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Basic Rights for Juveniles in Juvenile Proceedings Under the Minnesota Juvenile Court Rules: A Response to Gault

Under our Constitution, the condition of being a boy does not justify a kangaroo court.

—Mr. Justice Fortas in *In re Gault*
387 U.S. 1 (1967)

The development of juvenile courts in the United States is based upon the recognition that a child who violates the law ought not be subjected to adult criminal proceedings and adult criminal penalties.¹ Juvenile statutes in the past sought to provide "treatment" for the child rather than punishment² under the concept of *parens patriae*.³ Moreover, most statutes classified the juvenile proceeding as "civil" rather than "criminal" in an effort to remove the stigma associated with "criminal" acts.⁴

1. The nation's first juvenile court act was passed in Illinois in 1899. ILL. LAWS, 41st Gen. Ass. 1899, The Treatment and Control of Dependent, Neglected, and Delinquent Children § 21 at 137:

The care, custody, and discipline of a child [found to be delinquent, dependent or neglected] shall approximate as nearly as may be that which should be given by its parents.

2. See, e.g., Juvenile Court Act of 1959, MINN. STAT. § 260.011 (2) (1967):

The purpose of the laws relating to juvenile courts is to secure for each minor under the jurisdiction of the court the care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the state; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents.

3. Under this concept the state is permitted to assume the position of the parent and act in his stead to secure the welfare of a minor. *E.g.*, *Cinque v. Boyd*, 99 Conn. 70, 83, 121 A. 678, 682-83 (1923); *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905). The leading article in the development of this concept and the idea that a child ought to be cared for rather than punished is Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

4. MINN. STAT. § 260.211(1) (1967):

[N]or shall any child be deemed a criminal by reason of this adjudication, nor shall this adjudication be deemed a conviction of crime.

This distinction has also been made by numerous courts in dealing with juveniles. *E.g.*, *State ex rel. Knutson v. Jackson*, 249 Minn. 246, 82 N.W.2d 234 (1957); *Shioutakon v. D.C.*, 98 U.S. App. D.C. 371, 236 F.2d 666 (1956); *Thomas v. United States*, 74 U.S. App. D.C. 167, 121 F.2d 905

These developments were followed by a movement away from a formalized court procedure in juvenile court which was thought to be detrimental to the child.⁵

The practical result of these "protective" measures was an effective denial of the juvenile's procedural rights.⁶ Since the "treatment" received by the child was often similar in effect to that of convicted criminals, the denial of traditional due process came to be sharply criticized as a legal fiction.⁷ The United States Supreme Court's decision in *In re Gault*⁸ is the culmination of a growing recognition⁹ that *parens patriae* has failed to achieve its objectives¹⁰ and that a juvenile hearing which could result in commitment, loss of personal freedom and disruption of the family relationship is clearly more criminal than civil in nature.¹¹

Specifically, *Gault* held that notice of charges, right to counsel, right of confrontation and cross-examination and the privilege against self-incrimination are to be extended to the adjudicatory phase of delinquency proceedings where an adjudication of delinquency carries with it the possible consequence of commitment to a state institution.¹² Thus, due process previously granted to adults in criminal proceedings was made available to juveniles in state juvenile proceedings.

(1941); *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932); *Peterson v. McAuliffe*, 151 Minn. 467, 187 N.W. 226 (1922); *Robinson v. Wayne Cir. Judges*, 151 Mich. 315, 115 N.W. 682 (1908); *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905).

5. It was thought that formalized procedure would render the juvenile statute nugatory and deprive it of the greater part of its benevolent purposes. *In re Sharp*, 15 Idaho 120, 96 P. 563 (1908).

6. *In re Gault*, 387 U.S. 1, 16-17 (1967). Prior to *Gault*, constitutional due process was traditionally held not applicable to juvenile proceedings. *Pee v. United States*, 274 F.2d 556 (1959); *Shioutakon v. D.C.*, 98 U.S. App. D.C. 371, 236 F.2d 666 (1956); *Thomas v. United States*, 74 U.S. App. D.C. 167, 121 F.2d 905 (1941); *Cinque v. Boyd*, 99 Conn. 70, 121 A. 678 (1923); *Commonwealth v. Fisher*, 213 Pa. 48, 62 A. 198 (1905).

7. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 791 (1966); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 550 (1957).

8. 387 U.S. 1 (1967).

9. See *Kent v. United States*, 383 U.S. 541 (1966); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

10. Judge Ketcham of the Washington, D.C. Juvenile Court noted the failure of juvenile courts under *parens patriae* in Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME AND DELINQ. 97 (1961) and argued that "the state has no right to substitute governmental for parental neglect." *Id.* at 101.

11. 387 U.S. at 23-24, 36-37.

12. *Id.* at 13, 30.

As the result of a re-evaluation of juvenile procedure brought about by *Gault*, several attempts, either by promulgation of court rules or by statute, to extend due process to juveniles have been undertaken in several states.¹³ The Minnesota Juvenile Court Rules¹⁴ stand as one of these attempts. With respect to the grant of basic rights for juveniles, the Rules seem to be the most comprehensive of these attempts to deal with the problems of due process for juveniles in the aftermath of the *Gault* decision.¹⁵

This Note will examine the Rules critically as a response to *Gault*. Special consideration will be given to the basic rights extended to the juvenile by these Rules, the problem of compliance with these Rules in view of present court practice, and the probable impact of the Rules on the form and substance of the juvenile hearing once full compliance is achieved.

I. THE MINNESOTA JUVENILE COURT RULES

The Rules specifically provide for notice of charges,¹⁶ right to counsel,¹⁷ right to confrontation and cross-examination,¹⁸ and the privilege against self-incrimination,¹⁹ all of which are required by *Gault*, plus the right to a transcript of the proceedings²⁰ and the right to appellate review,²¹ which were discussed but not passed on in *Gault*.²² The Rules also provide for the power of subpoena²³ and the right to enter evidence in one's own behalf.²⁴ To insure the protection of these rights, the Rules set forth detailed requirements for (1) the giving of notice of basic

13. See MICHIGAN JUVENILE COURT RULES (1969); NEW JERSEY AND DOMESTIC RELATIONS COURT RULES, PROCEDURE IN JUVENILE CAUSES, rules 6:8-6:8.7 (1969); CALIF. WELF. & INST'NS CODE §§ 627.5-707 (West Supp. 1968); N.Y. FAMILY COURT ACT (McKinney 1968).

14. RULES OF PROCEDURE FOR JUVENILE COURT PROCEEDINGS IN THE MINNESOTA PROBATE-JUVENILE COURTS (1969), as amended, (Supp. Sept. 1969) [hereinafter cited as MJCR].

15. In addition to the procedural rules promulgated since *Gault* and noted *supra* note 13, see COUNCIL OF JUDGES, NAT'L COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS (1969) which provided much of the background for the drafting of the MJCR.

16. MJCR 3-2(1).

17. MJCR 2-1.

18. MJCR 2-3(1)(b) & (c).

19. MJCR 2-2.

20. MJCR 2-3(1)(d).

21. MJCR 2-3(1)(e).

22. 387 U.S. at 57-58.

