1-1-1987

Juvenile Court Dispositional Alternatives: Imposing a Duty on the Defense

John L. Roche

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
JUVENILE COURT DISPOSITIONAL ALTERNATIVES: IMPOSING A DUTY ON THE DEFENSE

John L. Roche*

I. INTRODUCTION

After an adult criminal conviction, California courts typically refer a felon, and sometimes a misdemeanant, to the county probation department. Sentencing is delayed for two or three weeks to give the probation officer time to interview the defendant, investigate her or his background, make inquiries of references provided by the defendant, correlate this information, and prepare a pre-sentence report. The completed report is submitted to the court nine days prior to the sentencing hearing.

Juvenile court delinquency procedure differs significantly from adult criminal procedure. The difference is due partly to the juvenile court’s roots in the common law court of equity and partly to the beneficent objectives of a separate juvenile justice system espoused by its early advocates. In most cases, the probation officer’s investigation of a minor commences at or before the time a petition is filed and is completed before a determination of jurisdiction is

© 1987 by John L. Roche
* Professor of Law, University of San Diego; B.A., 1953, San Diego State University; J.D., 1965, University of San Diego.
1. CAL. PENAL CODE §§ 1191, 1203(b), (d), (g), (h) (West 1986); CAL. R. CT. 1371(b) (West 1987).
2. Welfare and Institutions Code section 602 establishes the jurisdiction of the juvenile court over any minor who violates a law of the state or of the United States or an ordinance of a California city or county defining crime. Status offenders (truancy, curfew, beyond control) are defined in section 601 of the Welfare and Institutions Code. Dependent children of the court are defined in section 300 of the Welfare and Institutions Code. These are the three groups of juveniles who come within the jurisdiction of the juvenile court in California. CAL. WELF. & INST. CODE §§ 602, 601, 300 (West 1984).
4. The juvenile court has its own lexicon of terms, parallel to but not the same as those used in adult courts. These special terms will be translated for readers not familiar with them into the most closely related adult criminal language, since this discussion relates to Welfare and Institutions Code section 602 cases of delinquency. A petition is the charging document in juvenile court, analogous to a complaint, but it is filed “on the behalf” of the juvenile.
This procedure produces a dispositional recommendation that is already on file with the court before the minor's jurisdictional hearing or admission. The disposition is intended to provide the best environment for treatment and care of the juvenile.

In many cases, the court proceeds to the dispositional phase of the case immediately after accepting an admission or making a true finding. Prosecutors may make dispositional recommendations to the court, but disposition is generally considered to be a judicial function. If the minor's defense counsel is not prepared to present an alternative plan to the court, the only recommendation fully explored and presented at the hearing is that of the probation officer.

Unfortunately, probation officers are not perfect. Some are lazy, some are incompetent, some are overburdened by excessive caseloads, and some may simply be distracted by personal problems. Moreover, the general training of probation officers often leaves much to be desired. An individual in California need only be hired by a county government agency to acquire the title of Deputy Probation Officer. The state sets no other prerequisites for hiring probation officers. After hiring, training occurs largely through on-the-job experience. This training is supplemented to some extent by periodic courses funded and approved by the California Standards and Training for Corrections Program.

Another danger inherent in the juvenile court system is that defense counsel may be inadequately prepared for the dispositional hearing. Although defense counsel are ready to advise the client regarding an admission to the allegations or to argue the legal merits of relevant defenses, at the dispositional phase defense attorneys are typically equipped to argue only that the probation officer's recom-

5. "Jurisdiction" is used here as being synonymous with "guilt" in adult proceedings.
7. An "admission" is analogous to a "guilty plea," and a "jurisdictional hearing" is analogous to a "trial."
8. The disposition is generally considered to be rehabilitative rather than punitive. But see CAL. WELF. & INST. CODE § 202(b) (West 1984) (regarding punishment as a part of rehabilitation).
9. A "true finding" is the same as a "verdict of guilty."
11. CAL. PENAL CODE §§ 6035-37, 6040-44 (West Supp. 1987). This training program is administered by the California Youth and Adult Correctional Agency of the Board of Corrections.
mendment is too harsh and that the disposition should be less severe. In most cases, defense counsel are not prepared to present alternatives which may be more appropriate for the minor. Limiting argument to disputing the probation officer’s recommendation is not adequate representation. Without adequate preparation and presentation to the court of an alternative plan, the argument that the probation officer’s recommendation is too harsh constitutes a weak strategy which is often doomed to failure.

