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# So You're Going to Represent a Juvenile!

JOHN R. HEILMAN\*

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## MOTIVATION

"It's good to be a seeker, but sooner or later you have to be a finder. And then it is well to give what you have found, a gift unto the world for whoever will accept it."

Jonathan Livingston Seagull

## INTRODUCTION

No judge, at any level, in any jurisdiction, has a decision more difficult to make than the disposition of a matter involving a juvenile. No attorney has a commitment more difficult than the representation of a juvenile. If there is a challenge to these conclusions, consider the premise. A juvenile has almost all of his

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life before him; he is in a critical changing and formative stage of his life; he is generally a product of his environment, he knows only his own peer society and not yet that of the adult society of responsibility, law, economics and career. His chances and opportunities for rehabilitation are greater in his younger years than they will be in his later years. "Ominous responsibility" is indeed a trite phrase, but a knowledgeable and conscientious determination of the direction to be given to a very young person, when his or her future lies in your hands, deserves no lesser characterization.

The intention of this article is to provide the attorney representing a juvenile with some background guidelines, suggestions, source materials, and checklists for practicing before a juvenile and family court in the dispositional phase of a case.<sup>1</sup>

The attorney is educated, trained and experienced in the adversary approach to the practice of law. However, in juvenile and family court practice, guardianship and the best interests of the child will at times require a substantial modification of that approach. Young attorneys sometimes have a great deal of difficulty with this concept, particularly if they have been active in the criminal field.<sup>2</sup> The trend in some jurisdictions toward a hard line or adversary approach to dealing with serious juvenile offenders has distorted the meaning and intent of the "best interests" concept. If this trend continues to gain momentum, emphasis on the adversary approach may become more prominent in the name of keeping the youth from the more punitive action of the criminal justice system. This is generally evident in the fact-finding stage. But the number of juveniles involved in the so-called "violent offenders" type of crime is a very small percentage of the number who come before the juvenile court. When the current hysteria and political profit taking in juvenile crime legislation subsides, the attorney will find himself in a more reasonable climate of juvenile justice, with the juvenile no longer being, as the Mikado says, "a source of innocent merriment." The predominance of "best interests" over "adversary" should therefore continue to prevail. It is in such context that the suggestions which follow are offered.

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1. For a good article on representation of a juvenile at the detention and fact-finding hearing stages, see Stewart and Cromwell, *Representing the Child: Attorney and Guardian Ad Litem*, 25 St. Louis B.J. 12 (1978) [hereinafter cited as *Representing the Child*].

2. California and New York were the first states to make statutory provision for juvenile counsel. In New York such persons are called "Law Guardians" with the purpose of combining legal and due process standards with the child's best interests. For commentary on this concept see N.Y. FAM. CT. ACT § 241 (McKinney), Practice Commentary, Douglas J. Besharov.

### SOME TERMS, VARIABLES AND LIMITATIONS

Unfamiliarity with terms frequently causes lack of comprehension. Statutory definitions of juvenile delinquency vary in the several jurisdictions. Most states, including California and New York, treat a youth as a juvenile up to his eighteenth birthday, a few stop at the seventeenth birthday, and only about six cut off at the sixteenth birthday. Practice and procedures differ between states, whether in chambers or courtroom. Dispositional alternatives range from appropriate and numerous, to limited or non-existent.

Adapt what is said herein concerning a "juvenile delinquent" to the circumstances of your particular jurisdiction. Recognize that reference will be made to a boy or girl below the specified statutory age who is before a court with juvenile jurisdiction, and charged in a complaint or petition, with an act which would constitute an adult crime.

"Status offenders" is another term that carries varying statutory terminology. In this category, we shall be dealing with young people within the prescribed age who are incorrigible, ungovernable, beyond parental control, but who have violated no penal law. Some of what is said here concentrating on juvenile delinquency may also be applicable to other juvenile matters, including custody, abuse and neglect, foster care and contested adoptions.

The principal concern of this article will be with the dispositional phase of the case. This stage in delinquency and status offender cases is analogous to sentencing in adult criminal cases. The fact-finding stage in custody and contested adoptions, however, is so full of evidentiary matters critical to a disposition, that the two stages often become merged. Adversary lawyers are presumed to be trained and to have ample competence for the investigative, preparatory and fact-finding stages. Thus, the emphasis is on disposition. Some of what is set forth here may also assist an attorney in determining how, and how far, to proceed with the fact-finding process, and also help him to decide whether to invoke and participate in the procedures for diversion from the juvenile justice system, where that is possible.