23. MJCR 2-3(1)(f).

24. MJCR 2-3(1)(a).

rights at various stages of the juvenile proceeding, and (2) the waiver of rights by the juvenile, which has not been dealt with adequately by courts²⁵ in the past although acknowledged as a problem in *Gault*.²⁶ In addition, forms are required to be used in connection with notice of rights and other provisions of the Rules to obtain compliance with individual rules and to achieve the formalized procedure contemplated by the Rules.²⁷

II. BACKGROUND OF MINNESOTA JUVENILE LAW

Prior to promulgation of the Rules, juvenile law in Minnesota was based on both statute and custom. The statutory requirements are contained in the Minnesota Juvenile Court Act of 1959,²⁸ which in regard to providing certain basic rights is similar to juvenile acts recently adopted in other states.²⁹ The Act provides for the right to counsel, including the appointment of counsel where the court finds this "desirable,"³⁰ and for the appointment of a guardian ad litem where the parent or guardian is found to be hostile to the interests of the child.³¹ A recitation of the substance of the petition must be served with the summons,³² and notice of the pending cause is required to be served upon the parents where they have not otherwise been

25. See discussion in Note, *Waiver in Juvenile Court*, 68 COLUM. L. REV. 1149 (1968).

26. The Court acknowledged that a problem of waiver would exist in the case of juvenile rights but set down no guidelines to be followed. This caused Judge Ketcham to predict that this might prove to be the "achilles heel" of the opinion. Ketcham, *Guidelines From Gault: Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700 (1967).

27. Of the 87 counties in the State of Minnesota, the juvenile court is a division of the probate court in 85 while in the two metropolitan counties—Hennepin and Ramsey—it is a division of the district court. The difference in court structure is based on population—200,000 or more persons places the county juvenile court within the district court. MINN. STAT. § 260.021 (1937). Thus, the MJCR do not apply to the two largest counties of the state where over 50 percent of the juvenile hearings are conducted.

St. Louis County has a population in excess of 200,000 but juvenile court jurisdiction was recently transferred to the probate court. Thus, the Rules apply by virtue of the language contained in MJCR 1-2(d) without further action.

28. MINN. STAT. §§ 260.011-.301 (1967).

29. E.g., COLO. REV. STAT. ANN. ch. 22 (Supp. 1967); See ILL. ANN. STAT. ch. 37 (Smith-Hurd Supp. 1969). See also NAT'L PROBATION AND PAROLE ASS'N, STANDARD JUVENILE COURT ACT (1943).

30. MINN. STAT. § 260.155(2) (1967).

31. MINN. STAT. § 260.155(4) (1967).

32. MINN. STAT. § 260.135(1) (1967).

summoned.³³ At the hearing, any party to the juvenile cause³⁴ may enter evidence, testify and cross-examine witnesses.³⁵ Appeal may be taken from an adjudication of delinquency.³⁶ The Juvenile Court Act specifies no formalized procedure for notification of these rights, nor for conduct of the hearings. In fact, the Act expressly provides that the hearing may be run in an informal manner but does not specify what "informal" means.³⁷

Aside from the Juvenile Court Act, juvenile law in Minnesota prior to the Rules has been shaped primarily by custom, which varies widely from county to county.³⁸ The variance in court procedure is due in part to the statutory provision for appeal from the probate-juvenile court to the district court *de novo*,³⁹ which in effect makes the juvenile hearing records of probate courts nonreviewable. As a result, such records have been infrequently maintained.⁴⁰ This practice impeded the development of uniform procedure and consequently makes it difficult to draw conclusions on the procedure of juvenile courts in Minnesota. A second factor contributing to the variance in procedure is the dearth of appellate court decisions⁴¹ establishing

33. MINN. STAT. § 260.135(2) (1967).

34. A "juvenile court cause" is defined as, any action over which the juvenile court has original and exclusive jurisdiction . . . except an adoption action and proceedings for judicial consent to marriage.

MJCR 1-2(b). Under MINN. STAT. § 260.111 (1967), the juvenile court has exclusive and original jurisdiction in the following proceedings: delinquency, traffic offense, neglect, dependency, termination-of-parental-rights, appointment and removal of a guardian in termination, judicial consent to marriage and adoption matters involving children.

35. MINN. STAT. § 260.155(6) (1967).

36. In those counties in which the juvenile court is a division of the probate court, appeal is taken to the district court *de novo* whence it may be appealed to the Minnesota Supreme Court. MINN. STAT. § 260.291(2)(b) (1967). In the other counties, appeal is direct to the Minnesota Supreme Court from the district-juvenile court. MINN. STAT. § 260.291(2)(a) (1967).

37. MINN. STAT. § 260.155(1) (1967).

38. Interview with Judge Charles E. Cashman of the Juvenile Court of Steele County and Chairman of the MJCR Committee, in Owatonna, Minnesota, Feb. 11, 1969.

39. *Id.*

40. A substantial number of the probate-juvenile courts do not make a verbatim record of the proceedings. MINNESOTA GOVERNOR'S COMM'N ON LAW ENFORCEMENT, AD. OF JUSTICE AND CORRECTION, REPORT OF COMM. ON AD. OF JUSTICE, SUBCOMM. ON JUVENILE PROCEDURES AND FACILITIES app. B at 2 (Jan. 1968) [hereinafter cited as JUVENILE SUBCOMMITTEE REPORT].

41. The few appellate decisions that do exist deal with notice. The leading case is *State ex rel. Knutson v. Jackson*, 249 Minn. 246, 82 N.W.2d 234 (1957) (Notice requirement held to be jurisdictional in a

procedural guidelines for juvenile courts to follow. Thus, the absence of appellate precedent coupled with the absence of review of probate-juvenile hearing proceedings left juvenile judges free to develop their own procedural rules.

One of the greatest differences in procedure was found in the area of notice of charges. The statute allows a minimum of only 24 hours between the notice of charges and the adjudicatory hearing,⁴² but does not specifically require that this notice contain a statement of facts in support of the allegation of delinquency.⁴³ Thus, much was left to the discretion of each juvenile court. Courts in some counties held a preliminary hearing similar to a criminal arraignment up to seven days before the adjudicatory hearing⁴⁴ for the sole purpose of advising the juvenile of his rights, the nature of the charges against him, the facts supporting them and the possible consequences of the proceeding.⁴⁵ More often no such amount of time was given, nor was a statement of facts presented to the juvenile. As a result, the practice in some counties of proceeding on the merits at the initial hearing permitted little time for the preparation of the juvenile's defense.

The form of notice of charges has varied as much as the time permitted to prepare for a hearing. In the past, less than half of the probate-juvenile courts served written notice on the child as *Gault* seems to require.⁴⁶ Virtually all courts advised the juvenile and his parents of the right to counsel and the right to confront and cross-examine witnesses,⁴⁷ but no reliable data is available on the frequency of appointment of counsel.⁴⁸ On the other hand, just over half of the courts routinely advised the juvenile of his right to remain silent.⁴⁹

hearing on reference for prosecution. Court order for reference is not valid when notice is not effected prior to hearing and waiver cannot be accomplished after hearing.)

42. MINN. STAT. § 260.141(1)(a) (1967).

43. MINN. STAT. § 260.131(3)(a) (1967) only requires the petition to include "the facts which bring the child within the jurisdiction of the court." It should be noted, however, that if the petition is not attached to the summons or notice, even this provision of the statute would not be operative for the purpose of giving the person some form of notice of charges. Cf. Note, *Reference for Prosecution in Juvenile Court Proceedings*, 54 MINN. L. REV. 389 (1969).