Even if the law recognized a duty on the part of defense counsel to present the court with dispositional alternatives which both benefit the client and allow the court to adequately protect the community, enforcing such a duty would be a difficult task. The state courts have been unsuccessful in resolving the enforcement problem. The courts find it difficult to separate defense counsel’s incompetence, which merits reversal, from valid strategic or tactical defense decisions. Consequently, the courts have been reluctant to reverse on the grounds of inadequate representation by defense counsel.

The purpose of this article is to advocate adoption of a legally enforceable ethical duty on the part of defense counsel to present dispositional alternatives to the juvenile court. The author also presents one rational approach to the problem of enforcing such a duty.

II. THE PROBLEM

"Everybody talks about the weather, but nobody does anything about it."

—Mark Twain

A great increase in the ranks of defense counsel in the California juvenile courts occurred at approximately the same time as the

In re Gault decision. That landmark case, decided by the United States Supreme Court in 1967, was the national impetus for providing defense counsel to juveniles. The California Legislature responded to a perceived need for such counsel by completely changing the course of juvenile law in the state. In the period immediately following the Gault decision, the courts made an effort to determine whether minors were indigent before appointing counsel. Today, however, courts assume that most minors have no resources of their own and routinely provide appointed counsel.

The notion that one function of defense counsel is to present alternatives to the court in the disposition of the minor’s case was formulated in the first few years after Gault. Observers quickly recognized that the dispositional phase of the juvenile court proceeding is of primary importance to most juveniles. Minors want to know from the beginning what could happen to them. Minors are frequently willing to admit to the juvenile court’s jurisdiction if the court’s disposition will be of minor consequence, such as the common declaration of wardship and placement with the minor’s parents. At the time this concept was being developed, commentators were quick to point out that counsel’s role in a dispositional hearing should be the presentation of alternatives to the court, rather than merely arguing for less severe disposition than the probation officer’s recommendation.

There are many more dispositional alternatives in juvenile court than are available in the adult criminal court. In adult felony cases, the defendant may be sentenced to prison or may be granted probation, which may include local custody. Fines and other monetary deprivations may serve as sentences or as conditions of probation.
When probation is prohibited by statute, dispositional alternatives are even more limited. In contrast, the juvenile court has a wider range of possible dispositions, including transfer to adult court, placement at a wide variety of youth institutions, and placement with relatives or foster parents. Consequently, the juvenile court requires assistance in choosing a particular disposition.

A. Dispositional Alternatives

It is important to understand the wide choice of dispositional alternatives available in the juvenile court. The most significant alternative to juveniles aged sixteen or seventeen is transfer to the adult court. Section 707 of the California Welfare and Institutions Code enumerates the crimes which allow or require transfer to the adult system. Transfer differs from other dispositions in that it must be initiated prior to any jurisdictional hearing, otherwise the minor may successfully assert double jeopardy.

For wards who are retained in the juvenile system, commitment to the California Youth Authority is the most restrictive dispositional option. The Youth Authority is a state-operated agency which takes the juveniles from the committing county for incarceration in an institution of the Authority’s choice, where the minor is evaluated and treated. The state arranges for supervision by parole agents after the institutional period.

1203c, 1203e, 1205.3 (West Supp. 1987), § 1205, 1209 (West 1982 & Supp. 1987).
26. Kay & Segal, supra note 13, at 1416; Treadwell, supra note 17, at 113; STANDARDS RELATING TO DISPOSITIONS §§ 3.1-3.3 (Tent. Draft 1977).
27. Although Welfare and Institutions Code section 707(a) permits transfer to the adult court on the finding that the juvenile is unfit for juvenile court jurisdiction, section 707(b) requires transfer if the juvenile is accused of certain serious offenses. CAL. WELF. & INST. CODE § 707(b) (West Supp. 1987). The juvenile then has the burden of overcoming the statutory presumption of transfer to adult court by establishing that he or she is fit to remain in the juvenile court. If the court retains the minor in juvenile court, a commitment to the California Youth Authority may be made for a longer period than otherwise.
28. Transfer to the adult court under the California system is the same process, though not done in the same way, as was covered in Kent v. United States, 383 U.S. 541 (1966). In jurisdictions other than California the process is often referred to as “waiver.”
30. CAL. WELF. & INST. CODE §§ 731, 733-34 (West 1984); Comment, supra note 10, at 654; STANDARDS RELATING TO DISPOSITIONS, supra note 26, at § 2.1.
Placement in a camp or "juvenile ranch facility" is the most restrictive disposition available at the local level of government. These institutions, which have a broad spectrum of programs, are operated by county authorities. The facilities are open, without bars or guard towers, and are limited to a maximum of 100 minors in each camp.

