Chapter 38

Dispositions

Part A. Overview of the Dispositional Stage and Dispositional Options

§ 38.01 THE UNIQUE NATURE OF SENTENCING IN JUVENILE COURT; OVERVIEW OF THE CHAPTER

It is at the dispositional phase that juvenile delinquency proceedings differ most strikingly from adult criminal proceedings. The dispositional process is the stage at which the attempt is made to provide individualized justice – the rationale of juvenile court. Lawyers who represent delinquents in juvenile court cannot do an effective job without recognizing the unique features of dispositional hearings and developing strategies to maximize the possibility of a favorable outcome at the dispositional hearing.

This chapter begins by describing the role of counsel at the dispositional phase of a delinquency case (§ 38.02). It discusses the unique features of the dispositional phase and the range of dispositions available in a delinquency case (§ 38.03), then describes the procedures prior to and at the dispositional hearing (§38.04). Sections 38.05-38.16 describe the various things counsel should do or consider doing in preparation for the dispositional hearing. Section 38.17 presents an argument for the right to an evidentiary dispositional hearing. Sections 38.18-38.24 deal with the conduct of evidentiary dispositional hearings. Sections 38.25-38.27 deal with the conduct of non-evidentiary hearings. Finally §§ 38.28-38.29 briefly discuss actions that counsel should consider taking after a final order of disposition has been entered. (Chapter 39 discusses in greater detail post-dispositional features of delinquency practice.)

§ 38.02 THE ROLE OF COUNSEL AT DISPOSITION

As explained in § 2.03 *supra,* the prevailing view of counsel's role in a delinquency case before *In re Gault,* 387 U.S. 1 (1967), was that counsel was free to substitute his or her own wishes for the objectives of the client. The result in the dispositional phase was that an attorney could defy his or her client's wishes and seek incarceration of the client if counsel believed that this course of action best served the client's needs. When *Gault* formalized the trial phase of a delinquency case and established fundamental rules for the relationship between counsel and client in that phase, the lessons it taught necessarily carried over to the dispositional phase. As recognized in the ethical standards governing representation in delinquency cases, the only legitimate *post-Gault* view of the attorney-client relationship at disposition is that the client defines the objectives of representation just as s/he does throughout the earlier stages of the case. The Juvenile Justice Standards of the Institute of Judicial Administration and the American Bar Association explain:

The role of counsel at disposition is essentially the same as at earlier stages of the

> proceeding: to advocate, within the bounds of the law, the best outcome available under the circumstances according to the client's view of the matter. . . . Counsel may, of course, appropriately advise a client with respect to community or correctional-therapeutic services that may be of long-term benefit; where circumstances warrant, counsel may also urge the client to accept these services or programs as part of a dispositional plan. Discharge of this counseling function must, however, be distinguished from the actual decision, which is for the client to make. Once full advice is given, the lawyer's own opinion of the client's needs or interests is subordinated to the client's definition of those interests, and the lawyer-client relationship generally demands that counsel advocate the client's desires as strenuously as possible.

IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Commentary to Standard 9.3(a) (1980).

§ 38.03 THE DISPOSITIONAL OPTIONS AVAILABLE IN JUVENILE COURT

§ 38.03(a) Introduction

In virtually all jurisdictions the range of alternative dispositions available to the court is extremely broad. Even after an adjudication of delinquency based on a finding that the respondent committed a serious felony, the court is empowered to dismiss the case at the dispositional phase upon a showing that the respondent does not need any services and that dismissal is consistent with the best interests of both the respondent and the community. *See, e.g.*, *State ex rel. Juvenile Department of Multnomah County v. Dreyer*, 328 Or. 332, 334, 338, 341 976 P.2d 1123, 1125-26, 1128 (1999). Of course, dismissal is rare in cases in which the respondent was convicted of a serious felony.

Far more common is a disposition that leaves the respondent in his or her own community on probation. Probation itself encompasses a range of alternatives. A judge may require as little as that the respondent live at home, attend school regularly, and meet regularly with a probation officer. Or the judge may insist that while living at home, the respondent attend a program in the community (such as out-patient therapy or vocational training after school) or that the respondent participate in a residential community-based program (such as a drug rehabilitation program).

The more severe dispositional alternatives, from the respondent's point of view, involve placement out of the community. In some States the only placement available to a respondent who is removed from the community is in the state training school. In many States, however, there are various alternatives: group foster care; work camps; private residential programs with schooling; and the state training schools, which may range from minimum to maximum security facilities.

§ 38.03(b) The Judge's Power To Order a Specific Program

In all jurisdictions judges have the power to order that, as a condition of probation, the respondent cooperate with a particular program. If the respondent fails to comply with the rules of the program, s/he will be in violation of probation. This type of conditional probation comes very close to placing the respondent with the program. However, it is not technically a placement. Depending on the jurisdiction, the judge may not have the power to place respondents with certain programs, or the program may not be required to accept the respondent into its care. By ordering probation conditioned upon the respondent's compliance with the rules of the program, the court can remain within the limits of its power and keep the respondent in the community. In addition, in many jurisdictions, judges do have the power to place respondents in particular facilities, at least when the facility is willing to accept the placement.

§ 38.03(c) The Range of Dispositional Alternatives

In most jurisdictions there are no formulas requiring specific sentences for adjudications of delinquency based upon particular crimes. Typically, an adjudication for any offense exposes a juvenile to an indeterminate period of incarceration that can theoretically extend to the child's age of majority, either through an initial indeterminate sentence until the child's age of majority or through annual extensions until that age. Commonly, a sentence of incarceration cannot be based solely upon the fact that a delinquent was convicted of violating the penal law. Rather, incarceration can be ordered only if there is both a crime and a showing that the delinquent requires treatment which must be provided in a secure facility in order to satisfy the community's needs for protection from the offender.

Conceptually, these are the factors that set juvenile court apart from adult criminal court. Though the statutory language may differ among jurisdictions, juvenile court judges typically are required to consider the individual needs and interests of the juvenile when fashioning a final order of disposition and to design an order that is the least drastic alternative consistent with the needs and best interests of the juvenile and the needs of society.

The range of dispositional alternatives and the judge's discretion in choosing among them are both extraordinarily broad. The array of dispositions available in most jurisdictions includes, in order of increasing severity:

1. Outright dismissal of the case without retaining jurisdiction of any kind over the respondent. Dismissal may be ordered for many reasons, including a showing that the respondent does not need or would not benefit from court intervention.

2. Probation without verdict (called by different names in different jurisdictions, including "adjournment in contemplation of dismissal," "diversion," and "deferred entry of judgment"). Sentencing is delayed for a specified period of time (usually six months or one year), and if the respondent remains arrest-free and complies with other court-ordered conditions throughout that period, the case is dismissed (and in many jurisdictions all court records of the

case are sealed). Court-ordered conditions frequently include the requirements that the respondent attend school regularly; participate in some sort of community-based program (*e.g.*, counseling, or alcohol or drug treatment); engage in community service or provide restitution to the complainant; and meet on a periodic basis with a probation officer or other agency official. See § 19.01 *supra*. See also § 14.06(b) *supra*. *But cf. United States v. Wolf Child*, 699 F.3d 1082, 1087 (9th Cir. 2012) (sentencing court's imposition of a supervised release condition prohibiting the defendant from "residing with or being in the company of any child under the age of 18, including his own daughters, and from socializing with or dating anybody with children under the age of 18, including his fiancée, . . . unless he had prior written approval from his probation officer" violated the "fundamental right to familial association," which is a "'particularly significant liberty interest'": the imposition of such a condition required at least "special findings on the record supported by evidence in the record, that the condition is necessary for deterrence, protection of the public, or rehabilitation, and that it involves no greater deprivation of liberty than reasonably necessary").

3. Restitution. Many jurisdictions provide for restitution as a disposition, making it either an available condition of probation (among others) or an end in itself. Restitution typically involves the respondent's paying compensation to a victim. The compensation can take the form of monetary payments – which may extend over a period of time – or can include community work service. In several jurisdictions the juvenile statute establishes an upper limit on the amount of monetary restitution that can be ordered, and some States restrict the use of the restitution option to cases in which the respondent is above a specified age at the time of the dispositional hearing. *See, e.g.*, N.Y. FAM. CT. ACT § 353.6(1) (2023) (fines may not exceed $1,500 and may be levied only when the juvenile is at least ten years old). *Cf. In re Don Mc.*, 344 Md. 194, 196, 202, 686 A.2d 269, 270, 273 (1996) (the trial court "abused its discretion . . . when it awarded restitution without first considering the age and circumstances of the child and in ordering restitution without providing Petitioner's mother a meaningful opportunity to be heard": "The plain language of the statute clearly requires that the court must first consider the age and circumstances of the child.").

Restitution orders are subject to federal constitutional restriction under the basic principles of Due Process and Equal Protection that prohibit the incarceration of indigents in default of fines they are unable to pay (*see*, *e.g.*, *Tate v. Short*, 401 U.S. 395 (1971)). The Supreme Court precedent most closely addressing this restriction involved the revocation of an adult convict's probation for failure to make court-ordered restitutionary payments (and to pay a fine) that were included as conditions in his probationary sentence. In this setting, the Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that the "sentencing court . . . inquire into the reasons for the failure to pay. . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment" (*Bearden v. Georgia,* 461 U.S. 660, 672-73 (1983)). *See also Black v. Romano*, 471 U.S. at 614-15 (discussing *Bearden*). State-court decisions reach the same result through an abuse-of-discretion analysis. *See, e.g.*, *State v. Chelette*, 558 So.2d 770, 771-72 (La. App. 1990) ("Despite th[e] uncontradicted

evidence of defendant's indigent status, the trial judge found defendant was willfully avoiding his restitution obligations. We find this to be an abuse of the trial court's discretion in that the evidence shows defendant has made bona fide attempts to seek the means by which he can pay the restitution."); *State v. Spare*, 374 S.C. 264, 268-71, 647 S.E.2d 706, 708-09 (S.C. App. 2007) ("the circuit court judge abused his discretion in concluding that Spare's failure to pay restitution was willful [and revoking probation on that ground]. Based on our review of the record, we believe the judge failed to make the requisite inquiry into Spare's ability to pay, his reasons for failing to pay, and whether his failure to pay was willful. From all indications, Spare was making progress, albeit slow, toward paying his restitution obligation."). And if revocation is an impermissible disposition in the case of an indigent probationer who fails to make restitution through circumstances beyond his or her control, then the initial imposition of a restitutionary condition on an involuntarily impecunious youth must be equally impermissible.

4. Conditional discharge, also known as suspended judgment. This disposition is a cross between probation and adjournment in contemplation of dismissal. During the period of the suspended judgment, which often runs for one or two years, the respondent is expected to follow rules specified in the judgment. However, the respondent usually is not under direct supervision of a probation officer. At the completion of the period, the final order adjudicating the respondent a delinquent remains intact, unlike an adjournment in contemplation of dismissal.