### ORIGINS AND PHILOSOPHIES OF JUVENILE JUSTICE

The attorney who intends to practice before a court having jurisdiction over juveniles should acquaint himself with the history

and philosophies of juvenile justice.<sup>3</sup> Preliminary to a thorough acquaintance, the following brief sketch is offered.

Roman law gave the father absolute control over his children, whom he could sell or condemn to death. This concept of absolute right of control carried over into English law and prevailed until the fourteenth century. During the Middle Ages, childhood was not seen as the unique phase of life we consider it to be. It was customary to place children as young as seven into apprenticeship or service to a master. Learning was secondary to the labor that the child performed.

It was not until the sixteenth century that children came to be looked upon as being of particular interest as individuals and as objects of affection with the right to some guidance and training for their own future. Yet even in the eighteenth century the English father had an almost absolute right to custody over his children. Since the father owned or managed all of the family property, the child would be without support if removed from his custody. The idea began to evolve, however, that if the father had rights, he also had responsibilities for the child's care. The doctrine of *parens patriae* developed with the idea that the Crown should protect all those who had no other protection, and that the State had the power to care for children in its jurisdiction. The courts began assuming jurisdiction over the welfare of children. Much of our law came from England, and so this doctrine became part of our jurisprudence. Gradually, however, the authority of the mother was asserted, and by 1925 there was equality in the law, if not in practice, in both England and the United States with respect to each parent's right to custody of his or her children. Thus, the family concept, with some recognition in law of authority, rights and responsibilities, was established.

About the turn of the century adults and minors were treated alike in criminal matters. The theory began to change, however, to one that refused to treat children as criminals, positing instead a court for non-criminal treatment. The object became reform, rather than stigmatization. Remember the old reform schools? The essential question was not what the child did, but how he got that way. What was the best course of action in his interests and in the interests of the community to save him from a downward career? The trend was toward rehabilitation, to make his first offense the last. This was all part of the surge of social reform in the early part of this century that encompassed such things as child labor laws, women's suffrage, prison reform and the plight of

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3. See Paul Piersma, *Juvenile Court: Historical Perspective, Recent Reforms and the Current Debate*, 24 St. Louis B.J. 32 (1978).

immigrants. And so the turn of the century has been termed the "watershed of juvenile justice" as we know it today; the treatment of young people as something more than chattels and other than adult criminals.

The first juvenile court, as a separate court for children, was established in Cook County, Chicago, in 1899, and came to be a part of the judicial system all over the country. Even before that there had been some movement to treat children separately, such as in New York where there were separate dockets, records and trials for children under sixteen. Now there are juvenile courts in all fifty states, but there is no uniformity. A few years ago it was estimated that about 33% of these juvenile courts were primarily probate, and about 9% were administered by the criminal divisions. The present trend appears to be toward Family courts. About twenty-six states either have this type of court now or are considering it. The first such court was established in Rhode Island. These courts are founded on the idea that a juvenile's problem is not necessarily his alone, unconnected with family or parent problems. The court is, therefore, given added jurisdiction over the parents as well as over the child.

In the last two decades, both theory and practice in the handling of juvenile problems have undergone some exploration and upheaval. There was *Kent*,<sup>4</sup> *Gault*,<sup>5</sup> *Winship*,<sup>6</sup> *McKiever*<sup>7</sup>—the last a sort of diversion toward a complete criminal procedure takeover—and *Breed*.<sup>8</sup> There were fifth, fourteenth and eighteenth amendment rights established. Procedural due proc-

4. *Kent v. United States*, 383 U.S. 541 (1966). A child must have an opportunity for a hearing before entry of a waiver order. He is entitled to counsel who is entitled to see the child's records.

5. *In re Gault et. al.*, 387 U.S. 1 (1967). An integral part of a fair hearing, demanded by due process, is notice of right to counsel at every juvenile proceeding. If the family is unable to afford counsel it should be provided on request.

6. *In re Winship*, 397 U.S. 358 (1970). The accused is innocent until proven guilty. The prosecution must carry the burden of proof beyond a reasonable doubt with regard to every fact necessary to constitute the crime.

7. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Juvenile court proceedings do not constitute criminal proceedings. Consequently, they do not fall within the context of the sixth amendment guarantee of a right to an impartial jury in all criminal prosecutions.

8. *Breed, Director, California Youth Authority v. Jones*, 421 U.S. 519 (1975). Accused was placed twice in jeopardy. The first was during a juvenile court adjudicatory hearing that determined whether or not he had committed criminal acts, the consequences of which are stigma and possible incarceration. Prosecution in superior court after the child was found unfit to be tried as a juvenile placed him in double jeopardy.

ess, substantive due process, equal protection, freedom from cruel punishment—all were a part of the trend of appellate and supreme court intervention in the juvenile justice system, and all were a part of the individual rights and constitutional rights revolution of recent years. The *parens patriae* theory has been a principal target of this revolution.

The old general theory of how to deal with young people has received a good working over. One of the new approaches advocates the child's right to treatment.<sup>9</sup> For an articulation of this viewpoint see *O'Connor v. Donaldson*,<sup>10</sup> a view as yet unaccepted by the Supreme Court. In response, some have suggested that the juvenile has a "right to punishment."<sup>11</sup> Another current idea is to employ the least restrictive, the least drastic remedy in dealing with a juvenile—to do only what is necessary to do the job. This policy is being advocated for detention, as well as for final disposition. Another group has challenged the appropriateness of the jurisdiction of juvenile or family courts over the status offender.

There has also been a refinement of the individualized treatment theory which is so fundamental to juvenile justice. The emphasis has been on changing the individual offender. The new movement stressed changing the manner in which various social institutions, including courts and correctional agencies, relate to him. The causes of delinquency and youth crime are perhaps found in conditions of social and political inequality, especially in a lack of economic and educational opportunity, rather than solely in individual pathology and personal failure. This introduces at the individual case level an interdisciplinary perspective with heavy social science emphasis. Guiding principles come from social science, law and psychology. Helping to forge this theory was the Report of the President's Commission on Law Enforcement and Administration of Justice in 1967. Not everyone agrees with this theory which involves almost all elements of our society and relies heavily on social history, and indeed statistics show that juvenile crime derives from every economic, social and ethnic strata of our nation. Yet the theory is very much alive today.

Recent theories and developments in juvenile justice, with particular emphasis on the state of the family, may complicate the representation of the juvenile.

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9. E. BROWNE, THE RIGHT TO TREATMENT UNDER CIVIL COMMITMENT (N.C.J.F.C.J. 1975) [hereinafter cited as BROWNE].

10. 493 F.2d 507 (5th Cir. 1974), *rev'd* 422 U.S. 563 (1975).

11. See generally FEDERAL PROBATION (June 1967).

### CAUSE AND EFFECT

In considering the disposition of a juvenile case, we must go back and look at what caused the problem in the first place, and we must try to see that the child is so treated that he or she is not returned in the same condition to the same environment.

It is suggested that some or all of the following may have contributed to juvenile problems today and may be proffered in the dispositional hearing:

1. Temptations: travel, auto, broader exposure.
2. Idleness, unemployment.
3. The use of drugs, alcohol.
4. The erosion of all authority figures: parents, policy, officials, teachers, even of judges.
5. The lack of discipline in the schools: the breakdown of *in loco parentis*.
6. The get-something-for-nothing philosophy that permeates our society today.
7. The example set by adult lack of respect for law.
8. Improper literature, pornography, adult pictures.
9. Affluence and the lack of regard for property: "it's covered by insurance."
10. Unsupervised group activity and the congregation of kids.
11. Violence: they learn their lessons with explicit detail on T.V. or in the press, and then take their exams on the street.
12. Lack of discipline, love and affection in the home.
13. Broken homes, working parents and children born out of wedlock.
14. The absence of religious training and moral values.

If the attorney is able to isolate and point out the specific cause or causes of delinquency in his juvenile client, he may generate a more receptive attitude by the court for the disposition he proposes.

What about children in family relationships today? Each generation does not automatically accept the morals, justice and principles of the preceding generations, and they cannot be made to. They take pride in creating their own standards. They want to make or leave their own mark on history.