44. JUVENILE SUBCOMMITTEE REPORT, *supra* note 40, app. B at 1.

45. Interview, *supra* note 38.

46. JUVENILE SUBCOMMITTEE REPORT, *supra* note 40, app. B at 1.

47. *Id.* at 2.

48. *Id.* at 1-2.

49. *Id.* at 2.

The role of officials in the juvenile process also varied widely from county to county. In some counties, all juvenile proceedings have been presided over by the juvenile judge.⁵⁰ Other counties have relied on probation officers as referees in all traffic offender cases,⁵¹ which constitute the great bulk of juvenile cases in those counties. The role of police officers varied from drafting petitions in the larger counties, and extensive participation at intake in metropolitan areas to very little participation in the rural counties.⁵² It has been the practice in most counties to have the county attorney present the state's evidence at the adjudicatory hearing,⁵³ though this is not required by statute.⁵⁴

Thus, since the structure and procedure of the juvenile court process have evolved primarily from custom, it is difficult at best to draw broad conclusions about juvenile law in Minnesota. It is against this background of ollapodrida in structure and procedure as well as against the requirements of *Gault* that this examination of the Rules is made.

III. ANALYSIS AND EVALUATION OF MJCR

While seeking to establish basic due process in the juvenile court the Minnesota Juvenile Court Rules are not merely a *pro forma* adoption of *Gault*. Though incorporating the specific requirements set forth by *Gault*, the Rules also deal with problems discussed but not adjudicated in that case. Due process is extended to the pre- and post-adjudicatory phases of delinquency proceedings, and to the adjudicatory and dispositional phases of dependency, neglect and termination-of-parental-rights hearings. Thus, the Rules are more appropriately viewed as an attempt to provide due process for juveniles using *Gault* only as a starting point for that purpose.

50. This is true of the practice in Steele County. Interview, *supra* note 38.

51. *E.g.*, In Scott County the Chief Probation Officer sits as referee in these cases.

52. Interview with J. Jerome Kluck, County Attorney, Dakota County and President, Minnesota County Attorney's Association, in Hastings, Minnesota, Feb. 19, 1969.

53. Interview, *supra* note 38. This is in marked contrast to the practice reported in other states where the role of "prosecutor" is often filled by the judge, referee or probation officer. *See generally* Note, *supra* note 7.

54. MINN. STAT. § 260.155(2) (1967) makes provision for the county attorney to present evidence when requested to do so by the court.

A. NOTICE OF CHARGES

The notice requirements of the Rules differ in many respects from past practice in most Minnesota counties.⁵⁵ Under the Rules, the notice or summons to appear must be served together with a copy of the petition⁵⁶ upon both the parent and the child unless the child is under 14 years of age in which case it must be served only upon the parent.⁵⁷ The summons, and any initial notice, must contain a statement describing the purpose and possible consequences of the adjudicatory hearing and a statement specifying and explaining the child's basic rights.⁵⁸ Most importantly, the Rules adopt the *Gault* requirements that the notice to appear must contain a statement of facts, made with "particularity,"⁵⁹ to support the cause on which the petition is based, and that service must be made "sufficiently in advance" of the proceeding to permit enough time for preparation of a defense. Specifically, the Rules triple, to 72 hours, the statutory minimum amount of time between notice and hearing.⁶⁰ Thus, by providing juvenile courts with a clear, formalized technique for giving notice of charges, the Rules fill an area left open by *Gault*.

The Rules raise the obvious question of whether the practice of immediate adjudication on the merits at the initial hearing is now permissible. While this practice may not have provided sufficient time to prepare a defense in the past,⁶¹ it could be argued that the more specific notice of charges combined with the extension of the minimum time under the Rules preclude any denial of due process. It would seem, however, neither expedient nor necessary in the quest for due process to proceed on the merits at the initial hearing. Rather, judges would be well advised to use this hearing to inform all parties of their rights

55. See text accompanying notes 45-49 *supra*. The Juvenile Court Act requires only a minimum of information set forth in the petition, (MINN. STAT. § 260.131 (1967)), and only 24 hours notice before the hearing. MINN. STAT. § 260.141(1) (a) (1967).

56. MJCR 4-2.

57. MJCR 4-6.

58. MJCR 4-2(b)-(d).

59. The MJCR require a citation of the law violated and a "clear and particularized statement of facts" to support the allegation of delinquency. MJCR 3-2(1)(a) & (b). See also MJCR 4-2. This requirement is mandatory in all other juvenile proceedings as well. MJCR 3-3 (neglect); MJCR 3-4 (dependency); MJCR 3-5 (termination-of-parental-rights).

60. MJCR 4-4.

61. See 387 U.S. at 33; Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527, 541 (1968).

and the consequences of the proceeding, since written notice alone may be inadequate to protect these rights. More importantly, the initial hearing should be used to determine the relationship between parent and child for the purpose of appointing a guardian ad litem or separate counsel when necessary.⁶²

The Rules also require that all petitions, with the sole exception of the notice to appear on a traffic offense, must be drawn by the county attorney.⁶³ The degree to which this can be expected to increase the county attorney's workload depends, of course, upon current practices. In counties with large populations the juvenile department of the local police force often drafts the petition,⁶⁴ and in at least one county all petitions are drafted by the office of the Director of Court Services.⁶⁵ While the validity of these practices is placed in question by a strict reading of the Rules, in the larger counties where most of the juvenile cases are heard such practices may actually be necessary to comply with the requirement for more detail in the petition. Thus, so long as the petition is reviewed and signed by the county attorney, such practices should not be held violative of the Rules. In this event, any impact on the workload of the county attorney's office as a result of the notice requirement is not likely to be substantial except when taken together with other requirements.⁶⁶

B. RIGHT TO COUNSEL

1. *Nature of the Right Under the Rules*

The *Gault* court declared that due process requires the right to counsel and appointment of counsel where it can not be afforded, and notice of these rights for *both* the child and his parents. The Court, however, limited its consideration to delinquency proceedings in which an adjudication can result in "com-

62. See text accompanying notes 77-79 *infra*.

63. MJCR 3-1(1) (a).

64. *E.g.*, Dakota County. Interview, *supra* note 52.

65. Interview with Richard Mulcrone, Chief Probation Officer and Director of Court Services, Scott County, in Shakopee, Minnesota, Mar. 25, 1969.

66. *E.g.*, The possible increase in representation by counsel, noted at text accompanying note 91 *infra*, and the apparent requirement that the county attorney appear at all hearings. The requirements of the MJCR have already met strong criticism from the State County Attorney's Association as being too burdensome in terms of time for the nature of the juvenile case involved. On the other hand, there is no reason not to require the state to make a clear showing of its case merely because a juvenile is involved.

mitment to an institution in which the juvenile's freedom is curtailed."⁶⁷ This restriction is not surprising since the right to counsel⁶⁸ is usually considered only in the context of the adjudicatory hearing.

