

# The Juvenile Law Reader

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Juvenile Rights  
PROJECT

## Raising Competency and Culpability

In the last several years, scientists have discovered that adolescent brains are far less developed than previously believed. There is now clear biological evidence that adolescents do not have the same ability as adults to make sound decisions and to prevent impulsive behavior. The part of the brain that governs impulsivity, judgment, planning for the future, foresight of consequences and other characteristics that make people morally culpable, does not, research now shows, mature until the early 20's. "Adolescent Brain Development and Legal Culpability", ABA Juvenile Justice Center, October 2002.

These discoveries have led legal experts and practitioners to rethink issues of competency, culpability, and disposition or sentencing for juveniles. At the same time the severity of sanctions juveniles in Oregon face has increased substantially. As a result of Measure 11 more juveniles are tried and sentenced as adults, including being subjected to mandatory minimum sentences. Juveniles may now remain in the ju-

venile corrections system or facilities until the age of twenty-five. There are also increasing collateral consequences such as sex offender registration and use of juvenile adjudications to enhance adult sentencing.

As a result of these developments, more aggressive motion practice challenging competency, raising lack of criminal responsibility and advocating more strongly for appropriate dispositions or sentences is required in cases involving juveniles.

### COMPETENCY TO BE ADJUDICATED

It is fundamental to the adversary system of justice that a defendant, including a juvenile defendant, have sufficient adjudicative competence to: 1) have a rational and factual understanding of the proceedings against her; 2) the ability to consult with counsel; and 3) the ability to assist counsel in preparing her defense. That a defendant can aid and assist in her defense helps guarantee accurate adjudications, increases the likelihood that the defendant's decisions,

including for example, a decision to accept a plea offer, are autonomous decisions reflecting her wishes, and preserves the "dignity of the criminal justice process by ensuring that defendants have a moral understanding of the proceedings against them."

The unfortunate reality is that incompetent juveniles are adjudicated in Oregon Courts every day. This practice arises both because of the inadequate level of motion practice in many Oregon juvenile courts and the resistance of judges who cling to an outdated notion of a paternalistic juvenile court in which the best interests of the youth are of paramount concern and adversarial processes are discouraged.

Con't on p. 3.

### Children Under 12 with Delinquency Petitions 6/1/98 – 6/11/04

County	Children
Baker	19
Benton	17
Clackamas	19
Clatsop	5
Columbia	13
Coos	11
Crook	19
Curry	3
Deschutes	47
Douglas	17
Gilliam	1
Grant	6
Harney	2
Hood River	8
Jackson	82
Jefferson	19
Josephine	9
Lake	6
Lane	22
Lincoln	4
Linn	24
Malheur	41
Marion	152
Morrow	23
Multnomah	11
Polk	19
Tillamook	6
Umatilla	54
Union	2
Wallowa	1
Wasco	4
Washington	10
Wheeler	1
Yamhill	20
<b>Total</b>	<b>751</b>

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### NEW DELINQUENCY ASSESSMENT INSTRUMENT

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces the availability of "Assessing the Mental Health Status of Youth in Juvenile Justice Settings." This 8-page Bulletin reports the results of a study of a new assessment instrument, the Voice DISC-IV, a version of the Diagnostic Interview Schedule for Children (DISC) that is self-administered using a computer and headphones. The study also recommends best practices in assessing the mental health of juvenile offenders. This bulletin is available online at:

<http://www.ojjdp.ncjrs.org/publications/pubi=11733>

### FOSTER CARE—PERMANENCY AND REUNIFICATION

"Assessing the Context of Permanency and Reunification in the Foster Care System" is a compilation of six papers prepared by Westat and the Chapin Hall Center for Children. The papers provide important information regarding reunification efforts in the foster care system and evaluating reunification in the context of permanency. Included are studies about reentry experiences of children, the role of race, and the reunification case decision making process. The studies are available online at:

<http://aspe.hhs.gov/hsp/fostercare-reunif01/>

### SERVICES FOR CURRENT AND FORMER FOSTER YOUTH 18 TO 21

The U.S. Department of Health & Human Services' Children's Bureau has published a monograph addressing promising practices under the John H. Chafee Foster Care Independence Program entitled "The Transition Years: Serving Current and Former Foster Youth Ages Eighteen to

Twenty-one". The monograph describes available services, and current barriers to serving this population. The monograph is structured around four core principles that the National Resource Center for Youth Development at the University of Oklahoma, College of Continuing Education maintains are critical for the successful delivery of services to youth: youth development, collaboration, permanent connections, and cultural competence. The monograph is available online at:

<http://www.ncrys.ou.edu/NRCD/publications.htm>

### JRP RESEARCHES MINORITY OVER-REPRESENTATION IN SCHOOL DISCIPLINE

Children in the foster care and juvenile delinquency systems often suffer from poor school outcomes. School failure is one of the strongest predictors of future delinquency and lifelong poor prospects. Minority youth experience more school failure and higher rates of school discipline. In Portland Public Schools, for example, African American students account for only 16.5% of the student population, but 43.5% of the major disciplinary referrals. This research paper addresses the causes and solutions for minority overrepresentation in Oregon school discipline cases. Contact Jennifer McGowan for more information, at: [jennifer@jrplaw.org](mailto:jennifer@jrplaw.org)



## SB 808—NEW REQUIREMENTS FOR PERMANENCY REVIEW HEARINGS

### ADVOCATING FOR TEENS AGING OUT OF FOSTER CARE

Acting on concerns for poor outcomes being experienced by youth exiting foster care in Oregon, including a substantially increased likelihood of homelessness, mental and physical health problems, incarceration, poor educational achievement and underemployment, the Oregon Legislature enacted SB 808. (ORS 419B.343(3) & 419B.476(3))

DHS is now required to prepare a comprehensive transition plan for independent living for each foster youth at least by age 16, and in some cases for 14 & 15 year old youth. The plan must address the youth's needs and goals for transition related to housing, physical and mental health, education, employment, community connections and supportive relationships.

To encourage participation by the Juvenile Courts in transition plans, SB 808 also requires the Juvenile Court to review plans at Permanency hearings and make findings as to:

- Whether the plan is adequate to assure a child's successful transition to independent living;
- Whether DHS has offered appropriate services pursuant to the plan; and
- Whether DHS has involved the youth in the development of the plan.

Statewide training has been provided for DHS caseworkers and DHS is developing a model form to be used in developing the comprehensive transition plan. Many DHS workers are using the newly developed Teen Decision Meeting,

similar to a Family Decision Meeting, but the Teen takes a lead role to develop the plan. Judges have also received training on their role under SB 808. For more information see: "Teens Aging Out of Foster Care in Oregon: A guide to Transition Planning for Caseworkers, Judges and Advocates" which can be accessed at the JRP website: [www.jrplaw.org](http://www.jrplaw.org). Click on links and publications on the left banner.

**"As a society we have expected too little of these young people to help them aim high and strive for big goals, and we have expected too little of ourselves to marshal the necessary resources to make it happen."**

**Toni Cook-Connected by 25**

## RAISING COMPETENCY, continued from p. 1

The increasing stakes in juvenile cases, however, demand that youth must be competent to stand trial before they are subjected to adjudication in juvenile court. While this is true for all juvenile defendants, the argument for younger juveniles (fifteen and under) is even more compelling in light of current understanding of their developmental capacities. Significant numbers of very young children (under twelve years of age) are adjudicated in Oregon Juvenile Courts. (See Chart on p. 1).

Adjudications of so many younger youth are especially suspect in light of the recent findings of the MacArthur Juvenile Adjudicative Competence Study. The MacArthur Study found that based on criteria established in studies of mentally ill adult offenders, approximately one-third of 11 to 13-year-olds and approximately one-fifth

of 14 to 15-year-olds are as impaired in capacities that affect their competence to stand trial as are seriously mentally ill adults who would likely be considered incompetent.