5. Probation. This disposition – generally available to all respondents in all cases, regardless of the type of crime that the respondent was found to have committed – is the most common disposition used in juvenile court. The typical length of probation is one or two years, depending on the jurisdiction and the gravity of the offense. In some jurisdictions the order of probation is indeterminate and extends until the respondent reaches the age of adult court jurisdiction. It is a common but not invariable practice for probation orders to contain numerous conditions, including meeting monthly with a probation officer, remaining crime-free, avoiding all use and possession of drugs and alcoholic beverages, obeying a curfew, and attending school regularly. Although a court's power to set conditions of probation is broad, there are at least some outer boundaries. *See, e.g.*, *United States v. Green*, 618 F.3d 120, 122-24 (2d Cir. 2010) ("A condition of supervised release must provide the probationer with conditions that 'are sufficiently clear to inform him of what conduct will result in his being returned to prison'"; "it violates due process if 'men of common intelligence must necessarily guess at its meaning and differ as to its application.'"; "The condition of supervised release that prohibits Green from the 'wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to [criminal street] gangs' . . . does not provide Green with sufficient notice of the prohibited conduct. The range of possible gang colors is vast and indeterminate."); *accord, United States v. Carlineo*, 998 F.3d 533 (2d Cir. 2021); *United States v. Sandidge*, 863 F.3d 755, 757-79 (7th Cir. 2017) (the court of appeals – which had previously ruled that the district court's "special condition [of supervised release] prohibiting 'mood-altering substances' was impermissibly vague and overbroad," and remanded the case to the district court for resentencing – holds that the "revised condition[ ] of supervised release," imposed by the district court at resentencing, which prohibited "the 'excessive use of alcohol,' defined [by the district court] as

including ‘any use of alcohol that adversely affects [the] defendant’s employment, relationships, or ability to comply with the conditions of supervision’” is impermissibly vague because it “raises concerns about fair notice to defendants trying to comply and leaves room for arbitrary enforcement by supervising agents”; the court of appeals modifies the condition by inserting the “limiting” adverb “materially” before “affects.”); *United States v. Sealed Juvenile*, 781 F.3d 747, 756-57 (5th Cir. 2015) (probation condition requiring a 15-year-old who was convicted of abusive sexual contact with a child below the age of 12 to seek permission from his probation officer for accessing a computer or the Internet was “unreasonably restrictive” given that “access to computers and the Internet is essential to functioning in today’s society”); *United States v. Cabral*, 926 F.3d 687 (10th Cir. 2019) (when imposing the standard federal supervised-release condition that the defendant must notify third parties if a probation officer determines that s/he poses a risk to them, the district court must provide adequate guidance to the probation officer regarding what constitutes a risk; by leaving the matter in the unconstrained discretion of a probation officer, the sentencing judge violated the doctrine forbidding delegation of judicial functions to a non-judicial officer); *People v. Acuna*, 195 A.D.3d 854, 855, 145 N.Y.S.3d 831, 832 (Mem) (N.Y. App. Div., 2d Dep’t 2021) (vacating a probation condition that “required the defendant to consent to a search by a probation officer of his person, vehicle, and place of abode, and the seizure of any illegal drugs, drug paraphernalia, gun/firearm or other weapon or contraband found”: state law “‘quite clearly restricts probation conditions to those reasonably related to a defendant’s rehabilitation,’” and “[t]he defendant was not under the influence of any substance or armed with a weapon when he committed the crimes at issue, and his criminal history did not include offenses involving substance abuse or weapons. As such, the consent to search condition of probation was improperly imposed because it was not reasonably related to the defendant’s rehabilitation, or necessary to ensure that the defendant will lead a law abiding life.”); *State v. Chapman*, 2020-Ohio-6730, 163 Ohio St. 3d 290, at 290, 293-94, 170 N.E.3d 6, 7, 10 (Ohio 2020) (striking down the community-control release condition that a defendant convicted of failing to pay child support to the mothers of his eleven children “‘make all reasonable efforts to avoid impregnating a woman’” during his probationary period: the validity of a condition of community-control release “looks to whether . . . [it] reasonably relates to the offense at issue, furthers the twin goals of rehabilitation and justice, and does not cause a greater deprivation of liberty than is necessary to achieve those penological goals.”); *United States v. Malenya*, 736 F.3d 554, 559-61 (D.C. Cir. 2013) (probation conditions prohibiting the “‘possess[ion] or use [of] a computer or . . . access to any on-line service without the prior approval of the United States Probation Office’” violated the governing statute’s requirement that “conditions of supervised release . . . ‘involve[ ] no greater deprivation of liberty than is reasonably necessary’”; “We have often noted the ubiquity of computers in modern society and their essentialness for myriad types of employment. . . . A ban on computer and internet usage, qualified only by the possibility of probation office approval, is obviously a significant deprivation of liberty.”; “It is unclear if *any* computer or internet restriction could be justified in Malenya’s case, but the condition in its current form is surely a greater deprivation of liberty than is reasonably necessary to achieve the goals referenced in [the statute] . . . .”); *Rechenski v. Williams*, 622 F.3d 315, 320, 325-32 (3d Cir. 2010) (prison’s classification of a prisoner as a sex offender and recommendation that he be enrolled in a sex offender treatment program, even

though he was "never charged with, nor convicted of, a sexual offense," violated the due process clause); *United States v. Blair*, 933 F.3d 1271 (10th Cir. 2019) (holding impermissible a condition of supervised release that forbade a defendant convicted of child pornography to access the internet except as authorized by his probation officer); *United States v. Eaglin*, 913 F.3d 88 (2d Cir. 2019) (invalidating conditions of probation that prohibited a defendant convicted of failing to register as a sex offender – on the basis of decade-old statutory rape convictions – from accessing the internet without prior court permission or from viewing or possessing adult pornography); *accord, United States v. Ellis*, 984 F.3d 1092 (4th Cir. 2020) ("[T]here is no evidence connecting the internet to any criminal conduct. Mr. Ellis's only federal offense – failing to register as a sex offender – did not involve the internet. Mr. Ellis's violations of his supervised release – travelling without permission, dishonesty with the probation officer, failing to cooperate with treatment – did not involve the internet." *Id*. at 1102-03. "[T]he district court heard no evidence about how . . . pornography use may or may not influence Mr. Ellis's behavior. The government put forward no individualized evidence linking pornography to Mr. Ellis's criminal conduct or rehabilitation and recidivation risk." *Id*. at 1099. "We find, on this record, the conditions banning legal pornography and internet access cannot be sustained as 'reasonably related' [to the nature and circumstances of the offense, the history and characteristics of the defendant, and the statutory goals of deterrence, protection of the public, and rehabilitation] under 18 U.S.C. § 3583(d)(1) and are overbroad under 18 U.S.C. § 3583(d)(2) [providing that conditions be no greater [a] deprivation of liberty than is reasonably necessary" to achieve those statutory goals]." *Id*. at 1095.); *People v. Morger*, 2019 IL 123643, 160 N.E.3d 53, 57, 61, 442 Ill. Dec. 480, 484, 488 (2019) (relying on *Packingham v. North Carolina*, to strike down, as "unconstitutionally broad," a state statute mandating that a sentencing order of probation for "a sex offense, as defined in the SORA [Sex Offender Registration Act]," include a probationary condition "ban[ning] . . . the [probationer's] use of social media . . . , whether or not a minor was involved [in the sex offense] and whether or not the use of social media was a factor in the commission of the offense"); *Janny v. Gamez*, 8 F.4th 883 (10th Cir. 2021) (an encyclopedic opinion collecting the federal cases holding that probation or parole conditions which require releasees to reside in religious halfway houses and other facilities where the rules require participation in religious exercises of instruction violate the First Amendment); *In re Ricardo P.*, 7 Cal. 5th 1113, 1115-16, 446 P.3d 747, 749, 251 Cal. Rptr. 3d 104, 107 (2019) (striking down a probation condition which "required Ricardo to submit to warrantless searches of his electronic devices, including any electronic accounts that could be accessed through these devices," even though "there was no indication Ricardo used an electronic device in connection with the burglaries" that resulted in the convictions and sentencing order, and which was imposed as a probation condition by the sentencing judge "in order to monitor [Ricardo's] compliance with separate conditions prohibiting him from using or possessing illegal drugs": "We hold that the record here, which contains no indication that Ricardo had used or will use electronic devices in connection with drugs or any illegal activity, is insufficient to justify the substantial burdens imposed by this electronics search condition. The probation condition is not reasonably related to future criminality and is therefore invalid"); *In re Edward B.*, 10 Cal. App. 5th 1228, 1231, 1236, 217 Cal. Rptr. 3d 225, 228, 232 (2017) (invalidating a probation condition that prohibited the defendant from "associating with known gang members and gang associates";

the court explains that although "Edward is well advised to keep his distance from gang members and gang associates," the record does not show "a reasonable connection between the condition and the offense or between the condition and future criminality. . . . Any connection between Edward's offense [grand theft from the person] and gang activity is speculation. And in the absence of evidence of gang affiliation or association with gang members or risk of gang involvement on Edward's part, the gang condition is not tailored to his future criminality."); *Commonwealth v. Feliz*, 481 Mass. 689, 691, 119 N.E.3d 700, 703-04 (2019) (construing the state constitution to hold that "prior to imposing GPS monitoring on a given defendant [as a condition of probation], a judge is required to conduct a balancing test that weighs the Commonwealth's need to impose GPS monitoring against the privacy invasion occasioned by such monitoring"); *United States v. Parkins*, 935 F.3d 63, 64-65, 67 (2d Cir. 2019) (vacating a "condition of supervised release requiring 300 hours of community service per year" (which would have amounted to "a total of 695 hours") and remanding for resentencing because "the pertinent policy statement issued by the Sentencing Commission must be read to advise that courts should generally refrain from imposing more than a total of 400 hours of community service as a condition of supervised release," and "[w]e further conclude that Parkins's condition of supervised release requiring 300 hours a year is not reasonably related to any of the relevant sentencing factors and involves a greater deprivation of liberty than is reasonably needed to achieve the purposes of sentencing": "While community service can provide educational or vocational training, Parkins's service consists primarily, if not entirely, of distributing uncooked meals in the St. John's food pantry. In any event, the district court did not find that Parkins was in need of any of the training that community service might provide, and there is no reason on this record to believe that 695 hours of community service is required for Parkins to achieve the benefit such service offers. ¶ The government argues that the community service will keep Parkins occupied in productive activities, thus preventing him from returning to the 'negative influences' that 'led him astray.' . . . But this argument lacks a limiting principle that would allow an evaluation of how much community service is 'greater than necessary' to keep Parkins off the street. And Parkins's job driving for Uber seems at least equally suited to keeping him occupied, and confers the not-incidental benefit of allowing him to provide for his young daughter. Moreover, it appears evident that, as Parkins argues, his productive occupation is disrupted by the amount of community service he must perform."); *United States v. Hamilton*, 986 F.3d 413, 416 (4th Cir. 2021) (holding that a condition of supervised release imposed upon a defendant convicted of possessing child pornography that he "must not work in any type of employment without the prior approval of the probation officer" is overbroad and lacking a sufficient nexus to the nature and circumstances of the offense); *People v. Martin*, 51 Cal. 4th 75, 82, 244 P.3d 496, 500, 119 Cal. Rptr. 3d 99, 104 (2010) ("when under a plea agreement a defendant pleads guilty to one or more charges in exchange for dismissal of one or more charges, the trial court cannot, in placing the defendant on probation, impose conditions that are based solely on the dismissed charge or charges unless the defendant agreed to them or unless there is a 'transactional' relationship between the charge or charges to which the defendant pled and the facts of the dismissed charge or charges"); *State v. Doe*, 149 Idaho 353, 360, 233 P.3d 1275, 1282 (2010) (magistrate judge's order that juvenile respondent's parents "undergo urinalysis testing as a condition of their daughter's juvenile probation" "constituted a search under the

Fourth Amendment of the U.S. Constitution that is presumptively invalid absent a warrant"); *N.L. v. State*, 989 N.E.2d 773, 776 (Ind. 2013) ("a juvenile may only be ordered to register as a sex offender if, after an evidentiary hearing, the trial court expressly finds by clear and convincing evidence that the juvenile is likely to commit another sex offense"). *See also Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (striking down, on First Amendment grounds, a state statute that made "it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter" (*id*. at 1733); the Court explains that the statutory prohibition "from using these websites . . . bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge," and that "[e]ven convicted criminals – and in some instances especially convicted criminals – might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives." (*id*. at 1737)); *Paroline v. United States*, 572 U.S. 434 (2014) (*dictum*) (restitution orders in criminal cases may come "'within the purview of the Excessive Fines Clause'").

6. Prison without walls. A relatively new form of final order of disposition is to confine the respondent to his or her home, usually with the aid of electronic devices, for a specified period of time, such as weekends.

7. Placement in a group home. The least intrusive form of disposition that removes a respondent from his or her home is placement in a community-based group home. These placements often allow the respondent to attend his or her regular school and to remain in close proximity to family and friends. The group home may be state-run or may be operated by a private child-care agency.

