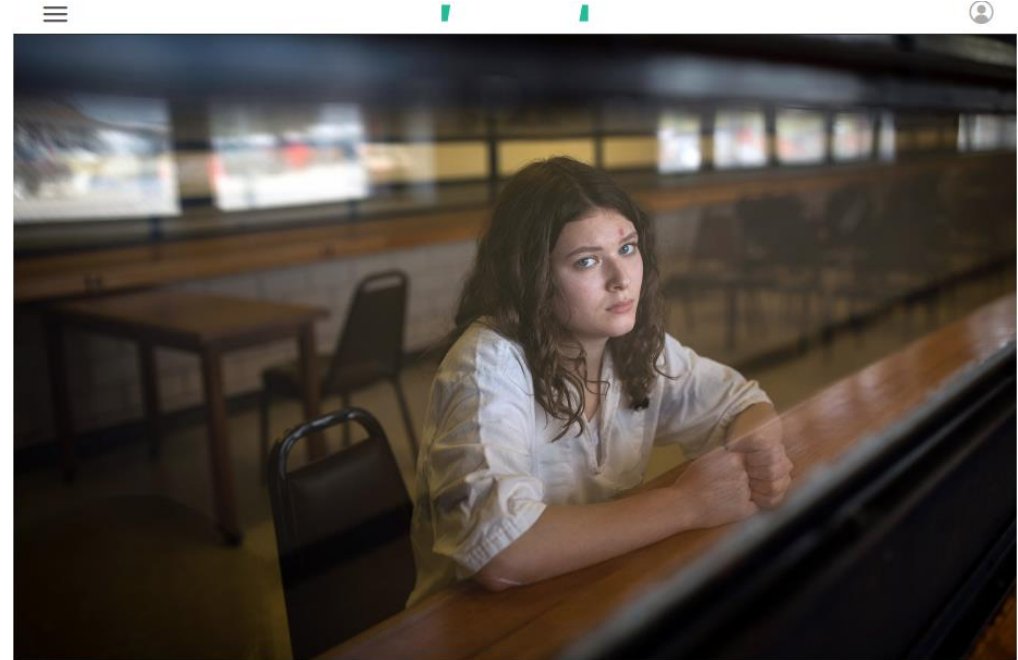
Second Quarter Report FY 19
December 1, 2018 to February 28, 2019

Gainesville State School

Gainesville State School is a TJJD secure facility with a current population of 155 male residents. The facility offers Alcohol, Drugs, Violent Offender, and Sexual Behavior treatment programs. Although the population of the facility has decreased slightly since the last reporting cycle, JCO shortages continue to be an increasing concern. Incidents of gang tagging appear to be reduced, and gang tensions have subsided as reported by both staff and youth offenders. Conditions within the facility overall have improved over the course of the quarterly reporting cycle.

Example Two

Confirmed sex trafficking victim reports that her involvement with a capital murder is a direct result of her own victimization.



She Says Her Best Friend Sold Her To A Pimp. The Court Says She's A Criminal.

Mia was sentenced to 20 years in prison, but alleges she was a trafficking victim who was forced to go along with a robbery that turned deadly.

By Angelina Chapin | 12/21/2019 06:00 am ET | Updated Dec 21, 2019



Conflicting Stories

Who was the mastermind and what role did the juvenile play?



From the left:
Latharian
(convicted of
capital murder for
shooting Ethan
Walker), Sean
(accused of
shooting Zachary
Beloate and
pleaded guilty to
murder in
association with
Walker's death),
Ariana (pleaded
guilty to
aggravated
robbery), Megan
(pleaded guilty to
aggravated
robbery), Jalen
(pleaded guilty to
aggravated
robbery), Jaymor
(convicted of
capital murder)
TARRANT COUNTY
SHERIFF'S OFFICE

There are conflicting stories about what happened the night of the 2016 crime. According to Mia, Ariana had the idea to rob some drug dealers they knew and planned a stick-up with a group of four guys who had guns. Mia said during a trial that she asked to be dropped off at home before the crime happened, and that Ariana forced her to come along. But Megan, Ariana's 19-year-old friend who was also there that night, testified that Mia was the mastermind.

