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Here's Looking at You, Kid: Prosecutors in the Juvenile Court Process

DAVID KEITH HICKS*

I. INTRODUCTION

Very little has been written about the prosecutor in juvenile court, and almost nothing by prosecutors themselves. This article is written by a Deputy District Attorney who has completed three assignments totaling two and a half years with the juvenile court. During that time, the role of the prosecutor in the juvenile court changed from "kiddie court" advisor to state's trial attorney. The principal reason for this transition has been the alarming increase in the commission of serious crimes by children.¹ This increase in crime includes proportionate increases in such serious offenses as murder, robbery, rape and

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¹ CAL. CIV. CODE § 25 (West 1972) defines children as "... all persons under 21 years of age." However, juvenile courts have broad but specific jurisdiction. See notes 13, 14 and 15, infra.
residential burglary, to name a few.\textsuperscript{2}

Among the reasons prosecutorial participation in the juvenile court process is a unique experience are the age, emotional maturity, community orientation, and personality of the juvenile offender. It is a trying psychological and emotional experience to vigorously prosecute one who may be physically smaller in stature and whose psyche is less developed and more vulnerable, but has nevertheless committed a serious crime. The personality of the juvenile delinquent ranges from vicious and defiant, apathetic, arrogant and "street wise," to frightened and submissive. The emotional demands this places on a prosecutor can substantially affect his or her performance. Often the prosecutor must wrestle with the conflict between the basic "goodness" of an individual juvenile and the seriousness of a man-endangering offense the juvenile is alleged to have committed. On the other hand, a prosecutor may find himself urging the court to take strong measures because of the attitude and comportment of the child, even though the current offense is not of the serious variety. This article proposes to explore selected aspects of prosecutorial participation in the juvenile justice process from the perspective of the prosecuting attorney.

II. THE POWER AND DUTY OF THE PROSECUTOR IN RELATIONSHIP TO JUVENILE COURT

The California Business and Profession Code establishes gen-


1. The number of juveniles arrested in California for crimes against persons (which include homicide, robbery, assault and forcible rape) rose sharply between 1968 and 1973 (46.8 percent) compared with decline (10 percent) in all other juvenile arrests. The number of adults arrested in California for crimes against persons rose 18.5 percent between 1968 and 1973, but did not increase as sharply as did the "all other" category (37.8 percent).

2. The proportion of males to females among juvenile offenders arrested in California between 1968 and 1973 showed little change. In 1968, males comprised 77.3 percent and females 22.7 percent of those arrested; in 1973 males comprised 75.3 percent and females 24.7 percent. Adult offenders also showed little change in the male-female proportions.

3. Compared to the national picture, California showed an alarming increase in the number of arrests for violent crimes from 1968 to 1973 while the national percentage of juvenile arrests remained approximately the same.

4. Based on total arrests, the national percentage of juveniles arrested for violent crimes showed no substantial increase; but the actual number of crimes against persons rose sharply. Between 1968 and 1973, there was a 59 percent increase in the number of juveniles arrested for murder; burglary increased 18 percent, aggravated assault rose 42 percent, and juvenile arrests for rape doubled to 52 percent.
eral duties which apply to all attorneys, including prosecutors, and provides sanctions for violation of these duties.\(^3\) Additionally, the Government Code establishes duties and powers of the prosecutor.\(^4\) As a part of the overall criminal justice process the prosecutor's role is as follows:

1. The protection of society from individuals who pose a danger to the persons or property of other individuals;
2. The deterrence of other individuals from posing a similar danger in the future;
3. The punishment of individuals for failing to fulfill their responsi-

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3. These duties are found in CAL. BUS & PROF. CODE §§ 6068, 6076, 6077 (West Supp. 1977). Section 6068 sets out the duties of an attorney:

   It is the duty of an attorney:
   
   (a) To support the Constitution and laws of the United States and of this State.
   
   (b) To maintain the respect due to the courts of justice and judicial officers.
   
   (c) To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense.
   
   (d) To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
   
   (e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.
   
   (f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.
   
   (g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.
   
   (h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed.

Section 6076 contains the entire text of the Rules of Professional Conduct of the State Bar of California. Section 6077 sets out the power to discipline attorneys.

The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar.

For a willful breach of any of these rules, the board has power to discipline members of the State Bar by reproof, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar.

4. CAL. GOV. CODE §§ 26500, 26501 (West 1968). Section 26500 states: “The district attorney is the public prosecutor. He shall attend the courts, and conduct on behalf of the people all prosecutions for public offenses.” Section 26501 states:

   The district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed. For that purpose, when not engaged in criminal proceedings in the superior court or in civil cases on behalf of the people, he shall attend upon the magistrates in cases of arrest when required by them and shall attend before and give advice to the grand jury whenever cases are presented to it for its consideration.
bility to obey the laws on which the preservation of an orderly and free society rests;

4. The rehabilitation of individuals so they can become law abiding members of a free society and thus permit other individuals more secure enjoyment of their freedom.

If prosecution within the criminal justice system is law, then these four purposes are the tools of that more or less important mechanism. These purposes become relatively more or less important in particular cases depending on the particular facts. Sometimes these purposes may be in conflict with each other or with a criminal prosecution in another case.5

When the prosecutor works in juvenile court his or her powers and duties are further delineated in the Welfare and Institutions Code.6 This role is tempered by the statutorily imposed purpose of the juvenile court.7 A juvenile court prosecutor must walk the fine line between the vigorous prosecution of juvenile crimes and the purpose of juvenile court—to correct deviant behavior in the environs of home and family whenever possible. As can be seen, the prosecutor's role in juvenile court is more complex and in some ways more demanding than his or her traditional role. The prosecutor must master the unique juvenile court system,8 with its specialized rules and statutes.9 Because juvenile law is undergoing dramatic change the prose-

5. CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION UNIFORM CRIME CHARGING STANDARDS 6 (December 1974).
6. The duties of a prosecutor are set out in CAL. WELF. & INST. CODE § 681(a) (West Supp. 1977).
7. In a juvenile court hearing which is based upon a petition that alleges that the minor upon whose behalf the petition is being brought is a person within the description of Section 602, the prosecuting attorney shall appear on behalf of the people of the State of California.
   (a) The purpose of this chapter is to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental and physical welfare of the minor and the best interests of the state; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. This chapter shall be liberally construed to carry out these purposes.
   (b) The purpose of this chapter also includes the protection of the public from the consequences of criminal activity, and to such purpose probation officers, peace officers, and juvenile courts shall take into account such protection of the public in their determinations under this chapter.
cutor has the difficult task of staying abreast of a flood of new case law in the area, in addition to carrying a large case load.