Family life in the United States has changed. Members used to be more closely knit and interdependent. Family and community ties were strong, and the force of the homogenous community served as a sufficient social control mechanism.<sup>12</sup> Who your family and parents were, meant something, and you did not disgrace them. Each child had his or her assigned chores. The son often

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12. WHEELER, CONTROLLING DELINQUENTS 31 (Wiley 1968).



followed in his father's footsteps in business. Kids were taken to the woodshed, not to court.

Now, large rural families are not popular. Not as many things are done together as a family. There is often lack of close daily interaction. Worshipping together or in the home is not as common. Deviance from rules and laws is not necessarily bad according to some parents. Kids now have more right to express themselves, and say what they think. Our more mobile society means the children are not so much tied to the home. Parents brought up in one generation do not know how to understand and deal with the changes of the new generation. It is in this often frayed condition of the family environment that the attorney must work for the best interests of his juvenile client.

### OBJECTIVES OF A DISPOSITIONAL HEARING<sup>13</sup>

The attorney must keep in mind the possible purposes which the court may consider in rendering its decision, as well as the philosophy in dealing with juveniles that prevails in his jurisdiction. Among these are generally the following:

1. Early identification and prevention,
2. Rehabilitation: remedial action and plan,<sup>14</sup>
3. Correction,
4. Punishment,
5. Protection of society,
6. Removal from society or environment, including the family,
7. Treatment and plan,<sup>15</sup>
8. Conformance of behavior.

The last of these policies is one of the more controversial, particularly as to status offenders. It is asked, to what standard of acceptable behavior—adult, family, middle class, dominant culture—must the juvenile conform? How will the judge's own

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13. See L. ARTHUR, *DISPOSITION HEARINGS: THE HEARTBEAT OF THE JUVENILE COURT* (N.C.J.F.C.J. 1974) [hereinafter cited as ARTHUR]; R. TRAITEL, *DISPOSITIONAL ALTERNATIVES IN JUVENILE JUSTICE: A GOAL ORIENTED APPROACH* (N.C.J.F.C.J. 1974) [hereinafter cited as TRAITEL].

At the February 12, 1979, meeting of the ABA House of Delegates in Atlanta, Georgia, certain proposed IJA/ABA Juvenile Justice Standards were approved, while others were withdrawn because of serious objection. Among those approved were Vol. V, "Dispositional Procedures", and Vol. XXIII, "Dispositions" . . . The introduction to the latter volume contains the following policy statement: "Presently, juvenile court dispositions are chosen according to the court's perception of the best interests of the child, with little or no consideration of the act upon which the adjudication is based. These standards represent an attempt to reconcile this "treatment-oriented" approach with juvenile corrections within a system which regards sanctions for delinquent acts as punishments which ought to be proportional in severity to the seriousness of the offense and the culpability of the offender." The standards are advisory only.

14. See Fogel, *The Fate of the Rehabilitation Ideal in California Youth Authority Dispositions*, 75 *CRIME AND DELINQUENCY* 479 (Oct. 1969).

15. See BROWNE, *supra* note 9.

standards affect the attorney's approach to the disposition? This concept of conformity was essential to the original purposes of the juvenile court, particularly as to status offenders, and can be discerned in the current attack on the court's jurisdiction over such cases.

The objective of the attorney in representing his juvenile client is to secure from the court a decision that is in the juvenile's best interests. The disposition should fit the juvenile first, but there may be other interests to be considered. Thus, the attorney must be prepared to delineate which of the objectives need to be met in the particular case and how his recommendation would be effective as to each.<sup>16</sup>

#### BEFORE THE HEARING

*Juvenile court proceedings are generally more informal than formal. Therefore, the legal skills that are important are more often those of a persuader or a negotiator than those of a trial tactician. Touching base with all those involved with a hearing, prior to the hearing, will often win the case for you.*<sup>17</sup>

*The Facts.* The attorney should be sure of his facts, not just the facts of the incident or course of his client's conduct, but of every other factor that will go into his presentation to the court. Very little else reduces the credibility of an attorney as does the crumbling of the factual basis for his argument.