Zachary Beloate, one of the victims, told a jury that Mia was his girlfriend and that she set him up. He also denied that he sold drugs. Mia told HuffPost they were acquaintances who sometimes smoked weed together, and that she hadn't known about the robbery when she spoke with him earlier the day of the crime.

Ariana is in prison and did not respond to HuffPost's questions about this story. But her lawyer, Rose Anna Salinas, said Mia "knew she was the mastermind" of the crime.

"The girls got together and they cooked up that scheme," she said. "She wasn't forced to do anything."

What do the documents say?



FORT WORTH POLICE DEPARTMENT

350 W. BELKNAP STREET
Fort Worth, Texas 76102
Nature of Call
SEXASSAULC
Fax 817-392-4201
817-392-4200

Reported Date
06/13/2016

Member#/Dept ID#
MCCORMICK, M

Supplement No
ORIG

FORT WORTH POLICE DEPARTMENT

Victim 1: SMITH, MARY PSEUDO

Involvement	Invl No	Type	MNI	Race
Victim	1	Individual	2683253	White
Sex	Age	Ethnicity	Juvenile?	Means of Attack
Female	15	Non-Hispanic or Non-Latino	Yes	Other (See Narrative)
Extent of Injury	Dom Violence	Sexual Assault	S.A. Injury	Res Status
Severe body trauma-bruising	No	Yes	None	Resident
Vic/Ofnd Age	PRN			
15	4341599			

IBRS Info

Victim Invl No	Offense Codes	Injury
1	64B	None
Rel	Involvement	Invl No
RU	SUS	1
Race	Sex	DOB
B	M	12/22/1984

Modus Operandi

Physical Evidence	Weapon Used	Premise Type	Victim's Race	Victim's Sex
Documents	Unknown	Bar, lounge, tavern	White	Female
Victim's Age	Suspect Action			
Juvenile	Suspects actions described in narrative			
Crime Code(s)				
Sex Assault-Children Victims				

Narrative

On June 13, 2016 I, Officer M. McCormick #4144 was working the 350 desk as C307 when I was advised of a human trafficking case occurring at 5316 Superior Pkwy by a walk in.

I spoke with REP 1 SANTORO, MIRIAM and REP 2 Santoro, Vincent who came up to the desk and advised that the VIC PSEUDO, Mary their 15 year old daughter was being sex trafficked. Rep 2 said that he had received an anonymous phone call from a girl who asked if he was the VICs dad. When he said yes she told him that she was concerned for the VIC and gave REP 2 the VICs Instagram name "snowfreakyass". When REP 1 looked up the account they said that it showed the VIC stripping and having sex with what appeared to be other minors. REP 1 said that one video showed women licking the VICs vagina. REP 1 said she didn't watch all the videos because they were too disturbing. REP 1 said the VIC appears to be under the influence of narcotics in the videos and that while most of the videos were said to be coming from Cabaret North that others are tagged in Las Vegas and Miami. On the website was the SUS (later identified as Tutt, Willie BM 12/22/1984) info under the name "trickgod". He was said to have a link to his Twitter account under the name "trickgod" and to text snow to him at [REDACTED] to book the VIC for performances. REP 1 also advised that when she saw the VIC that the VIC had bruises and she didnt know where they had come from.

The SUS is a registered sex offender and has a lengthy criminal history of narcotics and violent offenses.

The REPs are afraid to confront the VIC for fear that she will run away. They are scared for her safety. The VIC doesn't stay with the REPs in Arlington because she had been in trouble with the courts in the past so they sent