8. Indeterminate placement in a private residential facility. There are many alternatives to state-run residential institutions. In every jurisdiction there exist first-rate private residential facilities that at least occasionally accept court-ordered placements of delinquents. Some jurisdictions also permit juveniles to be placed in out-of-state facilities. Private residential facilities usually have greater resources than their state-run counterparts; they are often able to provide the respondent with more help; the conditions under which residents live are usually less harsh and restrictive; and private facilities tend to keep juveniles in their care for less time (often under one year). Placements in private facilities typically are for indeterminate periods, leaving the time of release to the discretion of the administrators.

9. Indeterminate placement in a state-run non-secure or minimum security juvenile facility. In most jurisdictions a sentence of incarceration (called "placement" in some jurisdictions and "commitment" in others) is an indeterminate sentence limited, in theory, only by the respondent's age of majority. In other jurisdictions it is an indeterminate sentence of up to 18 or 24 months that can, in theory, be extended annually until the respondent's age of majority. Once the court has imposed the indeterminate sentence, custody of the respondent is transferred

to the state agency that administers juvenile placement facilities. In most jurisdictions the agency thereafter determines the respondent's release date on the basis of his or her behavior within the institution and his or her prior juvenile court record. In these jurisdictions the judge has no power over the length of sentence that the respondent actually receives. As a practical matter almost all incarcerated juveniles are released by the state-run facility within 12 or 18 months. All jurisdictions maintain a range of facilities from minimum to maximum security. In most jurisdictions the choice of facility to which the respondent will be sent rests with the agency administration. In some jurisdictions the sentencing judge can exercise some control over the choice of the facility.

10. Indeterminate placement in a state-run secure or maximum security juvenile facility. Maximum security facilities constrain the respondent's freedom of movement within the facility to a far greater degree than other facilities. Juveniles placed in maximum security facilities are also likely to remain incarcerated longer than juveniles kept in less secure facilities.

11. Determinate placement in a state-run juvenile facility. A few jurisdictions authorize or require that the respondent receive a determinate sentence or a placement in a facility for a mandatory minimum period of time. These sentences are usually reserved for juveniles who are adjudicated delinquent for committing very serious felonies or for juveniles who have an extensive record of delinquency adjudications. Determinate placements almost always are in maximum security facilities, at least for a portion of the placement period, after which a transfer to a less restrictive facility may be possible.

12. Incarceration in a state-run adult facility. In a few jurisdictions respondents adjudicated delinquent by the juvenile court may end up in adult prisons. This may occur either because the respondent is committed directly to the adult facility by the juvenile court or because the respondent is sentenced by the juvenile court to a term that extends beyond the age at which state-run juvenile facilities may no longer keep minors, and the respondent is transferred to prison upon reaching this maximum age.

§ 38.04 PROCEDURES PRIOR TO AND AT DISPOSITION

§ 38.04(a) The Role of the Probation Department; The Nature and Functions of the Pre-Sentence Report

In most jurisdictions once the respondent has been found to have committed a crime, the probation department will be directed to prepare and submit a report to the judge to be considered when the judge makes the final order of disposition. This report, sometimes called a "pre-sentence report," an "investigation and report," or a "social study," usually will be written by a probation officer assigned to the case by the court or by the probation department. In some jurisdictions the prosecuting agency will recommend a disposition, either by itself or in addition to the probation department.

The probation officer's report is frequently the most important influence at the dispositional hearing. It is a report on the crime and on the background of the respondent. The report will typically include a description of the facts of the present offense (and, in some jurisdictions, a "victim impact statement"); descriptions of the respondent's prior record, of the respondent's attendance and behavior at school, of the respondent's conduct at home as described by the parent, and of the respondent's use of alcohol or drugs; the probation officer's assessment of whether the respondent is remorseful for having committed the crime (including observations about the respondent's attitude and behavior since arrest); a description of all previous efforts to provide the respondent with services (including the respondent's placement history and involvement in any community-based programs); a diagnosis of the respondent's needs; and the probation officer's recommendation of the most appropriate disposition for the respondent. Although the judge is not obliged to accept the recommendation of the probation department (or the prosecuting agency, if that agency is responsible for making a recommendation), a favorable recommendation is enormously helpful to the respondent, and an unfavorable recommendation is often difficult for the respondent to overcome.

§ 38.04(b) Other Diagnostic and Evaluative Material

In many jurisdictions it is common to order a mental health examination (which may consist of a psychological examination, a psychiatric examination, or both) whenever a placement is being considered. Typically, the mental health expert writes a report on the basis of a 30-to-45 minute interview of the respondent and a review of court-related information about the respondent. This report may be relied upon by the probation officer when making his or her dispositional recommendation, and the report itself is ordinarily submitted directly to the judge for consideration at the dispositional hearing. Reports by mental health experts frequently are also sent to agencies that may be considering accepting the respondent into their facilities.

Other tests, including medical and educational testing, may be ordered for the respondent. These would rarely be ordered without special reasons; often it is counsel for the respondent who requests additional tests.

§ 38.04(c) The Nature of the Dispositional Hearing

Depending on the jurisdiction, the dispositional hearing will be conducted either as a full evidentiary hearing with sworn testimony or as a non-evidentiary hearing similar in many respects to an adult sentencing hearing. In jurisdictions in which an evidentiary hearing is conducted, either the probation department or the prosecuting agency will begin the hearing by recommending a particular order of disposition and will then support that recommendation with evidence. In a non-evidentiary hearing the probation department or the prosecuting agency will submit a written or oral recommendation that it will support by argument but not necessarily by evidence.

Part B. Preparing for Disposition

§ 38.05 COUNSELING THE RESPONDENT AND HIS OR HER PARENT AND ADVISING THEM HOW TO BEHAVE DURING THE DISPOSITIONAL PROCESS

§ 38.05(a) Counseling and Conferring with the Respondent

It is very important that counsel carefully and fully explain to the respondent the proceedings that follow an adjudication of delinquency. Respondents must be made aware of the possible dispositions that can be ordered and of the process by which the choice among them will be made. Counsel should emphasize the need to keep all appointments and to cooperate with the probation department.

Counsel should advise the respondent that everything s/he says to the probation officer and other court personnel who may interview him or her during the dispositional process will probably find its way into the probation report and will be used against the respondent if it is unfavorable. Respondents should be informed that probation officers are often interested in a respondent's expression of remorse. Continued protestations of innocence or signs of arrogance or hostility toward the victim or the authorities can be extremely damaging. *But cf*. *State v. Burgess*, 156 N.H. 746, 759-60, 943 A.2d 727, 737-38 (2008) ("where a defendant maintains his innocence throughout the criminal process," "denying a defendant leniency [at sentencing] simply because he fails to speak and express remorse [at sentencing] is equivalent to penalizing him for exercising his right to remain silent" to avoid "jeopardizing his post-trial rights," and thus would violate state constitution's Privilege Against Self-Incrimination); *Johnson v. Fabian*, 735 N.W.2d 295, 297, 310-12 (Minn. 2007) ("extension of . . . [prison] inmates' periods of incarceration as a disciplinary sanction for refusal to admit or discuss the inmates' crimes of conviction in a sex offender program" violates the Fifth Amendment Privilege Against Self-Incrimination if "a direct appeal of th[e] . . . conviction is pending, or as long as the time for direct appeal of that conviction has not expired" or if the admission would contradict the defendant's testimony at trial and thereby expose the defendant to the risk of prosecution for perjury); *State v. Washington*, 832 N.W.2d 650, 652, 661-62 (Iowa 2013) (sentencing judge violated the defendant's Fifth Amendment Privilege Against Self-Incrimination by imposing a term of community service far higher than what the State had recommended in the plea agreement after the defendant invoked his right to silence instead of answering the judge's question whether the defendant "would be 'clean or dirty' if he took a drug test"). Both probation officers and mental health personnel are likely to inquire into other criminal activity by the respondent. Rarely will the respondent help himself or herself by informing those officials about crimes s/he has committed. Similarly, probation officers and mental health personnel routinely inquire about drug and alcohol use. The respondent should be made aware that admitting such use will often have a harmful effect upon the final disposition. In general, counsel wants to emphasize the enormous influence that the probation department's recommendation can have on the judge, so as to put the respondent in the right frame of mind when s/he meets with the probation officer or other court personnel.

In addition to advising the respondent about the mechanics of the dispositional process, counsel must also discuss the likely outcome of the case and the goals that the defense should seek to attain at the dispositional stage. As at the trial stage, this does not mean merely asking the respondent, "What do you want?" Lawyers, possessed as they are with knowledge and experience of the system, must provide their clients with the information that the client needs in order to make intelligent decisions. Lawyers must tell their clients what lies ahead in the process, what are the realistic chances of success of various arguments, and what, in the lawyer's opinion, will be the most effective argument to make. Lawyers also have an important function in helping the client to sort out and think through the client's objectives. However, counseling of these kinds must be done in a way that minimizes the risk of the lawyer's taking decision-making out of the client's hands. Lawyers representing young people possess vast influence and can inadvertently (or deliberately) manipulate their clients toward the result the lawyer wants. It is important for counsel to recognize this reality and to make every effort not to control the respondent when giving advice.

After a first meeting or series of meetings to discuss dispositional alternatives with the respondent, counsel will begin taking steps to secure the disposition that the respondent seeks. However, there may come a time when it is apparent that the respondent's preferred disposition is unobtainable. For example, the probation officer may oppose this disposition for reasons that are likely to prove persuasive to the court, and counsel may be finding it impossible to develop any credible dispositional plan that will meet the probation officer's concerns. This impossibility is often the result of failure to locate a suitable facility into which the respondent can be placed or of failure to find sufficient support for the respondent in the community to enable counsel to develop a positive image of the respondent for sentencing purposes. In these situations counsel should meet again with the respondent and discuss probable outcomes of the case. After devoting substantial efforts to the preparation of the case for disposition, counsel is in a position to ask the respondent to reconsider his or her dispositional goals.

This process may lead the respondent to develop new goals. Often, juveniles are rejected from facilities or programs that are potential alternatives to state-run residential institutions only because the juvenile has neglected to keep an appointment for an admission interview or has displayed a bad attitude in the interview. Sometimes in the light of the awareness that a commitment to a state training school is virtually certain unless the respondent works hard to avoid it, s/he will cooperate in keeping appointments and will improve his or her attitudes when interviewing the personnel of any remaining alternative facilities which counsel may be able to identify.

§ 38.05(b) Discussions with the Respondent's Parent or Guardian

It is also critically important to speak with the respondent's parent before any meetings that the parent may have with the probation officer or other court personnel, such as mental health experts. Counsel should ascertain from the parent what disposition s/he hopes the court will order. Different strategies are required depending on the answer to this question.

If the parent desires the least restrictive disposition possible, then the parent is already allied with the respondent and counsel, and the parent can be made a full member of the team. In this situation counsel should give the parent the same advice that is recommended in § 38.05(a) *supra.* The parent should be informed of the harm that can be done by revealing any criminal activities, drug or alcohol use, serious misbehavior at home, or other bad conduct of the respondent to the probation officer and other court personnel unless the parent is sure that they are already aware of this information. The parent should be informed of the procedures that lie ahead in the dispositional process and of the importance of the respondent's cooperating and maintaining good relations with the probation officer and other court personnel.

It is important for the parent to understand both the influence that the probation recommendation will likely have on the final outcome of the case and the influence that the parent can have on the recommendation made by the probation department. If the parent is properly instructed about the importance of cooperating with probation authorities, of demonstrating a concern for the respondent and a willingness to be attentive to the respondent's needs, and of supporting the respondent by reporting favorable information about him or her, the parent is most likely to be an asset in obtaining a favorable disposition. In addition, the parent will be able to influence the respondent to cooperate during the dispositional process.

If the parent is not already on the respondent's side but desires placement or some form of punishment for the respondent, counsel should not be quite as forthcoming with the parent and cannot treat the parent as an ally. But neither should counsel accept the parent's goal on its face. Counsel is free to, and should make every effort to, persuade the parent to support the least restrictive disposition feasible. This can sometimes be accomplished by informing the parent of the many alternatives to placement available in the community and the many ways the respondent can be supervised and helped without the necessity of a placement out of the home. Counsel should also consider the strategies recommended in § 3.21 *supra,* which discusses ways to persuade parents to support the release of a respondent who is being held at the precinct. One effective strategy is to inform the parent about known abuses in juvenile facilities and the existence of any lawsuits brought by inmates or former inmates seeking redress for injuries they received while in placement. Counsel is acting responsibly by truthfully telling a parent negative information which the parent does not know so that the parent's final view of what is the most appropriate disposition for his or her child is truly an informed decision.