The Rules' treatment of the right to counsel goes significantly further by granting the right to counsel at "any and all" stages of a cause⁶⁹ under which the juvenile court has exclusive and original jurisdiction, with the sole exception of adoption proceedings.⁷⁰ Thus, the right arises in traffic offense, neglect, dependency, and termination-of-parental-rights causes⁷¹ and also in the pre- and post-adjudication phases of delinquency proceedings which were singled out as unique in *Gault* and therefore not within the ambit of the Court's opinion.⁷²

2. *Time at Which the Right Arises*

While *Gault* makes no reference to the time at which the right to counsel arises, the Rules clearly state that a child's right to counsel, including the right to reasonable consultation with his attorney while in custody, arises at "the moment he is taken into custody by a representative of the state."⁷³ A strict reading of this provision, in connection with the rule prohibiting interviewing the child in the absence of his parents, would require the appointment of an attorney for the child as soon as

67. 387 U.S. at 13.

68. For a discussion of the right to counsel see Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L.J. 558 (1968); Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 568-72 (1957); Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585 (1965). Right to counsel is often guaranteed by statute, e.g., CALIF. WELF. & INST'NS CODE § 633 (West Supp. 1968); COLO. REV. STAT. ANN. § 22-1-6 (Supp. 1967); ILL. ANN. STAT. ch. 37, § 701-20(1) (Smith-Hurd Supp. 1969); N.Y. FAMILY COURT ACT § 741 (McKinney 1968).

It can hardly be maintained that the juvenile does not need counsel when one considers his disability by virtue of his age and the possible consequences of a delinquency hearing. See Note, *supra* note 25, at 1154, 1158; Skoler, *id.* at 572; Welch, *Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653, 694-96 (1966).

69. MJCR 2-1(1).

70. MJCR 1-2(2).

71. MINN. STAT. § 260.111 (1967) includes these causes in the exclusive and original jurisdiction of the juvenile court.

72. 387 U.S. at 31 n.48.

73. MJCR 2-1(1). This Rule does not specifically require that the attorney be present during any interrogation of the child while in custody following notification of rights, but it does require the presence of at least one parent.

he is taken to the police station if his parents could not be located to exercise waiver. Even if located, a court might find the parents incapable of exercising a knowledgeable waiver of the child's right to counsel. In such a case, the child could be taken into custody and held without interview pending the appointment and arrival of an attorney to represent him. This, of course, raises the practical problem of whether counsel will be readily available. In those counties with a limited number of public defenders available, the Rules may be difficult to follow.⁷⁴

3. *Parent-Child Conflict of Interest*

One of the most striking features of the Rules is the right to *separate* counsel for both parent and child when their interests conflict.⁷⁵ Since the juvenile court may appoint separate counsel on its own initiative, without a formal request by the parties, it is faced with a special responsibility to determine whether such conflict does in fact exist. The right to such appointment exists in all instances where the right to counsel arises. Due to the special importance of separate counsel in neglect, dependency and termination-of-parental-rights causes, the Rules provide that in these situations the interests of the parent and child are *deemed to conflict*, and appointment of separate counsel is mandatory.⁷⁶

Whenever the conflict is such that separate counsel is appointed, appointment of a guardian ad litem is mandatory.⁷⁷ It is also required during the detention period *prior to filing of the petition* where it appears that a neglect, dependency or termination-of-parental-rights cause will be brought before the court, and also when the parents cannot be located or brought before the court or when the child has no parent.⁷⁸ In addition, the court may appoint a guardian ad litem whenever in its discretion it "deems appointment . . . to be in the best

74. The variety of custom noted earlier, in the discussion at notes 38-54 *supra*, is also present in the use of public defenders in the juvenile courts. Some counties employ no public defenders in juvenile court. Others have as many as two public defenders in addition to frequent assistance from outside counsel. The Hennepin County Legal Aid Society employed four full time attorneys for juvenile court work until Dec. 1, 1969 when this responsibility was shifted to the Public Defender's Office.

75. MJCR 2-1(4).

76. MJCR 2-1(5). A similar provision is found in CALIF. WELF. & INST'NS CODE § 634 (West Supp. 1968).

77. MJCR 9-1.

78. MJCR 9-1.

interests of the child."⁷⁹ As in the appointment of separate counsel, this places a responsibility upon the court to inquire into the relationship between parent and child prior to proceeding on the merits.

In determining whether the requisite indifference or hostility of the parent exists, the court is confronted with a dilemma when notice of the juvenile proceeding cannot be effected upon the parent. Since the parent has not clearly failed in his duties, the court has little guidance in determining whether to make an appointment. If a parent is extremely difficult to reach, the court is best advised not to delay the proceedings, but rather to deem the absence a display of indifference.

An additional problem is whether the guardian ad litem may act on behalf of the parent without prejudicing the parent's rights such as notice and waiver. The Rules state that the guardian ad litem is to be considered as the parent for purposes of the juvenile proceeding.⁸⁰ Traditionally, guardians ad litem have been viewed as acting on behalf of the child⁸¹ and therefore responsible for ensuring that the child's rights are considered by the court.⁸² In fact, case law clearly states that they are not permitted to waive any right of the child unless it is not of such substance as to affect the proceeding.⁸³ Thus, if the right of the parent to receive notice is considered to be intimately related to the child's rights, it is arguable that the child could object or appeal on the grounds of failure to give notice to his parent. The Rules are apparently designed to avoid this problem by viewing the guardian ad litem, once appointed, as the child's parent and as having the rights thereof. Even under this interpretation, however, a person may be reluctant to be appointed since his appearance must necessarily be construed as cutting off the

79. MJCR 9-1.

80. MJCR 9-3.

81. The guardian ad litem is considered to be an officer of the court, *Garner v. I.E. Schilling Co.*, 128 Fla. 353, 174 So. 837 (1937); *Cole v. Superior Ct. of San Francisco*, 63 Cal. 86 (1883); *Bryant v. Livermore*, 20 Minn. 313 (Gil. 271) (1874); who is charged with protecting the interests of the infant, *Cozine v. Bonnick*, 245 S.W.2d 935 (Ky. 1952); *Ebbert v. Westfall*, 123 W. Va. 690, 17 S.E.2d 787 (1941).

82. *Stunz v. Stunz*, 131 Ill. 210, 23 N.E. 407 (1890); *Long v. Mulford*, 17 Ohio St. 485 (1867).

83. *Ostman v. Kane*, 389 Ill. 613, 60 N.E.2d 93 (1945); *In re Hills*, 264 N.Y. 349, 191 N.E. 12 (1934). Minnesota case law follows the general development noted in notes 81 & 82 *supra*. While the Minnesota Supreme Court has said that the guardian ad litem cannot waive *any* of the minor's rights, *Eidan v. Finnegan*, 48 Minn. 53, 50 N.W. 933 (1892), no recent statement has been made by the court on this issue.

parent's right to notice and other rights in connection with the proceeding. Nonetheless, in changing the duties and responsibilities of the guardian ad litem, the Rules provide the juvenile court with a useful device to proceed without unnecessary delay in all juvenile causes where a parent is absent.

4. *Dispositional Hearing*

In addition to the increased participation of counsel at the adjudicatory hearing, the Rules provide that at the dispositional hearing, counsel may scrutinize the reports⁸⁴ and recommendations of probation officers and cross-examine the officer who prepared the report.⁸⁵ Since Minnesota, unlike most other states, has previously permitted counsel to participate at disposition, it is arguable that the right to inspection of these reports under the Rules will have no significant impact. It is expected, however, that the expanded rights at disposition under the Rules will encourage more frequent appearance of counsel at disposition.

