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At Long Last Credibility: The Role of the Attorney for the State Under Indiana's New Juvenile Code

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Following the creation of the first juvenile court act,¹ there was a significant time lapse before any meaningful discussion appeared in the literature on the role of the attorney for the state in juvenile court. While little has been written to explain this apparent lack of attention perhaps an examination of the juvenile court concept itself will give one some insight into the area.

As is widely known, the creators of the juvenile court movement saw the criminal law as an oppressive failure. The public seemed appalled by the application of adult procedures and sentences to children and set out to create a court where the state, through the exercise of its power of "parens patriae," could act as a wise and benevolent parent.² Because the various acts that have passed since the creation of the original court were the products of individual state supreme court rules or statutes, the procedures have varied from state to state. Even with the constitutionalization of certain of these juvenile procedures by the United States Supreme Court in *Kent v. United States*³ and *In re Gault*,⁴ as late as 1968 only two states⁵ required appearances by prosecuting attorneys.

Although Indiana had passed its first juvenile code in 1903⁶ and completed a major revision and codification of the state's juvenile statutes in 1945,⁷ it was not until 1978⁸ that the General Assembly saw fit to specifically establish a statutory role for the state's attorney, the prosecuting attorney and the attorney for the department of public welfare, his civil counterpart in juvenile matters.⁹

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¹The first act was allegedly created in Cook County, Illinois, in 1899, although some observers discount the accuracy of this claim. See, e.g., Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

²M. PAULSEN & C. WHITEBREAD, *JUVENILE LAW AND PROCEDURE* 24 (1974).

³383 U.S. 541 (1966).

⁴387 U.S. 1 (1967).

⁵See COLO. REV. STAT. § 20-1-102(a) (Supp. 1978); N.J. STAT. ANN. § 2A:4-48 (West Supp. 1979).

⁶Act of March 10, 1903, ch. 237, § 10, 1903 Ind. Acts 522 (repealed 1945).

⁷Act of March 10, 1945, ch. 356, 1945 Ind. Acts 1724 (repealed 1945).

⁸Act of March 10, 1978, Pub. L. No. 136, § 1, 1978 Ind. Acts 1196 (amended 1979).

⁹IND. CODE § 31-6-4-7(d) (Cum. Supp. 1979). All citations herein to article 6 are from the new Juvenile Code, effective October 1, 1979.

In setting out this statutory role,¹⁰ Indiana joined what seems to be a national trend¹¹ by removing the decision to file a petition from the judge and placing it in the hands of the attorney for the state. The basis for this decision and the compromise reached to allow its inclusion within the Code will be discussed within this article.

While it will be impossible to discuss each section of the Code, the major areas of concern, as they pertain to the duties and functions of the attorney for the state, will be pointed out in hopes that those representing the state will then be motivated to make an in-depth study and analysis of the Code's provisions.

GENERAL PROVISIONS (CHAPTER 1)

Purpose Perhaps most significantly for the attorney for the state, the Code, in its initial purpose and policy statements,¹² states the policy of Indiana and the purpose of this article to be: "to provide a juvenile justice system that protects the public by enforcing the legal obligations children have to society."¹³ It goes on to state that even when using diversionary programs as vehicles for providing "care, treatment, rehabilitation, or protection"¹⁴ for the children under its jurisdiction, courts should "utilize diversionary programs which are consistent with public safety."¹⁵

These provisions become even more significant when coupled with the provisions of the section on dispositions¹⁶ which allows a court to "order temporary confinement in a detention facility for children or in the juvenile part of the county jail for not more than ten (10) days"¹⁷ for those children found to be delinquent children because they have committed an act which would be a crime if committed by an adult.¹⁸

While some members of the Commission¹⁹ felt that these provisions, if allowed to be included within the Code, would simply turn Indiana's juvenile justice system into a "mini-criminal justice system," it finally was decided that to have any credibility with the public at all the Code

¹⁰*Id.*

¹¹See IJA-ABA, STANDARDS RELATING TO PROSECUTION 25 (Tent. Draft, 1977, approved February 12, 1979)[hereinafter cited as IJA-ABA]. See also NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS (LEAA), JUVENILE JUSTICE AND DELINQUENCY PREVENTION 503 (1976) [hereinafter cited as NAC-LEAA].

¹²IND. CODE § 31-6-1-1 (Cum. Supp. 1979).

¹³*Id.* § 31-6-1-1(1).

¹⁴*Id.* § 31-6-1-1(3).

¹⁵*Id.* § 31-6-1-1(4).

¹⁶*Id.* § 31-6-4-16.

¹⁷*Id.* § 31-6-4-16(g)(5).

¹⁸*Id.* § 31-6-4-1(g).

¹⁹The 1975 Indiana General Assembly created a 24 member Juvenile Justice Division of the Indiana Judicial Study Commission. IND. CODE § 2-5-8-1.1 (1976). The Division was scheduled to go out of existence on January 1, 1978, but the termination was delayed until October 1, 1979. Act of March 10, 1978, Pub. L. No. 136, § 56, 1978 Ind. Acts 1196.

had to first provide for the public's safety and to hold those who violated its provisions accountable. As a compromise, however, it was hoped that in doing so the same system would continue to treat children within its jurisdiction as "persons in need of care, treatment, rehabilitation, or protection,"²⁰ as had been provided within the 1945 Act.²¹ Whether this can be achieved will be seen.

Definitions While this section of the Code²² does not contain many new terms with regard to the general practice of juvenile law, those attorneys assuming their duties under it for the first time should familiarize themselves with these definitions so that in dealing with juveniles under its provisions they will use the correct categories and related procedures.

Two new terms which do appear for the first time are "secure facility"²³ and "shelter care facility."²⁴ They will become particularly important at hearings involving detention of a delinquent child²⁵ or "detention of a child in need of services"²⁶ since the place of detention wherein a child is placed will dictate the time frame in which the attorney must decide to file his charges.²⁷

JURISDICTION (CHAPTER 2)

Juvenile Court—Original In this chapter,²⁸ the Code provides for the exclusive original jurisdiction of the juvenile court, with one notable exception, in the same general terms of prior acts.²⁹ Article 6, the Juvenile Law portion of Title 31 - Family Law, does *not* apply, however, to "a child who violates: (1) any traffic law, if the child is sixteen (16) years of age or older at the time of the violation; (2) any law regulating the use or registration of watercraft or snowmobiles; or (3) any law protecting fish or wildlife."³⁰ Parts (2) and (3) dealing with watercraft, snowmobiles and wildlife are new provisions of the Indiana law.

Also of significance to the attorney for the state in this area is the provision covering murder, which in the prior Code was *not included* in juvenile court jurisdiction.³¹ Under the new Code the juvenile court has

²⁰IND. CODE § 31-6-1-1(3) (Cum. Supp. 1979).

²¹Act of March 10, 1945, ch. 356, § 1, 1945 Ind. Acts 1724 (repealed 1979).

²²IND. CODE § 31-6-1-2 (Cum. Supp. 1979).

²³*Id.*

²⁴*Id.*

²⁵*Id.* § 31-6-4-5.

²⁶*Id.* § 31-6-4-6.

²⁷*See id.* § 31-6-7-6, which spells out the time frame in which an attorney must file his charge and try his case or the child, if in "secure detention," may be released.

²⁸*Id.* §§ 31-6-2-1 to -4.

²⁹*Compare* § 31-6-2-1(a) (Cum. Supp. 1979) *with* the 1978 version, § 31-6-2-1 (Supp. 1978). *See also id.* § 31-6-2-1.5 (Cum. Supp. 1979), for an exception to exclusive original jurisdiction.

³⁰IND. CODE § 31-6-2-1(b) (Cum. Supp. 1979).

³¹IND. CODE § 31-5-7-4.1(a) (1976) (repealed 1979).

exclusive original jurisdiction over children alleged to have committed murder.³² This requires the attorney for the state to then "waive" the child to adult court, as provided by law,³³ unless he wishes the child to remain within the juvenile justice system.

Concurrent—Felony One of the most significant changes in this chapter provides a resolution to a serious omission in prior codes. Under former juvenile acts there was no mechanism provided for the attorney for the state to extradite a child who had voluntarily left the state after having committed a juvenile act that would be a crime if committed by an adult. In such a case under the new law,³⁴ the attorney for the state can file the charge against the child in a court having felony jurisdiction (under the regular general provision of probable cause) if he can show that the act committed by the child is a felony³⁵ or murder,³⁶ that the child has left Indiana,³⁷ and that the state cannot obtain jurisdiction over him except under proceedings for extradition of alleged felons.³⁸ If the child's return is secured in this manner, then the court having the felony jurisdiction over the child *shall immediately* transfer him to the proper juvenile court.³⁹

Transfer From Criminal Courts This section⁴⁰ answers the problem of what to do with a child when it is discovered during an adult prosecution that he is only a child. The Code provides that in such a case the court having criminal jurisdiction "*shall immediately* transfer the case, together with certified copies of all papers, documents, and testimony, to the juvenile court."⁴¹ The section then provides for the child's release "on his own recognizance or to his parent, guardian, or custodian upon that person's written promise."⁴² However, the court may detain the child, under provisions similar to the general criteria provided within the general detention section for such a child,⁴³ with the direction that, if detained, he shall be detained in "a place designated by the juvenile court."⁴⁴ Finally, this section states for the first time a position that is uniform throughout the Code: that children under the general jurisdiction of the juvenile court "may not be released on bail."⁴⁵

³²IND. CODE § 31-6-2-1(a)(1) (Cum. Supp. 1979).