*Sources of Information.* One of these will be the probation or social report. Counsel should see and check it as much before the hearing as possible. If he needs time to investigate any controversial part of its contents, he should request it. He should interview the probation officer or social worker who prepared it if he feels that is necessary. He must be prepared to cope with claims of confidentiality as to sources and content.<sup>18</sup>

The attorney should also avail himself of other sources of information, such as the parents, relatives, police, church and social services records, if any. If there appears to be pertinent medical history, a release from the parents to inspect the medical records and talk with the physician may be necessary. There may also be a report from a detention facility submitted to the court.

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16. See TRAITEL, *supra* note 13.

17. *Representing the Child*, *supra* note 1.

18. Note the provisions of the Federal Privacy Act of 1974, 5 U.S.C. § 552(a) (1975).

The types of information the attorney should expect to find in such reports include the offense charged; any previous court record; the child's attitude toward the offense, court procedure and authority; the parents' attitude; family history and composition; living conditions, including neighborhood; school records; religious involvement and resource; employment record; interests and activities, including peers; medical, physical and emotional history; and recommended treatment plans or other alternatives.

The attorney will also want to have access to psychiatric and psychological reports. Prerequisite to understanding these is a familiarity with the professional terminology and the nature and purpose of various evaluating tests. Other reports that may be available from physicians, agencies treating emotional problems, youth diversion services, youth drug agencies, and courts of other jurisdictions. Availability to counsel of these reports varies among the jurisdictions.<sup>19</sup>

Should the attorney contact the prosecuting attorney? Remember that we are emphasizing the dispositional phase of a juvenile case. In a civil case, an attorney would discuss settlement. In a criminal case, he might seek plea bargaining with the District Attorney. There are possible pitfalls in using the plea bargaining process in juvenile cases. The youngster is not charged with having committed a crime, but with being a juvenile delinquent. Lowering the degree of the basic offense is not going to change the adjudication of juvenile delinquency. Face-saving for the juvenile, or letting him think he got away with something, or making the attorney look good, is not in the best interests of the juvenile. Certainly, the attorney should contact the prosecuting attorney. He might find that his juvenile client has not been leveling with him and has been trying to mislead him. The prosecutor's office may have had prior contacts with the juvenile and other background information on him.

Is the attorney counsel for the juvenile or for the parents who hired him? The attorney must have an understanding on this at the time he is retained. He must have full authority to do what he believes to be in the best interests of the juvenile in that case, even if the parents believe otherwise, and even if the juvenile and

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19. *Sorrels v. Steele*, 506 P.2d 942 (Okla. 1973); *Baldwin v. Lewis*, 300 F. Supp. 1220 (E.D. Wisc. 1969); *Kent v. United States*, *supra* note 4. The right to counsel is without effect in a case such as *Baldwin* if the juvenile court may base its findings on facts and documents never identified or made part of the record, because the counsel will never have the opportunity to inspect them. In *Sorrels* the defendant was clearly indigent and even though she was appointed counsel for adjudicatory and dispositional proceedings of the case, counsel was refused on appeal along with a request for transcripts.

his parents are in conflict.<sup>20</sup> If the parents are not satisfied, they can discharge the attorney, but the court may then appoint him to continue representing the juvenile.

#### HEARING PROCEDURE

*Time.* Ideally, a period of one or two weeks may elapse between the fact-finding or adjudicatory hearing and the dispositional hearing. This provides time for the probation and evaluation reports to be made, and of course for the attorney to see them in preparation for the dispositional hearing. Such reports may be ordered by the court before the fact-finding hearing, but the judge should not see them before his decision in the fact-finding. Of course the juvenile may not be cooperative before the fact-finding hearing, and the effort may also be wasted if the charge is dismissed.

However, the dispositional hearing may be held immediately after the fact-finding hearing. If there is a plea or finding of a non-serious offense, the court may want to dispose of the matter at once, and this may be consented to by the juvenile and counsel. On the other hand, the court's celerity may be because the seriousness of the offense requires immediate action for the good of the juvenile or the community. Note that the seriousness of the offense is a relative concept. Any matter involving a juvenile that has reached the court should be considered serious. In any event, the attorney for the juvenile must not wait until after the fact-finding to prepare for the disposition.

*Participants.* Most of the following individuals will be present at the dispositional stage of the proceeding:

1. Court personnel: reporter, clerk, court officer.
2. The juvenile: prepare him for this hearing even more carefully than he is prepared for fact-finding.
3. The juvenile's attorney.<sup>21</sup>
4. Parents or guardian: If the object of the hearing is partly, if not primarily, to keep the family intact, or to rehabilitate the relationship, the parents' participation in the hearing and in the treatment plan, if only to know what is being done and why, is vital.