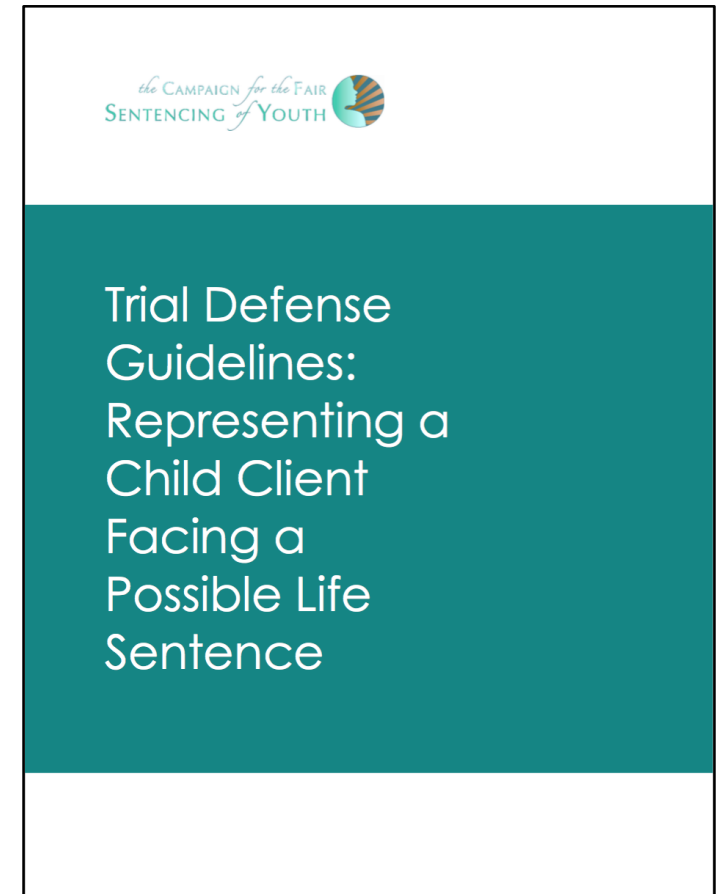
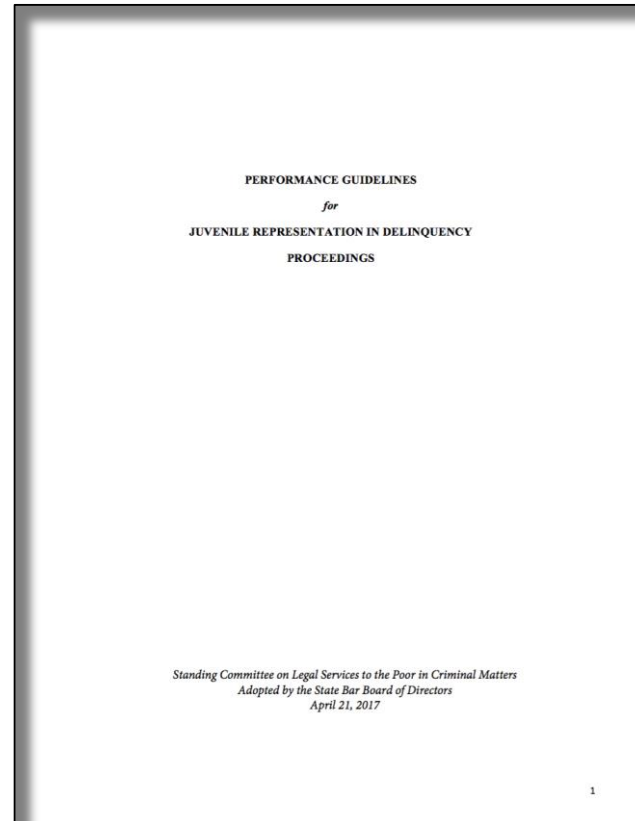
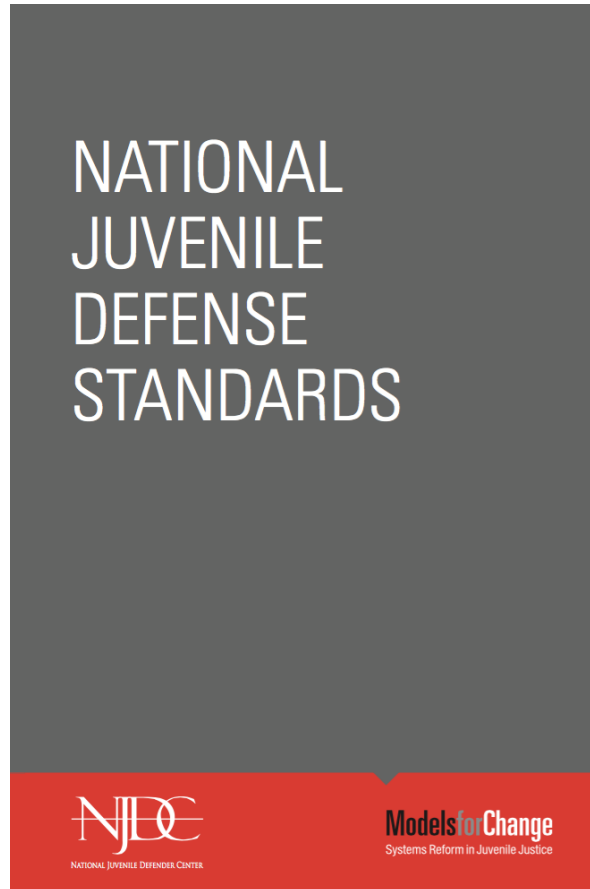
Invoke the 5th Amendment