A. Prosecutorial Input in the Initiation of Juvenile Petitions

The prosecutor's authority and power in adult court is well known. While the duty to prosecute violations of the law is generally viewed as mandatory, in actuality that duty is exercised with considerable unilateral discretion.

In juvenile court the power and authority of the prosecutor is not clearly defined. The prosecutor must interact with several other agencies, some non-legal, in handling juvenile matters. Each of these independent entities of the juvenile court process has certain discretionary authority of their own. The authority of the prosecutor to initiate legal process against a juvenile is itself a new power heretofore not a part of the prosecutor's role.

As the law presently stands there are three ways a juvenile can be brought before the court:

1. Dependent children petitions;
2. Status offender petitions;\textsuperscript{14}

3. Delinquent petitions.\textsuperscript{15}

The prosecutor's role in the first two categories is principally advisory. His authority is only tangential to that of the probation officer or social worker. Dependency petitions, for example, are generally filed by a social worker or probation officer. Likewise a so-called "601" petition is generally filed by the probation department.\textsuperscript{16}

When a juvenile is accused of committing a crime the involvement of the prosecutor's office is still not automatic.\textsuperscript{17} It is the probation officer who will initially review the case and make a decision regarding disposition.\textsuperscript{18} Often the probation officer will handle the application informally by requiring a program of probation, in lieu of recommending prosecution.\textsuperscript{19} The proba-
concludes that a minor is within the jurisdiction of the juvenile court or
will probably soon be within such jurisdiction, he may, in lieu of filing a
petition to declare a minor a dependent child of the court or a minor or a
ward of the court under Section 601 or requesting that a petition be filed
by the prosecuting attorney to declare a minor a ward of the court under
Section 602 or subsequent to dismissal of a petition already filed, and
with consent of the minor and the minor’s parent or guardian, delineate
specific programs of supervision for the minor, for not to exceed six
months, and attempt thereby to adjust the situation which brings the
minor within the jurisdiction of the court or creates the probability that
he will soon be within such jurisdiction. Nothing in this section shall be
construed to prevent the probation officer from filing a petition or
requesting the prosecuting attorney to file a petition at any time within
said six-month period. If the probation officer determines that the
minor has not involved himself in the specific programs within 60 days,
the probation officer shall immediately file a petition or request that a
petition be filed by the prosecuting attorney. However, when in the
judgment of the probation officer the interest of the minor and the
community can be protected, the probation officer shall make a diligent
effort to proceed under this section.

The program of supervision of the minor undertaken pursuant to this
section may call for the minor to obtain care and treatment for the
misuse of restricted dangerous drugs or addiction to narcotics from a
county medical health service or other appropriate community agency.

Further, this section shall authorize the probation officer with consent
of the minor and the minor’s parent or guardian to provide the following
services in lieu of filing a petition:

(a) Contract with private or public agencies to provide sheltered-care
facilities. Such placement shall be limited to a maximum of 90 days.
Counseling services shall be extended to the sheltered minor and his
family during this period of diversion services. The minor and his par-
ents may be required to make full or partial reimbursement for the
services rendered the minor and his family during the diversion process.
Referrals for sheltered-care diversion may be made by the minor, his
family, schools, law enforcement or any other private or public social
service agency.

(b) The probation officer shall be authorized to maintain and operate
crisis resolution homes, or contract with private or public agencies
offering such services. Residence at such facilities shall be limited to 20
days during which period individual and family counseling shall be
extended the minor and his family. Failure to resolve the crisis within
the 20 day period may result in the minor’s referral to a shelter-care
facility for a period not to exceed 90 days. Referrals shall be accepted
from the minor, his family, schools, law enforcement or any other pri-
vate or public social service agency. The minor, his parents, or both,
may be required to reimburse the county for the cost of services ren-
dered at a rate to be determined by the county board of supervisors.

(c) The probation officer shall be authorized to staff, maintain, and
operate counseling and educational centers. The probation officer shall
be authorized to contract with private and public agencies, societies or
corporations whose purpose is to provide vocational training or skills.
Such centers may be operated separately or in conjunction with crisis
resolution homes to be operated by the probation officer. The probation
officer shall be authorized to make referrals to the appropriate existing
private or public agencies offering similar services when available.

At the conclusion of the program of supervision undertaken pursuant
to this section, the probation officer shall prepare and maintain a fol-
low-up report of the actual program measures taken.

See also Marvin F. v. Superior Court, 75 Cal. App. 3d 281, 192 Cal. Rptr. 78
tion officer's decision is itself subject to review. Frequently the police, or another agency making application to commence juvenile proceedings, will disagree with the probation officer's decision not to recommend filing a "602" petition. In such cases appeal may be had directly to the office of the prosecutor who may "override" the decision and elect to file a petition against the advice of the probation officer.\(^{20}\)

This source of potential conflict between the prosecutor's office and the probation department points out the need for a strong and positive working relationship between the two offices. While the probation officer is given considerable discretion,\(^{21}\) California Welfare and Institutions Code Section 654 also permits the prosecutor to advise the probation department as to possible courses of action to follow where there has been an application for juvenile court action.\(^{22}\) The real difficulties raised by the interaction of these two agencies are the extent of the probation officer's discretion and the amount of formal or informal interaction between the prosecutor and the probation officer which the courts will permit.

The language of Welfare and Institutions Code Section 654 reads in part: "[W]hen in the judgment of the probation officer the interest of the minor and the community can be protected, the probation officer shall make a diligent effort to proceed under this section." Translating this statutory authority into realistic guidelines, the California Rules of Court provide a series of procedures to be followed by the probation officer in the exercise of his or her discretion.\(^{23}\) What is interesting about

\(^{20}\) 20. CAL. WELF. & INST. CODE § 655 (a) (West Supp. 1977) reads:
(a) When any person has applied to the probation officer, pursuant to Section 653, to request commencement of juvenile court proceedings to declare a minor a ward of the court under section 602 and the probation officer does not cause the affidavit to be taken to the prosecuting attorney pursuant to Section 653 within 21 court days after such application, such person may, within 30 court days after making such application, apply to the prosecuting attorney to review the decision of the probation officer, and the prosecuting attorney may either affirm the decision of the probation officer or commence juvenile court proceedings.

\(^{21}\) 21. See § 654(a), (b), (c) at note 19 supra.

\(^{22}\) 22. Id. at note 19 supra.