§ 38.06 MEETING WITH PROBATION OFFICERS AND OTHER COURT PERSONNEL BEFORE THEY PREPARE DISPOSITIONAL REPORTS

Counsel should play an active role in the pre-dispositional process described in §§ 38.04(a)-38.04(b) *supra.* In many jurisdictions the individuals most likely to affect the final disposition are the probation officer and the psychiatrist or psychologist (if either or both of these types of mental health experts are used) who will evaluate the respondent and provide a recommendation and report to the court.

The probation officer will always meet with the respondent and his or her parent for a personal interview. This interview is often a major factor in the probation officer's final recommendation. It can be very useful for counsel to meet with the probation officer before s/he conducts this interview. Counsel should bring to the probation officer's attention all favorable information about the respondent that s/he likely does not know. Ideally, counsel may be able to influence the officer's ultimate recommendation. Even if counsel has no new information, counsel may be able to get the probation officer to think about the respondent in a new light by informally advocating a favorable perspective ("Considering the problems this kid has had, I think s/he's really made a terrific adjustment, don't you?").

Similarly, counsel should try to speak to the mental health expert who is scheduled to do an evaluation before s/he interviews the respondent. Much of an evaluating expert's recommendation will be based on the expert's interpretation of the respondent's attitude during this 30-to-45-minute interview. It is a truism that one's biases affect his or her judgment. If the only people with whom the evaluating expert has spoken before the interview are the prosecutor and the probation officer, there is a risk that the expert will have fixed negative ideas about the respondent which will color the evaluation process. Although counsel cannot completely avert the risk of negative bias, a meeting at which counsel reveals favorable things about the respondent before the expert first sees the respondent may be quite useful.

§ 38.07 DEALING WITH COURT MENTAL HEALTH PERSONNEL

As discussed in §§ 12.15(a) and 13.14 *supra,* the Supreme Court of the United States has held that the Fifth Amendment forbids a state-hired psychiatrist to interview an accused person and obtain information to be used at a sentencing hearing unless the accused has validly waived his or her privilege against self-incrimination. Failure to give the accused a *Miranda* warning and to obtain a waiver of the right to remain silent renders the interview results inadmissible for sentencing purposes. *Estelle v. Smith,* 451 U.S. 454 (1981). *See also Mitchell v. United States*, 526 U.S. 314, 329 (1999). *See generally* LOURDES M. ROSADO & RIYA S. SHAH, PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM (Juvenile Law Center 2007); Lourdes M. Rosado, *Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court*, 38 WASH. U. J. L. & POL'Y 177 (2012).

Smith has been held to apply to juvenile court proceedings. *See, e.g., In the Matter of the Appeal in Pima County Juvenile Action No. J-77027-1,* 139 Ariz. 446, 679 P.2d 92 (Ariz. App. 1984); *In the Matter of J.S.S.*, 20 S.W.2d 837, 844-47 (Tex. App. 2000); *State v. Diaz-Cardona*, 123 Wash. App. 477, 487-88, 98 P.3d 136, 140-41 (2004). See also § 13.14 *supra*. Thus a respondent has the right to claim the Fifth Amendment and refuse to talk to a psychiatrist in any court-ordered mental examination if the results of the examination could be used to support a more restrictive disposition than the respondent might receive without them. The difficult question is whether counsel should advise a respondent to assert the Fifth Amendment privilege and decline to be interviewed by a state-hired expert in preparation for the dispositional hearing.

In some jurisdictions juvenile court judges routinely order a psychiatric or psychological examination or both whenever placement is likely. In other jurisdictions examinations are ordered only in special cases or on request of the respondent. Counsel should always inform the respondent of his or her right not to answer questions at any examination, but it may be poor advice to recommend that s/he exercise that right and remain silent.

In most jurisdictions neither the examination results nor any particular findings that might be based upon them are a precondition to imposing the maximum authorized sentence. The judge uses the examination results in deciding whether or not to impose a restrictive sentence, but s/he ordinarily has the power to impose the same sentence without any psychiatric or psychological results. In these circumstances it becomes a pertinent consideration that the respondent's assertion of the right to remain silent will typically be seen by the judge as an indication of non-cooperation and evidence of a lack of contriteness. Although it would violate the Fifth Amendment for the probation officer, prosecutor, or judge explicitly to treat the invocation of a constitutional privilege as a ground for viewing the respondent negatively, many probation officers and judges will implicitly do so. Counsel may thus prefer to advise the respondent to cooperate fully with the state-hired expert. If counsel does give this advice, counsel should prepare the respondent thoroughly for the expert's questions, informing the respondent that the expert often will be looking for expressions of contrition and remorse and that admissions to the expert of additional criminal activity, drug or alcohol use, or other misbehavior by the respondent may hurt the respondent unless these are already known to the authorities. See § 38.05(a) *supra.*

In jurisdictions in which specific findings that may be based upon an expert's report are necessary to enhance a sentence, it may be beneficial to the respondent to remain silent during the expert's examination. Even here, however, the respondent's failure to cooperate may hurt. If the expert is unable to conduct an interview, s/he may not be able to submit a report or to testify at the dispositional hearing on the basis of direct impressions obtained during the examination. But s/he may nonetheless be able to submit a negative report based on the respondent's history and background – information that the expert has received from the probation department and court records. Since the expert will almost certainly regard the respondent's invocation of the Fifth Amendment as a sign of non-cooperation, the expert will hardly be in a favorable frame of mind when writing his or her report.

It is clear under *Smith* that the respondent may waive the Fifth Amendment privilege and agree to an examination. The waiver may be explicit, given in response to questions put by the expert. A waiver may also be inherent in a request by the respondent for an examination by a state-hired expert. In the wake of *Buchanan v. Kentucky,* 483 U.S. 402 (1987), it is unclear whether the respondent's request for a court-appointed defense expert under *Ake v. Oklahoma,* 470 U.S. 68 (1985) (see § 38.09 *infra*), constitutes a waiver of the privilege not to undergo examination by a state-hired expert. The analysis in § 12.15(a) *supra* supports the conclusion that merely requesting the expert is not a waiver and that the respondent would have to introduce evidence based on the defense expert's examination or otherwise rely affirmatively upon the results of that examination in conducting the dispositional hearing in order for a court to find that

the respondent has waived the Fifth Amendment privilege.

Many of the issues raised by *Smith* have not yet been settled as they apply to the dispositional phase of delinquency proceedings. In fact, many juvenile court personnel are unaware of *Smith* and its implications for juvenile court practice. For this reason, counsel may be able to take a wait-and-see approach. It is rare for a court-ordered expert to advise a respondent of any rights before or during an examination. The failure to obtain an explicit waiver of rights is a violation of *Smith,* and counsel may prefer to read the report before deciding whether to move to suppress it or whether to allow it to be used without objection at the dispositional hearing.

§ 38.08 OBTAINING A COPY OF THE PRE-SENTENCE REPORT AND OTHER REPORTS AND RECORDS FOR USE AT DISPOSITION

The most important document that will be considered by the judge at the dispositional hearing is the probation officer's report, described in § 38.04(a) *supra.* It is critical that counsel obtain this report in advance of the dispositional hearing. Counsel should also make an effort to obtain any other reports about the respondent that are likely to be introduced at the hearing. See § 38.04(b) *supra*.

Several jurisdictions entitle the respondent to this information by statute. *See, e.g.,* N.Y. FAM. CT. ACT § 351.1(5)(a) (2023) (requiring all diagnostic assessments and probation investigation reports to be made available for copying and inspection at least five days before the dispositional hearing). In other jurisdictions case law recognizes a right to discovery of the information. *See, e.g., J. B. v. State,* 418 So.2d 423 (Fla. App. 1982).

Even when the jurisdiction does not have a clear rule granting the respondent access to probation and other pre-dispositional reports, counsel should try to obtain them by informally asking the probation officer in charge of the case to share them. Many probation officers will give information to counsel informally. But there may be disadvantages to getting it this way. When a probation officer has shared information with counsel in contravention of law, the lawyer cannot reveal in court, without endangering his or her relationship with the probation officer, that s/he obtained the records prior to the hearing.

If counsel is unable to obtain the reports informally or thinks it unwise to do so, counsel should make a motion for an order of the court requiring their disclosure. The motion should include an argument that failure to disclose the reports to the defense before the hearing will violate the respondent's right to effective assistance of counsel, since an essential part of that right is the capacity to prepare. *See, e.g., In the Matter of Jose D.,* 66 N.Y.2d 638, 485 N.E.2d 1025, 495 N.Y.S.2d 360 (1985). In addition, counsel should argue that allowing access to the reports before the hearing will promote judicial efficiency by avoiding the need for a continuance and a second hearing date if information revealed at the hearing surprises the defense. A motion is necessary in order to make an adequate record for appeal in the event of an unfavorable disposition in a case in which counsel was unable to obtain timely access to reports used in the

dispositional process. *See, e.g.*, *J.B. v. State*, 418 So.2d at 424.

In addition to obtaining the reports, counsel should subpoena all records bearing on the respondent that counsel will want to examine in preparation for the hearing. School records, child care program records and other records relating to the respondent that counsel has not previously inspected should be obtained in advance of the hearing.

If the respondent is or has been in special education, counsel should seek to obtain all school records concerning the respondent's placement in special education. These include the Individual Educational Placement (IEP) that must be developed for each student in special education and the clinical material developed for or by the Committee on Special Education, which is the entity that must recommend the particular educational placement appropriate for each student. These records are not necessarily kept in the local school attended by the respondent but may be in the district school building or some centralized facility. They often contain information about the respondent and his or her needs that is highly useful at the dispositional hearing.

Because the respondent's educational records, unlike the mental health and probation reports prepared for the dispositional hearing, are not in the possession of court personnel, a motion is not the appropriate procedure for obtaining them. Rather, counsel should have the respondent and the parent(s) execute a release of the records (see § 5.11 *supra*) and should secure a subpoena *duces tecum* addressed to their custodians (see § 8.17 *supra*).

School records and reports prepared by probation officers, psychiatrists, psychologists, and social workers form the basis for much of the information that will be before the court at the dispositional hearing. Counsel should review these materials with care, take notes on what is in them, and find out the meaning behind any term or diagnosis with which counsel is unfamiliar.

§ 38.09 SECURING PSYCHOLOGICAL EVALUATIONS AND OTHER ASSESSMENTS OF THE RESPONDENT

Planning and preparing for a possible dispositional hearing should begin when the lawyer first meets the respondent. As discussed in § 5.08 *supra,* information about the respondent's social history – for example, whether s/he ever lived or was placed outside of his or her family's home – is important to have at the outset of a case. This information will alert counsel to areas in which additional evaluative material would be useful in the event that the case ever reaches a dispositional hearing. By focusing early on the possibility of a future dispositional hearing, counsel is able to request the independent social history workups and psychological or psychiatric evaluations that are often essential to counteract negative reports and assessments that are made by court personnel.

In preparation for the dispositional hearing, counsel may wish to have the respondent evaluated by a defense expert either to prove that the respondent has no need for supervision or

(more often) to demonstrate with precision the particular needs that the respondent does have. If counsel lacks funds to hire an expert, s/he should request them from the court under *Ake v. Oklahoma,* 470 U.S. 68 (1985). See §§ 11.03(a), 13.06 *supra.* The utility of hiring a defense expert is that his or her evaluation is protected by the respondent's attorney-client privilege, *see, e.g., People v. Lines,* 13 Cal. 3d 500, 507-16, 531 P.2d 793, 797-804, 119 Cal. Rptr. 225, 229-36 (1975), and counsel has the option of ignoring any unfavorable results without the prosecutor or the court learning about them. To preserve this option, counsel should be sure that both the motion for funds and counsel's retainer agreement with the expert specify that the expert is being retained "as a defense consultant, to examine the respondent and advise counsel regarding the respondent's mental state for the purpose of assisting counsel to prepare for the dispositional hearing and to present information at the hearing if this is warranted by the respondent's needs." In some jurisdictions, communications to and from an expert retained unconditionally to *testify* or to *report to the court* on the respondent's behalf would not be protected by the privilege.