- Respondent wishes to invoke his 5th Amendment right not to speak with juvenile probation.
 - In *In the Matter of J.S.S.*, 20 S.W.3d 837 (Tex. App.—El Paso 2000, pet. denied), the El Paso Court of Appeals recognized that a juvenile has a 5th Amendment right against self-incrimination that can be triggered when responding to the questions collected for the social history report.

When might a mitigation specialist be appropriate?

Factors suggest that respondent or his family are reluctant to be open with probation officer.

- Past history with the criminal justice system
- Cultural concerns
- Immigration status

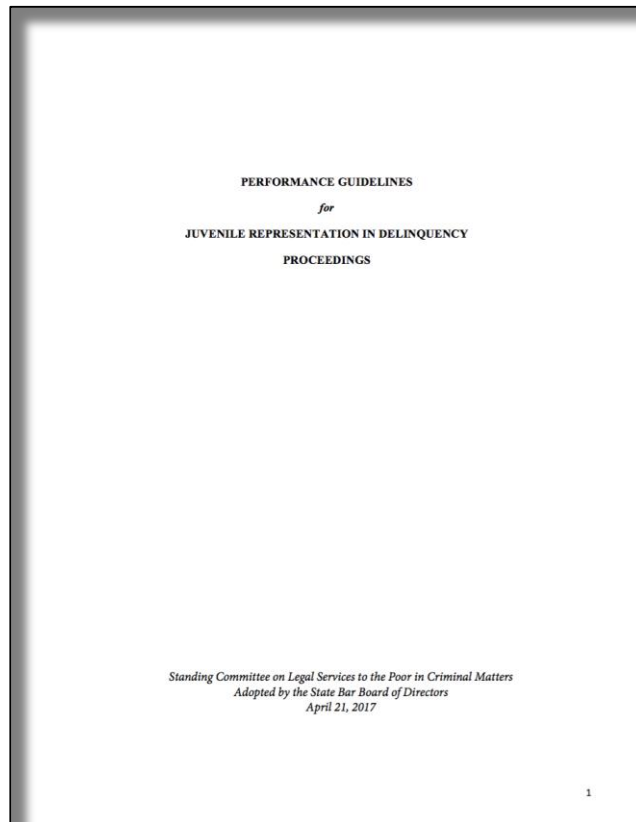


Best Practice: Rely Upon The Guidelines

ABA Standards for Criminal Justice

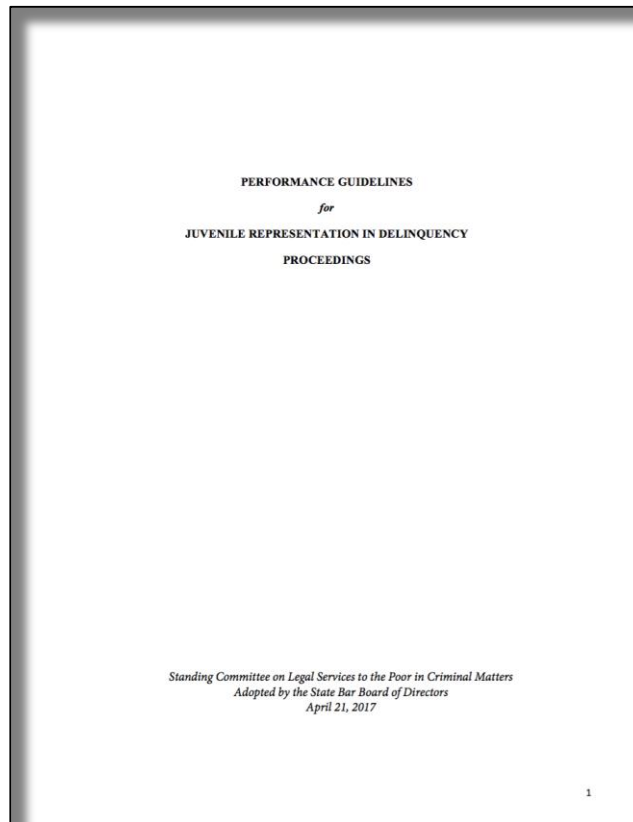
“It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.” 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp.).

Texas State Bar Performance Guidelines



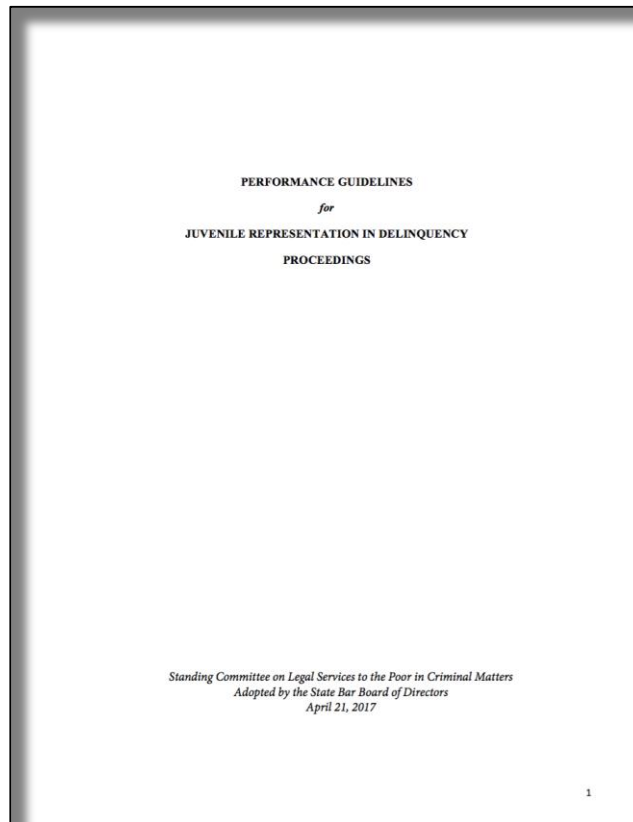
- These Guidelines specifically apply to juvenile defense practice in Texas state court from the time of initial representation in trial-level proceedings—recognizing that the impact of these proceedings may extend far beyond the Texas juvenile justice system—to the exhaustion of direct review before the Texas Supreme Court.
- In some instances, the Guidelines may call for a departure from local practices or may even seem to conflict with local procedures. In such cases, counsel should consult with lawyers, juvenile justice experts, ethics experts, and/or the commentary to the National Standards for guidance. If counsel determines that it is necessary to depart from a local practice in order to protect a client's rights, preserve error and/or meet his ethical obligation to the client, he must do so.

Guideline 4.1 (A) Investigation



- A Counsel has a duty to conduct, or secure there sources to conduct, an independent case review and investigation as promptly as possible. Counsel should be familiar with laws and guidelines governing discovery. See Guideline 4.2.
- Counsel should, regardless of the client's wish to enter a plea of true, determine whether the charges are factually and legally correct and inform the client of potential defenses to the charges.
- Counsel should explore all avenues leading to facts relevant both to the adjudication and to the disposition in the event of a delinquency finding. In no case should counsel delay a disposition phase investigation based on the belief that the client will not be adjudicated delinquent or that the charges against the client will otherwise be dismissed.