³³*Id.* § 31-6-2-4(c)(1).

³⁴*Id.* § 31-6-2-1.5.

³⁵*Id.* § 31-6-2-1.5(a)(1).

³⁶*Id.*

³⁷*Id.* § 31-6-2-1.5(a)(2).

³⁸*Id.* § 31-6-2-1.5(a)(3).

³⁹*Id.* § 31-6-2-1.5(b).

⁴⁰*Id.* § 31-6-2-2.

⁴¹*Id.* § 31-6-2-2(a) (emphasis added).

⁴²*Id.* § 31-6-2-2(b).

⁴³*Id.* § 31-6-4-5.

⁴⁴*Id.* § 31-6-2-2(c).

⁴⁵*Id.* § 31-6-2-2(d). In discussing this philosophical concept, the Commission remained adamant that it did not want to involve children in what it considered to be the "evils of the adult money bail system." While the Commission was not unanimous in this position the exclusion of "bail for children" remains consistent throughout the Code.

Waiver of Jurisdiction Perhaps the one choice that is the most important to the prosecuting attorney, in terms of the furtherance of his duties regarding public safety, is the decision as to which children are appropriate subjects for the juvenile system and which children, by virtue of their histories and present conduct, should be "waived" or transferred to the adult criminal justice system. This decision not only directly affects the individuals involved but also may be the process that allows the public in general to maintain its belief that the juvenile justice system in fact "protects the public by enforcing the legal obligations children have to society"⁴⁶ and yet at the same time "insures that children within the juvenile justice system are treated as persons in need of care, treatment, rehabilitation, or protection."⁴⁷

The procedures outlined within the new Code follow prior statutory provisions in Indiana which have been modified and changed on many occasions, primarily due to the directives of cases such as the United States Supreme Court decision in *Kent v. United States*⁴⁸ and its Indiana counterpart, *Summers v. State*.⁴⁹ The process is, by now, familiar to all attorneys who have become involved in these decisions over the years, but the Code does offer two new sections which must be noted for proper implementation.

First, since murder committed by a child is now within the exclusive original jurisdiction of the juvenile court,⁵⁰ the prosecutor is required to request waiver of those children whom he feels cannot be appropriately handled within the juvenile system. The Code provides that any child ten years of age or older when the act was allegedly committed shall be waived, provided the other criteria are met.⁵¹ Some question may be raised by defense counsel regarding this age requirement. Language in another subsection of these provisions seems to suggest that a child should be sixteen years of age to be waived for murder.⁵² However, this second reference seems to be merely an inappropriate inclusion of law dealing with violent acts in this general area of waiver, with the first provision clearly being the one which was intended to control in all murder cases.⁵³

⁴⁶*Id.* § 31-6-1-1(1).

⁴⁷*Id.* § 31-6-1-1(3).

⁴⁸383 U.S. 541 (1966).

⁴⁹248 Ind. App. 551, 230 N.E.2d 320 (1967). See also *Atkins v. State*, 259 Ind. 596, 290 N.E.2d 441 (1972); *Swinehart v. State*, ___ Ind. App. ___, 349 N.E.2d 224 (1976); *Seay v. State*, ___ Ind. App. ___, 337 N.E.2d 489 (1975), *rehearing denied*, ___ Ind. App. ___, 340 N.E.2d 369 (1976); *Clemons v. State*, 162 Ind. App. 50, 317 N.E.2d 859 (1974); *State v. Jump*, 160 Ind. App. 1, 309 N.E.2d 148 (1974).

⁵⁰See IND. CODE § 31-6-2-1.5 (Cum. Supp. 1979), for an example of concurrent original jurisdiction in the juvenile court.

⁵¹*Id.* § 31-6-2-4(c).

⁵²*Id.* § 31-6-2-4(d)(3).

⁵³If such an issue is raised it can be appropriately met by the attorney for the state by simply reminding the court that where two codified sections seem to be in conflict, one being of a general nature, as in § 31-6-2-4(d)(3) which deals with the general area of "crimes of violence" or "crimes against the person," as opposed to the specific nature of the provi-

The other new provision in this area of the Code deals with the concept of lesser included offenses.⁵⁴ Under the new language, it is clear that in all cases where a child is waived for one offense, the waiver applies not only to that offense but to all included offenses.⁵⁵

PROCEEDINGS GOVERNING DELINQUENT CHILDREN
AND CHILDREN IN NEED OF SERVICES (CHAPTER 4)

This chapter is critical to the attorney for the state as it sets out the procedures to be followed in dealing with children within the juvenile court system, as well as very carefully defining who shall have what duties and how each function relates to the next. In writing this chapter, the Commission realized that one of the strongest criticisms of the juvenile justice systems of the past has been that in attempting to be informal they have become as varied as the courts which administered them.

By starting with very precise definitions of terms and then carefully devising statutory provisions for each process, hearing and decision made within the system, the Commission has now provided the mechanism for a much more uniform approach to juvenile matters in Indiana. It should be noted, however, that in outlining a uniform process the Commission has been careful to allow maximum use of existing systems wherever possible so as to limit the fiscal impact of implementation of the Juvenile Code on the respective counties. In fact, in those counties which have faithfully followed not only the letter but the spirit of prior rules and statutory regulations, the impact of implementation of these procedures will be negligible.⁵⁶

Definitions In developing definitions for the basic categories within which children were grouped in prior laws, Indiana, like nearly every other jurisdiction, had divided its handling of these children based upon their activity or their condition. The traditional terms of "delinquent," "dependent," "neglected" and "abused" have also been commingled with less definitive terms such as "status offender." While generally feeling these terms were at best outdated, if not actually harmful, the Commission finally decided that the important issue was not what label you

sions of § 31-6-2-4(c)(1) which was written to cover the crime of murder only, then the one deemed to be the more specific shall prevail.

⁵⁴*Id.* § 31-6-2-4(a).

⁵⁵*Id.* See *Blythe v. State*, ___ Ind. App. ___, 373 N.E.2d 1098 (1978), which agrees with this provision even though the *Blythe* case was based on an older waiver statute which is silent on this issue.

⁵⁶For an excellent discussion of the overall effect of the provisions of this chapter on the juvenile system of Indiana and the Juvenile Code itself, see Kerr, *Forward: Indiana's New Juvenile Code*, 12 IND. L. REV. 1, 9-20 (1979). It should be noted that Mr. Kerr's article was written as a review of Pub. L. No. 136, § 1, 1978 Ind. Acts 1196, and therefore does not necessarily take into account any changes made in the law by the 1979 Indiana General Assembly, through Pub. L. No. 276, 1979 Ind. Acts, which is an integral part of the now complete Indiana Juvenile Code which becomes effective October 1, 1979.

put on the child or his condition but how he was treated in the system. Therefore, while it changed the traditional "labels" somewhat, the Commission has really only reorganized the categories. The real change has come in how children will be treated by the system, and as a result, the Code specifies very definite policy directives for each of the role players within the system.

The primary category which deals with the actions of a child is designated "Delinquent acts; delinquent child."⁶⁷ The traditional approach of designating acts which would be crimes if committed by adults as delinquent acts if committed by a child is continued,⁶⁸ although as previously mentioned, this category now also includes murder. Some of the traditional "status offender" acts are also included within the definition.⁶⁹ However, while the new definition is not seemingly much different, some important changes should be carefully noted.

First, "running away from home" has again been designated a delinquent act⁶⁰ after having been an act of dependency since 1976.⁶¹ However, under the new provision "running away from home" is an offense only if done "without reasonable cause and without permission of [the] parent, guardian, or custodian who requests his return."⁶² Additionally, the traditional acts of incorrigibility, ungovernability and being beyond the control of a parent are continued under the terminology of acts which constitute habitual disobedience.⁶³ Again, however, it must be noted that the act has been changed so that it only covers a child who "*habitually* disobeys the *reasonable* and *lawful* commands of his parent, guardian, or custodian."⁶⁴

The net effect of these changes is hard to predict. Some feel that the emphasis on such terms as "without reasonable cause,"⁶⁵ and "reasonable and lawful commands"⁶⁶ could lead to an increased involvement of juvenile courts in internal family matters and even unwarranted judicial supervision and limitation on traditional parental authority at a time when many are calling for less court jurisdiction over these matters. The hope is, however, that attorneys for the state, and juvenile courts as well, will exercise appropriate restraint in dealing with matters under these provisions.⁶⁷

Finally, while curfew violation has been retained as a delinquent act,

⁶⁷IND. CODE § 31-6-4-1 (Cum. Supp. 1979).

⁶⁸*Id.* § 31-6-4-1(a)(1).

⁶⁹*Id.* § 31-6-4-1(a)(2) to -1(a)(5).

⁶⁰*Id.* § 31-6-4-1(a)(2).

⁶¹IND. CODE § 31-5-7-5(1976)(repealed 1979).

⁶²IND. CODE § 31-6-4-1(a)(2)(Cum. Supp. 1979).