For more information on the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, visit the Network's website at: <http://www.mac-adoldev-juvjustice.org>

Factors unique to the immaturity of youths, other than the elements of understanding and reasoning that are determinative of adult competency, may be also be relevant in determining the competency of a juvenile defendant. Compared to adults, youths are more likely to comply with authority figures and less likely to recognize the risks inherent in the vari-

ous choices they face. Youths are also less capable of considering the long-term consequences of their legal decisions.

The court must hold a competency hearing when the issue of the youth's competency is raised with the burden of proof on the youth to show incompetence by a preponderance of the evidence. Because the right not to be adjudicated while incompetent is a constitutional guarantee, officers of the court may be ethically obligated to raise the issue when they have reason to doubt a youth's competence.

### IN THE NEXT ISSUE:

- Competency Evaluations;
- Strategies for Competency Hearings;
- Negotiating resolutions for incompetent youth.

## OHP Children's Mental Health Changes in the Works

The 2003 Oregon Legislature directed the Department of Human Services' Office of Mental Health and Addictions Services (OMHAS) through a budget note to make substantial changes to the Oregon Health Plan (OHP) children's mental health system "in order to substantially increase the availability and quality (breadth, depth and intensity) of individualized, intensive, culturally competent home and community based services so that children are served in the most natural environment possible and so that the use of institutional care is minimized..." The Budget note resulted from the advocacy of the Juvenile Rights Project and Oregon Advocacy Center, along with family advocates, who negotiated the budget note language.

OMHAS was directed to take a series of actions by June 30, 2005, including the integration of hospital, psychiatric residential and psychiatric day treatment programs into local and regional managed care systems. Since the OHP began transitioning mental health services into managed

care in 1995, the funds for day and residential treatment serves (which account for more than 46% of the funding for children's mental health Services) have been "carved out" of the managed care system. The managed care system receives just over half of the children's services funding, but serves nearly 95% of the children who receive OHP mental health services.

The result of this fragmentation has been that children with severe disorders have often been served inadequately (or not at all) by the outpatient system or placed in a more restrictive day or residential programs in order to receive intensive services. Some children merely languish on the long waiting lists for these programs, and even the children who are discharged successfully from these intensive treatment facilities are faced again with inadequate support in the community.

There has been little funding available and no incentive to provide more intensive community based services. This initiative will integrate children's

mental health funding at the managed care Mental Health Organization Level with the expectation that MHO's will expand the availability of evidence based intensive services such as Wraparound, Treatment Foster Care and Multi-Systemic Therapy. There will be a greater financial incentive to provide less expensive community support to families in order to avoid placing children in more restrictive and more expensive facility-based treatment programs.

This transition is scheduled to start with new MHO contracts with the State on January 1, 2005. Information on the Children's Mental Health Change Initiative can be found on the DHS web site at:

<http://www.dhs.state.or.us/mentalhealth/treatment/childmhsoc-initplngrp/index.html> You can also contact JRP Social Worker, Mark McKechnie at mark@jrplaw.org .

## CASE LAW UPDATES

Summaries and links to Oregon Appellate Cases can be obtained from Willamette Law Online Oregon Court of Appeals News by contacting: WLO-CTA@willamette.edu .

***Braam v. State of Washington***, 81 P.3d 851 (Wash. 2003). In December 2003, the Washington Supreme Court issued a landmark ruling, holding that foster children have rights protected by the due process clause of the 14<sup>th</sup> amendment. The holding is the result of a 6 year class action lawsuit, brought on behalf of over 3000 children who had experienced placement

in the foster care system. The case was, however, sent back for re-trial due to faulty jury instructions. The case settled in August of 2004 just prior to the re-trial. The settlement requires Washington to reform its child welfare system and to ensure foster children are provided with adequate mental health care and not moved unnecessarily to different homes. The settlement requires the state to: 1. decrease the number of times children move to different foster homes, 2. monitor the safety of the homes, 3. provide adequate mental

health services, 4. give foster parents more training and support, 5. make efforts to place siblings together, and 6. provide greater assistance to teens and foster children who "age out" of the system. The Washington Supreme Court states that in order to comply with the due process clause, the state must "provide conditions free of unreasonable risk of danger, harm, or pain, and must include adequate services to meet the basic needs of the child." *Braam*, at 857. When a state fails to make needed  
Con't on p. 5.