\(^{23}\) 23. CAL. JUV. CT. R. 1307 (1977) provides:
(a) (Role of juvenile court) The presiding judge of the juvenile court shall initiate meetings and cooperate with the probation department, welfare department, prosecuting attorney, law enforcement and other persons and agencies performing an intake function to establish and maintain a fair and efficient intake program designed to promote swift and objective evaluation of the circumstances of any referral and to initiate whatever course of action appears necessary and desirable.
(b) (Purposes of intake program) A juvenile court intake program shall be designed to do all of the following:
(1) To provide for settlement at intake by excluding or diverting from the juvenile process at its inception:
   (A) Those matters over which the juvenile court has no jurisdiction;
   (B) Those matters in which there would be insufficient evidence to support the petition; and
   (C) Those matters in which sufficient evidence may exist to bring the minor within the jurisdiction of the juvenile court but which are not serious enough to require official action under the juvenile court law or which may be suitably referred to a nonjudicial agency available in the community;
(2) To provide for a program of informal supervision of the minor under sections 300 and 654 in those cases where the minor is or probably will soon be within the jurisdiction of the juvenile court and official intervention short of formal adjudication seems desirable; and
(3) To provide for the commencement of proceedings in juvenile court by the filing of a petition only when necessary for the welfare of the minor or the safety and protection of the public.
(c) (Settlement at Intake—factors for probation officer to consider)
In determining whether a matter should be settled at intake, thereby excluding or diverting the matter from the juvenile court system, the probation officer shall consider:
   (1) Whether there is sufficient evidence of a condition or conduct to bring the minor within the jurisdiction of the juvenile court;
   (2) Where the condition or conduct is not considered serious, whether the minor has previously presented no significant problems in the home, school or community;
   (3) Whether the matter appears to have arisen from a temporary problem within the family which has been or can be resolved;
   (4) Whether any agency or other resource within the community is better suited to serve the needs of the minor, the parents, or both;
   (5) The attitude of the minor and the parent or guardian;
   (6) The age, maturity and mentality of the minor;
   (7) The prior delinquent history, if any, of the minor;
   (8) The recommendation, if any, of the referring party or agency;
   (9) The attitude of any affected persons;
   (10) Any other circumstances which indicate that settling the matter at intake would be consistent with the welfare of the minor and the safety and protection of the public.
(d) (Informal supervision (§§ 330, 654)) If after investigation the probation officer concludes that a minor is or probably will soon be within the jurisdiction of the juvenile court, the probation officer may, in lieu of filing a petition under section 300 or 601 or requesting that a petition be filed under section 602 and with the consent of the minor and the minor's parent or guardian, undertake to remedy the situation by delineating specific programs of informal supervision of the minor for not more than six months. The probation officer may file a petition or request that a petition be filed by the prosecuting attorney. However, when in the judgment of the probation officer the interest of the minor and the community can be protected, the probation officer shall make a diligent effort to proceed under section 654.
(e) (Informal supervision—factors for probation officer to consider)
In determining whether a program of informal supervision of the minor should be undertaken, the probation officer shall consider:
   (1) Where the alleged condition or conduct is not considered
serious, whether the minor has had a problem in the home, school or community which indicates that some supervision would be desirable;
(2) Whether the minor and the parents seem able to resolve the matter with the assistance of the probation officer and without formal juvenile court action;
(3) Whether further observation or evaluation by the probation officer is needed before a decision can be reached;
(4) The attitude of the minor and the parent or guardian;
(5) The age, maturity and mentality of the minor;
(6) The prior delinquent history, if any, of the minor;
(7) The recommendation, if any, of the referring party or agency;
(8) The attitude of any affected persons;
(9) Any other circumstances which indicate a program of informal supervision would be consistent with the welfare and safety of the minor and the protection of the public.

(f) (Filing of petition; role of probation officer and prosecuting attorney(§§ 325, 650)) Except as provided in sections 331, 364, 604, 653.5, 654 and 655, the determination of whether or not to file a petition shall be in the sole discretion of the probation officer in sections 300 and 601 proceedings, and in the sole discretion of the prosecuting attorney in section 602 proceedings.

(g) (Filing of petition—factors for probation officer to consider) In determining whether to file a petition under section 300 or 601 or to request the prosecuting attorney to file a petition under section 602, the probation officer shall consider:

(1) Whether any of the statutory criteria listed under rule 1348(b)(2) relating to the fitness of the minor are present;
(A) The degree of criminal sophistication exhibited by the minor;
(B) Whether the minor can be rehabilitated prior to the expiration of the juvenile court’s jurisdiction;
(C) The minor’s previous delinquent history;
(D) Success of previous attempts by the juvenile court to rehabilitate the minor;
(E) The circumstances and gravity of the offense alleged to have been committed by the minor.
(2) Whether the alleged conduct would be a felony if committed by an adult;
(3) Whether the alleged conduct involved physical harm or the threat of physical harm to person or property;
(4) Whether the alleged condition or conduct is not itself serious, but the minor has had serious problems in the home, school or community which indicate that formal juvenile court action would be desirable;
(5) Where the alleged condition or conduct is not itself serious, whether the minor is already a ward or dependent child of the juvenile court;
(6) Whether the alleged condition or conduct involves a threat to the physical or mental condition of the minor;
(7) Whether a chronic serious family problem continues to exist after other efforts to improve the problem have failed;
(8) Whether the alleged condition or conduct is in dispute and, if proven, court ordered disposition appears desirable;
(9) The attitude of the minor and the parent or guardian;
(10) The age, maturity and mentality of the minor;
(11) The status of the minor as a probationer or parolee;
(12) The recommendation, if any, of the referring party or agency;
(13) The attitude of any affected persons;
(14) Whether any other referrals or petitions are pending;
(15) Any other circumstances which indicate the filing of a peti-
the sections, *Guidelines for Settlement at Intake* and *Informal Supervision*, is that often the criteria to be used by the probation officer anticipate making what are in essence legal judgments. For example, section 1307 (c)(1) calls upon the probation officer to determine "if there is sufficient evidence of a condition (section 601 status offense) or conduct (section 602 criminal conduct) to bring the minor within the jurisdiction of the juvenile court." Resolution of that question will involve considering the burden of proof rules found elsewhere in the Welfare and Institutions Code.