⁶³*Id.* § 31-6-4-1(a)(4). These traditional acts of delinquency were found in IND. CODE § 31-5-7-4.1(a)(2) (Supp. 1978)(repealed 1979).

⁶⁴IND. CODE § 31-6-4-1(a)(4) (Cum. Supp. 1979) (emphasis added).

⁶⁵*Id.* § 31-6-4-1(a)(2).

⁶⁶*Id.* § 31-6-4-1(a)(4).

⁶⁷Kerr, *Forward: Indiana's New Juvenile Code*, 12 IND. L. REV. 1, 10 (1979).

and has been considerably rewritten to make it more understandable,⁶⁸ it now carries a provision, added in the House of Representatives of the General Assembly, that allows a city, town or county to "advance the curfew time within its jurisdiction by not more than one (1) hour"⁶⁹ if it determines that the curfew times provided within the subsection are inadequate to the furtherance of reasonable public safety. Although the Commission felt that in view of existing Indiana constitutional and case law⁷⁰ this provision was unconstitutional and had recommended its removal from the 1978 version of the Juvenile Code, the 1979 session of the General Assembly retained the subsection within its draft.

The attorney for the state will need to be particularly aware that being able to prove that a child has committed a "delinquent act" will not necessarily mean that he can prove that the child is a "delinquent child."⁷¹ In order to sustain this burden of proof in cases of delinquent acts which would be crimes if committed by adults, the attorney for the state will need to prove only that the child committed the act. In cases where the child is alleged to have committed a delinquent "status" offense, however, the attorney for the state must prove not only that the child committed the act, but also that the child "needs care, treatment, or rehabilitation that he is not receiving, that he is unlikely to accept voluntarily, and that is unlikely to be provided or accepted without the coercive intervention of the court."⁷²

This section then, perhaps more than any other, illustrates the basic underlying philosophy of the new Juvenile Code and what was in the minds of the Commission as they drafted it. Clearly, as has been previously pointed out, it was the intent of the Commission to hold children accountable for their "criminal" acts. By doing this they felt that they could provide for the public's safety and still maintain credibility for a juvenile justice system. However, by making the additional requirement of proof in cases of "status" acts, they made a clear statement that a juvenile court should be used for "coercive intervention" only, and that such intervention should occur only when the child cannot, or will not, voluntarily accept the "care, treatment, or rehabilitation" that is needed.⁷³ While the Code retains juvenile court jurisdiction over these types of acts it cautions that judicial intervention should be used only after all other efforts to deal with the problem have been exhausted.

The Code also provides a variety of options for the handling of juvenile problems, which will be discussed later in this article, thereby reflecting

⁶⁸IND. CODE § 31-6-4-2 (Cum. Supp. 1979).

⁶⁹*Id.* § 31-6-4-2(d).

⁷⁰See IND. CONST. art. IV, § 23. See also *City of Indianapolis v. Sablica*, 264 Ind. 271, 342 N.E.2d 853 (1976), *overruling* *Medias v. City of Indianapolis*, 216 Ind. 155, 23 N.E.2d 590 (1939).

⁷¹See IND. CODE § 31-6-4-1(b)(Cum. Supp. 1979).

⁷²*Id.* § 31-6-4-1(b)(2).

⁷³*Id.*

the Commission's position that just because a child behaves in a certain manner the place to deal with that behavior is not necessarily in the juvenile court. The juvenile court should be used, in short, not as a "service provider to children" but only where the public's or the child's welfare is threatened or where, after exhausting local efforts at solution, coercive intervention is needed to bring about a satisfactory solution to a recurrent problem or condition. By being aware of this philosophy and working toward its implementation, the professional participants within the juvenile system, together with their clients, should be forced into working as a team toward the various desired solutions rather than as individual players with no particular duties or obligations toward other participants.

This philosophy is not only applicable to "delinquent acts" and the "delinquent child"; it is also embodied within the Code's new approach to the traditional areas of dependency, neglect and abuse. The Commission combined all of the areas into one major area entitled "child in need of services"⁷⁴ and in so doing, provided six basic areas of involvement for the juvenile justice system. These can actually be grouped into three general approaches.

First, subsection (1) of this section combines the former areas of dependency or neglect into one by dealing with children whose mental or physical condition is seriously impaired or endangered as a result of the *inability, refusal, or neglect* of the parent, guardian or custodian to provide the child with necessary food, clothing, shelter, medical care, education or supervision.⁷⁵ This draft then combines the "condition" aspects of dependency with the "fault" aspects of neglect and abuse.

Second, subsections (2), (3), (4) and (5) of the section encompass the traditional acts of actual abuse, both physical and mental, through commission or omission, and sexually exploitative behavior by the parent or guardian or allowed by the parent or guardian.⁷⁶ The last subsection in section (a) of the definition deals with the child's acts against himself in endangering his own health as well as the health of another and also his refusal to voluntarily take corrective measures to deal with the problems created by those acts or omissions.⁷⁷

Finally, section (d) of the definition provides the usual religious exemption for parents in the "legitimate and genuine" practice of their religious beliefs by allowing a rebuttable presumption to arise that the child is not in need of services because of such practices alone. However, it should be noted that this provision will not prevent emergency service or care for the child under order from the juvenile court.⁷⁸

⁷⁴*Id.* § 31-6-4-3.

⁷⁵*Id.* § 31-6-4-3(a)(1) (emphasis added).

⁷⁶*Id.* § 31-6-4-3(a)(2) to -3(a)(5).

⁷⁷*Id.* § 31-6-4-3(a)(6).

⁷⁸*Id.* § 31-6-4-3(d).

Taking Into Custody—Detention The Juvenile Code next provides detailed procedures outlining by whom and how a child may be taken into custody,⁷⁹ what should happen once this occurs,⁸⁰ and when, where and how he may be detained.⁸¹ While these procedures do not specifically outline actual duties, or provide for an attorney for the state, one point needs to be made. If children alleged to be delinquent are detained then they are entitled to a "detention hearing" within forty-eight hours, excluding Saturdays, Sundays and legal holidays.⁸² If children alleged to be children in need of services are detained, they are entitled to a hearing within seventy-two hours, with the same exclusion for Saturdays, Sundays and legal holidays.⁸³ The Code is silent as to any requirements that counsel for the state take part in these hearings. However, should the state wish to have a child detained beyond these time frames for any reason, it will require that the attorney for the state be present when these hearings are held to make these wishes known to the court. Also, the attorney for the state needs to be acquainted with the provisions of the "speedy trial" section within the Code,⁸⁴ as discussed later in this article, since the time frames for preparation, filing and trial of the state's case are predicated on the time restraints outlined within that section.

The Decision to Charge This area of the Code finally brings credibility to the functions of the attorney for the state within the juvenile justice system. As has been previously noted, the judge under preceding codes in Indiana has had the power to determine not only by whom and how one would be charged, but also whether he was guilty and what should be the disposition. In drafting the new law the Commission, after much debate and research, decided that the traditional function of the decision to charge should rest with the attorney for the state but compromised the area by still requiring that the attorney for the state perform this function by "request[ing] the juvenile court to authorize the filing of a petition."⁸⁵ Whether this requirement will actually allow the court to deny such a request and thereby place the decision to charge back in the hands of the court is unclear, but at least the process now seems to be in the hands of the attorney for the state.

Of course, alongside with this legitimization of the function of the attorney for the state is the responsibility to see that this power is properly exercised and its inherent duties appropriately fulfilled. The Commission realized that specifying which of the possible attorneys for the state (the prosecuting attorney or the attorney for the department of public welfare) perform which function might engender some difficulties.

⁷⁹*Id.* § 31-6-4-4.

⁸⁰*Id.* §§ 31-6-4-7, -8.

⁸¹*See id.* §§ 31-6-4-5 to -6.5.

⁸²*Id.* § 31-6-4-5(f).

⁸³*Id.* § 31-6-4-6(e).

⁸⁴*Id.* § 31-6-7-6.

⁸⁵*Id.* §§ 31-6-4-9(a), -10(a).

Primarily, the Commission wished to limit the need to hire large numbers of new personnel to implement the Code, so it allowed for maximum cooperation between the two agencies, and in fact, hoped that this would occur. Only in the area of the delinquent act which would be a crime if committed by an adult is there a limitation of representation.⁸⁶ The prosecutor alone has the power to request that a petition be filed, while in all other areas both counsel may be involved with only two requirements: any decision to file or not is final only to the office of the attorney making the request (subject of course to the traditional rules of double jeopardy and *res adjudicata*);⁸⁷ and, once such a decision to file is made, the office of the attorney filing the matter is required to represent the state at all hearings relating to that matter.⁸⁸

In performing these functions and in making these decisions the attorney for the state will need to work closely with the intake officer.⁸⁹ It is envisioned by the Juvenile Code that the intake officer will receive the initial information regarding the child or his activities *in writing*, make a preliminary inquiry if the intake officer wishes to proceed, prepare a report of the findings of the inquiry together with any recommendations for further action and forward that report to the appropriate attorney for the state. After reviewing the report, the attorney for the state will make the final decision as to what will be done with regard to the filing of a petition. It should be noted that this referral procedure can be altered by agreement of the parties, specifically the prosecutor and the court, to allow for maximum use of existing systems operating within the state.⁹⁰

Once the attorney for the state makes the decision to request the juvenile court to authorize the filing of a petition, and the filing is authorized by the court, the petition must be prepared according to procedures outlined by the Code. Specifically, the petition *shall* be verified and must contain: (1) a citation as to the court's jurisdiction; (2) a citation to the statute allegedly violated or prescribing the need for services; (3) a concise statement of facts upon which the allegations are based; (4) the child's name, birth date and address, if known; (5) the name and address of the child's parent, guardian or custodian, if known; and, (6) the name and title of the person signing the petition. It should be noted that any error or omission in the citation is grounds for dismissal or reversal of adjudication *only* if the error or omission misleads the child to his prejudice. Finally, the person filing may request *in writing* that the child be taken into custody. The request must be supported by either sworn testimony

⁸⁶*Id.* § 31-6-4-9(a).