# OREGON LAW COMMISSION—JUVENILE CODE REVISION

The Oregon Law Commission continues its work to revise the Juvenile Code. The Juvenile Code Revision Work Group is Chaired by Senator Kate Brown and meets monthly in Salem. Sub-work Groups are also meeting and working on the following areas to develop legislation for the upcoming session:

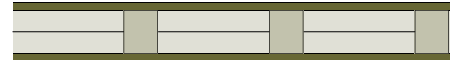
- Confidentiality and Juvenile Court Records;
- Juvenile Competency/Fitness to Proceed;
- Juvenile Psychiatric Security Review Board;
- Juvenile Code Split Clean-up;
- Guardians ad Litem for Mentally Ill Parents; and
- Putative Father.

The OLC webpage is available to anyone. The address is [http://www.willamette.edu/wucl/oregonlawcommission/home/work\\_groups.html](http://www.willamette.edu/wucl/oregonlawcommission/home/work_groups.html). This column will focus on a different sub-work group in each issue.

## FOCUS ON JUVENILE PSRB

Although juveniles have a right to raise a mental disease and defect defense in a delinquency proceeding, presently Oregon has no procedure to follow if the defense is successfully raised. This Sub-Work Group completed a bill that used a Juvenile Psychiatric Security Review Board as a model for creating new procedures for raising the defense. The Sub-Work Group looked at federal provisions for funding ideas and to other states for models when drafting the

bill. Presently courts either amend the delinquency petition to a dependency petition and put the youth in the custody of SCF or use ORS 419C.507 to try to fashion a remedy. The Oregon Youth Authority (OYA) has acknowledged that it is ill-equipped to treat youth offenders with severe mental illnesses, even though the number of those youth in the OYA close custody system has been increasing. Due to the fiscal impact of this bill, the bill remained in committee upon adjournment of the 2003 Legislative Session. The Sub-Work Group will continue to tweak the bill during the interim and seek to advance the bill in 2005, focusing on further defining the fiscal impact of



## CASELAW UPDATES - continued from p. 4

Con't from p. 4.

changes to the foster care system, litigation under the due process clause is clearly available as a method to address both structural and isolated failures within the system. Given that the 2001 federal audit of Oregon's foster care system found Oregon to be performing well below the national average, the holding in *Braam* provides a much-needed impetus for foster care reform.

***State v. Nicholls***, 87 P.3d 680 (Or. App. 2004)

The 1995 statutory amendments which extend juvenile court jurisdiction over youth offenders until their 25<sup>th</sup> birthday do not apply retroactively to youth offenders who committed the act resulting in juvenile court jurisdiction before June 30, 1995 because legislative history renders the amendments "substantive"

in nature, applying the amendment to offenders who committed delinquent acts prior to the amendment would raise serious constitutionality concerns, and there is a potentially inconsistent result in applying the amendment to youths who committed the delinquent act before the amendment took effect.

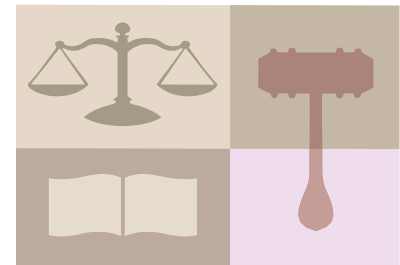
***State ex rel Juvenile Dep't of Wasco Co. v. Black***, 83 P.3d 338 (Or. App. 2004)

The State failed to prove beyond a reasonable doubt that youth committed sexual-abuse to a child because the child's accounts of the alleged abuse were factually inconsistent, the child's descriptions of the alleged abuse in the DHS interview revealed embellishments of his claim, and the child may have been exposed to sexual activity prior to the alleged incident with youth.