In selecting an expert for a particular case, counsel is well advised to consult other defense lawyers who have experience in juvenile court and, ideally, who are familiar with the judge before whom the respondent's case is scheduled. Some judges are more or less impressed with specific fields of expertise, such as psychology or psychiatry, and more or less impressed with individual experts who have been to court in the past. Sometimes personnel of the probation department or the clerk's office are able and willing to tell counsel the names of experts whom a particular judge repeatedly appoints as a court's witness or consultant when a "neutral" or "impartial" expert is desired; these experts will obviously have a credibility edge with the judge; but counsel should check them out with experienced defense lawyers, if possible, because some of them may be unsympathetic to respondents or prone to recommend restrictive dispositions.

Counsel might also consider consulting a faculty member of a university psychiatry or psychology department to obtain a list of qualified experts. Depending on the purpose for the use of the expert, counsel may prefer a psychiatrist over a psychologist or *vice versa.* As noted in § 12.10 *supra,* as a general rule psychologists tend to go deeper into the respondent's family history, social background, and emotional problems than many psychiatrists. However, this general rule should not dictate an undiscriminating preference for psychologists over psychiatrists. In certain cases a psychiatrist may be more useful to the defense, and in all cases the knowledge and experience of the particular expert should be considered. For example, when counsel wishes to develop evidence that the respondent has specific needs and that, in the light of those needs, a particular type of dispositional alternative or a particular placement is appropriate, the expert's knowledge of available programs and their capacities to serve the respondent's needs should be the most important criterion in selecting the expert.

When retaining an expert, counsel should explain to the expert precisely what counsel's game plan is and what role counsel hopes the expert will be able to serve. Although the expert's informed views after examining the respondent will refine this plan and may sometimes require its modification, counsel's purposes in consulting the expert should nevertheless be made clear at the outset. An initial discussion of these purposes may lead counsel to conclude that the

particular expert should not be retained. And if the expert is retained, s/he will be in the best position to assist the defense after being given a clear picture of what the defense is seeking to achieve in the dispositional phase.

§ 38.10 ENGAGING A SOCIAL WORKER

Often the most important resource for the respondent in developing a dispositional alternative that the court is likely to accept is a trained and knowledgeable social worker. The job requires an extensive knowledge of programs and services that few lawyers possess, and even for an unusually well-informed lawyer it is extremely time consuming without a social worker's help. If counsel works in a public defender office that has social workers on its staff, counsel should request their assistance shortly after meeting with the client to discuss the disposition.

Counsel who is not so fortunate as to have recourse to a staff social worker should consider retaining one for the particular case. If counsel is assigned, s/he should consider making a motion for court funds to employ a social worker as a defense consultant. The motion should be supported by an affidavit explaining the reasons that counsel requires expert assistance. The same principles that warrant the allowance of funds to hire other experts, such as psychiatrists, apply to social workers. See §§ 11.03(a), 13.06, and 38.09 *supra.*

In some localities there are organizations dedicated to finding and developing alternatives to institutionalization or prison. If there is such an organization in the vicinity, it will probably be worth calling to find out whether it has a social worker on its staff who is able to become involved in the case or whether it can recommend a suitable social worker.

In a community in which the local public defender office has social workers on its staff, counsel may wish to request their assistance even if s/he is not affiliated with that office. At the least, these social workers may be willing to share their knowledge of available programs and of names and telephone numbers of people to call for information. Their tips can be extraordinarily helpful when counsel is not conversant with the full range of programs and services that might enter into a dispositional plan in any particular case.

§ 38.11 GATHERING MITIGATION WITNESSES, LETTERS OF SUPPORT, AND EXHIBITS

Counsel should endeavor to interview people who know the respondent and are in a position to testify to the respondent's good character or capacity to benefit from a community-based program – teachers, social workers, program counselors, coaches, employers, ministers, adult friends, and neighbors. Those who have favorable things to say about the respondent and who are likely to make a good impression on the probation department and the court should be asked and assisted to write letters setting out their positive comments. These letters can first be drafted by counsel on the basis of counsel's interview notes and then sent to the witness for review and further input. If the witness uses personal stationery, s/he should write the final

version up on that; or if s/he uses business or official stationery, counsel or the witness should arrange to have the final version typed on the witness's letterhead for the witness to sign. Whenever possible, counsel should assist the witness to shape the letter so that the witness's contribution to the case fits into the overall pattern that counsel is attempting to develop for the court.

Occasionally, witnesses are reluctant to provide information or to have their views reduced to writing because of institutional prohibitions: for example, a teacher or a coach may be told by a principal that s/he cannot become involved. Counsel should speak directly with the official who has forbidden the witness to cooperate and, if this does not solve the problem, counsel should speak with the official's hierarchical superior. Most officials will come around and permit an employee to cooperate once they are confronted by a lawyer who informs them in an amiable but obviously determined manner, first, that all that is required of the witness is the writing and signing of a letter, not losing a day of work by coming to court; second, that the witness's information is important because the respondent's liberty is at stake; and third, that counsel hopes it will not be necessary to call the court's attention to the official's interference with the collection of evidence needed in a judicial proceeding.

Letters of support can be extremely helpful to the respondent. Shared with the probation officer while s/he is still writing his or her report, they may acquaint the officer with favorable aspects of the respondent's background and activities about which s/he was unaware and may make the difference between a recommendation of probation and a recommendation of placement. The letters may also be presented directly to the court either as formal exhibits offered in evidence at an evidentiary hearing (see § 38.22 *infra*) or as attachments to the respondent's sentencing memorandum in a jurisdiction that conducts non-evidentiary dispositional hearings (see § 38.25 *infra*).

Counsel should collect other types of exhibits as well. School and institutional records (§ 38.08 *supra*) and, when appropriate, reports by a social worker (§ 38.10 *supra*), psychiatrist or psychologist (§ 38.09 *supra*) should be kept in the file for potential use as exhibits. Counsel should be creative in gathering exhibits. S/he should consider, for example, using trophies, honors, and awards that the respondent has won, team photographs and news photos or snapshots of the respondent in activities, certificates of academic or other achievement, and items the respondent has made that demonstrate his or her artistic talents. The idea is to present the respondent to the probation officer or judge in a different and more favorable light than that in which the respondent would appear if viewed only as a convicted delinquent.

§ 38.12 MEETING WITH PROBATION OFFICERS AND OTHER COURT PERSONNEL AFTER THEIR DISPOSITIONAL REPORTS ARE WRITTEN

In addition to meeting with the probation officer, court experts, and other evaluating personnel before their work is begun, counsel should try to meet with these individuals again after their reports are prepared but before the dispositional hearing. These meetings can serve

several purposes. First, counsel may be able to persuade the individual to change an unfavorable recommendation in the light of events that have occurred since the writing of the report. Second, counsel may be able to learn what the recommendation will be, so as to prepare better for the hearing. Third, counsel may be able to learn the bases for the recommendation and, if it is unfavorable, begin to gather specific items of information needed to oppose it, either by refuting its bases or by diluting them with additional facts.

When a psychiatrist or psychologist has written a report that is likely to be important at the dispositional hearing, counsel's meeting with the psychiatrist or psychologist can profitably focus on:

1. Clarifying any confusing information in the report;
2. Breaking down diagnoses into terms that counsel can understand;
3. Determining the bases upon which the report was formulated and its recommendation was made;
4. Determining whether community services would be appropriate to achieve the purposes of a recommended placement; and
5. Determining what, if any, additional information might have changed the recommendation.

In addition, counsel should seek to elicit facts relevant to the weight that ought to be given to the recommendation. These will assist counsel to prepare for cross-examination in jurisdictions in which the dispositional hearing is evidentiary; and the same facts will guide counsel's preparation of written materials for submission to the court in jurisdictions in which the hearing is non-evidentiary. For these purposes counsel will need to uncover facts that are often not contained in the report. They include:

a. The qualifications of the expert (education and training, employment history, length of time at this particular job, length of time working with juveniles, and so forth).
b. The number and length of contacts that the expert had with the respondent.
c. The setting in which those contacts occurred (time of day, place, noise level, distractions, number of other people present, and so forth).
d. The quality of the contacts (respondent's communicativeness or uncommunicativeness, rapport with the expert, and so forth).
e. The conduct of the interview (what questions were asked; what answers were given; what information was elicited; what diagnostic tests were used, if any; what knowledge about the respondent, if any, did the expert have before the interview, and so forth).
f. All other factual data that entered into the evaluation and the recommendation (with whom, if anyone, did the expert speak about the respondent; what records relating to the respondent, if any, did the expert examine; what information about the respondent did the expert gather; what family members, teachers, employers,

neighbors, and counselors did the expert *not* consult; whether the expert visited the respondent's home, and so forth).

§ 38.13 NEGOTIATING WITH THE PROSECUTOR OR PROBATION OFFICER

Working out an agreed disposition with the probation department or the prosecutor is often effective. Their agreement does not bind the judge but will usually be influential with him or her. Getting the respondent enrolled in a promising program *before* beginning discussions with probation officers and prosecutors can be an important factor in obtaining their agreement.

In many jurisdictions, if the prosecutor and defense counsel are agreed about the appropriate dispositional outcome, it is possible to present the matter to the court for an immediate disposition without any report or investigation by probation personnel. This approach is often worth pursuing, particularly in cases in which there is information about the respondent's background that has not yet come to light and that is likely to make a negative impression on a judge or probation officer. Eliminating unnecessary inquiries into the respondent's background avoids the risk that they will lead to unfavorable results.

§ 38.14 FINDING SUITABLE COMMUNITY-BASED OR RESIDENTIAL ALTERNATIVES TO INCARCERATION AND ARRANGING FOR THE RESPONDENT'S ADMISSION TO A PROGRAM PRIOR TO THE HEARING

If, on the basis of information obtained at the early stages of a case, counsel calculates that placement out of the home is a realistically possible final disposition, the best strategy available to the respondent may be to have begun a community-based treatment program before the dispositional stage is reached. This sometimes means that waiting until after trial to begin preparation for the dispositional hearing is waiting too long. It may foreclose the opportunity to make one of the strongest arguments that can be made at the dispositional phase of a delinquency proceeding – that since the time when the respondent committed the offense for which s/he has been adjudicated delinquent, s/he has been getting the help necessary to assure that the wrongdoing will not be repeated.

Judges are far more apt to accept the respondent's recommendation for a disposition when the recommended disposition is already underway and has been working. Frequently, judges' reluctance to use community-based programs arises from a lack of confidence that the respondent will attend or participate regularly or that the program will do any good. Predicting the future is always precarious. Counsel can reduce the judge's resistance to betting on the respondent by eliminating as many unknown variables as possible. When the respondent is already in a program, it is possible to argue that experience to date demonstrates both the respondent's willingness to attend this kind of program regularly and the program's initial success in assisting the respondent to stay out of trouble. The risk involved in the tactic is the other side of the same coin. If court officials, such as probation officers, are aware of the respondent's involvement in a community-based program while the delinquency case is going on,

any failure of the respondent in the program is likely to come to their attention and if the probation department decides to recommend a placement out of the community, it will be able to refer to the respondent's failure during the pendency of the case as evidence that a more restrictive alternative is required.

Counsel should, if possible, obtain the services of a social worker to assist in identifying suitable community-based programs and arranging the respondent's admission into one of them. See § 38.10 *supra.* If counsel cannot get a social worker's help even to the extent of giving counsel a list of possible programs or informational contacts, counsel may be able to obtain a list or pamphlet of programs in the community by asking the local United Way, other social agencies – especially those that work with adolescents – or the local welfare department. Counsel needs not become an expert in community programs in order to represent the respondent adequately at the dispositional stage. But basic knowledge of these programs – including who runs them, how adolescents get admitted to them, and what services they are able to provide – is essential; and if counsel cannot secure the assistance of a social worker, counsel will have to acquire that knowledge personally. It may be necessary to arrange an interview for the respondent with a particular program or even to accompany the respondent to the interview. Counsel should do as much as possible to ease the respondent's task of gaining admission.