In practice, then, a probation officer exercises considerable unstructured discretion. Moreover, there are no guidelines as to how much of the probation officer's time is to be spent in independent investigation or how extensive the investigation should be. Since the probation officer is a peace officer and required to admonish a juvenile regarding "Miranda rights," should a probation officer attempt to obtain a confession from the juvenile? Having once gained the confidence of the juvenile, to what extent should the conversations between the probation officer and the juvenile be accorded a de facto privilege? Where confessions and inculpatory statements are involved, the conduct of the probation officer in acquiring them will directly bear on their admissibility. Can a probation officer prejudice the state's case by improper investigation? On the other hand, does poor investigation lead to the wrong decision to petition or to handle the matter informally? Having obtained information from an independent investigation, can the probation officer keep certain information confidential and still recommend filing a petition? Should the prosecutor attempt to influence the probation officer's decision regarding disposition of a juvenile matter? Not surprisingly the cases which limit the contact between the prosecutor and the probation officer do not address these issues in

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24. *Id.* at § 1307(c).
25. *Id.* at § 1307(e).
26. See note 23, supra.
light of the overlapping executive and judicial functions the probation officer exercises. This should not lead to the conclusion that contact between the prosecutor and probation officer can or should be unlimited.28 What must result from this interaction is a harmonious flow of information and advice between the two agencies while at the same time each permits the other to exercise independent discretion.

B. Prosecutorial Discretion in Filing Juvenile Court Petitions

Assuming the probation officer has recommended the filing of a petition and the application to commence a proceeding has been transferred to the prosecutor's office, it is still not automatic that a petition will be filed.29 Weight will be given to the victim's, police officer's, or probation officer's recommendations. Consideration will be given to the need for additional investigation, information from the juvenile's prior history and witness interviews in order to determine the advisability of alleging certain offenses. The prosecutor might also consider the cost of a successful trial, the attitude of the court regarding the way such offenses should ultimately be handled, whether the juvenile is needed as a witness against an adult participant or a more criminally sophisticated juvenile partner, and the possible impact in the community from which the juvenile comes.

The decision to prosecute is often made with ease, in part because it is made upon overwhelming evidence of serious wrongdoing. At other times the decision is made only after intensive investigation and labored evaluation. In order to secure equality in the decision-making process, the California District Attorneys Association prepared, and put into use, the 1974 Uniform Crime Charging Standards.

A prosecutor is ethically required to consider the following criteria before deciding to file a petition in juvenile court:

A. Whether there is sufficient evidence to show that the accused is guilty of the crime to be charged;

28. See People v. Villarreal, 65 Cal. App. 3d 938, 135 Cal. Rptr. 636 (1977), wherein the court set aside a sentence because of misconduct on the part of the prosecutor's office in attempting to influence the contents of a sentencing report prepared by the probation department.

29. See notes 7 and 19, supra.
B. Whether there is legally sufficient admissible evidence of a corpus delecti;

C. Whether there is legally sufficient admissible evidence of the accused's identity as the perpetrator of the crime charged;

D. Whether an objective fact-finder, hearing the admissible evidence, would find it convincing enough to warrant a conviction of the crime charged.\(^3\)

Because the burden of proof in juvenile court is the same as in adult court, these are obviously applicable criteria. However, the following are reasons NOT to prosecute which should also be considered:

A. The statute in question is antiquated in that it has not been enforced for many years and most members of society generally act as if it were no longer in existence;

B. Prosecution would serve no deterring or protective purpose; or

C. The victim has suffered little or no injury or loss and has requested no prosecution.

While these latter considerations may be a legitimate basis not to prosecute in adult court, their applicability to the decision not to prosecute in juvenile court is not so clear. Assuming for the purposes of illustration that either or all of the negative factors are present in a given case, would the decision not to file a petition be altered by the fact the juvenile's parents are the complaining witnesses? What if the minor had an extensive history of "601" violations? What if the victim, who is requesting that no action be taken, is also a juvenile? Would the decision not to file a petition be changed by the publicity or visibility accorded the juvenile's conduct by his or her peers? Does the attitude of the juvenile toward the courts or the law, reflected perhaps in frequent arrests, warrant filing a petition even where the gravity of the crime might not? These questions serve to illustrate the difficulty associated with the decision to file a

\(^3\) CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION UNIFORM CRIME CHARGING STANDARDS (December 1974).
petition even assuming the probation officer has made an affirma-
tive recommendation to do so.

In the initial decision to file, the prosecutor must balance a
number of considerations, wholly independent of the legal
evaluation, as to the strengths or weaknesses of the case. A
prosecutor should not lightly override the recommendations of
a probation officer. The prosecutor must ultimately respond to
the broader interests of society in the performance of his or her
duty, not just to the victim, the juvenile, or current sentiment.\textsuperscript{31}

In pleading the petition the prosecutor exercises considerable
discretion. Adding enhancement clauses\textsuperscript{32} may affect the ultimate
disposition of a juvenile petition. Enhancements can im-
press the court as to the amenability of the minor to juvenile or
adult court adjudication.\textsuperscript{33}

\textsuperscript{31} \textit{CAL. Gov. CODE § 26500} (West 1968). “[T]he district attorney is the public
prosecutor. He shall attend the courts, and conduct on behalf of the people all
prosecutions for public offenses.” \textit{See also} note 4, \textit{supra}.

\textsuperscript{32} Enhancement clauses are used in a petition by the prosecutor to in-
crease the magnitude of a crime alleged against a juvenile and can eff ect
the ultimate disposition of a petition. The clauses are descriptive of the crime and
assist the judge in determining whether to grant a “707” motion, as will be
discussed \textit{infra} note 34 and accompanying text. Enhancements either extend a
prison term or eliminate eligibility for probation. \textit{See} \textit{CAL. PENAL CODE § 1203.09
(West Supp. 1978)} and related 1978 amendments to \textit{CAL. WELF. & INST. CODE §
707} (West Supp. 1977). Enhancements are imposed, \textit{inter alia} for prior felonies,
being armed with or the use of firearms, inflicting great bodily harm, and
various combinations of the above. \textit{See also} T. Condit, \textit{The Uniform Deter-
minative Sentence Act} (1978).

\textsuperscript{33} \textit{CAL. WELF. & INST. CODE § 707} (West Supp. 1977) provides:

(a) In any case in which a minor is alleged to be a person described in
Section 602 by reason of the violation, when he was 16 years of age or
older, of any criminal statute or ordinance except those listed in subdivi-
sion (b), upon motion of the petitioner made prior to the attachment of
jeopardy the court shall cause the probation officer to investigate and
submit a report on the behavioral patterns and social history of the
minor being considered for unfitness. Following submission and con-
ideration of the report, and of any other relevant evidence which the
petitioner or the minor may wish to submit the juvenile court may find
that the minor is not a fit and proper subject to be dealt with under the
juvenile court law if it concludes that the minor would not be amenable
to the care, treatment and training program available through the
facilities of the juvenile court, based upon an evaluation of the following
criteria:

(1) The degree of criminal sophistication exhibited by the minor.
(2) Whether the minor can be rehabilitated prior to the expiration of
the juvenile court’s jurisdiction.
(3) The minor’s previous delinquent history.
(4) Success of previous attempts by the juvenile court to rehabilitate
the minor.
(5) The circumstances and gravity of the offense alleged to have been
committed by the minor.