***State ex rel Dep't of Human Svcs. v. Payne***, 86 P.3d 87 (Or. App. 2004).

The Appellate Court reversed denial of state's petition to terminate an otherwise adequate mother's parental rights after she failed to end a relationship with her husband who sexually abused one of her two children. Mother's adversarial relationship with DHS which reduced her ability to benefit from services cannot alone defeat an otherwise proper termination petition. Inability to protect one child from abuse and unwillingness to

Con't on p. 7.



# RESOURCES

## RESOURCES ON AUTISM

Oregon Health & Science University's Child Development and Rehabilitation Center (CDRC) now has an autism specialist, Dr. Darryn Sikora. Children who are evaluated at CDRC will be sent to her if autism is suspected for assessment, diagnosis and consultation. There is also a website: FEAT of Oregon (Families for Effective Treatment of Autism) - [www.feator.org](http://www.feator.org) - which lists treatment providers, support groups, educational tools, etc.

## JRP Helpline

JRP's Helpline is staffed by law clerks and Americorps volunteer attorneys. The Helpline provides information, referral and brief legal

brief legal services to children, teens and

services to children, teens and their advocates. The Helpline draws on the broad juvenile law expertise of JRP attorneys to address questions involving children's rights in foster care, emancipation, emergency programs and services, housing

issues for minors, child abuse reporting, alcohol and drug treatment, independent living programs, and scholarships for foster children. Two full-time attorneys are available to represent Helpline callers in areas including: special education and school discipline; immigration; guardianship; and filing of juvenile dependency petitions. Please contact us at 503.232.2540x246 or toll free at 866.608.1212 for assistance.

## Upcoming Conferences, CLE's and Trainings

**NLADA**—The National Legal Aid & Defender Association's annual conference will be held in Washington D.C., December 1—4, 2004. The conference features a Defender Track and a Joint Defender & Civil Track: *Protect the Children—Education is Liberation*. Visit the conference website at: [www.nlada.org/Training/Training/Train\\_Annual](http://www.nlada.org/Training/Training/Train_Annual) for more information.

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**NACC**—The National Association of Counsel for Children's annual conference will be held in Las Vegas September 7—10, 2004. The conference features tracks on Abuse & Neglect, Juvenile Justice, Custody, Visitation & Adoption, and Policy Advocacy. Visit the NACC Website for more information: [www.NACCchildlaw.org](http://www.NACCchildlaw.org)

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**OCDLA**—Oregon Criminal Defense Lawyer's Association will present a seminar based on the Ameri-

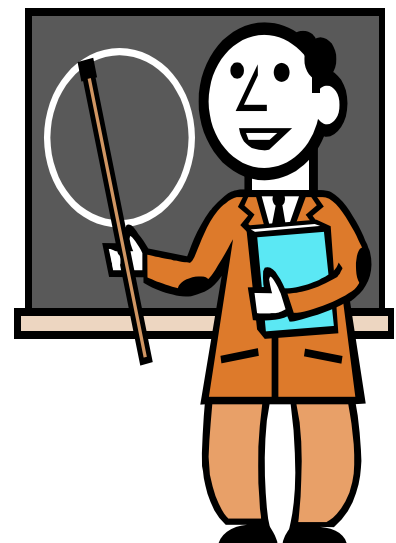
can Bar Association's Juvenile Court Training Curriculum: *Talking to Teens*, at their Fall Conference December 3, 2004 from 9 a.m. to noon at the Benson Hotel in Portland. The seminar will be presented by Elizabeth Colvin, an ABA Trainer and will focus on strategies for interviewing adolescent defendants, witnesses and victims. For more information contact OCDLA at [www.ocdla.org](http://www.ocdla.org)

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**OJDDA** - The Oregon Department Director's Association's 2004 Juvenile Justice Training Symposium will be held at the Inn of the Seventh Mountain, in Bend, September 26 - 28, 2004. The Symposium features a full-day training from the Center for Sex Offender Management and Keynote speeches on Diversity and Evidence Based Practices. For registration or more information contact Carol Munch at [[carol\\_b.\\_munch@class.orednet.org](mailto:carol_b._munch@class.orednet.org)] or see the website at [www.ojdda.org](http://www.ojdda.org) .