The "twenty-four hour schools," or "community care facilities," present the greatest variety of programs available to the juvenile court. For instance, the program known as "Vision Quest," of recent news media interest, may be considered a 24-hour school. Minors sent there may participate in diverse activities such as camping in the wilderness, canoeing in Baja California, or operating a wagon train that travels from state to state. Other 24-hour schools include the Boys' Republic, where Della Robbia wreaths are made and sold at Christmas time, and psychiatric institutions such as the Devereaux School. These institutions number in the dozens, and are located both inside and outside of California. Each has its own program directed at assisting youths who have some specific kind of problem. The diversity in the nature and availability of these institutions cannot be overemphasized. Old programs and institutions are continually being phased out by their sponsors and new programs and institutions are initiated as replacements. Many of these institutions are funded by grants, causing programs to change with financial sponsorship. Other institutions are operated by large philanthropic organizations such as the Lions Club or the Rotary Club, and have relatively stable financing which allows them to operate for many years.

Another disposition available to the juvenile court is placement in a foster home licensed by the State of California. Generally, the juvenile courts place children only in licensed homes, but under extraordinary circumstances the court has the power to place minors in foster homes pending licensing. Children who are over sixteen do

33. Id. at §§ 880, 886.
34. Id. at § 727(a)(2) (West 1984 & Supp. 1987).
35. About 150 California youths currently participate in Vision Quest programs in Arizona and Pennsylvania. A Chula Vista boy died in a Vision Quest camp in New Mexico in 1984, and a civil suit is pending. Vision Quest is close to obtaining a license to operate in California on condition that program leaders not use physical force or confrontational techniques. San Diego Tribune, Feb. 24, 1987, at 2, col. 15.
37. Id. at § 727. Address by Kenneth Vorsman, Executive Director of Boys Town, Missouri, St. Louis University Juvenile Delinquency Seminar (November 29, 1967) (noted in
not require licensed foster homes. The delegated licensing agency for the state is usually the county welfare department. Probation officers may call upon the welfare department to provide the names and addresses of homes that are willing to accept children from the juvenile court.

Placement with relatives is a common disposition that is highly favored by the court whenever removal of a child from his own home is necessary. Placement with relatives frequently offers the court the added advantage of being able to remove the child from an unfit environment at no expense to the taxpayers. Juvenile court funds are limited and must be conserved whenever possible. For example, the cost of placing a minor in a psychiatric institution, may cost the county $3,000 to $4,000 per month; therefore less expensive placements are sought where possible. However, placement with relatives is frequently risky because relatives may be unwilling to accept the child's problems or may not report difficulties to the probation officer. On the other hand, removing a juvenile from the environment which may have fostered delinquency can be eminently successful, particularly if maintained for a sufficiently long term. The variability of placement factors affecting a minor's behavior supports the notion that alternatives must be presented in order to select the most appropriate disposition.

Returning a juvenile to his or her own home is considered the best dispositional alternative. Section 202 of the California Welfare and Institutions Code, which sets forth the purposes of the juvenile court law, states that preservation and strengthening of the minor's family ties is a primary objective of the juvenile court and removal from parental custody should take place only when necessary. The court may also make provisions for treatment concurrent with return to the minor's own home by including certain conditions in the order
granting wardship. Treatment conditions may include programs helpful to the minor, such as counseling by an organization to be selected by the probation officer or by the court. Other conditions such as a requirement to submit to search and seizure without probable cause may assist the court in detecting probation violations. Additionally, orders to report to the probation officer, or to stay in the county, are conditions which may assist in control of the minor.