A determination that the minor is not a fit and proper subject to be
dealt with under the juvenile court law may be based on any one or a
combination of the factors set forth above, which shall be recited in
order of unfitness. In any case in which a hearing has been noticed
Enhancements serve several functions:

(1) They set apart the more serious crimes;

(2) They serve to illuminate the degree of participation of coparticipants;

(3) They characterize for the court the posture which the prosecutor will take in the case;

pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea which may already have been entered shall constitute evidence at such hearing.

(b) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he was 16 years of age or older, of one of the following offenses:

(1) Murder;

(2) Arson of an inhabited building;

(3) Robbery while armed with a dangerous or deadly weapon;

(4) Rape with force or violence or threat of great bodily harm;

(5) Kidnapping for ransom;

(6) Kidnapping for purpose of robbery;

(7) Kidnapping with bodily harm;

(8) Assault with intent to murder or attempted murder;

(9) Assault with a firearm or destructive device;

(10) Assault by any means of force likely to produce great bodily injury;

(11) Discharge of a firearm into an inhabited or occupied building, upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the juvenile court shall find that the minor is not a fit and proper subject to be dealt with under the juvenile court law unless it concludes that the minor would be amenable to the care, treatment and training program available through the facilities of the juvenile court based upon an evaluation of the following criteria:

(i) the degree of criminal sophistication exhibited by the minor, and

(ii) whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction, and

(iii) the minor's previous delinquent history, and

(iv) success of previous attempts by the juvenile court to rehabilitate the minor, and

(v) the circumstances and gravity of the offenses alleged to have been committed by the minor.

A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and reasons therefore shall be recited in the order. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at such hearing.
(4) They can be used to establish the maximum time which a juvenile may be held in custody;

(5) In the case of a juvenile aged sixteen or seventeen at the time the crime was committed, they put defense counsel on notice of a possible "707" motion.34

In juvenile court, enhancements are a mixed blessing. They permit the prosecutor to show leniency toward a juvenile even before the petition is heard in court. On the other hand, addition of enhancement clauses does not seem to have any appreciable impact on time in custody required of a juvenile by the court.35 As a result, the tendency of the prosecutor is to plead enhancements realizing that omitting the enhancement clauses can only narrow the field of plea bargaining. The considerations reflect a divergence from the usual use and purpose of enhancement clauses, to increase base terms in prison and to eliminate eligibility for probation.

A recent example from Alameda County may serve to illustrate the point: A seventeen year old female ran away from home in another state to be with her paroled boyfriend, currently residing in California. While in Alameda County she accosted an elderly woman and attempted to take her purse. A struggle ensued when the victim resisted her assailant. In the struggle the victim's hands were badly cut but the juvenile was unsuccessful in her attempted robbery. The juvenile fled on foot and was captured several blocks away by a private citizen. No weapons were seen or recovered in the incident, but the victim lost all sensation in the fingers of one hand due to the serious cuts. While the female had no prior history of juvenile offenses, she was wanted in a third state on suspicion of prostitution.

A petition was filed alleging attempted robbery.36 The plead-
ings were enhanced to include a "great bodily injury" allegation, an "aged or infirm victim" clause, and a second count of "assault with force likely to commit great bodily injury." The petition contained a request for a behavioral study from which the court could decide whether to have the juvenile tried as an adult or juvenile.

At this juncture the prosecutor had three alternatives available. First, he could return the juvenile to her home state by virtue of the Interstate Compact on Juveniles. This alternative was unworkable because the juvenile’s home state had not enacted the custody provisions of the compact and would only accept the female for courtesy probation supervision on an out-of-custody status. Second, he could move to have the juvenile remanded for trial in adult court under general criminal law. This alternative seemed particularly severe because of the juvenile’s prior history of good behavior and a mandatory state prison term. Third, he could retain the female in California’s Juvenile Court. This had its drawbacks as well. By retaining the female in juvenile court, the effect of the elderly victim clause requiring prison time, would be negated except for its value as an argument that some incarceration was warranted.

This example serves to illustrate the need for the juvenile courts to pay serious attention to enhancement clauses, notwithstanding the basic indeterminate nature of a youth authority commitment. In so doing the court will benefit by allowing the prosecutor to exercise genuine leniency in cases which warrant it, while serving notice of the seriousness of the conduct.

C. Fitness Hearings—Tactical Considerations Involved in Seeking to Have a Juvenile Tried in Adult Court

Certain forms of juvenile misconduct are of such gravity that a prosecutor should seriously consider moving the court to have

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38. Cal. Penal Code § 1203.09 (West Supp. 1977) mandates state prison in cases involving such victims.
the juvenile tried in adult court. This may be done in limited circumstances. Where a juvenile is sixteen years old at the time of commission of the offense charged, a prosecutor may elect to suspend juvenile proceedings and require a fitness hearing to determine if the juvenile in question is a fit and proper subject for juvenile court process. The fitness hearing process involves preparation of a behavioral report, presentation of evidence, and determination by the court, following specific statutory criteria, of the fitness and amenability of the juvenile to the rehabilitative treatment processes available through the juvenile court. If the court determines the juvenile unfit, it then authorizes the prosecutor to file a criminal pleading in adult court, and to handle the matter as a criminal prosecution.

California has a rather unique approach in resolution of the fitness question. When the juvenile is alleged to have committed one of eleven enumerated offenses, all of which involve the risk of, or actual physical injury or death of a victim, then the juvenile court is directed to declare the juvenile unfit for juvenile court process unless it is satisfied the juvenile can be treated and cared for by the juvenile court. In all other cases the juvenile court must conclude the juvenile is a proper subject for treatment in juvenile court unless the contrary is shown by clear and convincing proof. In simple terms the California statute sets up a de facto set of rebuttable presumptions. Initially, the juvenile is presumed to be fit for juvenile court process, but upon pleading the commission of certain enumerated offenses that presumption is reversed.