### **SAVE THE DATE:**

**\*\*OCDLA**— Spring Juvenile Law Conference April 15 –16, 2005 at the Hallmark Inn.

**\*\*Juvenile Law Section** Spring Seminar March 11, 2005 at the Western Forestry Center.



# CASELAW UPDATE continued

from p. 5

sever the marriage is imminent enough to justify termination for both children.

**State ex rel Juv. Dept. v. Nguyen**, \_\_\_P.3d \_\_\_, (Or. App. Aug. 25, 2004).

The Appellate Court reversed a Trial Court decision that the parents, whose parental rights of their two daughters had previously been voluntarily terminated due to severe abuse, were *presently unfit* parents to their 10-month old son and therefore should have parental rights to their son terminated. The State argued that the failure of the parents to acknowledge responsibility for the previous abuse proved the parents have not changed their behavior, and the that, therefore, the parents' rights to the youngest child should be terminated. The Court found that although the parents were unfit and reintegration was not possible within a reasonable time regarding their daughters, the state failed to prove by clear and convincing evidence that the parents were *presently unfit* parents to their son and that there was a highly probable risk of harm to the child if he remained in the parent's care.

**Crawford v. Washington**, 124 S. Ct. 1354 (2004).

The U.S. Supreme Court's decision in *Crawford* significantly altered the landscape regarding hearsay in criminal trials and changed the Confrontation Clause analysis of *Ohio v. Roberts*, 448 U.S. 86 (1980). Under *Crawford*, testimonial hearsay statements are inadmissible against a defendant unless the defendant had a previous opportunity to cross-examine the declarant. Although *Crawford* raises many unanswered questions, several clear guidelines remain. First, *Crawford* does not change the established rule that if the hearsay declarant testifies and is subject to cross-examination at trial, there is no barrier to admissibility because the Confrontation Clause is satisfied. Second, because *Crawford* is a Sixth Amendment case, it applies only in criminal trials and therefore is inapplicable in juvenile court dependency litigation, but is relevant in juvenile delinquency litigation. Third, *Crawford* only bars the admission of testimonial statements for purposes of establishing the truth of the matter asserted. Hearsay statements may be admissible if the purpose of admission is something other than the truth.

## JUVENILE TRAINING ACADEMY

The Public Defense Services Commission has authorized staff attorney Ingrid Swenson to work with other juvenile practitioners to plan a Juvenile Training Academy. The Juvenile Training Academy Workgroup has been meeting since Fall of 2003 and includes: Timothy Travis, Oregon Judicial Department Attorney, Chair; Ingrid Swenson, OPDS; Julie H. McFarlane, JRP; the Hon. John Collins, Yamhill County; Lea Ann Easton, Native American Program of OLS; Prof. Leslie Harris, UofO Law School; John Potter, OCDLA; Jill Mallery, OSB Public Affairs Staff Attorney; Kathie Berger, private practitioner; Angela Sherbo, JRP; Karen Stenard, private practitioner; and Kent Fisher, Umatilla County DA.

The Workgroup is developing curricula for juvenile delinquency and dependency training that would be focused on training new attorneys, but would also be open to experienced attorneys and others. It is hoped that most of the modules of the curricula would be presented as CLE seminars by interested groups such as OCDLA and OSB.

## OSB Juvenile Law Task Force Updates Standards for Attorneys in Juvenile Cases

On January 31, 2004 the OSB Board of Governors authorized the formation of a Juvenile Law Task Force to develop and recommend performance standards for juvenile law cases and to update the Principles and Standards for Counsel in Criminal, Delinquency and Dependency Cases adopted by the OSB in 1995. See Exhibit C. INDIGENT DEFENSE TASK FORCE REPORT, Qualification Standards for Court-Appointed Counsel to Represent Indigent Persons at