§ 38.15 TIMING OF THE HEARING: RIGHT TO A SPEEDY HEARING; DEFENSE MOTIONS FOR A CONTINUANCE

Many jurisdictions provide that dispositional hearings must be commenced or completed within a certain number of days after the fact-finding hearing is completed. It may not be in the interest of the respondent to insist upon the strict enforcement of this rule.

If the respondent is detained pending the dispositional hearing, there is obviously more reason to press the court to hold the hearing within the statutory period than if the respondent is at home. However, even when the respondent is detained, counsel's insistence upon a speedy dispositional hearing can irritate the judge or cause the judge to order an unfavorable placement because of lack of time to think about or to arrange a better one. If there is some hope that the judge can be persuaded to place the respondent in a program which the respondent prefers, it may be best to wait until the judge is ready to make the preferred placement.

If the respondent is not detained pending the dispositional hearing, delay may or may not work to the respondent's advantage. When disposition is delayed long enough for the respondent to prove that s/he can be maintained in the community without getting into further trouble, the probability of probation or even of a conditional discharge is increased. *See e.g., In re Shannon A.,* 60 Md. App. 399, 483 A.2d 363 (1984). The risk is that the respondent will *not* stay out of trouble. If s/he is rearrested during the pendency of the dispositional hearing, the court may conclude that placement out of the community is necessary. Counsel should weigh the possible benefits and risks of delay on the basis of a realistic assessment of the respondent's capabilities and attitude and should make the decision case by case.

If counsel is unhappy with the probation officer's recommended disposition or anticipates an unsatisfactory order by the court, counsel may want to object to going forward with the dispositional hearing until all of the diagnostic reports required by statute or caselaw have been completed. If there are reports still to be made, it may be reversible error for the court to conduct the hearing without having the necessary reports in hand. *See, e.g., In the Matter of Jose Luis Q.,* 64 A.D.2d 600, 408 N.Y.S.2d 510 (N.Y. App. Div., 1st Dep't 1978). An objection by counsel during the hearing may require a continuance until the reports are complete.

§ 38.16 SUBMITTING A SENTENCING MEMORANDUM PRIOR TO THE HEARING

§ 38.16(a) Reasons for Submitting a Sentencing Memorandum

In jurisdictions in which the dispositional hearing is non-evidentiary, the principal means by which the judge will receive facts and arguments bearing on disposition is through written submissions and through the oral arguments made at the hearing. The court will always have before it a written submission from the probation department. Counsel should almost always submit a sentencing memorandum for the respondent.

This memorandum serves several purposes. (1) It allows counsel to provide the court with extensive documentation and detailed arguments that the judge may lack the patience to listen to in oral form. If counsel has done a thorough job preparing for the dispositional hearing, there will probably be more relevant information to share with the court than the judge will allow counsel to describe orally. (2) A written submission enhances counsel's ability to present the case for the respondent thoroughly and accurately, since counsel can edit and polish it. (3) A written report will usually be read by the judge earlier than the judge would have heard counsel's oral arguments. It provides an opportunity to persuade the judge before s/he has assimilated the probation report or heard the prosecutor's arguments. If counsel's written submission makes a strongly favorable initial impression on the judge, the judge may retain that impression even after hearing countervailing arguments. (4) Finally, a well-written sentencing memorandum suggests a level of professional quality that will often work to the client's advantage. The more care and effort counsel has put into preparation for the dispositional hearing, the more inclined the court will probably be to think that the respondent deserves a fair disposition.

Most of the same benefits flow from a sentencing memorandum in jurisdictions in which the dispositional hearing is evidentiary. Written presentation can organize material in a way that complements the more dramatic but less orderly effect of testimony and exhibits. In evidentiary-hearing jurisdictions, however, counsel may want to focus the memorandum on (a) summarizing and analyzing facts that are already known to the prosecutor (such as those developed at the adjudicative hearing) and documentary materials that are readily available to the prosecutor (such as the respondent's juvenile court records) or contain no surprises, and (b) relating these facts and materials and the *kinds* of additional evidence that counsel will present at the dispositional hearing to counsel's theory of why a particular disposition is appropriate or inappropriate. Counsel may not want to include in the memorandum specific factual details that will make the

respondent's evidentiary case boringly redundant of what the judge has previously read or will give the prosecutor a head start in preparing to rebut it.

§ 38.16(b) Writing the Sentencing Memorandum

A sentencing memorandum is ordinarily written either as a formal memorandum or as a letter to the court, depending on local custom and the particular judge's preference. Whichever form the document takes, counsel can and usually should attach as many exhibits to the memorandum as are useful. Any type of attachment that is informative is appropriate. Attachments can include the various kinds of letters and exhibits suggested in § 38.11 *supra* – anything counsel has been able to gather that presents the respondent in a more favorable perspective than his or her delinquent acts alone provide. These attachments should be designed to humanize the respondent, to make the judge think well of the respondent, and to give the judge reasons to allow the respondent to continue to live in the community. Letters attesting to the respondent's participation in after-school activities (or photographs or tangible products of the respondent's participation in those activities), for example, can be very helpful. Once the judge knows that the respondent's after-school hours are taken up in kinds of activities that strike the judge as wholesome or at least not dangerous, the respondent's chance for a disposition of probation is increased.

Section 38.16(a) *supra* notes that a written submission has the advantage of providing the judge with more information than the judge would allow counsel to present orally. This does not mean that it is effective advocacy to write a voluminous sentencing memorandum. The memorandum's value depends on the judge reading it. Different judges have differing degrees of toleration for lengthy reports. It is important for counsel to find out about the particular judge's attitudes in this regard and to prepare the report with them in mind. Probation department personnel, defense lawyers who have practiced before the judge, and social workers assigned to juvenile cases by the local public defender office are useful sources of information. If counsel learns that the judge is likely to read everything in a respondent's sentencing memorandum, counsel will ordinarily want to develop in detail all of the favorable facts s/he can muster about the respondent. If counsel learns that the judge will probably not read a lengthy memorandum, counsel should keep it short and should state succinctly at the beginning the reasons supporting counsel's proposed disposition.

Some arguments about the factual details of the underlying offense are highly persuasive; others are not. If the respondent was a relatively passive participant in an offense committed principally by his or her companions, that is a helpful point to emphasize. If the companion(s) used a weapon but the respondent never had any weapon in his or her possession, that fact should also be emphasized. If the respondent was younger than the companions, their respective ages can be stressed in arguing that the respondent was influenced by a group of older youths (or adults) with whom s/he no longer associates. Arguments that may appear to make light of the offense should ordinarily be avoided. As mentioned in § 19.03(b) *supra,* counsel does not want to play into rejoinders by the prosecutor or the judge that counsel is inappropriately minimizing

the gravity of the crime or the harm to the victim. However, if there was no physical injury to any victim and if the respondent committed no acts that were intended or likely to injure anyone physically, counsel can refer briefly to the fact that the offense was nonviolent in arguing that a disposition which leaves the respondent in the community is not unduly risky.

Often a respondent's best dispositional argument is that restrictive forms of placement are unnecessary because the causes of the respondent's wrongdoing have already been eliminated. To support this argument, counsel should present in the sentencing memorandum all the information s/he can acquire about changes in the respondent's situation and habits since arrest, including involvement in after-school programs, good school attendance, new school or residence, and development of a new set of friends.

Certain cases lend themselves to an effective argument that the respondent's arrest served as a catalyst in changing the respondent's way of life and turning him or her around. Many juvenile court judges believe deeply in rehabilitation and can be persuaded that the respondent has learned an important lesson about the wrongfulness of engaging in criminal behavior. *But cf. State v. Burgess*, 156 N.H. 746, 759-60, 943 A.2d 727, 737-38 (2008) (discussed in § 38.05(a) *supra*); *Johnson v. Fabian*, 735 N.W.2d 295, 297, 310-12 (Minn. 2007) (discussed in § 38.05(a) *supra*). Once persuaded of that, they will favor a disposition no worse than probation. To persuade them, counsel will want to include in the sentencing memorandum both (1) objective evidence of improvement in the respondent's behavior and (2) evidence that the respondent realizes s/he did wrong and is genuinely remorseful. The latter evidence may include quotations from the respondent or from people who have spoken with the respondent since arrest. *See generally* Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469 (2002); Adam Saper, *Juvenile Remorselessness: An Unconstitutional Sentencing Consideration*, 38 N.Y.U. REV. L. & SOC. CHANGE 99 (2014).

§ 38.17 THE RIGHT TO AN EVIDENTIARY DISPOSITIONAL HEARING

To fashion a dispositional order in a juvenile case, the statutes of most jurisdictions require more information than that the respondent committed a particular crime. Facts about the respondent's background and needs are also indispensable. In virtually all jurisdictions it is reversible error for the court to enter a final order of disposition without first receiving a complete probation investigation and report. *See, e.g., E.C. v. State,* 445 So.2d 661 (Fla. App. 1984). The report is presented and its results are developed at the dispositional hearing.

§ 38.17(a) Conceptual Underpinnings for a Dispositional Hearing

In many jurisdictions juvenile courts do not commonly conduct evidentiary dispositional hearings. If counsel nevertheless wants one, s/he should file a motion for an evidentiary hearing on the ground that the court's statutory responsibilities and the due process clauses of the state and federal constitutions demand it. This and the following subsection develop the arguments

that counsel can make for that result.

In juvenile court the trial can best be seen as the precondition to the dispositional hearing. A case cannot reach the dispositional phase unless and until a juvenile is adjudicated delinquent. In most jurisdictions proof that the juvenile committed acts constituting a violation of the penal law is sufficient to support an adjudication of delinquency. But more is needed before a final order of disposition may be entered. Additional facts must be found relating to the juvenile's need for services or for the continuing jurisdiction of the court.

Morever, in some States the finding of a violation of the law, though necessary, is not sufficient even to adjudge a child delinquent. *See, e.g.,* N.Y. FAM. CT. ACT § 352.1(1), (2) (2023). In these States the delinquency adjudication itself requires the additional finding of fact that the juvenile needs the care, discipline, or supervision of the state.

The necessity of additional findings of fact going beyond the fact that the respondent violated the law is what sharply distinguishes juvenile dispositional proceedings from adult criminal sentencing. A criminal conviction suffices, without more, to authorize the imposition of a criminal sentence; and although criminal sentencing judges often do (and are sometimes statutorily obliged to) make additional factual inquiries for the purpose of advising their choice among sentencing options, the result of these inquiries does not go to the heart of the court's function in entering a final order, as it does in juvenile proceedings. Most juvenile court statutes express a benevolent, nonpunitive purpose underlying the existence of juvenile court. This purpose is designed to be met in the dispositional phase. In many jurisdictions it is required to be accommodated with the goal of protecting the community. But counsel can plausibly argue that the primary concern remains effectuation of the juvenile's welfare, because it is that concern which justifies the separate existence of juvenile court in the first place.

To attend properly to that concern – and also to reconcile it properly with the community's needs (which include not only security against the juvenile's possible repetition of harmful conduct but also the more lasting benefit that the community acquires when a child who has gone astray is rehabilitated as a productive and law-abiding citizen) – the court must receive and evaluate factual information bearing on a broader range of considerations than the juvenile's mere "guilt" or "innocence." If the court does not obtain the information, it is not doing its basic job; and when the nature of the information is such that its reliability can best be assured by receiving and testing it at an evidentiary hearing, the holding of an evidentiary hearing is a necessary part of the court's fulfillment of its statutory mission. In some States which do not expressly require a dispositional hearing by statute, courts have ruled that a hearing is nevertheless required because the failure to consider evidence of a child's background, character, and environment as bearing on disposition is an abuse of discretion. *See, e.g., Rathbone v. State,* 448 So.2d 85 (Fla. App. 1984); *In re Wilkinson,* 116 R.I. 163, 353 A.2d 199 (1976).