⁸⁷*See id.* §§ 31-6-4-7(e), -8(d).

⁸⁸*See id.* §§ 31-6-4-9(a), -10(a).

⁸⁹An "intake officer" is defined as a "probation officer or a caseworker who performs the intake, preliminary inquiry, or other functions specified by the juvenile court or this article." *Id.* § 31-6-1-2.

⁹⁰*See id.* §§ 31-6-4-7(e), -8(d). It should be noted that this "decision is final only as to the office of the person making it." *Id.*

or affidavit and, if granted, the court must make written findings of fact on the record of the grounds for detention.⁹¹

The attorney for the state should further note that the court is mandated to authorize the filing of petitions if it finds probable cause to believe either that the child is delinquent and it is in the best interests of the public or the child that the petition be filed, or that the child is a child in need of services.

Finally, the position of the attorney for the state with regard to requested dismissals of petitions seems absolute, as the court shall dismiss any petitions he has filed upon the motion of the person representing the interests of the state.⁹²

Initial, Fact-Finding, and Dispositional Hearings Assuming that the decision has been made not to handle the case through "informal adjustment"⁹³ and that the petition to charge has been authorized and appropriately filed, the attorney who filed the petition on behalf of the state, as previously explained, will be required to represent the state at all subsequent hearings. In outlining the various types of hearings that would be required in the uniform handling of juvenile matters, the Commission was acutely aware of the limitations of court and attorney time to handle these hearings. Therefore, the attorney for the state should be aware that many of the seemingly separate functions of these hearings can be handled within one hearing and that the important requirement is that the functions be appropriately carried out and made part of the record.

In the "initial hearings" outlined within the Code, both for the delinquent child and the child alleged to be a child in need of services,⁹⁴ the matters to be covered by the court could be covered at the beginning of one hearing which would also include the matters to be heard in the "fact finding" hearing. In fact, if the required "pre-dispositional reports" have been authorized, prepared and distributed,⁹⁵ and all parties are prepared and give their consent, the "dispositional hearing"⁹⁶ could be combined with the above matters as well.

It is important that the attorney for the state remember that he should approach these hearings with the same preparation and attention to detail as he would their adult counterparts of arraignment, trial and sentencing. This requires that he be sure that the court has advised the child and the parent, guardian or custodian of all the required rights,

⁹¹See *id.* §§ 31-6-4-9, -10.

⁹²*Id.* § 31-6-4-11. This provision is even stronger than its adult counterpart found at § 35-3.1-1-13(a), which requires the attorney for the state to list his reasons for the dismissal. For an excellent discussion of the areas of "Initiating Formal Action" and the "Role of the Prosecuting Attorney" under the new Juvenile Code see Kerr, *Forward: Indiana's New Juvenile Code*, 12 IND. L. REV. 14-16 (1979).

⁹³IND. CODE § 31-6-4-12 (Cum. Supp. 1979).

⁹⁴See *id.* §§ 31-6-4-13, -13.5.

⁹⁵*Id.* § 31-6-4-15.

⁹⁶*Id.* § 31-6-4-16(a).

duties and obligations they face and that these advisements are understood and on the record. Also, it will be incumbent upon the attorney for the state to be sure that his motion for "waiver" is on file and duly noted by the court⁹⁷ and that this motion is heard *before* the child is allowed to admit the allegations of the petition or he will be foreclosed from filing such a motion.⁹⁸

Another point for the attorney for the state to remember is that if the child is alleged to have committed a delinquent act, *including any of the "status" offenses*, he is entitled to counsel unless the child waives this right.⁹⁹

The fact-finding hearing is the basic trial mechanism of the juvenile court system and, as such, should be approached by the attorney for the state the same as any trial. Evidence rules are generally not included within the Juvenile Code except as later noted in this article; in delinquency matters the rules of evidence are the same, with some notable exceptions, as in adult criminal trials. The only important additional point to remember in handling those hearings is that the court can withhold judgment in the matter for up to twelve months unless the child or his parent requests otherwise, in which case judgment must be entered within thirty days. A second consequence of withholding judgment is that it may subject the child to release from detention if the child is being held in a secure facility.¹⁰⁰ The attorney for the state needs to be aware of this so that a child is not mistakenly allowed to leave the court's jurisdiction.

The dispositional hearing is perhaps the most important proceeding for the attorney for the state. Here the court, after hearing all the evidence and receiving the required reports, must try to devise a dispositional decree consistent with the philosophy of treatment of juveniles, both delinquent and in need of services, as outlined in subsection (d) of this section of the Code.¹⁰¹ To do this he will need a strong advocate for the state who has enlisted the help of the other professionals in the community in outlining a plan that meets the needs of public safety and yet can actually rehabilitate the child. The new Code allows much leeway in formulating these plans, from providing up to ten days in local correctional facilities for those who commit delinquent criminal acts, to complete emancipation for the child able to go out on his own. Restitution is specifically provided for and state facilities can be used as well. To accomplish this task the attorney for the state will need to be aware of the services available within his community and how effective such services really are.

⁹⁷See *id.* §§ 31-6-2-4, -4-13(d).

⁹⁸*Id.* § 31-6-2-4(e).

⁹⁹See *id.* §§ 31-6-7-2, -3.

¹⁰⁰*Id.* § 31-6-4-14(e).

¹⁰¹*Id.* § 31-6-4-16.

Finally, it is very important that the attorney for the state be sure that once the court has rendered its decision and it has been duly recorded and explained to all concerned, that the court then advise the child and his parents of their right to appeal and close the record.¹⁰² While these tasks may seem exclusively the function of the court the attorney for the state will have to retry the case if it is reversed for an improper record, and he should do all in his power to see that that does not happen.

Parental Participation The new Juvenile Code has created a procedure whereby the juvenile court may require parental¹⁰³ participation in a program of care, treatment or rehabilitation of a child. The attorney for the state, whether he is the prosecuting attorney or the attorney for the county welfare department, may file a petition requesting such parental participation.¹⁰⁴ It is required that the child be adjudged a delinquent child or child in need of services before a parental participation petition can be filed.¹⁰⁵ At the initial hearing on a child in need of supervision (CHINS) or a delinquent child the juvenile court must inform the parent that if the child is adjudicated a CHINS or a delinquent child he may be required to participate in a program of care, treatment or rehabilitation.¹⁰⁶ Upon a finding that a child is a delinquent or CHINS a predispositional report will be prepared by a probation officer or a caseworker¹⁰⁷ which could recommend a program of parental participation.¹⁰⁸ At the dispositional hearing the predispositional report may be admitted, but the person representing the interests of the state must be given a fair opportunity to controvert any parts of the report admitted into evidence.¹⁰⁹ Also, the juvenile court could hold a hearing on a petition for parental participation concurrently with the dispositional hearing or with any hearing to modify a dispositional decree.¹¹⁰ A parent may controvert any allegations at a hearing concerning a program of parental participation,¹¹¹ and is entitled to cross-examine witnesses, obtain

¹⁰²*Id.* § 31-6-4-16(1).

¹⁰³"Parental" here includes parents, guardians and custodians.

¹⁰⁴IND. CODE § 31-6-4-17 (Cum. Supp. 1979). The petition must be signed and verified and is entitled "In the Matter of the Participation of _____, the Parent, Guardian, or Custodian of _____." The petition must allege: "(1) the respondent is the child's parent, guardian or custodian; (2) the child has been adjudicated a delinquent child or a child in need of services; and (3) the parent, guardian, or custodian should: (A) obtain assistance in fulfilling his obligations as a parent, guardian or custodian; (B) provide specified care, treatment or supervision for the child; or (C) work with any person providing care, treatment or rehabilitation for the child." *Id.*

¹⁰⁵*Id.* See also *id.* § 31-6-4-16(d)(4), -16(i).

¹⁰⁶*Id.* §§ 31-6-4-13(f)(1), -13.5(e)(1).

¹⁰⁷Defined as "any child welfare worker of the county department." *Id.* § 31-6-1-2.

¹⁰⁸*Id.* § 31-6-4-15(a), -15(b). Indeed, the Juvenile Code seems to indicate a preference for parental participation. The predispositional report is to recommend a program for the child that "provides a reasonable opportunity for participation by the child's parent, guardian or custodian" whenever it is consistent with the safety and welfare of the child and the community. *Id.* § 31-6-4-15(d).