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20. L. WIES, A GUIDE TO JUVENILE COURT (1977).

21. Regarding the need for an attorney in a dispositional hearing, see *In re F.*, 30 App. Div. 2d 933, 293 N.Y.S.2d 873 (1968); *Steinhauer v. State*, 206 So. 2d 25 (D.C. Fla. 1968), *cert. denied* 398 U.S. 914 (1969).

The parents' attitude may have a decisive effect on the court's determination.

5. Prosecuting or petitioner's attorney.
6. Aggrieved party: possible, but rare. It is a good way of letting him know how the court dealt with "his" case.
7. Probation officer, available for questioning on his report and to start the process if probation is ordered.
8. Social agency representative.
9. Witnesses, usually having had some other contact with the juvenile.

*Joint Hearings.* If the attorney represents one of several juveniles charged in the same incident, an evaluation must be made of the merits of one hearing with all involved juveniles present, or a separate hearing for the individual client. Such things as openness of speaking, embarrassment over revelation of personal data or criticism, special interests of the client, and possible confusion of the court between contents of various reports as to different juveniles, are to be considered. In rare cases, if conflict of interests can be resolved, counsel may represent more than one juvenile.

*Order of Presentation.* Be aware of the procedure usually followed by the court. Is it formal or informal? The judge feels comfortable with his routine and methods. If the attorney disrupts it, he may lose some rapport with the court. If he is unfamiliar with it, he will lose some of his effectiveness. Of course procedure may vary with the circumstances of each case. Should the attorney request a conference with the court prior to the actual hearing? Will there be witnesses? Be prepared for their examination or cross-examination. Will you speak for, or before, your client? Will your client speak at all? Will the judge question him? How will your client react to what the judge says? Should the juvenile feel that he should have a chance to say something if he wants to? Will you, or the judge, be sure that the juvenile is told why the particular disposition is being made and what is expected of him?

*Evidence and degree of proof.* The attorney must be cognizant of statutory provisions as to what is admissible and how much proof is required at this stage of the proceeding.

#### THE JUDGE

A trial lawyer evaluates his jury in order to present his case and argument in the most favorable light. The attorney for a juvenile is dealing with a one man audience. He must not overlook the personality of the judge in whose hands his client's fate rests. He must orchestrate his presentation at the dispositional hearing

to be convincing to one person whose philosophy, attitude and practices may be well established and predictable. At the same time he must be fair and honest with the court, sincere, and avoid putting on an act. Most judges recognize very quickly the efforts of an attorney merely to impress his client. Nevertheless, put forth the best attributes of the juvenile in the proper light of his background, recognizing that adolescents are in a period of flux, and that sometimes the cause of a single incident that gets the juvenile into trouble may be hard to discern.

A few years ago Sophia M. Robison published a study<sup>22</sup> in which she came up with five distinct judge-role types.

1. **Parent Judge.** He identifies more with the parent, regards the child's duties to the parent as paramount, and obedience necessary if the child is to be saved. He does not look at the individual child in the light of the child's special needs, but believes that he, the judge, like the parents, knows what is best for the child.

2. **Counsellor Judge.** He emphasizes the unique individuality of the child, views its behavior as stemming from a chain of experiences in the home, school and community; is concerned with the relationship between parent and child; and places reliance on the social history, probation, psychiatric and psychological evaluations. This judge is aware of himself and of the way in which he may be projecting himself into his decision.

3. **Chancellor Judge.** He is self-disciplined rather than self-aware, and regards himself as the protector of the child, balancing the child's rights with those of the community. He believes the court is set up to help the child and the law is the principal tool in that process.

4. **Lawyer Judge.** He also uses the law as the primary tool, but differently. He regards the court as the appropriate forum for administering the law, and helping the child as a by-product. He identifies with the adult court, and symbolizes the concept of proceeding against, rather than in behalf of the child.

5. **Antagonistic Judge.** He reacts personally in each situation, often appearing hostile to the child.