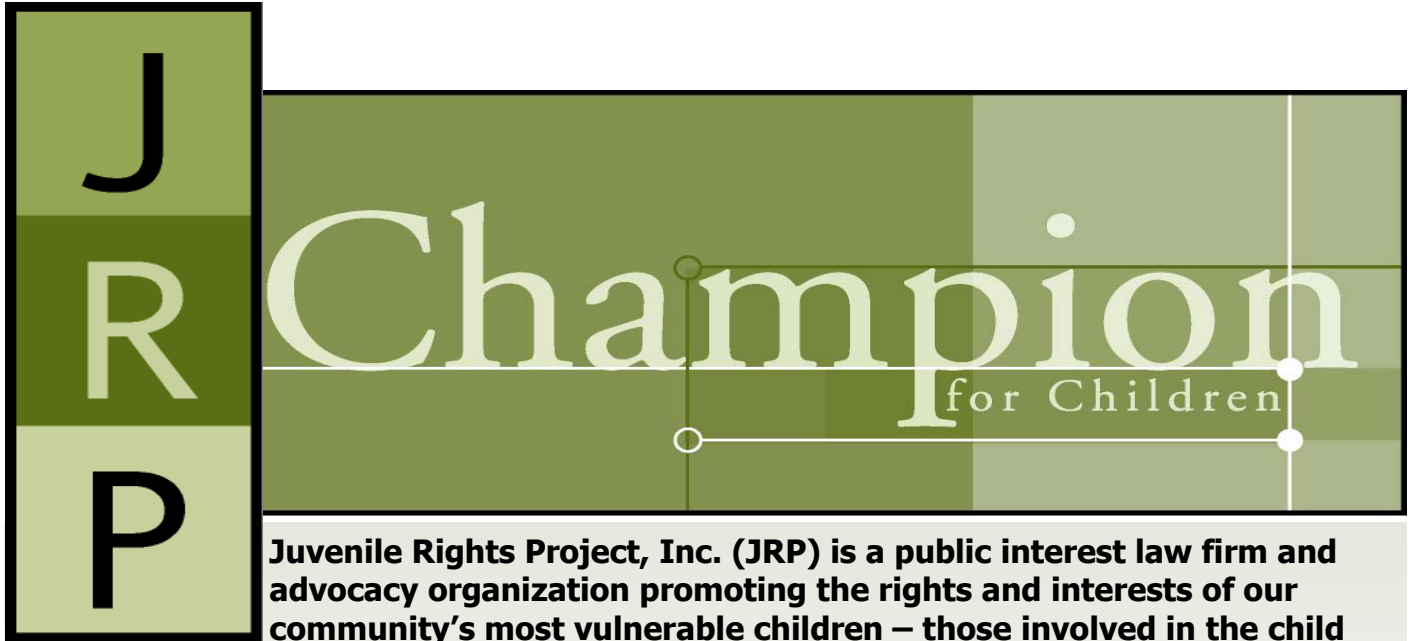
State Expense in Oregon Rules of Court. The Task Force is charged to "study and make recommendations to the Board of Governors on the adoption of juvenile practice performance standards in light of significant legal and system wide changes affecting the practice of juvenile law, particularly in the dependency area. Standards should serve as a detailed guide for practitioners to ensure competent legal counsel and to assure that the system operates as an integrated

whole in delivery of justice." The Task Force will be presenting their recommendations at the April 8 -9, 2005 Board meeting. For more information or copies of proposed changes to the standards contact Jill Mallery, OSB Public Affairs Department. [jmallery@osbar.org](mailto:jmallery@osbar.org)

**Lawyers, I suppose were children once"**

**Charles Lamb**

**To Kill a Mockingbird**



**Juvenile Rights Project, Inc. (JRP) is a public interest law firm and advocacy organization promoting the rights and interests of our community's most vulnerable children – those involved in the child welfare and juvenile justice systems. JRP has a 29 year history of representing children individually in the Multnomah County Juvenile Court and through class action litigation. JRP also advocates for Oregon's children in the legislature and with public agencies, and offers training and technical assistance to families, social service and legal professionals around the state who care for and work on behalf of some of Oregon's most disadvantaged children.**



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