42. As will be seen the court may set a case for a fitness hearing sua sponte.  
43. CAL. WELF. & INST. CODE § 707, at note 33, supra.  
44. Id. at § 707(a).  
45. Id.  
46. Id. at § 707(a)(1) through (5).  
47. Id. at § 707(a).  
48. CAL. WELF. & INST. CODE § 707.1 (West Supp. 1977). Having once determined that a given juvenile is unfit for treatment though juvenile court, the court must transfer all subsequent offenses to adult court. See In re Dennis J., 72 Cal. App. 3d 755, 760, 140 Cal. Rptr. 463, 466 (1977). In some states it is the prosecutor, rather than the court, who determines in which forum the juvenile will be tried. See People v. McCalvin, 55 Ill. 2d 161, 167, 302 N.E.2d 342, 346 (1973), and United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1973), cert. denied, 412 U.S. 909 (1973) for an extensive discussion of prosecutor's commitment discretion.  
49. CAL. WELF. & INST. CODE § 707(b)(1) through (a) (West Supp. 1977). For complete text see note 33, supra.  
50. Id. at § 707(b)(11).  
51. Id. at § 707(a).
In determining whether to seek a fitness hearing the prosecutor must consider the juvenile's prior history balanced against the strengths of the case. Often it is the juvenile who may prefer adult court over juvenile court, especially where there is a prior history of reprimands, probation and releases which a juvenile court judge would consider at a disposition hearing. A juvenile may prefer to "take a chance" with an adult court and a jury, knowing that his or her prior record cannot affect any sentence actually imposed. The anomaly this situation often produces is that a juvenile may be in a better position to escape institutionalization in adult court, as a criminal defendant, than as a juvenile before a juvenile court judge or referee. An "eligible" juvenile may demand trial in adult court, even where the prosecutor might wish the juvenile court to retain jurisdiction.  

III. ALTERNATIVE PROCEDURES AVAILABLE TO THE PROSECUTOR WHEN DECIDING TO FILE A PETITION AGAINST A JUVENILE ALREADY ON PROBATION

Where a juvenile already on probation is alleged to have committed an offense, the prosecutor has several alternative procedures available, beyond those already discussed, which should be carefully explored before taking action. A prosecutor may elect to (1) request a modification of the terms and conditions of the existing probation based on a change in circumstances;  


53. See CAL. JUV. R. 1391(a), (c), 1392(a) and 1393 (effective July 1, 1977).


An order changing or modifying a previous order by removing a minor from the physical custody of a parent, guardian, relative or friend and directing placement in a foster home, or commitment to a private institution or commitment to a county institution, or an order changing or modifying a previous order by directing commitment to the Youth Authority shall be made only after noticed hearing upon a supplemental petition.

(a) The supplemental petition shall be filed by the probation officer in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the minor.

(b) Upon the filing of such supplemental petition, the clerk of the
A. Modifying Probation Based on a Change of Circumstances

The juvenile court rules provide that anyone having an interest in a juvenile who has been declared a ward of the court may petition the court for a modification of probation. Among those who may be interested parties are parents, probation officers, social workers, peace officers, and the prosecutor. This alternative has two significant features of which the prosecutor should be aware. First, modification of probation may deliver a cautioning or motivating message to a juvenile whose compliance with the terms of probation, such as school attendance and obedience to parents, is marginal. Typically, restitution requirements, time in weekend custody, curfew, and interaction with victims or criminally active peers are all subjects for modification which the prosecutor can effectively use where subsequent non-dangerous illegal conduct has occurred. Second, while some courts fail to notice, there is no statutory basis for a motion for new trial in juvenile court; however, modification of probation is a vehicle which can be used by defense counsel to attempt to re-open a case and consider new evidence or reconsider issues previously decided. Upon proper showing the court may re-open the contested hearing, take additional evidence, and if appropriate, modify by outright dismissal of the case. The prosecutor is necessarily involved in these de facto motions for new trial. “Double jeopardy” precludes the prosecutor from initiating this type of modification. Previous testimony must stand unless new testimony impeaches the witness in which case the prosecutor may re-subpoena a witness and attempt rehabilitation.

B. The Supplemental Petition and Criminal Contempt

The supplemental petition provided for in Welfare and Institutions Code section 777 allows the prosecutor to demonstrate
that a juvenile is in need of "more restrictive placement" than previously required by the court.\textsuperscript{58} This procedure is particularly effective where a juvenile demonstrates a distinct lack of cooperation with parents or officials in complying with the terms of probation, or where the juvenile commits a crime while on probation.\textsuperscript{59} Disobedience of a directive of probation (i.e., failure to make restitution, running away from home, truancy from school) is itself a misdemeanor criminal contempt\textsuperscript{60} which, when proven, may be a basis for more restrictive placement.

At this juncture the prosecutor may elect not to file the supplemental petition but use the misconduct as a basis for an ex parte application for probation modification, agree to ignore the offense altogether, or file the petition and seek more restrictive placement. The course of action the prosecutor should follow ought to turn on whether the juvenile's continued liberty in the community represents a threat to the safety of the public. Proper uses of this alternative in a responsive court could put an end to the plethora of cases where juveniles have ten, twenty, or even thirty arrests.

IV. \textbf{DOES THE PROSECUTOR REALLY PROSECUTE IN JUVENILE COURT?}

After the decision to file a petition is made, the role of the prosecutor is still somewhat uncertain. This uncertainty results from the fact that while the prosecutor is involved in an adviso-

\textsuperscript{58} Id. at § 1391(b)(1) through (6). More restrictive placement involves increasing the level of custody of a juvenile. In ascending order these increasing degrees of custody involve: removal of the juvenile from his or her residence; placement in foster care facilities; placement in private or public custodial or non-custodial institution; and commitment to the California Youth Authority. \textit{See also} In re Michael R., 73 Cal. App. 3d 327, 334, 140 Cal. Rptr. 716, 721 (1977), \textit{quoting} In re Arthur N., 16 Cal. 3d 326, 545 P.2d 1345, 127 Cal. Rptr. 641 (1976).

\textsuperscript{59} \textit{CAL. JUV. CT. R.} § 1392(a) (1977):

(a) The supplemental petition shall be verified and contain the information required to be in an original petition by paragraphs (1), (3), (4), (5) and (7) of rule 1309(a). It shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the minor. The supplemental petition shall be filed in the original action in which the minor was found to be a ward or dependent child of the juvenile court. If the supplemental petition charges a violation of law as defined in section 692, the petitioner shall be the prosecuting attorney. As amended, effective July 1, 1977.