5. *Role of Counsel*

Even though the "treatment" following an adjudication of delinquency may be as severe as a criminal penalty, the defense counsel in juvenile court has not held the important position enjoyed by his counterpart in the criminal court.⁸⁶ In view of the rights afforded juveniles under the Rules, the provisions outlining the right to counsel are the most important since they offer the most potential for change in the traditional setting of the juvenile proceeding. The extent of such change in the juvenile court will be determined not only by the frequency with which counsel appears in juvenile court but more importantly, by the manner in which he represents his client.

The frequency of defense counsel appearance prior to the Rules ranged from nearly every case in a few counties to one out of ten in others.⁸⁷ The impetus for increased appearance of coun-

84. See text accompanying notes 130-32 *infra*.

85. MJCR 2-3(1)(c), 10-5(1).

86. Cf. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

87. In Dakota County, counsel is appointed in almost every case, whereas in Scott County it has been estimated that counsel appears, appointed or otherwise, in only 10 percent of the cases. On the basis of these practices it is tempting to conclude that due process is being denied where counsel is not appearing on a fairly frequent basis. However, many other factors must be considered. For example, the infrequent appearance of counsel in small counties may stem from a wide-

sel can be expected to come from the court itself as well as from those juveniles brought before it. If the current proposals to provide for direct review of probate-juvenile court decisions⁸⁸ are successful, and if verbatim records of juvenile proceedings are made as required,⁸⁹ judges who have proceeded in the absence of counsel in the past will probably be more reluctant to permit waiver of counsel. Similarly, as the juvenile court evolves from an agency for juveniles with an informal hearing to a traditional court with accompanying formal procedure, more juveniles may feel the need for counsel and therefore request it.⁹⁰ Based upon the experience of other states where counsel has more freely been made available to juveniles, it appears quite certain that representation in Minnesota will increase.⁹¹ Judges and attorneys alike agree with this conclusion but are reluctant to hazard an estimate as to the form that representation will take under the Rules.

While the Rules make clear *when* counsel may participate in juvenile proceedings, neither the Rules nor *Gault* provide any guidelines as to the *manner* in which counsel should participate.⁹² Many writers have argued that because of the "special situation" of the juvenile as the subject of state care and treatment, the role of the lawyer in the juvenile court properly differs from that in criminal court.⁹³ If the juvenile proceeding is in

spread feeling that the probate-juvenile judge is "doing a good job" and therefore the determination of juvenile cases should be left solely to his judgment. In such cases parents may not feel the need for counsel. Another factor to be considered is the manner in which counsel is tendered to the parties. If it is not done in a positive manner and made readily available, the desire to "get it over with" will often prevail. For further comment on this subject, see Paulsen, *supra* note 61, at 528 *et seq.*

88. See text accompanying note 144 *infra*.

89. See MJCR 1-3.

90. The increase in formality and decrease of informal discussion of the juvenile's "problem" is likely to bring with it a complexity that may make a party uncertain of his rights in the absence of counsel. Operating against this is the traditional feeling of the parent to "get it over with."

91. See Platt & Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1163-84 (1968).

92. It is commonly recognized that most lawyers have little if any expertise in handling juvenile cases. Paulsen, *supra* note 61, at 528-29; McKesson, *Right to Counsel in Juvenile Proceedings*, 45 MINN. L. REV. 843, 846 (1961).

93. Judge Ketcham has defined the juvenile lawyer's role in the following terms:

- 1) To advocate and defend proper legal rights.
- 2) To be a legal guardian with special concern for his client's welfare and best interests.

fact a "special situation," the lawyer is faced with the problem of deciding what kind of representation to give the juvenile in the delinquency hearing—either to assume the role of a vigorous advocate and endeavor to secure the lightest "penalty" for his client, or to assist the court in its attempt to rehabilitate the child. Lawyers are likely to be as divided as writers on this subject.⁹⁴

It might be contended that where the juvenile has admitted guilt to the attorney, representation should be directed towards achieving an effective means of rehabilitation at the dispositional hearing, rather than vigorous pursuit of all the procedural rights provided by the Rules. This position necessarily assumes that counsel has a responsibility to help treat the child which outweighs the duty to press for all the rights available to his client. The danger is that the attorney has in effect assumed the role of judge in the case, and thus deprived the juvenile of his procedural safeguards. In view of the tendency of children to confess⁹⁵ and the unreliability of their statements, a greater danger is that the child may be induced by the attorney into a confession he might not otherwise have made and which may be totally untrue. In such a situation the attorney who is seeking to help the child has effectively prevented the child from receiving the vigorous defense contemplated by the Rules.

Because of the failure of the *parens patriae* doctrine as noted in *Gault*⁹⁶ and the punitive nature of the "treatment" juveniles may receive after adjudication, advocates in the traditional sense are necessary to protect the rights provided by the Rules.⁹⁷ Indeed, the Rules Committee contemplated no restriction on the

3) To act as an officer of the court with a concern for the administration of justice.

Ketcham, *supra* note 68, at 591. It has also been contended that while his role may not differ greatly at the adjudicatory hearing, the lawyer "can and should adopt a role different from his role in a criminal court" when he appears at the dispositional hearing. Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 798-99 (1966).

94. The dilemma which faces the attorney "is the extent to which such role enlargement should temper the lawyer's traditional duty to help secure the lightest possible penalty or sanctions for his client's wrongdoing." Lefstein, *In re Gault, Juvenile Courts and Lawyers*, 53 A.B.A.J. 811, 812-13 (1967). See Skoler, *supra* note 68, for an argument that the past failures of the juvenile court justify vigorous defense by counsel. For a discussion of the possible harm of a "criminal mouthpiece" in juvenile court, see Paulsen, *supra* note 68, at 569.

95. See note 116 *infra*.

96. 387 U.S. at 26-27.

97. See Skoler, *supra* note 68, at 580.

traditional advocate's role,⁹⁸ though such restrictions have been recommended by others.⁹⁹

The Rules also recast the role of the county attorney and juvenile judge. Since the county attorney must present the state's evidence at the adjudicatory hearing,¹⁰⁰ the juvenile judge is effectively placed in his traditional courtroom role. Any problem of the judge being both prosecutor and trier of fact, such as has arisen in other states,¹⁰¹ is avoided. Accordingly, juvenile proceedings can be expected to depart from the informal manner which has characterized past procedure, take on a more adversary nature¹⁰² and unavoidably become more like the adult criminal trial.

The shift to a more truly adversary proceeding in juvenile court may lead to an occasional dismissal on procedural grounds. It has been argued that the vigorous counsel who presses procedural points in the juvenile court destroys the setting and effect of the juvenile court as an instrumentality for providing help and guidance to the child. The argument continues that dismissals on technical points may defeat the purpose of the juvenile court in individual cases by "letting the child off."¹⁰³ But whether the child is "let off" actually depends on the willingness of the county attorney to present a strong case consistent with the Rules, and on how well police officers recognize the child's rights when taking a child into custody. While the argument is equally applicable to the criminal court, it is commonly rebutted there by concern for due process which has come to be recognized as of primary importance. The same concern for due process must be present for juveniles, and fears of "letting the child off" should be regarded as no more than a vestige of the discredited philosophy of *parens patriae*.

6. Other Effects of Counsel

In addition to the potential development of more procedural issues, the increased activity of counsel is likely to lead to increased appellate review. This possibility and the more frequent appearance of counsel will no doubt influence the juvenile judge

98. Interview, *supra* note 38.

99. *E.g.*, Paulsen, *supra* note 61, at 536-37.