B. The Role of Defense Counsel in Presenting Dispositional Alternatives

The dispositions set forth above are subject to many variations. Effective representation of the minor's interests dictates that alternative dispositions be presented to the court in specific terms. For instance, when the probation officer has recommended commitment to the Youth Authority, a mere statement of defense counsel's belief that a 24-hour school would be more appropriate is a weak and unpersuasive suggestion. Espousing a specific plan and identifying both its potential strengths and weaknesses for the court is essential to achieving the desired objective.

One cause of defense counsel's failure to suggest alternative dispositions is counsel's lack of familiarity with the variety of options available. Unfortunately, virtually no juvenile law training exists in law school. How does a well-meaning defense attorney become knowledgeable in the area of dispositions? Most knowledgeable counsel have learned of the available dispositional alternatives and how to present them through day-to-day involvement in the juvenile court system. Yet, even attorneys practicing juvenile law find themselves unable to keep up with all of the possible juvenile court dispositions on a daily basis. Since these dispositions change so frequently, a specialized source of information about the various alternatives is needed, including data on the types of cases accepted, their costs, and their effectiveness.
III. A Duty Arises

"I shall sell no wine before its time."
—Paul Masson, per Orson Welles

If Paul Masson had waited as long to sell his wine as the legal profession has waited to impose a duty to provide dispositional alternatives, M. Masson would have found himself in the vinegar business. The necessity for defense counsel to provide dispositional alternatives has been discussed in court decisions and in law review articles for over fifteen years.52

Unfortunately for the minors involved, appellate courts have not set aside many dispositional orders for defense counsel’s failure to adequately present alternatives to the court. The case of People v. Cropper,53 an adult criminal matter decided in 1979, presents an example of the gross dereliction of duty required for a reversal. Cropper was represented by counsel at his probation hearing. The probation officer recommended denial of probation, and set forth four factors in aggravation of Cropper’s crime with no factors in mitigation.54 At sentencing the court asked Cropper’s lawyer for evidence or arguments. Counsel responded that he had nothing to offer, and that he agreed with the evaluation of the probation department. Counsel then requested the court to hear from Cropper personally. Cropper asserted on his own behalf that he had obtained custody of his children and that although he had lost his job, he could go back to work.55 Cropper had previously written the court requesting permission to serve time on weekends so that he could support his two dependent children.56 Cropper stated orally to the court, again without the assistance of his attorney, that the probation department report contained false information.57 After his presentation Cropper was sentenced to a term in the state prison.58

On appeal, Cropper’s new attorney argued that the trial attorney had acted as an advocate against Cropper’s interests by agreeing with the probation officer’s negative recommendation.59 Thus, Cropper had been deprived of his constitutional right to the effective as-

52. See supra note 17.
54. Id. at 718, 152 Cal. Rptr. at 556.
55. Id. at 718-19, 152 Cal. Rptr. at 556.
56. Id. at 719 n.2, 152 Cal. Rptr. at 556 n.2.
57. Id. at 719, 152 Cal. Rptr. at 556.
58. Id.
59. Id.
sistance of counsel. Appellate counsel also asserted that the failure of trial counsel to present positive alternative recommendations had deprived Cropper of his right to effective counsel.60

The Court of Appeal for the Second District concurred with the appellant’s first argument,61 and therefore did not consider the second claim. The court did not decide the question of whether any arguments favorable to the defendant could have been presented by the attorney to the court. However, Cropper’s efforts on his own behalf indicate that his trial counsel could have stressed certain factors for the court in order to obtain a more favorable outcome. Cropper’s case was returned to the trial court for resentencing.

The appellate court in Joe Cropper’s case repeated the already familiar statement that effective assistance of counsel includes representation at sentencing, quoting from both California and federal cases.62 Nevertheless, the court’s holding did not go far enough to satisfy the need to clarify counsel’s ethical duty to effectively represent a defendant at a sentencing hearing. The holding indicates what the attorney should not have done (argue against his client’s interests), but does not specify what he should have done. Furthermore, it does not explore the question of what counsel could have done, in addition to presenting the weak arguments Cropper made for himself.

Fortunately, there are very few cases like Cropper’s, where defense counsel either argues against his own client or fails to advocate positively on the client’s behalf. No similar juvenile case has been found, but many cases exist in which counsel fails to present alternatives that would be helpful to the client. Since no enforceable duty to present alternatives is recognized in case law, those cases pass unnoticed. Juveniles are entitled to full and effective representation. An enforceable ethical duty to present alternatives in the best interests of the defendant should be imposed upon defense counsel.