\textsuperscript{60} \textit{CAL. PENAL CODE} § 166.4 (West 1972); \textit{CAL. WELF. & INST. CODE} § 213 (West Supp. 1977).
rial adjudication of a juvenile petition, he or she must balance and weigh legitimate, yet conflicting, interests. Because no "conviction" will be forthcoming the prosecutor must decide how much of his or her limited resources to commit to the contested hearing. The more criminally active and sophisticated the juvenile, the more adversarial the hearing becomes. Additionally, the greater the evidence required, and the more technical in nature it becomes, the more like a "trial" the contested hearing becomes. Prosecution of a criminal offense is traditionally thought to involve a trial, verdict, judgment and sentencing. But the Welfare and Institution Code provides that no juvenile under the age of sixteen can be convicted of a crime.

The effect this distinction should have upon the conduct, tactics or procedures followed by the prosecutor is insignificant since his burden of proof is not affected thereby; the rules of evidence are not significantly modified; and due process requirements do not appear to be significantly reduced.

61. The word prosecution denotes a criminal proceeding; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime. United States v. Neisinger, 128 U.S. 398 (1888).

62. CAL. WELF. & INST. CODE § 707(a) (West Supp. 1977) provides that juveniles over fifteen may be certified to adult court. CAL. WELF. & INST. CODE § 203 (West Supp. 1977) reads, "An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." See also CAL. WELF. & INST. CODE § 606 (West 1972).

63. CAL. WELF. & INST. CODE § 702 (West Supp. 1977). Often this distinction is lost on the juvenile. Rather the atmosphere is one of prosecution and defense. The juvenile views himself as a defendant out to "beat the rap" or "get over."

64. CAL. WELF. & INST. CODE § 701 (West Supp. 1977):
At the hearing, the court shall first consider only the question whether the minor is a person described by Section 600, 601 or 602. The admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision. Proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 600 or 601. When it appears that the minor denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the prosecuting attorney to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made.

65. Id.

A second factor which makes handling a juvenile petition unlike a prosecution is the intended result. In adult court the goal of the prosecutor in a criminal prosecution is judgment of conviction and the imposition of an appropriate prison sentence as punishment for the criminal behavior. However, in juvenile court the overriding concern is proper rehabilitation of the child. With the focus on rehabilitation of the juvenile and the legislature's desire to avoid institutionalization, should a prosecutor work as vigorously in presenting a case before the court? Is there room for a sympathetic prosecutor in a juvenile court contested hearing? The California Supreme Court in Leroy T. v. Workmen's Comp. Appeals Board stated, "[The] underlying philosophy (of the Juvenile Court law) is that the state assumes a protective role with respect to the juveniles over whom it gains jurisdiction. . . . California decisions reflect the view that juvenile court proceedings are in the nature of guardianship proceedings . . . and are concerned primarily for the welfare of the juvenile. . . ." If the role of the prosecutor in juvenile court is not purely one of advocacy, is there a danger that too many sympathetic parties (prosecution, defense and court, not to mention probation) may lead to "unkind leniency?" The answer is 

§ 702.5 (West 1972) (privilege against self-incrimination, right to confront and cross-examine witnesses).
68. It was not until recently the legislature declared that another reason for filing a petition in juvenile court is to protect the public from juvenile misconduct. See CAL. WELF. & INST. CODE § 202(b) (West Supp. 1977).

[The Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

that prosecutors must know the difference between serious criminal conduct and childhood maladjustment, and in each case stress community interest to the court about to make a dispositional order.

A. The Juvenile Court Prosecutor's Relationship with Defense Counsel

The prosecutor must take his relationship with defense counsel very seriously. There are several self-evident reasons for this. First, the prosecutor in juvenile court generally reserves his most vigorous prosecutorial efforts for the most serious cases. Prosecutors must attempt to make every contact a

While already on probation under the juvenile court law, 14 year old Ricardo M. was again, pursuant to Welfare and Institutions Code section 602, adjudicated a ward of the court on March 27, 1975. The offense charged was possession of marijuana. Ricardo was placed on probation and continued in the custody of his mother. On April 1, 1975, another petition was filed, pursuant to section 602, alleging that Ricardo had committed three burglaries. On April 25, still another petition charged Ricardo with possession of marijuana. On May 19, 1975, Ricardo admitted the commission of one of the burglaries.

Disposition hearing on the admitted burglary charge occurred on June 13, 1975. Probation reports involving Ricardo's prior contacts with the juvenile court revealed a history of trouble at school and with the law, as well as ties with "known gang members." On one occasion, Ricardo's mother had vainly urged his detention "with the hope that it (might) straighten (him) out." The current probation report recommended that Ricardo be declared a ward of the court pursuant to section 602 of the Welfare and Institutions Code, and that he be placed upon probation to remain in the home of his mother. Recommended conditions of probation were restitution, abstinence from narcotics, and attendance at a school program approved by the probation officer.

At the disposition hearing, the juvenile court judge dismissed the charges of burglary not admitted, declared that Ricardo remain a ward of the court, and placed him on probation. The conditions of probation were those recommended plus an additional condition which is an issue of this appeal. The judge conditioned the probation upon Ricardo's spending not less than 5 nor more than 20 days in juvenile hall, the exact amount of time to be determined by the juvenile hall staff based upon Ricardo's attitude and cooperation. The order recites that it is its intent that Ricardo be detained for the minimum period if his attitude and cooperation are "adequate."

The juvenile court judge stated: "I am imposing (the added condition) under the provisions of 730 of the Welfare and Institutions Code, which indicates the Court may impose any reasonable term and condition of probation, and I feel that it is important that (Ricardo) have a short period of incarceration to deter (him) from further misconduct and criminal activities, and to aid in (his) rehabilitation. The Court considered a camp commitment . . . but rejected it because of the fact there seems to be some ties with the family, and (Ricardo is not) totally out of control and beyond the control of (his) parents, but (he has a) prior record, (has) been in trouble with the law before, and I think something has to be done to impress (him) with the seriousness of the offense, and I hope that (he doesn't) repeat again."

Execution of the added condition of probation was stayed while Ricardo pursued his application for writ of habeas corpus to this court.
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juvenile has with the juvenile justice system the last. Therefore, the prosecutor must be willing to listen to alternatives. Inexperienced and misinformed defense counsel only makes prosecution more difficult. Everything tends to become an issue, and an inability to predict defense counsel's actions (a critical professional skill) causes plea bargaining to fall apart. Ineffective plea negotiation inevitably results in the setting cases for trial which have no real triable issues. Such practice will tend to alienate the court and may create for the juvenile a less hospitable climate at a disposition hearing.

Objective prosecutors warm to defense attorneys who wrestle with the difficult problems in representing juveniles, such as the negative effects inherent in denial and trial, and attempt to work with defense counsel who perceive their clients' best interests. Usually, effective communication between counsel avoids the need for unproductive and lengthy contested hearings, particularly on account of the high frequency of confessions and partial admissions, uncharacteristic of more sophisticated juvenile delinquents.