100. MJCR 5-2(1).

101. Note, *supra* note 93, at 795-96.

102. See Ketcham, *supra* note 68, at 596.

103. Such a result has been criticized but accepted as an unavoid-

to be more alert to the requirements of the Rules and due process.

Of course, the greater demand for defense counsel will result in added expense to the county where the parties cannot afford an attorney. This could create a problem where a county is reluctant to provide more money for juvenile defenders. Moreover, it has been estimated that a substantial increase in costs for preparation of the case will result since the county attorney is required to draw all petitions.¹⁰⁴ Furthermore, juvenile judges may insist that the county attorney appear at all phases of the proceeding. Thus, if strict compliance with the Rules is achieved, the cost increase to the county could be significant despite the current small caseload.

C. RIGHT TO REMAIN SILENT AND PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination has not always been extended to children in juvenile court.¹⁰⁵ It was argued that since the court was participating in the "treatment" of the child, it should encourage the child to admit his transgression as the first step in his rehabilitation. *Gault* held to the contrary; the "constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."¹⁰⁶

The right to remain silent in an adjudicatory hearing is provided by the Rules not only to a child who is the subject of a delinquency cause, but to a child in a traffic offender cause as well.¹⁰⁷ No mention of this right is made in regard to other types of juvenile proceedings. This right is to be distinguished from the traditional privilege against self-incrimination, which is not specifically articulated in the Rules but is subsumed by them.

The right to remain silent arises at the moment the child is taken into custody and continues until adjudication.¹⁰⁸ It specifically includes the right of the child to be interrogated only in the presence of at least one of his parents.¹⁰⁹ The Rules explicitly adopt the four point warning set down in *Miranda v.*

able consequence of participation of counsel to protect the child's rights Paulsen, *supra* note 61, at 539.

104. Interview, *supra* note 52.

105. *E.g.*, *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932).

106. 387 U.S. at 55.

107. MJCR 2-2(1).

108. MJCR 2-2(1).

109. MJCR 2-2(1).

*Arizona*¹¹⁰ as the proper form for notice of this right.¹¹¹ In addition, the child has the right to be *warned* of his right to remain silent, in the presence of at least one of his parents.¹¹²

The *Miranda* warning has previously been used by many counties, and the Rules are not the first to require that this warning be given to both parent and child.¹¹³ The requirement that the warning be given to the child and parent *in each other's presence*, however, has been criticized as "unduly complicating" the pre-adjudicatory phase.¹¹⁴ While it may be burdensome from the standpoint of time delays and possible extension of the child's detention, this requirement is probably necessary to make the provision on waiver of rights meaningful. Juveniles have been observed to confess readily when made the subject of a juvenile cause.¹¹⁵ A juvenile is also more likely than an adult to confess in the presence of the police officer who takes him into custody.¹¹⁶ Thus, a juvenile requires special handling¹¹⁷ and peculiar safeguards to ensure that his right to remain silent is not violated in the apprehension process.¹¹⁸

The Rules give additional protection to the child when his admission is obtained in conformance to the Rules. While admissible at the adjudicatory hearing, these statements must be corroborated to sustain an adjudication in a delinquency or traffic offender cause.¹¹⁹ In view of the child's tendency to confess,¹²⁰ and the possible unreliability of his statements, this rule is an important safeguard for the juvenile.

A perplexing problem arises with regard to how pre-custody statements made by the child should be handled. *Miranda* applies only to the custodial phase of the investigation and there-

110. 384 U.S. 436 (1966).

111. MJCR 2-2(1).

112. MJCR 2-2(1).

113. Such a requirement was set forth in *Matter of William L.*, 29 App. Div. 2d 182, 287 N.Y.S.2d 218 (1968).

114. Comment, *Juvenile Law—Due Process Requires Child's Parent Be Given Miranda Warning—Matter of William L.*, 32 ALB. L. REV. 667, 671 (1968).

115. See Note, *supra* note 93, at 794.

116. Comment, *Juvenile Offender and Self-Incrimination*, 40 WASH. L. REV. 189 (1965).

117. Paulsen, *supra* note 68, at 551.

118. In connection with the problem of juvenile waiver, it has been argued that "something more than . . . *Miranda*" is required in view of the child's disadvantage vis-à-vis the police officer. Note, *Waiver in the Juvenile Court*, 68 COLUM. L. REV. 1149, 1164 (1968).

119. MJCR 5-3(1).

120. See note 116 *supra*.

fore does not offer any solution. Since the Rules adopted the *Miranda* warning language, it is arguable that the right to remain silent is limited to custodial interrogation. While consistent with the language of the Rules, this interpretation does not follow their spirit. The Rules should be no less protective than requirements presently placed upon police in investigating criminal activity. Thus, the child must at least be afforded the right to remain silent when the pre-custody investigation has begun to "focus on a particular suspect."¹²¹ It might seem that due to the child's disposition toward making false confessions, the child should have an absolute right to remain silent in all instances. Such a restriction on police beyond present criminal requirements, however, would be a substantial, if not debilitating, hindrance on the performance of their duty. Nevertheless, any admissions obtained at this stage are properly subject to the requirement for corroboration to sustain an adjudication of delinquency.

While the Rules expressly extend the right to counsel to both the child and the parent, the same is not true of the right to remain silent.¹²² Thus, a child's parents might be called upon to give testimony which could provide the grounds for a neglect or termination-of-parental-rights proceeding. The privilege against self-incrimination would normally be available to the parents upon taking the stand. Nevertheless, it is indeed possible that such privilege could not be invoked in juvenile court since all juvenile proceedings are considered to be civil rather than criminal. Also, while the child still has the privilege against self-incrimination during the dispositional hearing, his right to remain silent ceases upon an adjudication of delinquency.¹²³ Presumably he could not withhold information after adjudication which might lead to a neglect or termination-of-parental-rights proceeding.

The right to remain silent, if strictly protected, will probably have a substantial impact on present police procedure in handling juveniles after they have been taken into custody. The Rules may well result in a reversal of the present situation in which the overwhelming majority of juveniles appearing in court have admitted their guilt,¹²⁴ and, in turn, the state will need to

121. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

122. The Rules clearly state that this right is made available to the child alone. MJCR 2-2(1).

123. MJCR 2-2(1).

124. Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527, 543 (1968).

present a much stronger case than is the current practice if it is to secure an adjudication of delinquency. In large measure, the extent of the impact of the right to remain silent will depend upon the vigor with which it is asserted by defense counsel.

D. RIGHT TO CONFRONTATION AND CROSS-EXAMINATION

The right to confrontation and cross-examination during the delinquency hearing is provided in the Minnesota Juvenile Court Act;¹²⁵ the Rules follow this statutory provision.¹²⁶ The Rules facilitate the cross-examination of witnesses by providing for the right to enter evidence¹²⁷ and the right to have the court issue subpoenas.¹²⁸ This will be done at county expense if the party is unable to pay.¹²⁹ Of particular importance is the right to cross-examine the person who prepared any report for the use of the court, after it has been filed and entered into evidence.¹³⁰ With one exception,¹³¹ these reports are not admissible at the adjudicatory hearing, but they are admissible at the dispositional hearing,¹³² and it is at that point that the right to cross-examine the preparer of the report arises.