It is fitting that such an ethical duty should arise first in the juvenile courts. The state’s interest in its juveniles is different from and greater than its interest in adult criminal defendants.63 Juveniles are generally more open to change and are more likely to be rehabilitated.64 Section 202 of the California Welfare and Institutions Code

60. Id.
61. Id. at 721, 152 Cal. Rptr. at 558.
62. Id. at 719-20, 152 Cal. Rptr. at 556-57.
64. Heilman, So You’re Going to Represent a Juvenile!, 6 PEPPERDINE L. REV. 783,
states that the concept of rehabilitation is an important function of the juvenile court process. The court, therefore, has a greater need for a broad range of alternatives in order to accomplish that rehabilitation. Clearly, the juvenile court lawyer must be aware of the available alternative dispositions, must address their propriety in the circumstances, and must present them to the court.

IV. A Solution

“New occasions teach new duties.”

—James Russell Lowell

Juvenile court lawyers should be required to know all possible dispositions available for their clients. Because most juvenile cases result in a dispositional hearing, attorneys should begin discussing dispositional alternatives with their clients as early in the case as possible. Furthermore, a defense duty to guide and assist the court in reaching its decision should be imposed; at disposition no one should know the case better than defense counsel.

A. Establishing Competence of Counsel in Dispositional Hearings

The issue of competency of counsel at dispositional hearings in the juvenile court bears a very close analogy to that of competency of counsel in other similar hearings. For instance, a study of the actions of counsel in conservatorship proceedings in California has indicated that the same type of preparation and knowledge advocated for juvenile court is also necessary to properly represent conservatees or alleged conservatees before the mental health court. The type of preparation expected of counsel in the juvenile court is similar to that which should be required of counsel in all proceedings in which the client is subject to involuntary restrictions on his or her personal conduct.

Merely urging effective representation of clients at dispositional hearings has not been effective. The duty must be imposed in such a fashion that it will be given effect by the practicing bar. In other

798 (1979).

66. STANDARDS — SENTENCING ALTERNATIVES, supra note 14, at § 5.3(f)(v).
words, a mechanism must be built into the system imposing the duty which will force compliance by attorneys practicing before the juvenile court. Moreover, attorneys must have access to the information necessary for compliance with the duty imposed. Given the exigencies of practicing law and maintaining a law office, imposing the duty without making it possible for counsel to comply on a practical, daily basis would be pointless. Imposing a duty without providing a way to meet it would result only in "white knight flight," the reduction of the already sparse ranks of competent defense counsel due to fears of disciplinary proceedings should they be unable to meet the standard or be in violation of the duty. Considering the juvenile courts' low rate of compensation for appointed private practitioners and the endemic overloading of public defenders, the necessary information must be available from a reasonable and reliable source without excessive expenditure of time or money.

Assuming that the duty should be imposed, then by what method? The available options are: a) by court decision, b) by state legislation, c) by statewide rule of court, or d) by local rule of court. Judicial legislation is not always effective because of the courts' tendency to be ambiguous and limit holdings to the facts of the case. Thus, the court decisions leave large gaps to be filled in by other decisions or by later action of the Legislature. Careful, detailed, clear-cut rules for the conduct of counsel do not often have their genesis in court decisions. When they do, the propriety of such "legislation" by courts is questionable.

The general trend of decisions by the United States Supreme Court in recent years has shifted away from attempting to create "bright line" rules which are specific and detailed. Instead, the Court is turning to a balancing or ad hoc procedure, referred to as "totality of the circumstances," which allows a court to consider all facts in the case. This balancing facilitates the courts' attempt to adequately accommodate the public policy of protecting the majority,

70. Comment, supra note 10, at 651. Although the author of the cited article recommends turning to lists published by the federal government, my experience would indicate that this is one of the slower methods to utilize. Instead, contact with a local group which has knowledge of the facilities available within the nearby community is much more likely to yield a useful result.