¹⁰⁹*Id.* § 31-6-4-16(b).

¹¹⁰*Id.* § 31-6-4-17.

¹¹¹*Id.* § 31-6-4-13.5(e)(3).

witnesses or evidence by compulsory process and introduce evidence on his own behalf.¹¹² If the juvenile court decides to order a program of parental participation it must accompany its dispositional decree with findings of fact concerning the need for such a program and must specify its reasons for the disposition.¹¹³

The juvenile court must advise the parent that failure to participate as required by its order could lead to termination of the parent-child relationship.¹¹⁴ Further, failure to obey an order of the court is punishable as contempt.¹¹⁵ The juvenile court retains jurisdiction over the parent until the child reaches twenty-one unless the court discharges the child or parent at an earlier time¹¹⁶ or until guardianship is awarded to the department of correction.¹¹⁷ Additionally, the department of correction may petition the court to reinstate jurisdiction over the child and his parent.¹¹⁸

In summary, the attorney for the state may become involved in litigation concerning parental participation in a program for a child in several different ways. He may be the one petitioning the court for a program of parental participation. He may be contesting recommendations in a predispositional report concerning parental participation, but it is more likely that the attorney for the state would be in the position of supporting the recommendations of the predispositional report against an attack from the parent required to participate in a rehabilitation program. This would undoubtedly be the case where a welfare caseworker prepared the predispositional report and the attorney for the state is the welfare attorney. The attorney for the state would also become involved if the parent failed to comply with the juvenile court's order to participate in a rehabilitation program. This may lead to an action to terminate the parent-child relationship, which could be brought by either the welfare attorney or the prosecuting attorney.¹¹⁹ Or, the parents may be found in contempt of court.¹²⁰ Since the failure to obey the dispositional decree of the juvenile court would no doubt be indirect contempt of court and, where the contempt is indirect criminal contempt, it must be prosecuted by the state,¹²¹ the prosecuting attorney may become involved in enforcing a dispositional decree ordering parental participation through contempt proceedings.

¹¹²*Id.* § 31-6-3-2.

¹¹³*Id.* § 31-6-4-16(j).

¹¹⁴*Id.* § 31-6-4-17.

¹¹⁵*Id.* § 31-6-7-15.

¹¹⁶*Id.* § 31-6-2-3(1).

¹¹⁷*Id.* § 31-6-2-3(2).

¹¹⁸*Id.* § 31-6-2-3.

¹¹⁹*Id.* § 31-6-5-4.

¹²⁰*Id.* § 34-6-7-15; *LaGrange v. State*, 238 Ind. 689, 153 N.E.2d 593 (1958); *Boggs v. State*, ___ Ind. App. ___, 386 N.E.2d 992 (1979).

¹²¹*Allison v. State ex rel. Allison*, 243 Ind. 489, 187 N.E.2d 565 (1963); *Denny v. State ex rel. Brady*, 203 Ind. 682, 182 N.E. 313 (1932).

Periodic Review of Disposition At any time after the date of the original disposition decree the juvenile court may order the county welfare department or the probation department to file a progress report on implementing the decree.¹²² Additionally, during any time the juvenile court retains jurisdiction the court may modify the dispositional decree on its own motion or upon the motion of a number of different individuals, including the prosecuting attorney and the county welfare attorney.¹²³

At least every nine months after a dispositional decree which removes a child from his parent, and possibly more often if ordered by the juvenile court, the court must hold a formal hearing to determine whether the dispositional decree should be modified.¹²⁴ The court is to consider whether the present placement of the child is still appropriate.¹²⁵ The court is permitted to consider a list of statutory factors in making this determination.¹²⁶ There is a presumption in favor of returning the child to his parent. For the state to prevail, it must show that the child should not be returned to his parent.¹²⁷

At least eighteen months after the date of a dispositional decree the juvenile court must decide whether it should continue to entertain jurisdiction and it must hold a formal hearing on the matter.¹²⁸ On this issue there appears to be a presumption against continued jurisdiction for once again the state bears the burden of showing that jurisdiction should be continued, and it must do this by demonstrating that the objectives of the dispositional decree have not been accomplished and that a continuation of the decree has a probability of success.¹²⁹ If the state does

¹²²IND. CODE § 31-6-4-19(a) (Cum. Supp. 1979).

¹²³*Id.* § 31-6-7-16(a).

¹²⁴"Parent" will include guardian and custodian. *Id.* § 31-6-4-19(6).

¹²⁵*Id.*

- ¹²⁶
- (1) The services that have been provided or offered to a parent, guardian or custodian to facilitate a reunion.
 - (2) The extent to which the parent, guardian or custodian has enhanced his ability to fulfill his parental obligations.
 - (3) The extent to which the parent, guardian or custodian has visited the child, including the reasons for infrequent visitation.
 - (4) The extent to which the parent, guardian or custodian has cooperated with the county department or probation department.
 - (5) The child's recovery from any injuries suffered before removal.
 - (6) Whether any additional services are required for the child or his parent, guardian, or custodian and, if so, the nature of those services.
 - (7) The extent to which the child has been rehabilitated.

Id.

¹²⁷*Id.* This presumption against continued separation of parent and child reflects one of the basic policies of the Juvenile Code: "to remove children from their families only when it is in the child's best interest or in the interest of public safety." *Id.* § 31-6-1-1(6). The burden of proof upon the state on this issue is by a preponderance of the evidence. *Id.* § 31-6-7-13(a).

¹²⁸*Id.* § 31-6-4-19(c).

¹²⁹*Id.* As with the burden of proof in the nine-month review of a removal decree, the state must sustain its proof by a preponderance of the evidence. *Id.* § 31-6-7-13(a).

not meet its burden of demonstrating that jurisdiction should be continued the juvenile court may either discharge the child or his parent¹³⁰ or may authorize a petition for termination of the parent-child relationship.¹³¹ This second alternative is interesting because it arises if the state fails to meet its burden of proof. There may be situations where the state desires a termination of the parent-child relationship and thus wants to "fail" in the burden of proof that has been placed on it, or actually attempt to prove the need for termination of the parent-child relationship.

Before the nine-month or eighteen-month reviews of the dispositional decrees the probation department is to prepare a progress report.¹³² As with the predispositional report, the person representing the interests of the state must be given a fair opportunity to controvert any parts of the progress report admitted into evidence.¹³³

Therefore, a prosecuting attorney or county welfare attorney is permitted a role in post-dispositional proceedings, though he is not statutorily required to attend any dispositional review hearing. He may move to modify a dispositional decree at any time. If he chooses to urge continued removal of a child from his parent or that the juvenile court should continue to retain jurisdiction past eighteen months the burden is upon him to demonstrate this necessity to the juvenile court.

TERMINATION OF PARENT-CHILD RELATIONSHIP (CHAPTER 5)

Termination of the parent-child relationship may be done either with the consent of the parents or against their will. If done with the parents' consent the county welfare department or a licensed child placing agency may sign a verified petition for the voluntary termination of the relationship.¹³⁴ It must be alleged that termination would be in the child's best interests and that the petitioner has developed a satisfactory plan of care and treatment for the child.¹³⁵ A petition to end the parent-child relationship may be filed only by either the county welfare attorney or the prosecuting attorney, and whichever one files the petition must represent the interests of the state in all subsequent proceedings on the petition.¹³⁶ Proceedings to terminate the parent-child relationship can be initiated only after the child has been adjudicated a delinquent child or a child in need of services, the child has been removed from the parents' custody for six months after the adjudication, and the parents have been offered

¹³⁰*Id.* § 31-6-4-19(c)(2). The Juvenile Code repeats this alternative at § 31-6-4-19(g).

¹³¹*Id.* § 31-6-4-19(c)(1).

¹³²*Id.* § 31-6-4-19(d).

¹³³*Id.* § 31-6-4-19(f).

¹³⁴*Id.* § 31-6-5-2(a).

¹³⁵*Id.* § 31-6-5-2(a)(3), -2(a)(4).

¹³⁶*Id.* § 31-6-5-4.

reasonable assistance in fulfilling their parental obligations and still have not done so.¹³⁷

Parents at a hearing to terminate the parent-child relationship are entitled to cross-examine witnesses, subpoena witnesses and evidence and introduce witnesses on their own behalf.¹³⁸ A parent is also entitled to representation by counsel, including counsel appointed at state expense.¹³⁹ In addition, a child may be excluded from the hearing.¹⁴⁰

Therefore, the county welfare attorney will quite probably be involved in preparing a petition for the voluntary termination of the parent-child relationship. Only the prosecuting attorney or county welfare attorney has the authority to file a petition for involuntary termination.

PROCEDURE IN JUVENILE COURT (CHAPTER 7)

Generally If past appellate decisions on similar matters are any gauge, the section of the new Juvenile Code dealing with procedures in the juvenile court should be the most litigated section of the Code. Therefore, this section should be carefully scrutinized by the attorney for the state, especially the prosecuting attorney. A few of the more important, or possibly controversial, sections will be examined here.