In addition to the right to cross-examine the report's author—normally a probation officer—the parties may inspect any report prior to its admission into evidence.¹³³ This right is

125. MINN. STAT. § 260.155(6) (1967) provides:

The minor and his parent, guardian, or custodian are entitled to be heard, to present evidence material to the case, and to cross-examine witnesses appearing at the hearing.

126. MJCR 2-3(1)(b).

127. MJCR 2-3(1)(a).

128. MJCR 2-3(1)(f).

129. MJCR 2-3(1)(f).

130. MJCR 2-3(1)(c), 10-5(1). The reports set forth in the rules are as follows: MJCR 10-1 (social study); MJCR 10-2 (medical examination); MJCR 10-3 (traffic offense study); MJCR 10-4 (reference study). While the Rules do not address themselves to the problem of later hearings on modification of the disposition, it would appear that such a hearing ought to be regarded as being in the nature of a dispositional hearing and thus the right to cross-examination should be made available to the parties.

131. The reference study is admissible at a hearing on reference for prosecution in a delinquency or traffic offender cause and at the adjudicatory hearing in neglect, dependency or termination-of-parental-rights causes. MJCR 10-4(3).

132. MJCR 10-1(3), 10-2(3), 10-3(3).

133. MJCR 2-3(1)(c). MINN. STAT. § 260.161(2) (1967) permits inspection by counsel of "any report or social history furnished to the court . . ." No provision is made for cross-examination of the preparer of such a report nor has such a practice been followed by the courts.

specifically extended to counsel,¹³⁴ and when not represented by counsel, the party has a right to inspect the report for himself.¹³⁵ Where the court feels, however, that it is not in the best interest of the child for him to see the report, counsel will be appointed for that purpose.¹³⁶

These provisions represent a significant change from past practice where reports were seldom admitted into evidence at the dispositional hearing.¹³⁷ Even when admitted, neither examination of the reports by counsel nor cross-examination of the preparer of the report has been a regular procedure. Both the report, once admitted, and any cross-examination of the officer will be made part of the hearing record. Recommendations on disposition made in the report will be open to direct attack and possible appellate review. As a result, the reports prepared by officers are likely to be more carefully drawn and recommendations as to disposition are likely to be based on specific observable data rather than merely on opinion of the probation officer.¹³⁸

E. TRANSCRIPT OF RECORD AND APPELLATE REVIEW

Neither the right to a transcript of the proceeding nor the right to appeal a juvenile decision was passed on in *Gault*.¹³⁹ In Minnesota the Juvenile Court Act provides for the juvenile's right to appeal¹⁴⁰ and the Rules have now granted the right to a transcript of any proceeding.¹⁴¹ Accompanying these rights is the requirement that a verbatim record be made in *all* juvenile court hearings, except in traffic offender causes unless the child or parent request that such a record be made.¹⁴²

134. It should be noted that by the language of MJCR 10-5(1) the right to inspection is granted to the parties *by their counsel*. This appears to conflict with MJCR 2-3(1)(c) which grants this right to *parties*. It would seem that MJCR 10-5(1) should be viewed as the governing rule since the discussion in MJCR 2-3(1)(c) appears to be nothing more than a passing reference to the right of inspection.

135. MJCR 10-5(1).

136. MJCR 10-5(1).

137. No statutory requirement exists under the Juvenile Court Act for admission into evidence of these reports nor have they been made a part of the record in past practice.

138. While the past role of the probation officer may be limited by the provisions on inspection of reports and cross-examination of the preparer, the probation officer may continue to present state's evidence at the dispositional hearing. MJCR 6-4(1).

139. 387 U.S. at 8.

140. MINN. STAT. § 260.191 (1967). See also MJCR 2-3(1)(e).

141. MJCR 2-3(1)(d).

142. MJCR 1-3(1).

The value of the probate-juvenile court record for purposes of appeal is questionable since the Juvenile Court Act provides that appeal from probate-juvenile courts is to be taken to the district court *de novo*.¹⁴³ A proposed amendment would, however, establish direct appeal to the Minnesota Supreme Court in all cases except traffic offenses.¹⁴⁴ If direct appeal is eventually authorized, these requirements may instill in judges a greater alertness for the rights of the child and the requirements of due process. Furthermore, the possibility that the proceedings may be challenged under the critical eye of the supreme court will no doubt aid in achieving greater procedural uniformity in the juvenile courts.

F. NOTICE OF BASIC RIGHTS

To insure protection of the child's basic rights, the Rules provide the child with timely and effective notice of his rights. In all cases the Rules require that the form of the notice match the language in which the right is granted.¹⁴⁵ For example, since the Rules incorporate the *Miranda* warning¹⁴⁶ in the right to remain silent, the notice must be equally specific.

The Rules leave no doubt as to who must give the notice and at what point it must be given. The requirement of notice arises at the moment the child is taken into custody,¹⁴⁷ and must be included in the summons or notice to appear,¹⁴⁸ at any preliminary hearing and at *each stage* of the formal proceedings.¹⁴⁹ The judge must not only notify all parties of their rights at the beginning of any hearing but, where demanded by the Rules, he must ascertain whether previous notice has been given.¹⁵⁰ The Rules attempt to prevent circumvention by the judge on requirements of time, form and frequency of notice.¹⁵¹ If strictly ad-

143. MINN. STAT. § 260.291(2) (1967).

144. Such a proposal was introduced in the 1969 session of the Minnesota Legislature. Although it received substantial backing from the judiciary, it was rejected.

145. *E.g.*, MJCR 2-3(2).

146. *See* text accompanying note 111 *supra*.

147. MJCR 7-1(2).

148. MJCR 4-2(d).

149. *E.g.*, MJCR 5-1. This requirement applies to the reference, adjudicatory and dispositional hearings.

150. MJCR 5-1(c) (adjudicatory hearing); MJCR 6-3 (dispositional hearing).

151. Such an attempt to skirt notice requirements is further restricted by the mandatory forms adopted to complement the Rules.

hered to, they will guarantee that adequate and timely notice is given in the majority of cases.

G. THE PROBLEM OF WAIVER

Under the Rules all basic rights are waivable with the sole exception of the right to counsel at a reference hearing when the alleged violation of law would constitute a felony if committed by an adult.¹⁵² The commonly accepted definition of waiver is "an intentional relinquishment or abandonment of a known right or privilege."¹⁵³ The United States Supreme Court has held that any waiver must be "intelligently and understandingly" exercised to be effective.¹⁵⁴ Since the child's legal capacity at common law was viewed as something less than that of an adult,¹⁵⁵ it has been asserted that the child in a juvenile proceeding is not likely to meet the standards for effective waiver.¹⁵⁶

The Rules, however, clearly articulate the requirements for a valid waiver by a juvenile which effectively prevent the juvenile from waiving for himself. If the child is under 14 years of age, he plays no part in the decision to waive.¹⁵⁷ If he is 14 or older, he may waive his rights subject to ratification by his parent.¹⁵⁸ Thus, in the case of the older child, waiver cannot be accomplished unless *both* parent and child participate. A recent

152. MJCR 1-5(1). The right to nondisclosure of sealed records under MJCR 11-3 is also not waivable. Notice that no reference is made to this nonwaivability under rule 1-5(1). It seems apparent that rule 1-5(1) purports to deal only with basic rights and that sealing of records is not included within that category. Since there is no conflict between these two rules the provision on sealing of records should be given no less weight than basic rights on the matter of waiver. Cf. Note, *Sealing of Juvenile Court Records*, 54 MINN. L. REV. 433 (1969).