The attorney for the juvenile may analyze the judge who will preside, in the light of the foregoing, and find one or more factors to guide him in the manner and content of his representation. Is the judge patient, will he hear the attorney out, or will he become

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22. S. ROBISON, *JUVENILE DELINQUENCY—ITS NATURE AND CONTROL* (1976).

impatient to say what he has to say and interrupt? Will he take time to listen to all parties and be tolerant of witnesses? Is he the type who asks questions? Does he accept recommendations of dispositional alternatives? Does he generally go along with probation or professional recommendations? Does he make up his mind ahead of time and stick to it in spite of hearing evidence? Is he statistic minded and anxious to get the case in the "closed" column? In what order does he usually call upon participants to speak? Does he permit or encourage dialogue between participants? What is his general attitude toward attorneys and the extent of their experience? Is he bound to statute and case law precedent? How does he react to public opinion, the mood of the moment, or news media comment?

#### FACTS OR CRITERIA IN DETERMINING DISPOSITION

Whatever disposition the attorney plans to seek for the juvenile, he must, in a sense, place himself in the judge's position, and ask, "What are we trying to accomplish for this juvenile?" Punishment, rehabilitation, treatment, protection of the public, reduction of recidivism (making the first offense the last), restoration or preservation of the family relationship? How will the judge arrive at his decision? Will he lean toward the right to punishment theory,<sup>23</sup> or toward the right to treatment theory? What factors will he consider and what weight will he give to each?

The attorney ought to be prepared to discuss authoritatively, and in the best interests of his client, the following factors:<sup>24</sup>

1. The act or acts committed by the juvenile. The magnitude of the offense is certainly a factor, as is the attitude of the judge toward that act, and whether the disposition will be tailored to the offense or to the offender.<sup>25</sup> Is this an isolated act or a pattern of behavior? Are there mitigating factors?

2. Prior record. This helps to assess the juvenile's moral character.

3. Delinquent behavior. This may not necessarily be reported or on record, but it helps to assess the propensity for criminal behavior.

4. Race. Is there evidence of prejudice or conformity to the juvenile's own or the dominant culture?

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23. See generally, *Right to Treatment*, 9 JUV. DIG. 6 (Jan. 1977).

24. Barton, *Discretionary Decision-making in Juvenile Justice*, 24 CRIME AND DELINQUENCY 470 (Oct. 1976).

25. *Interest of Patterson*, 210 Kan. 245, 499 P.2d 1131 (1972). Juvenile case disposition should be tailored to suit the offenders and should best serve the child's interest and welfare.

5. Social class. Will this help or hurt before a particular judge?

6. Sex. Of course both sexes must be kept in mind, for statistics indicate a rising number of girls are becoming involved with the juvenile court, particularly for criminal offenses.<sup>26</sup> Perhaps the attorney will find sympathy more effective in cases involving girls than it is for boys. When representing a runaway girl, the attorney would do well to emphasize in his investigation and preparation what the girl is running away from, not to.

7. Age. Consider physical and mental, and whether very young or near adult status.

8. Family. What part does that environment play in both the causes of the juvenile's action and the disposition? Particularly, what participation should the family have in the treatment plan?

9. School. Consider attendance, grades, discipline and teacher's notes. Is there a relationship or pattern in the delinquency and academic achievement? Are there learning disabilities, problems with the school itself, racial conflicts, viable work alternatives or vocational training?

10. Peers. The nature of the juvenile's associates, good or bad, can affect assessment of his commitment of the act and his moral character. If the attorney knows of innovative and workable peer correction, involvement or decision agencies or avenues, he should be prepared to suggest them.

11. Juvenile attitude. Does the attorney's view of his client's attitude agree with that of the probation officer, or of the police, school or others? If not, he must be prepared to sustain his own view. Will the juvenile take responsibility for his actions? How willingly will he participate in a given program, particularly one of a restrictive nature?

12. Public safety. This is important where violent crime is involved. The attorney must know whether the court is reacting to the current mood of people, press and legislatures, and be prepared to protect his client from emphasis on those factors, rather than the best interests of the juvenile. The disposition should fit the juvenile, not the crime.