In all delinquency cases procedures governing criminal trials apply, unless otherwise covered by the Juvenile Code.¹⁴¹ Where a person is being tried in juvenile court for a crime¹⁴² the laws governing criminal trials apply.¹⁴³ The Indiana Rules of Trial Procedure apply in all other cases, unless otherwise dictated by the Code.¹⁴⁴

Appointment of Counsel A child alleged to be a delinquent child is entitled to have counsel appointed for him at a detention hearing or at the initial hearing, whichever is earlier.¹⁴⁵ It is discretionary with the juvenile court whether counsel is appointed for the child for any other proceeding.¹⁴⁶ This particular language may be important to police officers who advise a delinquent or his parents of his rights.¹⁴⁷ Police in their advisement of *Miranda*¹⁴⁸ rights often advise a suspect of his right

¹³⁷*Id.* § 31-6-5-3(6).

¹³⁸*Id.* § 31-6-3-2.

¹³⁹*Id.* §§ 31-6-3-2(c), -5-3(7), -7-2(b).

¹⁴⁰*Id.* § 31-6-7-10(d).

¹⁴¹*Id.* § 31-6-7-1(a).

¹⁴²The juvenile court has concurrent original jurisdiction in cases where adults are charged with the crimes of neglect, contributing to delinquency, or violating the compulsory school attendance law. *Id.* § 31-6-2-1(c).

¹⁴³*Id.* § 31-6-7-1(b).

¹⁴⁴*Id.* § 31-6-7-1(c).

¹⁴⁵*Id.* § 31-6-7-2(a).

¹⁴⁶*Id.*

¹⁴⁷As will be discussed later in this article, one of the issues in determining whether a waiver of rights during custodial interrogation is voluntary is whether the child, and his parent or custodian have been advised of his right to the appointment of counsel. *Id.* § 31-6-7-2(d)(6).

¹⁴⁸*Miranda v. Arizona*, 384 U.S. 436 (1966).

to the immediate presence of an attorney, then add that they have no way of furnishing an attorney "but one will be appointed for you, if and when you go to court."¹⁴⁹ Since the right to appointed counsel for a delinquent does not occur until a detention or initial hearing, police officers might specifically advise the delinquent suspect and his parents or guardian of this limitation. The appointment of counsel provision also requires that the attorney who represents a delinquent child not have a "conflict of interest."¹⁵⁰ This language would seem unnecessary since an attorney with a conflict of interest could probably not ethically¹⁵¹ or constitutionally¹⁵² represent that client.

Waiver of Rights Perhaps no provision of the new Juvenile Code will be more important to law enforcement officials than the waiver of rights section.¹⁵³ It is deserving of a separate law review in itself, but there are some points that will be mentioned here. As juvenile confession cases have developed through the years in Indiana a set of rules has evolved. A juvenile's statement or confession cannot be used against him unless he and his parents or guardian are informed of his constitutional rights and are given an opportunity for consultation prior to questioning. The record must demonstrate that there was a meaningful opportunity for the juvenile and his parents to consult together.¹⁵⁴ The waiver section of the new statute borrows much of the language from the leading Indiana decisions but changes their thrust. Under the case law a juvenile could waive his rights if he and his parents or guardian were adequately advised of his constitutional rights and had the opportunity for meaningful consultation. Under the new Juvenile Code a juvenile may not waive his rights alone. He must be joined in the waiver by his attorney or custodial parent, guardian, custodian or guardian ad litem.¹⁵⁵

¹⁴⁹Gaddis v. State, ___ Ind. ___, 368 N.E.2d 244 (1977); Dickerson v. State, 257 Ind. 562, 276 N.E.2d 845 (1972).

¹⁵⁰IND. CODE § 31-6-7-2(a) (Cum. Supp. 1979).

¹⁵¹IND. CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101 to 5-107.

¹⁵²Holloway v. Arkansas, 435 U.S. 475 (1978).

¹⁵³IND. CODE § 31-6-7-3 (Cum. Supp. 1979).

¹⁵⁴Hall v. State, 264 Ind. 448, 346 N.E.2d 584 (1976); Lewis v. State, 259 Ind. 431, 288 N.E.2d 138 (1972).

¹⁵⁵The text of the statute reads:

(a) Any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only:

(1) by counsel retained or appointed to represent the child, if the child knowingly and voluntarily joins with the waiver, or

(2) by the child's custodial parent, guardian, custodian, or guardian ad litem if:

(A) that person knowingly and voluntarily waives the right;

(B) that person has no interest adverse to the child;

(C) meaningful consultation has occurred between that person and the child; and

(D) the child knowingly and voluntarily joins with the waiver.

(b) The child may waive his right to meaningful consultation under subdivision (a)(2)(C) if he is informed of that right, if his waiver is made in the presence of his custodial parent, guardian, custodian, guardian ad litem, or at-

While it is anticipated that language in the statute identical to that found in leading Indiana cases will be interpreted in the same way the common law language has been, the statute may be more restrictive in several instances. The statute begins by stating that "any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law" may be waived only in the manner prescribed by the statute.¹⁵⁶ The leading Indiana cases dealing with a juvenile's waiver of rights concerned only confessions or statements made by the juveniles. The statute speaks of "any rights" guaranteed to the child by the United States or Indiana Constitutions. Without becoming involved in an academic discussion of what constitutional rights a juvenile enjoys, it would seem that a juvenile would have a right "to be secure . . . against unreasonable searches and seizures."¹⁵⁷ Does the statute mean, for example, that a child could not give a consent to search without a joint waiver with a parent, guardian or attorney? The first sentence of the statute speaks of rights guaranteed to the "child." Child is defined by the Juvenile Code basically as a person under eighteen years of age.¹⁵⁸ Suppose that a police officer decides to question a suspect who is under eighteen but tells the police officer that he is over eighteen. The police officer proceeds in good faith to interrogate the person under adult standards and obtains a valid confession by adult standards. The Indiana Supreme Court has held that under such circumstances the confession would be admissible, though in technical violation of its rules for juvenile confessions.¹⁵⁹ Would the same results attach where "child" is defined by statute and procedures for interrogation of a child are specified by statute?

Next, the statute requires the joint waiver of rights by the juvenile with either his attorney or with "the child's custodial parent, guardian, custodian, or guardian ad litem."¹⁶⁰ The term "custodial parent" excludes the non-custodial parent of the child, even if the custodial parent is not available. "Guardian," "custodian" and "guardian ad litem" are all defined by the Juvenile Code.¹⁶¹ Guardian and guardian ad litem are limited to a legally appointed person, while a custodian may be "a person with whom a child resides." The Indiana Supreme Court has approved meaningful consultation by a juvenile with a "de facto guardian"¹⁶² or a "guardian acting *in loco parentis*."¹⁶³ While the individuals in both these cases would not qualify as guardians under the new Juvenile Code, both

torney, and if the waiver is made knowingly and voluntarily.
IND. CODE § 31-6-7-3(a), -3(b) (Cum. Supp. 1979).

¹⁵⁶*Id.*

¹⁵⁷U.S. CONST. amend. IV; *see* IND. CONST. art. 1, § 11.

¹⁵⁸IND. CODE § 31-6-1-2 (Cum. Supp. 1979).

¹⁵⁹Stone v. State, ___ Ind. ___, 377 N.E.2d 1372 (1978).

¹⁶⁰IND. CODE § 31-6-7-3(a) (Cum. Supp. 1979).

¹⁶¹*Id.* § 31-6-1-2.

¹⁶²Hall v. State, 264 Ind. 448, 450 n.2, 346 N.E.2d 584, 586 n.2 (1976).

¹⁶³Burnett v. State, ___ Ind. ___, 377 N.E.2d 1340, 1342 (1978).

would probably qualify as custodians within the meaning of that term in the new law since the juvenile defendant was apparently living with the consulted person in each case.

The waiver of rights provision also requires that the custodial parent, guardian, custodian or guardian ad litem who joins the juvenile in his waiver must have "no interest adverse to the child."¹⁶⁴ The exact meaning of this term is uncertain but, if the term is construed consistently with the intent of the previous Indiana cases on juvenile confessions, a person will not be considered to have an interest adverse to the interests of the child simply because he advises him to confess.¹⁶⁵ The Juvenile Code retains the requirement of Indiana case law for "meaningful consultation" between the juvenile and another person, but its importance would seem to be diminished where there must be a joint waiver rather than a waiver by the juvenile alone.¹⁶⁶ The child may waive his right to meaningful consultation, but the waiver must be made in the presence of the parent, guardian or attorney.¹⁶⁷

The new Code also contains a statute similar to one contained in the criminal statutes¹⁶⁸ to measure the voluntariness of a waiver of rights during custodial interrogation.¹⁶⁹ The statute also adopts the constitutional rule that a statement or confession given after an inadequate advisement of rights, but otherwise knowing and voluntary, may be used to impeach the child as a prior inconsistent statement if he testifies as a witness.¹⁷⁰

One final point should be mentioned. Except for proof that a child committed a delinquent act or that an adult committed a crime, which must be proved beyond a reasonable doubt, the standard of proof for any other finding made by a juvenile court is preponderance of the evidence.¹⁷¹ Thus, a finding by the juvenile court that a child's statement was knowingly and voluntarily made could be based upon a preponderance of

¹⁶⁴IND. CODE § 31-6-7-3(a)(2)(B) (Cum. Supp. 1979).