§ 38.17(b) The Constitutional Right to an Evidentiary Hearing

Even when an evidentiary hearing is not required by statute, counsel can argue that due process of law requires such a hearing. The Supreme Court in *Specht v. Patterson,* 386 U.S. 605 (1967), reviewed an adult criminal procedure through which a sentencing judge could enhance the sentence of a convicted defendant if the judge found, after conviction, that the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.* at 607. The decision whether or not to enhance a sentence was to be based upon a written psychiatric report. No hearing was held before the sentencing judge made the decision. The Supreme Court set aside a sentence enhanced by this procedure, holding that, because the sentencing court could not impose the higher sentence without making specific findings of fact adverse to the defendant, the Due Process Clause of the Fourteenth Amendment required that the defendant be given an opportunity to be present with counsel, to be heard, to be confronted with witnesses against him, to cross-examine, to offer evidence of his own, and to have findings made that were adequate for meaningful review on appeal. *Id.* at 610. See also § 13.04 *supra,* describing the basis for the settled rule that constitutional due process may require a hearing when state substantive law makes important consequences turn upon the establishment of particular facts, even though state procedural law does not demand that those facts be established at a hearing.

Whenever juvenile statutes or state caselaw require specific findings of fact adverse to the respondent before a final order of disposition may be entered, *Specht* supports the claim of a right to a hearing. Courts reaching this issue in juvenile proceedings have generally held that a juvenile is entitled to a hearing on the question of disposition. *See People v. Superior Court of Los Angeles,* 142 Cal. App. 3d 29, 190 Cal. Rptr. 721 (1983); *Norwood v. City of Richmond,* 203 Va. 886, 128 S.E.2d 425 (1962). As an appellate court in New York has said:

> It requires no citation of authority to support the principle that even the worst malefactor under our system of jurisprudence must be given a fair trial in accordance with the Constitution and the statutes. Surely, no less consideration should be given to this cardinal principle because the person charged is under the age of 16.

In re Dennis, 20 A.D.2d 86, 89, 244 N.Y.S.2d 798, 801 (N.Y. App. Div., 4th Dep't 1963).

Part C. Conducting An Evidentiary Hearing

§ 38.18 STRATEGIC REASONS FOR WAIVING THE RIGHT TO A HEARING

There are many cases in which insistence upon a formal dispositional hearing will not be in the respondent's interest. Often, the best strategy in the dispositional phase is to attempt to convince the probation officer, the prosecutor, or both to recommend the disposition that the respondent wants. See § 38.13 *supra.* When this is achieved, there is no reason to insist upon a hearing; counsel can simply inform the court that counsel has no objection to the recommendation of the probation department or the prosecutor.

The more difficult cases are those in which the probation department's recommendation is not what the respondent wants but is less restrictive than what the judge may order. In these cases counsel must weigh the benefits and risks of insisting on a formal hearing and opposing the recommended disposition. The likelihood of persuading the judge to order a more favorable disposition than was recommended has to be compared with the likelihood that the court will order a less favorable disposition than the recommendation. Counsel can often gain insight into these probabilities by speaking with other lawyers who have appeared before the judge. The prosecutor's likely reaction to counsel's insistence on a contested dispositional hearing should also be considered. Just as some judges and prosecutors may penalize a respondent for demanding a trial rather than accepting a guilty plea (see § 14.05 *supra*), some judges and prosecutors are prone to exact a toll if the respondent takes up their time by insisting on contested dispositional proceedings. Although they might have acquiesced in a recommended disposition if the respondent consented to it, they will seek a more restrictive disposition if the respondent opposes the recommendation. This does not mean that counsel should routinely advise the respondent to accept the recommended disposition. It does mean that counsel should not routinely advise respondents to oppose all recommended dispositions. The decision whether to advise the respondent to accept a proffered settlement in the dispositional phase is similar to the more familiar decision whether to advise the respondent to accept a plea bargain or go to trial, and it is similarly difficult. See §§ 14.03-14.12 *supra.*

§ 38.19 TECHNIQUES FOR CONDUCTING AN EVIDENTIARY DISPOSITIONAL HEARING

Counsel should develop a plan for how s/he wants the hearing structured and how s/he will go about trying to structure it that way. Often it is not easy to impose any sort of orderly structure on dispositional hearings because of the informality with which they have traditionally been conducted. In practice, judges and probation officers routinely assume that a juvenile who has been found to have engaged in criminal conduct perforce needs the discipline or protection of the court or is in need of supervision or confinement. As a result, the juvenile courts frequently conduct dispositional hearings as informal colloquies, and evidence concerning the needs of the juvenile is presented in an off-handed way. This makes it exceedingly difficult to create the kind of record that will support meaningful appellate review.

Statutes and caselaw permitting or requiring an evidentiary hearing obviously contemplate more than an informal colloquy, see § 38.17 *supra;* and counsel should consider whether it is to the respondent's advantage to insist that the hearing be conducted in a more formal manner. Often, the respondent's best chance of a favorable disposition lies in structuring the hearing to address in the proper order the questions that the hearing is designed to resolve. In most hearings held without a formalized structure, the question which the judge takes up first is the one that ought to come last: What final order of disposition is proposed? Very often, for example, the court will want to start by considering the recommendations made in conclusory diagnostic reports that advise a placement in a "structured" setting. But analysis of the kind of disposition that is appropriate should follow, not precede or substitute for, consideration of the

respondent's needs. Ordinarily, counsel's task will be to try to focus the court's attention on those needs rather than on placement.

Informal hearings usually begin by the probation officer reading aloud the recommendation for final disposition and possibly also summarizing or reading excerpts from the probation report. When, as is often the case, there is no probation officer at the hearing, the judge usually will review the written report. Counsel should make a motion to have the probation report marked as an exhibit and admitted into evidence. This makes the record clear for appeal purposes and implicitly reminds the judge that the proceeding is a formal factfinding hearing subject to appellate review. And after the probation officer's report and any other evidence offered by the probation department and the prosecutor have been received, counsel should consider a motion to dismiss if the evidence is arguably too meager to justify a finding that the respondent has any need for the care or supervision of the state.

The point to press upon the court is that there are two related but separate questions to determine at the dispositional hearing: (1) Does the respondent need the "care, discipline or protection" of the state and, if so, (2) what final order of disposition should be entered. In some jurisdictions, if the answer to the first question is "no," the respondent may not be adjudicated delinquent, and the case must be dismissed. *See, e.g.*, N.Y. FAM. CT. ACT § 352.1(2) (2023) ("If, upon the conclusion of the dispositional hearing, the court determines that the respondent does not require supervision, treatment or confinement, the petition shall be dismissed."); *In the Matter of McP.*, 514 A.2d 446, 450 (D.C. 1986) ("While commission of a delinquent act creates a presumption that the juvenile is in need of care or rehabilitation, the juvenile may rebut that presumption at the dispositional hearing. . . . If the juvenile does rebut the presumption, he or she is not in need of care or rehabilitation and thus, by definition, is not a delinquent child subject to disposition."). In other jurisdictions a "no" answer precludes the court from ordering a restrictive placement. See § 38.17(a) *supra.* Only if the answer to the first question is "yes," does the second question arise: Given that the respondent needs the care of the state, what type of care does s/he need? Thus, at the beginning of the dispositional hearing, the focus should be upon the particular problems of the child, his or her needs, and his or her background.

Ordinarily, counsel should insist that evidence be presented addressed specifically to the respondent's need for care or supervision. When the only evidence before the court on this point is the underlying act which caused the respondent to be charged with delinquency, counsel should argue that the state has not made a sufficient showing that the respondent is in need of placement. *See, e.g., In re B.C,* 169 Ga. App. 200, 311 S.E.2d 857 (1983). If, for example, the respondent goes to school regularly, does well at school and at home, and has never been in trouble before, so that the criminal act which brought the case to court appears uncharacteristic, *why* does the child need the care or supervision of the state? It may well be reversible error in such a case to enter a final order of placement. But unless the record of the dispositional hearing makes clear that the final order was entered without the factual showing required by the statute governing dispositions, an appeal will not be successful.

If and after the needs of the respondent have been documented at the dispositional hearing, it is in order to consider a particular placement or disposition in the light of those specific needs. At this point counsel needs to be particularly creative. The most difficult job at a dispositional hearing is to connect the respondent's specific treatment needs with the disposition that counsel is seeking and to show that those needs do not call for the more restrictive placement plan recommended by the probation officer.

As mentioned earlier in this section, very often the probation officer's recommendation will be for a "structured" setting – a common euphemism for the state training school or the maximum security facility in the state. In these cases counsel may wish to shift the focus of the hearing to the facility and its inability to provide the services appropriate for the respondent. Unless counsel is already familiar with the recommended facility and prepared to document its shortcomings (see § 39.07 *infra*), s/he will have to request a continuance in order to investigate it. One reason that counsel should always obtain a copy of the pre-sentence report in advance of the dispositional hearing if possible (see § 38.08 *supra*) is that this will ensure adequate time to collect the necessary information about a recommended facility without depending on the court's discretionary grant of a continuance.

Whether counsel investigates the recommended facility before the hearing or during a continuance, s/he may wish to have his or her own expert visit the facility so as to be able to testify in court about its capabilities and limitations. The issue at this stage of the hearing is whether the disposition recommended by the probation officer is "appropriate" within the meaning of the statute governing dispositional placements. It will not be an appropriate placement unless the recommended facility is realistically able to meet the specific needs of the respondent in the particular case. *See, e.g., In the Matter of Jose B.,* 71 A.D.2d 551, 418 N.Y.S.2d 73 (N.Y. App. Div., 1st Dep't 1979).

§ 38.20 THE APPLICABILITY OF THE RULES OF EVIDENCE

In virtually every jurisdiction hearsay is admissible at the dispositional hearing. Most jurisdictions do not require that evidence proffered at the hearing meet the ordinary tests of legal admissibility (see § 30.01 *supra*) but require only that the evidence be relevant and material.

Although hearsay is not objectionable as such, counsel should be alert to the possibility of challenging certain hearsay evidence on the ground of unreliability. Information about the respondent which was obtained from unchecked sources of dubious accuracy – such as third-hand information (hearsay within hearsay) that has no identifiable, dependable source – may be challengeable on the ground that it lacks a sufficient degree of trustworthiness to be accepted into evidence. The use of grossly unreliable evidence in adult criminal sentencing has been held to violate the Due Process Clause of the Fourteenth Amendment, *Townsend v. Burke,* 334 U.S. 736 (1948); *cf. Johnson v. Mississippi,* 486 U.S. 578 (1988), and counsel may want to backstop his or her common-law and statutory objections with references to the state and federal constitutional guarantees of due process. Often counsel will not be in a position to challenge the admissibility

of evidence on these grounds without cross-examining or conducting *voir dire* to determine the source of the information; requests to question the authors of reports that contain unattributed or apparently unchecked hearsay can be supported by the assertion that questioning is necessary to permit adequate evaluation of the trustworthiness of second- or third-hand information. *Cf. Smith v. Illinois,* 390 U.S. 129 (1968). Once counsel has demonstrated that neither the person offering the information nor the source of the information can attest to its reliability, counsel should argue that the information is inadmissible for lack of trustworthiness.

§ 38.21 CROSS-EXAMINING THE PROBATION OFFICER OR MENTAL HEALTH EXPERT PRESENTED BY THE PROSECUTION

If the probation officer or the expert who prepared a pre-sentence report and recommendation is not expected to be in court, counsel should consider seeking a subpoena for him or her in order to cross-examine. This should ordinarily be done when counsel has reason to believe that the report contains inaccurate information or is based on unreliable hearsay that might be discounted by the judge or when, as discussed in the next paragraph, a particular disposition is recommended which counsel believes is inappropriate to the respondent's needs.

Often, of course, counsel will not choose to pursue the issue whether the respondent needs supervision; the respondent's previous record may, for example, foreclose any colorable claim that no form of supervision is necessary. In these cases the attorney should focus on identifying the specific needs of the respondent. This can often be profitably done by cross-examination of the probation officer and the authors of any other diagnostic reports submitted to the judge. Counsel's goal is to elicit a precise diagnosis of needs and a specific prescription of the necessary treatment for those needs. Then counsel can attack the recommended disposition as unlikely to provide the appropriate treatment.