13. Personality and emotional problems. It is rare that a judge

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26. For interesting articles on the developing attitude toward the female offender, see, *Juvenile Women and the Double Standard of Morality*, 19 U.C.L.A. L. REV. 313 (1971); Greene & Esselstyn, *The Beyond Control Girl*, 23 JUV. JUSTICE 13 (1972).



does not place some, if not heavy, reliance on the psychiatric and psychological reports. The attorney should do likewise. These reports should be regarded neither as decisive nor as inconsequential. Evaluate the evaluations. Were these professionals aware that their conclusions might be the sole or principal basis for a judge's decision? How recent is the report? Are these reports from different periods of the juvenile's life and subject to comparison? Does the attorney understand the technical vocabulary, and the nature and purpose of tests conducted, along with the findings? What was the attitude, mood and emotional state of the juvenile when the interviews and tests were conducted? What were the facts upon which the professional evaluation was made? Were all of the facts available, and what was their source?

IJA/ABA Juvenile Justice Standards, Vol. V, "Dispositional Procedures", sets forth the following standard:

"2.3 Information base.

A. The information essential to a disposition should consist of the juvenile's age; the nature and circumstances of the offense or offenses upon which the underlying adjudication is based, such information not being limited to that which was or may be introduced at the adjudication; and any prior record of adjudicated delinquency and disposition thereof.

B. Information concerning the social situation or the personal characteristics of the juvenile, including the results of psychological testing, psychiatric evaluations, and intelligence testing, may be considered as relevant to a disposition.

C. The social history may include information concerning the family and home situation; school records, in accordance with the *Juvenile Records and Information Systems* volume; (*italics*) any prior contacts with social agencies; and other similar items. - - -"

Through the above thirteen factors, the IJA/ABA Standards, and perhaps others peculiar to a particular case, the attorney should be able to formulate an option or combination of options, to recommend to the court as a disposition.

1. Viable goals. How many alternatives are there? What are the chances of any specific disposition succeeding? Try to avoid a Don Quixote approach. The plan should not be too ambitious, unreachably, or beyond the capacity of the juvenile. The role of the attorney is to demonstrate that his client is amenable to the least restrictive program and plan available in the juvenile system.

2. Rehabilitation. The younger the subject, usually the better the chance there is of this being achieved. Critical factors here are the circumstances of the crime, the juvenile's prior criminal or antisocial record, the nature of the environment in which rehabili-

tation will be attempted, and whether adequate facilities and programs are available.<sup>27</sup>

3. Deterrence. Directed chiefly to the juvenile as part of rehabilitation. Deterrence to others is not a viable objective if confidentiality of dispositional proceedings exist.

4. Restitution. This is certainly a fair and equitable provision as far as the victim is concerned, for he learns to appreciate the "justice" in "juvenile justice." As for the juvenile, in working to repay monetary or property loss, he learns the valuable lesson of why he is working. Work may also be done for the common good. Do not overlook the value of the juvenile volunteering restitution.<sup>28</sup>

5. Available treatment facilities or programs. Lack of availability and adequacy of services has been one of the chief causes of criticism directed at the effectiveness of the juvenile justice system. If a facility is neither available nor adequate, all the fine analyses for a treatment plan may be for naught. The attorney, of course, faces some handicaps in learning enough about a particular facility and its programs to make a knowledgeable recommendation.<sup>29</sup>

The attorney for a juvenile must not only be prepared to persuade the judge by direct presentation, but to discuss, oppose, agree to or compromise with, recommendations made by the prosecuting attorney, the probation officer and any others.

Do not forget the alternative that the petition should be dismissed or the juvenile be discharged with a warning, because the aid of the court is not required. No remedial action may be necessary.

#### A CLOSING NOTE

The attorney for a juvenile should devote his utmost efforts and talents to investigation, preparation and analysis for his presentation in the best interest of the juvenile at the dispositional hearing. By so doing, he will improve the standards of both the Court and the Bar, increase his own self-esteem, and enhance his own

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27. See Fogel, *Institutional Strategies in Dealing with Youthful Offenders*, 31 FED. PROB. 41 (June 1967).

28. FAM. CT. ACT § 758(a) (N.Y.); *New Jersey v. D.G.W.*, 70 N.J. 488, 361 A.2d 513 (1976). Restitution imposed as a condition of probation in a juvenile proceeding triggers the juvenile's entitlement to due process.

29. *Usen v. Sipprell*, 41 App. Div. 2d 251, 342 N.Y.S.2d 599 (1973).

competence and reputation. But more than all of that, he will honor his commitment to his juvenile client.