¹⁶⁵*Buchanan v. State*, ___ Ind. ___, 376 N.E.2d 1131 (1978). In *Buchanan*, the supreme court said that its procedures for juveniles were designed "to afford the juvenile and the mature person who, by nature, would have the best interest of the suspect uppermost in his thoughts, the opportunity to reflect upon the predicament before making what may be a critical decision." *Id.* at ___, 376 N.E.2d at 1134. *Cf. Garrett v. State*, 265 Ind. 63, 351 N.E.2d 30 (1976) (waiver of the right to remain silent must be shown to have occurred beyond a reasonable doubt).

¹⁶⁶IND. CODE § 31-6-7-3(a)(2)(C) (Cum. Supp. 1979).

¹⁶⁷*Id.* § 31-6-7-3(b).

¹⁶⁸IND. CODE § 35-5-5-2 (1976).

¹⁶⁹IND. CODE § 31-6-7-3(d) (Cum. Supp. 1979). As to a discussion of "custodial interrogation," see *Johnson v. State*, ___ Ind. ___, 380 N.E.2d 1236 (1978); *Bugg v. State*, ___ Ind. ___, 372 N.E.2d 1156 (1978). Presumably, the new statutes on waiver of rights would not affect a spontaneous utterance made by a juvenile, or where the statement was not a product of custodial interrogation. *Lockridge v. State*, 263 Ind. 678, 338 N.E.2d 275 (1975).

¹⁷⁰IND. CODE § 31-6-7-3(c) (Cum. Supp. 1979); *Harris v. New York*, 401 U.S. 222 (1971); *Johnson v. State*, 258 Ind. 683, 284 N.E.2d 517 (1972).

¹⁷¹IND. CODE § 31-6-7-13(a) (Cum. Supp. 1979).

evidence. This would appear to change the rule in Indiana regarding juvenile confessions.¹⁷²

Speedy Trial One of the most often litigated issues in the criminal arena is the defendant's right to a speedy trial, primarily contested under Indiana Rules of Criminal Procedure, CR 4. It has been held that the criminal rules for a speedy trial do not commence until the child is waived from juvenile court.¹⁷³ The new Juvenile Code creates speedy trial rights for juveniles which are primarily modeled upon the criminal rules for speedy trials, with one noticeable distinction. The criminal rules do not set a period of time for commencement of criminal action. Rather, the time periods under the criminal rules begin either upon the arrest of the defendant or when he is formally charged, whichever is later.¹⁷⁴ The Juvenile Code establishes time limits in which a petition must be filed. If a child is in detention a petition alleging delinquency must be filed within seven days (excluding Saturdays, Sundays and legal holidays) after he is taken into custody.¹⁷⁵ If he is not charged within seven days he is to be released on his own recognizance or to his parents, guardian or a custodian.¹⁷⁶ If the child is still in detention after a petition is filed then either a fact-finding hearing or a waiver hearing must be held within twenty days (excluding Saturdays, Sundays and legal holidays) after the petition is filed.¹⁷⁷ If the child is not in detention this time period is extended to sixty days (excluding Saturdays, Sundays and legal holidays).¹⁷⁸ Failure to comply with these time periods also requires release of the child on his own recognizance or to his parents,¹⁷⁹ but delays caused by the child or court congestion may extend the time.¹⁸⁰

If a waiver hearing is held and waiver denied the fact-finding hearing must be commenced within ten days (excluding Saturdays, Sundays and legal holidays) after the denial.¹⁸¹ If waiver is granted then Criminal Rule 4 applies on the date of the waiver order.¹⁸²

Similar to Criminal Rule 4,¹⁸³ a child may not be held to answer a delinquency petition for more than one year in aggregate.¹⁸⁴ Also copied from Criminal Rule 4 are provisions excluding from the time periods delay

¹⁷²Garrett v. State, 265 Ind. 63, 351 N.E.2d 30 (1976).

¹⁷³State ex. rel. Hunter v. Juvenile Court, 261 Ind. 624, 308 N.E.2d 695 (1974).

¹⁷⁴IND. RULES OF CRIM. PROC., CR 4. See Heflin v. State, ___ Ind. ___, 370 N.E.2d 895 (1977); Stewart v. State, ___ Ind. App. ___, 354 N.E.2d 749 (1976). But see State v. Roberts, ___ Ind. App. ___, 358 N.E.2d 181 (1976).

¹⁷⁵IND. CODE § 31-6-7-6(a) (Cum. Supp. 1979).

¹⁷⁶Id. § 31-6-7-6(g).

¹⁷⁷Id. § 31-6-7-6(b).

¹⁷⁸Id.

¹⁷⁹Id. § 31-6-7-6(g).

¹⁸⁰Id. § 31-6-7-6(f).

¹⁸¹Id. § 31-6-7-6(c).

¹⁸²Id. § 31-6-7-6(d); IND. RULES OF CRIM. PROC., CR 4; State ex. rel. Hunter v. Juvenile Court, 261 Ind. 624, 308 N.E.2d 695 (1974).

¹⁸³IND. RULES OF CRIM. PROC., CR 4(C).

¹⁸⁴IND. CODE § 31-6-7-6(e) (Cum. Supp. 1979).

caused by the defendant or court calendar congestion,¹⁸⁵ allowing a ninety day continuance for the state if the child moves for discharge and evidence presently unavailable to the state can be produced within that time,¹⁸⁶ and allowing the state a thirty day continuance if the child causes any delay during the last thirty days.¹⁸⁷

Venue—Change of Venue—Change of Judge For a case where a child is alleged to be a delinquent child original venue may be in "the county where the child resides or in the county where the act occurred or the condition exists."¹⁸⁸ Thus, the venue could be in several different counties. Additionally, a case may be venued to the juvenile court of the county of the child's residence prior to a dispositional hearing,¹⁸⁹ or supervision of the child may be assigned to the same court.¹⁹⁰ There is no automatic right to a change of judge; a change may only be granted upon good cause shown by an affidavit filed at least twenty-four hours before the fact-finding hearing.¹⁹¹ Though the change of judge section does not specifically limit itself to delinquency or CHINS proceedings, an adult charged with a crime in juvenile court would no doubt be governed by the Indiana Rules of Criminal Procedure,¹⁹² and, thus, by Criminal Rule 12; the adult would then be entitled to a mandatory change of judge upon a timely filing of a motion. The elimination of this automatic change of judge from all other juvenile proceedings has been viewed as one of the most significant changes effected by the new Code.¹⁹³

Conduct of Hearings, Burdens of Proof, Evidence All proceedings in juvenile court involving adults charged with criminal charges or contempt of court are to be tried in open court.¹⁹⁴ It is within the discretion of the trial court to exclude the public from other juvenile proceedings but it seems that the juvenile court might be expected to more frequently exercise its discretion in favor of public disclosure where it is alleged that the child committed murder or a felony, or the alleged act was part of a pattern of less serious offenses, because these two categories of cases are singled out for special statutory mention for possible open proceedings.¹⁹⁵

¹⁸⁵Compare *id.* § 31-6-7-6(f), -6(i) with IND. RULES OF CRIM. PROC., CR 4(A), 4(C), 4(F).

¹⁸⁶Compare IND. CODE § 31-6-7-6(h) (Cum. Supp. 1979) with IND. RULES OF CRIM. PROC., CR 4(D).

¹⁸⁷Compare IND. CODE § 31-6-7-6(i) (Cum. Supp. 1979) with IND. RULES OF CRIM. PROC., CR 4(F).

¹⁸⁸IND. CODE § 31-6-7-7(a) (Cum. Supp. 1979). The provisions of the present statute are confusing as to the question of venue. The juvenile court could receive information "that there is within the county or residing within the county, a dependent, neglected or delinquent child" before authorizing an investigation and filing of a petition. IND. CODE § 31-5-7-8 (1976)(repealed 1979).

¹⁸⁹IND. CODE § 31-6-7-8(a) (Cum. Supp. 1979).

¹⁹⁰*Id.* § 31-6-7-8(b).

¹⁹¹*Id.* § 31-6-7-9.

¹⁹²See note 143 & accompanying text *supra*.

¹⁹³Kerr, *Indiana's New Juvenile Code*, 12 IND. L. REV. 1, 25-26 (1979).

¹⁹⁴IND. CODE § 31-6-7-10(a) (Cum. Supp. 1979).

¹⁹⁵*Id.* § 31-6-7-10(b). The public access or exclusion order is to be placed in the file of the proceedings.

An adult charged with a crime in juvenile court is entitled to be tried by a jury unless he requests a bench trial.¹⁹⁶ This presents an interesting contrast with the procedure in a criminal court where both the prosecuting attorney and the court must consent to a bench trial.¹⁹⁷ All other matters in juvenile court, including delinquency proceedings, are tried to the court.¹⁹⁸

The new Code has a general section on burdens of proof. Only proof that a child committed a delinquent act or that an adult committed a crime must be based upon proof beyond a reasonable doubt. Any other finding must be based upon a preponderance of the evidence.¹⁹⁹ The possible change this may have created in the burden of proof upon the voluntariness of a child's confession has already been mentioned.²⁰⁰ Additionally, several cases have indicated that a standard of "clear and convincing proof" may be constitutionally required on such matters as termination of the parent-child relationship.²⁰¹

The Code has codified several evidentiary principles for CHINS cases. If the state introduces competent evidence of probative value that a child has been injured, that at the time the child was injured, the parent, guardian or custodian had care, custody or control of the child, or had legal responsibility for the child, and that the injury would not likely have been sustained except for the act or omission of his parent, a rebuttable presumption arises that the child is a child in need of services.²⁰² Also, evidence of prior or subsequent acts or omissions of the parent are admissible in CHINS proceedings to prove the parent's responsibility.²⁰³ Finally, the physician-patient and husband-wife privileges are abrogated in CHINS cases.²⁰⁴ Obviously, these rules for the conduct of juvenile proceedings and codification of evidentiary rules will be important for the attorney for the state appearing in juvenile court.