B. The Problem of Proving Capacity in a Contested Hearing

In the event that a petition has been filed against a juvenile under the age of fourteen, the prosecutor has an added burden of proof in order to sustain the petition. The California Penal Code requires the prosecutor to establish with clear proof that the juvenile knew at the time of the act the wrongfulness of his or her conduct. This requirement of the Penal Code presents a potentially explosive situation. Because the prosecutor may not call the juvenile to the stand to inquire as to his or her capacity, he may elect to call the juvenile's parents.

Initially it appears the prosecutor is calling a friendly witness of the defense to establish a crucial element in the state's case. Often, however, the complaining witnesses are the juvenile's parents. It is frequently productive for a prosecutor to interview parents prior to the contested hearing. Certain communications of the child with his or her parents, in connection with communications to counsel, psychiatrist, or clergy, may be accorded privileged status, and thus may not be used by the prosecutor to establish capacity. Additionally, testimony of capacity may be obtained from all parties who have had contact with the minor, including victims and police officers. On occasion, conversation with a juvenile's parents may determine whether the prosecutor will even proceed with the petition. Dealing with such emotionally involved parties, in the highly charged courtroom atmosphere, requires a prosecutor to exercise care in clearly and carefully establishing the element of capacity.


We rely instead in part on the reasoning of In re Terry W. In the case of In re Terry W. (1976) 59 Cal. App. 3d 745 (130 Cal. Rptr. 913), the court said (at p. 748): "There are undoubtedly situations where a communication from child to parent falls within the attorney-client or other professional privilege. Where, for example, the communication to the parent is to further the child's interest in communication with, or is necessary for transmission of information to, a lawyer (Evid. Code, § 952), a physician (Evid. Code, § 992), or a psychotherapist (Evid. Code, § 1012), the communication is protected by the pertinent statutory privilege.

76. An experience of the author may best illustrate the point: Two brothers age 16 and 12 had been charged with stealing money from laundering machine coin boxes. Neither had prior arrest history. The family had recently moved into the neighborhood where this type of activity was nearly a daily event. The parents disbelieved the charges, but were willing to discuss the case. As the evidence was detailed for them, one fact suddenly became significant. One of the boys had told an eyewitness neighbor that his parents were going to sue her for false arrest. Identification of the boys as the thieves by this witness had occurred without the boys knowledge at a school bus stop the following morning. The boys had professed complete innocence to their parents (a position that some families adhere to despite overwhelming evidence to the contrary). If they were truly innocent, they would have no way of knowing this woman was a witness. The father turned to his youngest and pointedly asked if he had ever said such a thing. His reply was "No, sir." The same question to the older boy evoked an angrily defensive "When?" When the father replied there was going to be a "talk" as soon as the family got home, it became quite clear that whatever good the juvenile court process had to offer was about to obtain on its own. The case was dismissed.

77. Often a court will tend to "hang its hat" on the capacity issue. Where the case is close, a few courts will opt for holding lack of capacity rather than address the factual issue. For a case critical of such an approach, see In re Tanya L., 76 Cal. App. 3d 725, 143 Cal. Rptr. 31 (1977). See also CAL. PENAL CODE § 262 (West 1970) (proof of capacity of child to commit rape).
Prior to January 1, 1977 the prosecutor's presence at a disposition hearing was within the discretion of the court. At times the court or probation officer invited the prosecutor to participate in dispositions to assist in determining how best to work with a juvenile declared a ward of the court. At that time, the prosecutor's occasional participation at contested and dispositional hearings only followed the entry of defense counsel for the juvenile into each such proceeding. It was not uncommon for the probation department to call upon the office of the prosecutor to assist in the presentation of evidence, to urge the court to sustain the probation department's petition, and to argue in support of the department's recommendations. Because the prosecutor was not a party to any aspect of the juvenile court procedure he became an attorney for the real party to the action, the probation department.78

With the increase of juvenile crime and judicial expansion of juvenile rights it became apparent that probation officers were no match for the juvenile's counsel as cases became more complex and divergent. In an effort to afford better representation of the state's case, the legislature amended the Welfare and Institutions Code to provide for participation of the prosecutor in all phases of section 602 petition proceedings, including dispositional hearings.79

This new authority was more akin to the prosecutor's familiar role. With the new role some questions had to be asked and answered. Would the prosecutor continue to advance the cause of the probation department? What would be the impact of the prosecutor taking a dispositional position at variance with the probation department? How much weight would the prosecutor's recommendations carry with the court? With what self-imposed limitations should the prosecutor engage in disposi-

78. See People v. Superior Court (Tony S.), 44 Cal. App. 3d 904, 119 Cal. Rptr. 125 (1975), wherein the court refers to the district attorney as an attorney for the probation department. This case, of course, preceded the current statutory arrangement.

tional bargaining with defense counsel? Without the promise of any rehabilitative effect, should the prosecutor seek restitution? All of these questions are gradually being resolved, and will continue to be resolved as the role of the prosecutor develops. One fact is emerging, the prosecutor's comments, observations, and criticisms of the probation report\(^8^0\) carries weight with the court in a disposition hearing. This directly results from the prosecutor's intimate familiarity with the facts of a given case including evidence inadmissible at trial,\(^8^1\) familiarity with dispositional alternatives,\(^8^2\) the plight of the victim, the need for protection of the public, and a strong desire to use juvenile dispositions as a deterrent to future misconduct. Continued development in the independence of the prosecutor in providing input at disposition is still required. The prosecutor is no longer the probation department's "hired gun." Rather the prosecutor must remain a clear and independent voice advocating that position which best protects his constituency, the public.

\(^{80}\) See CAL. JUV. CT. R. 1347(c) and 1371(b) (effective July 1, 1977). In adult cases the Penal Code expressly empowers an order of "reparation" as a condition of probation. CAL. PENAL CODE § 1203.1 (West Supp. 1977). Juvenile Courts have "broad powers" when imposing probation conditions. In re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966). The prosecutor should assist the court to accurately ascertain the actual uninflated loss, the minor's ability to pay, and to impose conditions not impossible to be performed. See In re Gonzales, 43 Cal. App. 3d 618, 118 Cal. Rptr. 69 (1974) and People v. Kay, 36 Cal. App. 3d 759, 111 Cal. Rptr. 894 (1974).

\(^{81}\) CAL. WELF. & INST. CODE § 706 (West Supp. 1977).

\(^{82}\) CAL. WELF. & INST. CODE § 731 (West Supp. 1977).