71. For instance, in Terry v. Ohio, 392 U.S. 1 (1968), the Court stated its holding in Section V, repeating nearly all of the factual elements in that specific case. An unsophisticated reader would have concluded that all of these factual elements were therefore necessary to the rule. Nothing could be further from the truth. Nearly every case in the last 20 years which has applied the "Terry stop and frisk" rule has lacked one or more of these factual elements. See, e.g., Adams v. Williams, 407 U.S. 143 (1972).
while maintaining individual rights.72

A classic case of a bright line rule still in effect is the well-known *Miranda* rule.73 This rule, which requires that police officers intone a specific liturgy to each suspect in custody before questioning, was adopted because of the coercive atmosphere inherent in such situations. The *Miranda* rule was intended to avoid all future problems connected with in-custody questioning; the determination of whether the warning was given would foreclose all arguments regarding the admissibility of the suspect's statements. However, the *Miranda* rule has spawned litigation in thousands of cases, resulting in varying interpretations and an increasing number of exceptions.74

Submission to the Judicial Council for adoption as a statewide Rule of Court is the preferable method of imposing the duty, with state legislation the next best alternative. The adult procedure covering statements in mitigation may serve as a model for the rule changes which should be made. The comparison is apposite, since the adoption of a juvenile defense attorney's alternative disposition will certainly result in mitigation of the punishment, at least as perceived by the minor.

Statements in mitigation for adults were provided for by the Legislature in Penal Code section 1170(b).75 The language is permissive, stating simply that the sentencing "court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution [or] the defendant. . . ."76 The permission is then amplified and expanded by Penal Code section 120477 and by Rule of Court 437,78 which set forth what a statement in mitigation should contain and how that information is to be considered by the court. Although the provisions for filing a statement in mitigation are permissive, many criminal practitioners protect themselves from appellate allegations of incompetency by filing the statement in every case. This may be an overabundance of caution, and perhaps some of the statements filed are

76. *Id.*
77. *Id.* at § 1204.
superfluous. Nevertheless, the positive effect is that a statement in mitigation will be filed in every meritorious case. Filing too many statements in mitigation is preferable to filing too few.

Initiation of state legislation would be a viable method of establishing the duty. The legislative process would allow for careful consideration of the form to be used in specifying the details of the duty. Various organizations, including the State Bar, would be able to express opinions. However, the same legislative process could result in excision or revision of essential provisions which might weaken or eliminate the duty. A change in the statewide Rules of Court would have many of the same advantages and disadvantages as legislation, but could be effectuated more quickly.

Leaving the duty to provide alternatives to be imposed by changes in the rules of the dozens of individual county juvenile courts would guarantee chaos. Inequities between courts would inevitably result and the attorneys who practice in juvenile court would be confused about what would be expected of them.

Modification of the statutory juvenile court law is not a necessary prerequisite to imposing a duty to present dispositional alternatives to the court. Welfare and Institutions Code section 706 already provides that at disposition "[t]he court shall receive in evidence the social study of the minor made by the probation officer and such other relevant and material evidence as may be offered. . . ." Rule of Court 1371(d) states that "the court shall receive in evidence the social study prepared by the probation officer and other relevant and material evidence offered by the petitioner, the minor, or the parent or guardian. The court may receive other relevant and material evidence on its own motion. . . ." No court is likely to rule that an alternative dispositional plan prepared by the defense is irrelevant or immaterial, even if the court chooses not to act upon it.

It is clear from the language of the juvenile court law and the juvenile court rules that defense counsel may submit alternative dispositional plans in writing. However, language establishing that

---

79. There is currently controversy among the members of the State Bar of California as to whether it is a proper function for an integrated bar to study proposed legislation and take a position upon it. Since all attorneys in California must pay dues to the State Bar, it is argued by some that this money should not be spent on an activity which is not shared by, or of particular use to, the majority of the State Bar members. They feel that this function should be relegated to some form of voluntary organization.


81. Id. at § 706.

82. CAL. R. CT. 1371(d) (West 1987).

83. CAL. R. CT. 1301-96 (West 1987).
the defense must submit such plans is missing. As a result, written alternative plans by the defense are the exception in juvenile court, when they should be the rule. A modification of Rule 1371 would change that. The proposed modification might read as follows:

**Rule 1371**

(d) The Court shall receive in evidence the social study prepared by the probation officer, statements as to alternative dispositions prepared by the minor or by the petitioner, and other relevant and material evidence offered by the petitioner, the minor, the parent or guardian. The Court may receive other relevant and material evidence on its own motion. Statements as to alternative dispositions shall be filed with the Court and provided to the opposing party 24 hours prior to the scheduled commencement of the dispositional hearing. In any judgment and order of disposition, the Court shall state that the social study and the statements as to alternative dispositions have been read and considered by the Court.