Guideline 4.1 (B) (9) Investigation

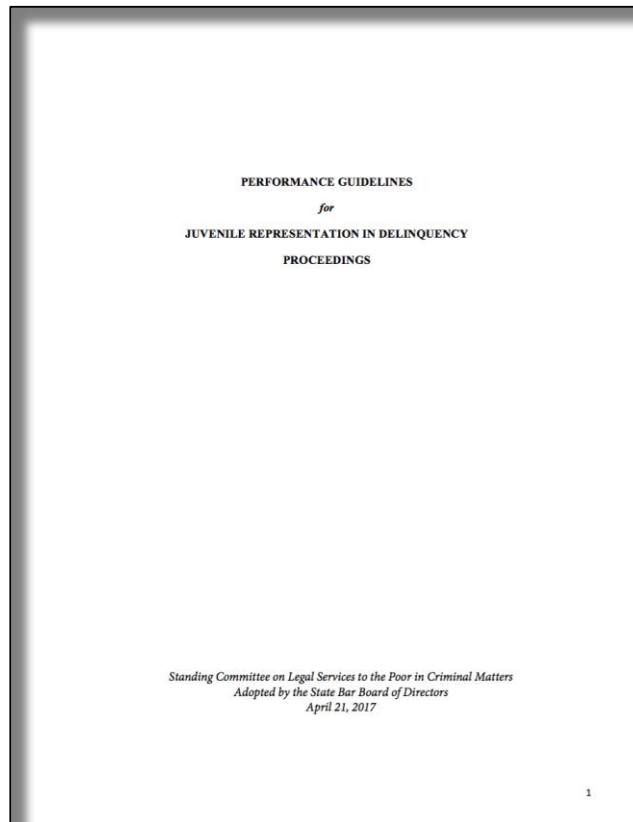


Expert Assistance

- Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate. Counsel should utilize ex parte and in camera procedures to secure the assistance of experts when it is necessary or appropriate to:
 - a. Prepare the defense;
 - b. Adequately understand the prosecution's case;
 - c. Rebut the prosecution's case or provide evidence to establish any available defense;
 - d. Investigate the client's fitness to proceed, mental state at the time of the offense, or capacity to make a knowing and intelligent waiver of constitutional rights; and
 - e. Mitigate any punishment that may be assessed after a verdict or plea of true to the alleged offense.

Guideline 8.2

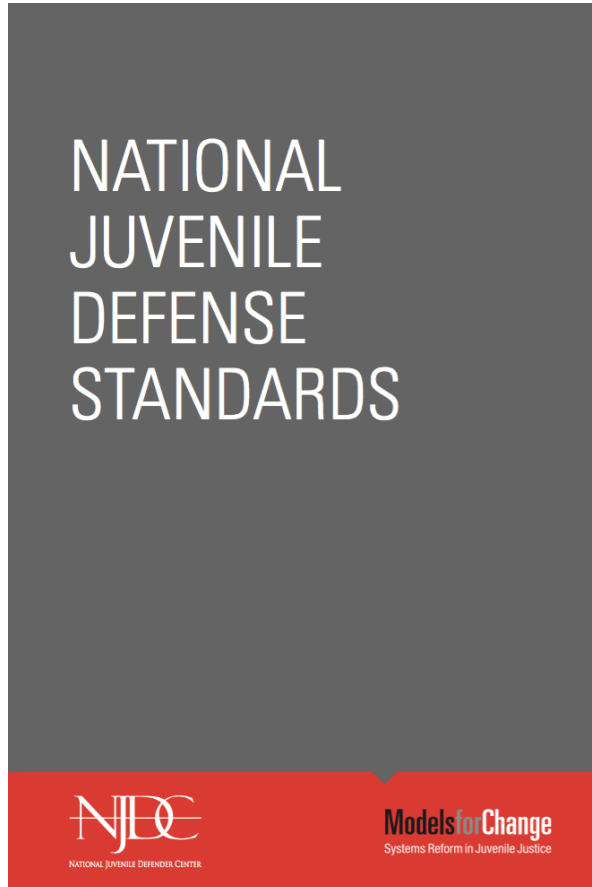
Social History or Predisposition Report



If counsel attempts to work with probation to develop the social history report and finds that probation is unresponsive, and counsel feels that a separate disposition report is necessary, **counsel should develop a defense disposition memorandum to distribute. Counsel should request his own expert to develop a defense predisposition report when appropriate.** Among the items counsel should consider including in the memorandum are:

1. Presentation of an individualized disposition proposal that takes into account the client's expressed interest;
2. Information favorable to the client concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, any mental health concerns, extracurricular activities, social strengths, employment record and opportunities, educational background, and family and financial status;
3. Information concerning the availability and appropriateness of community-based treatment programs, community treatment facilities, and community service work opportunities;
4. Information that would support a disposition other than out-of-home placement, such as the potential for rehabilitation, the nonviolent nature of the offense, and the availability of the clients' parents to support the client through completing any terms of probation;
5. Challenges to incorrect or incomplete information in the official predisposition report or any prosecution disposition memorandum;
6. Challenges to improperly drawn inferences and inappropriate characterizations in the official predisposition report or any prosecution disposition memorandum; and
7. Information contrary to that before the court and that is supported by affidavits, letters, and public records.

4.1 Investigate Facts of the Case



Counsel must conduct a prompt, thorough, and independent investigation of the facts and circumstances of the case.

- a. Counsel should be familiar with case law, code of professional ethics, and any statutory authority regarding how and to what extent counsel should investigate the case, obtain discovery, and attend ongoing investigative procedures, such as line-ups;
- b. Counsel must zealously investigate the facts of the case and pursue resources for investigation when appropriate;
- c. Counsel should investigate the allegations in a timely manner. Counsel should prioritize the investigation of witnesses and evidence that will be key to the development of the theory of the case, such as going to the scene of the alleged crime, interviewing eyewitnesses, and/or obtaining relevant evidence; and
- d. Counsel should not knowingly use illegal means to obtain evidence or instruct others to do so.

Unique issues for juveniles charged with capital murder or facing certification

Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence

- The representation of children in adult court facing a possible life sentence is a highly specialized area of legal practice, therefore these guidelines address the unique considerations specific to the provision of a zealous trial defense.
- Defense Team: The defense team must include a minimum of two qualified attorneys, an investigator, a mitigation specialist, and, when appropriate, an interpreter.
 - Specialized training representing child clients and individuals charged with homicide offenses.
- Thorough investigation, including investigation of mitigating factors.
 - Refer to scope of investigation outlined in key death penalty cases: *Wiggins v. Smith* and *Rompilla v. Beard*.

What does the law actually require?

Duty to Investigate: Wiggins v. Smith and Rompilla v. Beard

Duty to appoint appropriate experts, including mitigation investigators : Ake v. Oklahoma

Duty to Investigate: ABA Guidelines Adopted by Supreme Court

Rompilla v. Beard, 545 U.S. 374 (2005)

“[W]e long have referred [to these ABA Standards] as ‘guides to determining what is reasonable.’ ” Wiggins v. Smith, 539 U.S., at 524 (quoting Strickland v. Washington, 466 U.S., at 688) . . .

Implication? Must ask for discovery

Must make discovery requests for all documents obtained by

- ❖ Prosecutor
- ❖ Law enforcement
- ❖ Schools
- ❖ Juvenile probation, including the results of the PACT

Must then review documents, and conduct further investigation as needed

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the Supreme Court found a defense counsel ineffective for failing to review the entire prosecution file. AFTER defense counsel:

- Interviewed client on multiple occasions
- Interviewed 5 family witnesses
- Spoke with 3 mental health witnesses

Still defense counsel failed to review a post-conviction case file which contained more social history. Quoting the ABA Guidelines, the court found counsel's failure to obtain these documents and investigate ineffective assistance of counsel.

Ake v. Oklahoma

The Supreme Court held that an indigent defendant is entitled as a matter of constitutional right to an appointed expert in some cases.

Includes:

- Mitigation Specialists
- Investigators



LONE STAR
JUSTICE ALLIANCE

Elizabeth A. Henneke
Executive Director
3809 South 1st St.
Austin TX 78704
ehenneke@lsja.org