¹⁹⁶*Id.* § 31-6-7-10(c).

¹⁹⁷IND. CODE § 35-1-34-1 (1976).

¹⁹⁸IND. CODE § 31-6-7-10(c) (Cum. Supp. 1979).

¹⁹⁹*Id.* § 31-6-7-13(a). Proof that an act of delinquency must be based upon proof beyond a reasonable doubt would include status offenses. *See also* Warner v. State, 254 Ind. 209, 258 N.E.2d 860 (1970).

²⁰⁰*See* notes 136-137 & accompanying text *supra*.

²⁰¹Sims v. State Dep't of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub. nom.* Moore v. Sims, 47 U.S.L.W. 4693 (1979); Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975); *cf.* Addington v. Texas, 47 U.S.L.W. 4473 (1979) (clear and convincing proof standard is constitutionally required for civil commitment to mental institution).

²⁰²IND. CODE § 31-6-7-13(b) (Cum. Supp. 1979).

²⁰³*Id.* § 31-6-7-13(c). This is also the rule in criminal trials involving child abuse. Martin v. State, ___ Ind. ___, 372 N.E.2d 181 (1978); Corbin v. State, 250 Ind. 147, 234 N.E.2d 261 (1968).

²⁰⁴IND. CODE § 31-6-7-13(d) (Cum. Supp. 1979). The elimination of these evidentiary privileges in the Juvenile Code under this provision is limited only to CHINS cases. However, the abrogation of the same privileges by the child abuse provisions of the Juvenile Code are much broader and would apply to criminal prosecutions as well as juvenile proceedings. *Id.* § 31-6-11-8.

Examinations of Juveniles—Emergency Orders Upon the motion of a number of different persons, including the county welfare attorney or the prosecuting attorney, or upon the juvenile court's own motion, the court may issue an injunction to: (1) control the conduct of any person in relation to the child; (2) provide a child with an examination or treatment; or (3) prevent a child from leaving the court's jurisdiction.²⁰⁵ Persons affected by such an order must be notified and a hearing held on the motion.²⁰⁶ If an emergency is demonstrated by sworn testimony a seventy-two hour temporary restraining order may be obtained by following the procedures of Trial Rule 65.²⁰⁷

The juvenile court may authorize mental or physical examinations or treatment if no petition has been filed when a physician certifies that an emergency exists and the child may be detained in a health care facility while the emergency circumstances continue.²⁰⁸ Also, if the physician certifies that continued medical care is necessary to protect the child after the emergency has passed, continued detention for a reasonable length of time is authorized.²⁰⁹ The prosecutor or welfare attorney may also request an emergency change in the child's residence.²¹⁰

The attorney for the state, be he the county welfare attorney or the prosecuting attorney, has a procedure available under these provisions to obtain immediate medical attention for the victim of child abuse.

Appeals The section on appeals simply states: "Appeals may be taken as provided by law."²¹¹ This left open the question of whether or not appeals may be taken from the granting of the waiver of a child to adult court. The Indiana Supreme Court, however, has recently held that an appeal from a waiver order valid on its face must abate pending a final determination of the criminal prosecution authorized by the waiver.²¹²

JUVENILE RECORDS—LAW ENFORCEMENT RECORDS (CHAPTER 8)

The new Juvenile Code has provisions regarding the confidentiality of both court records and law enforcement records. All records of the juvenile court are confidential except those involving an adult charged with a crime or criminal contempt of court.²¹³ The records of the juvenile court, however, are available to certain persons, including the prosecutor or county welfare attorney, without a court order.²¹⁴ Procedures for

²⁰⁵*Id.* § 31-6-7-14(a).

²⁰⁶*Id.* § 31-6-7-14(b).

²⁰⁷*Id.* § 31-6-7-14(c); IND. RULES OF TRIAL PROC., TR 65.

²⁰⁸IND. CODE § 31-6-7-12(a)(1) (Cum. Supp. 1979).

²⁰⁹*Id.* § 31-6-7-12(a)(2).

²¹⁰*Id.* § 31-6-7-16.

²¹¹*Id.* § 31-6-7-17.

²¹²*State ex. rel. Snellgrove v. Porter Circuit & Juvenile Courts*, ___ Ind. ___, 386 N.E.2d 680 (1979).

²¹³IND. CODE § 31-6-8-1(a) (Cum. Supp. 1979).

²¹⁴*Id.* § 31-6-8-1(b).

release of other juvenile court information then depends upon whether or not the records could be classified as "legal records" or "confidential records." However, while the Code states that legal records "include docket sheets, index entries, summonses, warrants, petitions, orders, motions and decrees,"²¹⁵ the term "confidential records" is nowhere defined. Presumably, every juvenile court record other than a legal record is a confidential record.

A separate section of Chapter 8 controls the secrecy of law enforcement records involving allegations of delinquency or a child in need of services. However, the statute specifically provides that certain law enforcement information is public information:

the nature of the offense allegedly committed and the circumstances immediately surrounding it, including the time, location, any property involved, identity of any victim, a description of the method of apprehension, any instrument of physical force, the identity of any officers assigned to the investigation except for the undercover units, and the age and sex of any child apprehended or sought for the alleged commission of the offense. Records relating to the detention of any child in a secure facility, except for the name of the child, shall be open to public inspection.²¹⁶

All other records are described as confidential. The prosecutor's office and the county welfare department are entitled to the records of a law enforcement agency without specific permission from the head of the agency.²¹⁷ There are also provisions for a law enforcement agency to release certain confidential information.²¹⁸ It is specified that the juvenile court has no jurisdiction or control over law enforcement records.²¹⁹ Other sections of the Code concern fingerprinting and photographing of juveniles and expungement of records.²²⁰

INTERSTATE COMPACT ON JUVENILES (CHAPTER 10)

The 1978 Juvenile Code reenacted the Interstate Compact on Juveniles²²¹ and the 1979 Code did not alter any of the 1978 provisions. Three amendments were added to the Interstate Compact by the 1978 Code. One amendment concerned the return of runaways and another the confinement of juveniles in out-of-state facilities. However, probably the most important amendment as far as prosecuting attorneys are concerned is the rendition amendment which basically allows the extradition

²¹⁵*Id.* § 31-6-8-1(a).

²¹⁶*Id.* § 31-6-8-1.2(a).

²¹⁷*Id.* § 31-6-8-1.2(b).

²¹⁸*Id.* § 31-6-8-1.2(c), -1.2(d).

²¹⁹*Id.* § 31-6-8-1.2(k).

²²⁰*Id.* § 31-6-8-1.5, -2.

²²¹*Id.* § 31-6-10-1.

of juveniles who have committed acts of delinquency. At least arguably, there has been in the past no procedure for Indiana to bring back juveniles who may have committed an act of delinquency and fled from the state.²²² While a juvenile could have possibly been extradited for an alleged murder because original jurisdiction under prior law was in adult court, the Uniform Extradition Act speaks of rendition for "treason or felony."²²³ A felony, other than murder, committed by a juvenile was designated an act of delinquency rather than a felony. Therefore, even for very serious crimes, juveniles might obtain immunity from prosecution simply by fleeing the jurisdiction. The rendition amendment to the Interstate Compact was designed to change this.

CHILD ABUSE (CHAPTER 11)

One of the most important areas of concern for attorneys for the state is child abuse. However, Chapter 11 is basically a reenactment of a law that was already in effect on January 1, 1979²²⁴ and will not be discussed at length here. It should be noted, though, that the terminology of the present law has been changed to be consistent with the Juvenile Code. For example, child abuse or neglect will mean a child in need of services as defined in certain sections of the Juvenile Code.²²⁵

CONCLUSION

The role of the attorney for the state in juvenile court has been a confused area of the law for many years. Now that role is clearly defined. While it is mandatory in certain circumstances, the attorney for the state's participation in juvenile procedures is primarily a matter of his own discretion. While there may be legitimate differences of opinion as to what should be the duty of a prosecuting attorney or welfare attorney in juvenile court, there can be little doubt that a definition of what those duties are has been long overdue.

²²²The fact that an illegal extradition would not affect the legality of a conviction, *Massey v. State*, ___ Ind. ___, 371 N.E.2d 703 (1978), was of little consequence if officials from other states would not cooperate in producing the child where there is no procedure for extraditing him.

²²³IND. CODE § 35-2.1-2-3(2) (Cum. Supp. 1979).

²²⁴IND. CODE § 31-5.5 (Cum. Supp. 1979)(repealed 1979).

²²⁵IND. CODE § 31-6-11-2 (Cum. Supp. 1979).