In adult cases, the Penal Code provides that the probation officer's report shall be filed nine days prior to the scheduled sentencing hearing, and that statements in mitigation and aggravation shall be filed two days prior to the hearing. Thus, counsel are allowed seven days to read the probation officer's report and prepare and file the statements.

The process in the juvenile court is greatly accelerated, with a maximum of only fifteen judicial days from the detention hearing (if detained) to the jurisdictional hearing. The probation officer's social study may be filed as late as 48 hours before commencement of the dispositional hearing. Usually the disposition is scheduled to be heard immediately upon determining that the court had jurisdiction, although the court has the power to continue the matter even if the minor is detained. If defense counsel has been unable to plan a disposition, as in a case of an unexpected adverse resolution, a continuance is preferred because the court might order long-term commitment if no alternative plan is presented. If alternative dispositions have been under consideration from an early point in the defense, there should be no necessity for a continuance. Defense

85. **Cal. R. Ct.** 1351 (West 1987).
86. *Id.* at 1371(b).
87. *Id.* at 1356(a). *But see* Comment, *supra* note 10, at 645-46, concerning the need for a separate hearing.
88. **Cal. R. Ct.** 1356(a)-(c) (West 1987).
counsel should have the written plan ready well in advance. The suggested rule change also follows the procedure in the adult court in that it allows the petitioner to file a statement. While it is not necessary or even desirable to file a statement in all cases, the petitioner should have the opportunity to do so. However, there is no need to make a petitioner's statement mandatory. The proposed rule also makes it necessary for the court to read statements regarding alternative dispositions along with the probation officer's report. The court is presently required to state on the record that it has read such statements.

In cases where the minor agrees with the recommendation of the probation officer, a short statement to that effect may be filed. If a different disposition is recommended to the court by the defense, it too must be agreed to by the minor. In either event, all written statements as to alternative dispositions filed on behalf of the minor should contain an express agreement signed by the minor. The alternative plan is not to be just the statement of the defense counsel, but the statement of the minor and her or his representative as well. In the event that a dispositional hearing is held prior to the time originally set and prevents the probation officer from filing a written social study, provisions should be made allowing either waiver of written statements regarding alternative dispositions, or oral presentation if the probation officer's report is presented. If the defense is aware that the dispositional hearing will be held early and desires to submit a written statement, it should be allowed to do so if the petitioner has adequate notice. In the absence of proper notice, no written statement as to alternative disposition should be admitted. Otherwise, the dispositional hearing should be continued until all parties

89. Besharov, supra note 49, at 60; Costello, supra note 24, at 271.
90. Gilbert, supra note 14, at 15.
91. See Comment, supra note 10, at 655, which suggests a teamwork approach, including conferring with the social worker. This is an excellent idea where the social worker (probation officer) is willing to cooperate. Whenever the probation officer's recommendation and the defense recommendation concur, it is almost assured that the court will follow the recommendation. Therefore, the first line of defense is to try to get the cooperation of the probation officer. See also Allenstein, The Attorney-Probation Officer Relationship, 16 CRIME & DELINQ. 181 (1970).
92. Standards Relating to Counsel for Private Parties § 9.3(a), commentary at 178-80 (Tent. Draft 1976); Costello, supra note 24, at 272; Genden, supra note 12, at 589; Standards Relating to Dispositions § 2.2 (Tent. Draft 1977); Standards — Sentencing Alternatives, supra note 14, at § 5.3 comment k.
93. Guernsey, supra note 15, at 69-70; Standards Relating to Counsel for Private Parties, supra note 92, commentary at 179; Costello, supra, note 24, at 272; Portman, supra note 50, at 4; Edwards, supra note 6, at 41; Kay and Segal, supra note 13, at 1417; Genden, supra note 12, at 590.
can file their reports.