It should be noted that if a party wishes to exercise his right to inspect records under rule 10-5 and if the court feels it is not in the best interests of the child for him to see these reports, such right can only be exercised if the child is represented by counsel. This raises the question of whether counsel should ever be permitted to be waived.

153. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). See also *Miranda v. Arizona*, 384 U.S. 436 (1966).

154. *Moore v. Michigan*, 355 U.S. 155, 160-61 (1957).

155. For the best recent discussion on this problem, see Note, *supra* note 118.

156. *Williams v. Huff*, 142 F.2d 91 (1944); Note, *supra* note 118, at 1158; Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?*, 19 HAST. L.J. 223, 225 (1967).

157. MJCR 1-5(3) (a).

158. MJCR 1-5(3) (b).

case in New York sets forth a similar judicial requirement for effective waiver.¹⁵⁹

Bringing the parent into the waiver decision creates the problem, as in the case of right to counsel,¹⁶⁰ of determining when the parent is hostile or indifferent to the interests of the child. Since the Rules in both instances contemplate a great deal of participation by the parent, the determination becomes doubly important. One commentator has suggested that whenever a parent has the right to waive a child's right and does in fact waive that right, the court should immediately halt the proceedings and examine the parent-child relationship.¹⁶¹ To deal with the problem, the Rules should provide for an *initial* determination by the court on the wisdom of allowing the parent to act in the child's behalf. Such a provision would insure that the parent participates in the interest of the child and that any waiver by him is "intelligent and knowledgeable." Since the Rules seek to install the parent as a companion to the attorney in protecting the juvenile's rights, it would be quite appropriate to examine his parental responsibility prior to permitting him to exercise waiver for the child.

The waiver provision is likely to encourage the exercise of rights which have been routinely waived in the past, especially when an attorney is appointed guardian ad litem.¹⁶² It is difficult to see how the formal notice of rights in positive terms and the confrontation of the juvenile and his parents with the decision of waiver can have any other effect. In so providing, the Rules push "informal" juvenile hearings into the annals of the past and help to establish the juvenile court as a court in the traditional sense.

H. THE PROBLEM OF UNIFORMITY

The Rules are available for adoption by the district-juvenile courts in the two so-called "metropolitan counties" in Minnesota.¹⁶³ Presently, there is no indication that the procedure in these counties will soon approximate that of the Rules. Since

159. *Matter of William L.*, 29 App. Div. 2d 183, 287 N.Y.S.2d 218 (1968).

160. See text accompanying notes 75 & 76 *supra*.

161. Note, *supra* note 118, at 1158.

162. Under the Rules the guardian ad litem is required to be an attorney except where a certain layman would be more appropriate (*e.g.*, an adult relative who has demonstrated interest and concern for the child's welfare).

163. MJCR Foreword, 1-2(d).

over 50 percent of all juvenile causes in the state are heard in these counties alone,¹⁶⁴ the Rules will fail to provide for the uniformity of procedure which they seek to achieve until these counties act to adopt the Rules.

Hennepin County, comprised mainly of Minneapolis and its environs, has drafted its own proposed set of rules.¹⁶⁵ These rules were drawn independently of the Rules and thus do not follow their format. In regard to providing basic rights, the proposed Hennepin County rules differ from the Rules in two serious respects. First, the proposed Hennepin County rules do not require that a statement of facts in support of a delinquency cause accompany the notice of charges in the petition; rather they explicitly forbid a statement alleging delinquency.¹⁶⁶ The nature of the cause and the facts are to be determined at the initial hearing and only then will they be specified.¹⁶⁷ Whether such provisions allow adequate notice as required by *Gault* is indeed questionable.

The second major difference in the proposed Hennepin County rules is the provision which allows waiver of rights.¹⁶⁸ A child over 17 may waive if he has knowledge of his rights and the consequences of waiver. A child 17 or under is presumed to be incapable of exercising waiver. In contrast to this, the probate-juvenile court rules provide that no child can waive his rights without waiver by his parent.¹⁶⁹ Furthermore, where waiver is required by someone other than the child under the proposed Hennepin County rules, such person need not be the child's parent as required under the probate-juvenile court rules. He need only be an adult who meets the traditional test of capacity for waiver and who has a "demonstrable concern" for the child's welfare.¹⁷⁰ Thus, next of kin are in a position to waive the rights of the child. While this provision eliminates the time consuming determination of whether a conflict of interest exists, it places a heavy responsibility on the judge to make certain that the requisite "demonstrable concern" is present. Since a parent without such "demonstrable concern" is not suited to waive the child's rights, the proposed Hennepin County rules may be a

164. See text accompanying note 27 *supra*.

165. PROPOSED JUVENILE COURT RULES FOR HENNEPIN COUNTY (Draft No. 2, Dec. 31, 1968) [hereinafter cited as HENNEPIN].

166. HENNEPIN 31.02.

167. HENNEPIN 42.03.

168. HENNEPIN 15.01.

169. See text accompanying notes 157 & 158 *supra*.

170. HENNEPIN 15.02.

more satisfactory approach than the probate-juvenile court rules in this regard.¹⁷¹

IV. CONCLUSION

The Minnesota Juvenile Court Rules are the most comprehensive statement on the basic rights of juveniles set forth by any state to date. With the exception of the right to bail and right to jury, they extend the traditional safeguards of the criminal court to the accused child in juvenile court. If the Rules are followed, juvenile proceedings in Minnesota can be expected to change dramatically. Juvenile court hearings will become more formal and counsel will appear more frequently. This in turn will lead to fewer confessions and more contested cases. An increase in the amount of time and money spent on juvenile cases and in the cost of such proceedings can also be expected. This would be felt most severely in the metropolitan areas if their courts were to adopt the Rules. In light of these probable developments, it seems likely that the degree of compliance and the impact of the Rules will ultimately depend in greatest measure upon counsel and the role he assumes in the juvenile court. The Rules may also bring a drastic change in the role of the probation officer in making him subject to cross-examinations on any reports he has prepared for the court. The Rules continue to provide for the appointment of referees.¹⁷² The heavy caseload and limited number of personnel and facilities in the metropolitan areas probably demands the continuance of this practice for the present. It may, however, convincingly be argued that such a function is not consistent with the spirit and intent of the Rules which seek to establish the juvenile court as a traditional court of law.

Gault was not intended to transform the juvenile court into a criminal court.¹⁷³ Yet it is undeniable that many if not most of the characteristics of the criminal court may appear in juvenile courts under the Rules. Such a prospect need not be viewed as contrary to the purpose of the juvenile court. Indeed, it may fairly be argued that far from being antagonistic to the

171. Ramsey County (St. Paul) has not moved to adopt the MJCR or draft their own set of rules. St. Louis County (Duluth) is now under the Rules. Note 27 *supra*. It is possible that Ramsey County may follow the lead of Hennepin County.

172. MJCR 1-6.

173. Douglas, *Juvenile Courts and Due Process of Law*, 19 Juv. Cr. JUDGES J. 9 (Spring 1968).

traditional juvenile court goal of rehabilitation, formal guarantees of basic rights encourage rehabilitation by impressing upon the child the fact that he has not been subject to a kangaroo court. More importantly, such guarantees are a long step toward the no less vital goal of justice for the child.