B. Enforcement of the Duty

Having set forth a possible plan for imposing the duty upon defense counsel to file written dispositional alternatives with the court, it is equally important to consider the task of determining how attorneys are to meet the duty. As previously stated, there are many possible alternatives designed to meet a variety of different requirements for different cases. Is the individual attorney expected to be able to keep abreast of all of these possible alternatives? The question is rhetorical, since an individual attorney cannot possibly do so, nor can counsel undertake a study of the total dispositional field in order to make up a plan for one individual child. Fortunately, some people have made a profession of this type of activity. They may be social workers with extensive credentials or former probation officers who have left government employment to enter into business on their own. In any event the information is available.

One of the most effective ways of making this information readily available to defense counsel is to maintain a staff to accomplish this objective. Large public defender offices have made good use of this system. By having social workers on their staff to stay current on dispositions and to prepare reports for the court, the larger and better financed offices have been able to do a much better job than would otherwise be possible. Leaving the research and preparation of the reports to those most knowledgeable makes use of the special skills of the social workers and frees the attorneys' time for those matters which are within the lawyers' expertise.

An individual practitioner or a small law office might find it impractical to have a social work component within the structure of the office. Counsel should then have access to resource persons

95. See supra notes 26-46.
96. Genden, supra note 12, at 589, states: "a child may have less need for a litigation specialist than for a lawyer who has competence and familiarity with non-legal resources." It is submitted that if the knowledge is made available from another source, a much wider choice of competent counsel will be available than if it is expected that each attorney must have full knowledge of the resources available.
97. Besharov, supra note 49, at 64.
99. Comment, supra note 10, at 649; Edwards, supra note 6, at 39.
within a local defense organization, if any, or to some type of organization providing a similar service. Such an organization may already exist within the county probation department. If the defense of the minor is paid for from the county treasury, the expense of having such reports prepared for the court should be a proper charge to the county. If defense counsel is privately retained, the preparation of the report should be merely another expense assumed by the persons paying for the defense.

Having information on a variety of possible dispositions available to the court in most, if not all, of the juvenile cases will assist the court greatly in its function as a decision maker acting in the interest of the minor in question. The use of skilled personnel and the services which they can provide will significantly improve the services rendered by the juvenile court, which is to the advantage of both juveniles under its jurisdiction and to society at large.

V. CONCLUSION

"I never met a [minor] I didn't like."

—Will Rogers

No matter how likeable or unlikeable a juvenile may be, the state should enforce defense counsel’s ethical duty to adequately present the client’s case in the dispositional phase of the juvenile court. Failure to suggest alternative dispositions to the court should be considered incompetent representation by counsel. To date, very few decisions have held that representation was incompetent at the dispositional phase of the case, whether juvenile or adult. Most inadequate representation by counsel at disposition is not overtly adverse to the client’s interests. Instead, inadequate representation usually occurs in situations where no alternatives are presented. This omission is more difficult to detect and often results from counsel’s lack of effort to find an alternative.

Reviewing courts have great difficulty in determining whether counsel’s failure to present an alternative disposition was due to the unavailability of such options, to a tactical decision, to problems with a recalcitrant client, or to a lack of diligence. Because the record does not reveal which of these underlying reasons is responsible for such failure, a new duty requiring a showing of diligence on the record must be created to facilitate appellate review.

The imposition of an enforceable duty should not be delayed any longer. It is recommended that this duty be created by a Rule of Court requiring that all counsel in juvenile court matters file with
the court a statement of alternative dispositional recommendations. Enforcement provisions must also be included in the new rule. If information regarding dispositional alternatives is readily available, the requisite filing of such a statement is a small addition to defense counsel's proper performance of duties in juvenile court. Proper planning for discharge of this duty requires that counsel have considered disposition from the very beginning of the case. A statement of dispositional alternatives prepared in a professional manner would be a valuable resource for the juvenile court. The court is always seeking appropriate dispositions that will permit it to be lenient while protecting the community and carrying out the purposes of the juvenile court laws. The probation officer's recommendation should not be the sole determinative criterion for presentation of dispositional alternatives to the court. Presenting alternatives to the court for its consideration is a step toward advantageous judicial reform. Creating a mechanism which will result in preparation and presentation of those alternatives merits serious and immediate consideration. Giving to the court alternatives for its consideration is therefore a positive step toward appropriate disposition. Providing a mechanism that will result in the production of those alternatives is to be greatly encouraged.