The cross-examination can be conducted with any of several different strategies in mind. If counsel wishes to reinforce the respondent's need for treatment, the cross-examination should seek to cement the expert's opinion that the respondent has particular needs which can be served by certain programs. Such a cross-examination can be very friendly; the expert is simply being used by the respondent's attorney to emphasize facts that the expert concedes.

On the other hand, if counsel is aiming to oppose the expert's recommendation on the ground that the expert did not know enough about the respondent to make a reliable recommendation or on the ground that the expert's recommendation fails to connect the respondent's needs with the recommended facility's capacity to serve those needs, then the cross-examination may have to be more pointed. To discredit the expert's conclusions by demonstrating a lack of sufficient knowledge of the respondent, counsel should develop all of the shortcomings in the witness's contact with the respondent, including any inadequacy in the setting of the evaluative interview, limited time spent with the respondent, and failure to establish rapport during the interview. See § 38.12 *supra.*

To discredit the expert's recommendation on the ground that it is not responsive to the respondent's treatment needs, counsel may be able to show in some cases that the expert has little or no information about the programs and services actually provided in the facility that s/he recommends and that the recommendation is based upon the professed or supposed objectives of the facility rather than upon its real performance. Or counsel may be able to show that the expert is not aware of the full range of programs available to meet the respondent's treatment needs and, therefore, failed to consider alternatives that are superior to the expert's recommendation.

The various techniques for cross-examining expert witnesses suggested in § 31.09 *supra* are often useful in the present context. Particularly effective ways to attack a dispositional expert's conclusions are to show, in an appropriate case:

1. That the expert met with the respondent for only a short time;
2. That the conditions surrounding the interview were not optimal;
3. That the expert did little or nothing to put the respondent at ease;
4. That the expert has little knowledge of the respondent's family situation (for example, that s/he did not conduct home visits, interviewed only one family member, and so forth);
5. That the expert cannot identify any specific programs or services available in the facility s/he recommends that are suitable to the respondent's special treatment needs; and
6. That the expert is not familiar with available community alternatives that might serve the respondent's needs.

As the last two approaches imply, it is often productive to attack not only the expert's opinion about the respondent but also the expert's opinion about the efficacy (or relative efficacy) of the recommended placement. When counsel wishes to emphasize the inappropriateness of the ultimate recommendation in the light of the respondent's needs, counsel should pin down the expert's views of exactly what the respondent does need (asking, for example, whether psychotherapy is likely to be beneficial). Counsel can then elicit from the expert facts about the recommended placement facility – or about the particular facilities available to the court to provide the "structured'' setting recommended by the expert – which demonstrate that these facilities do not provide services adequate to meet the respondent's needs. For example, if the expert has admitted that the respondent needs psychotherapy, counsel can show that the facilities under consideration have such limited psychiatric staff that the psychiatrists at the facility do nothing more than interview all new inmates upon arrival for classification and administration purposes (a common phenomenon at training schools). If the expert is not familiar with the services in the facilities under consideration, counsel should nevertheless ask the expert about the operations of the facilities, in order to display the expert's lack of knowledge so that counsel can argue that the expert's recommendation was based on a false expectation of the facility's capacity to treat a person with the respondent's needs.

The expert can be cross-examined by using hypothetical questions in which counsel adds

more details to facts that the expert had at the time of making the recommendation. Questions can be posed to show that the expert did not know certain facts or did not assume certain facts to be true. Questions can also be posed to demonstrate that the expert did assume certain facts about the respondent or the recommended facility to be true and based the final recommendation, in part, on those assumptions (which counsel is prepared to prove independently are inaccurate).

§ 38.22 PRESENTING DEFENSE EVIDENCE

In jurisdictions that allow the presentation of evidence at dispositional hearings, caselaw almost invariably supports the rule that the court may not curtail the reasonable efforts of the respondent's lawyer to present relevant defense evidence. *In re Michael C.,* 50 A.D.2d 757, 376 N.Y.S.2d 167 (N.Y. App. Div., 1st Dep't 1975). This evidence may consist of reports and letters, since hearsay is admissible in most jurisdictions. The evidence may consist of calling witnesses. Obvious witnesses to consider are the respondent and his or her parent[s]. See §§ 38.26-38.27 *infra* for a discussion of preparing respondents and parents to address the court at the dispositional hearing. In addition, counsel should consider calling any witness who can provide factual information that supports the respondent's position on disposition, including: defense experts who have interviewed or evaluated the respondent; teachers; counselors; social workers; coaches; neighbors; and other adults whom the court is likely to credit.

Depending on the theory of the defense, the witnesses may be used to refute the conclusion that the respondent needs care and supervision, or the defense expert may be used to support a contention that the respondent's needs can be adequately met by supervision in the community. If the focus of counsel's theory is on the quality of services available in the facility or program recommended by the probation department or prosecutor, defense witnesses familiar with the facility's or program's capabilities and with the respondent's needs can be called to demonstrate that the recommended placement will not meet those needs.

Counsel may wish to use witnesses who are able to testify to the respondent's good character at home, in school, and in the community. Such individuals as teachers, religious counselors, employers, and neighbors who can testify to the respondent's good deeds or reputation for being responsible, well-behaved, and respectful are appropriate witnesses. Because the rules of evidence are considerably relaxed at dispositional hearings, these witnesses will usually be permitted to state their own opinion about the respondent's character in addition to the respondent's reputation. Compare §§ 33.17-33.18 *supra.*

Counsel should consider introducing as exhibits any favorable reports that have been written by experts who have evaluated the respondent. Exhibits can also include letters of support from any of the people mentioned in this section who are in a position to say good things about the respondent. (In deciding whether to call any particular individual to testify in person or whether to present his or her favorable views of the respondent in written form, counsel should consider the extent of the individual's knowledge of the respondent and the strength of the individual's enthusiasm for the respondent. Compare § 19.04 *supra.* Other possible exhibits are

discussed in §§ 38.11 and 38.16(b) *supra.*

When counsel uses defense experts at the hearing, counsel should stress the quality and number of contacts between the expert and the respondent – if, as is common, they are clearly superior to those of the probation department's expert – so that in closing, counsel can contrast the depth of the defense expert's knowledge of the respondent with the superficiality of the probation department expert's.

§ 38.23 PROPOSING A DISPOSITIONAL PLAN FOR THE DEFENSE

If counsel is able to show that the facility recommended by the probation department is inappropriate for the respondent, the judge will want to explore the question of what disposition *is* appropriate. Counsel will have to do more than prove that the probation department's recommendation is unsatisfactory; s/he will have to come up with a plan that is better. Once again, a defense expert may be very helpful. If a facility agreeable to the respondent can be located that will accept the respondent and that can be shown to best meet his or her needs, the chances of persuading the judge to place the respondent in that facility are optimal. (Of course, as already discussed, this strategy should not be used without the respondent's consent.)

In fashioning a dispositional plan and supporting theory for the defense, the best approach is to be creative. Precisely because there is little appellate law in the area of dispositional hearings and because the rules for juvenile court at this phase of the proceeding are supposed to be different from those of adult criminal court, lawyers are advised to think inventively and consider doing things that have not been tried before. *See, e.g., State in the Interest of Irving,* 434 So.2d 543 (La. App. 1983) (upholding the trial court's discretion to impose a condition of probation that respondent live with a relative in another State). This means not only expanding the range of evidence presented at the hearing (see § 38.11 *supra*) but also expanding the range of dispositions available for the court to consider. Judges often appreciate proposals that offer new ways to serve the judge's dual goals of protecting the community and helping the respondent; many routes lead to these joint goals; unique proposals evolved out of the peculiar background and facts of each individual case should be explored. More than in any other area of juvenile court practice, counsel will find it effective to innovate boldly in preparing for a dispositional hearing.

Creativity is particularly fruitful in devising conditions of probation. Many jurisdictions require that the court order the "least restrictive alternative" consistent with the respondent's best interests and the protection of the community. *See, e.g.,* N.Y. FAM. CT. ACT § 352.2(2) (2023); *In the Interest of B.S.*, 192 Ill. App. 3d 886, 891, 549 N.E.2d 695, 698, 140 Ill. Dec. 44, 47 (1989); *State in the Interest of Racine,* 433 So.2d 243 (La. App. 1983). In developing alternatives to incarceration, counsel will usually be able to identify a number of options that adequately protect the community. The following are some conditions of probation, among many, that counsel might consider proposing, depending on the facts and circumstances of the case: good school attendance; abstaining from certain conduct (such as associating with particular individuals or

gangs); enrollment in a certain community-based program; keeping out of certain places; cooperating with specified individuals; making restitution; submitting a regular progress report.

There is, of course, a danger that counsel's efforts in inventing conditions of probation in order to make community-based treatment appear palatable to the court will lead the court to place more restrictions on the respondent's liberty than would have been imposed without counsel's assistance. This danger has two components. First, the respondent may be subjected to greater restraints than the court would have thought of by itself. Second, the more conditions are imposed, the greater the risk will be that the respondent will violate one or more of them and thereby become subject to the filing of a petition to revoke probation. These dangers must be factored into the decision how aggressive counsel should be in proposing novel alternatives to placement.

§ 38.24 THE NEED FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is important to have the judge state on the record the reasons for the final order of disposition. This not only improves the respondent's record for appeal but gives counsel information making it easier to assess the probable success of an appeal. Many jurisdictions require that the court state the reasons for its dispositional order and the facts supporting those reasons on the record. *See, e.g.,* N.Y. FAM. CT. ACT § 352.2(3) (2023). And, as noted in § 38.17(b) *supra,* one of the constitutional requirements for dispositional hearings derivable from *Specht v. Patterson,* 386 U.S. 605 (1967), is that "there must be findings adequate to make meaningful any appeal that is allowed." *Id.* at 610. Appellate decisions support the view that if the dispositional hearing is handled correctly, the record should clearly reflect the special needs of the respondent and the reasons for the choice of the particular disposition ordered by the court. *See, e.g., State in the Interest of George,* 430 So 2d 289 (La. App. 1983). Counsel should request that the court make specific findings of fact on these issues. In any case in which the court places the respondent in a private residential facility or in a state-run non-secure or secure facility (see § 38.03(c) *supra*), counsel should also request that the court specify the educational, vocational, and other rehabilitative services that the facility must provide the respondent. See § 39.07 *infra*.

Finally, if counsel believes that the record fails to support the dispositional order, it is important to object to the order on the record, setting forth the basis for the objection.

Part D. Conducting a Non-Evidentiary Hearing

§ 38.25 TECHNIQUES FOR CONDUCTING A NON-EVIDENTIARY HEARING

In most jurisdictions that use the non-evidentiary hearing procedure, the persons present at the hearing will be the probation officer (or a representative from the probation department), the prosecutor, counsel for the respondent, the respondent, and his or her parent. Rarely are there any formal procedures for beginning the hearing. Many non-evidentiary hearings are merely *pro forma* appearances at which the court imposes a sentence to which all parties are agreed. See

§§ 38.13, 38.18 *supra.* If the respondent does not oppose the disposition recommended by the probation department and if the prosecutor indicates that s/he also acquiesces in the recommendation, the hearing will likely last only a few minutes.

Non-evidentiary hearings commonly consist of a colloquy that most resembles a trial-level oral argument. The hearing is not regularized and few rules exist regarding the order or length of presentations. In some jurisdictions the first person to speak is ordinarily the probation officer, who recommends a particular disposition. In other jurisdictions there is an uncertain void at the beginning of the hearing that is filled by the first person who starts talking. Usually, counsel should start and fill this void. Counsel should begin the hearing by summarizing the case and emphasizing the critical issues on which counsel wishes to focus. Compare § 38.19 *supra.* Judges will often give clues about how carefully they have read the pre-sentence report and, depending on the judge's familiarity with the case, counsel may choose to be more or less detailed.

In some cases the respondent does not oppose the probation department's recommendation, but the prosecutor has not clearly indicated acceptance of the recommended disposition. In these cases counsel must try to steer the dispositional hearing by being the first to speak, summarizing the recommended disposition and the reasons for imposing it. Sometimes this take-charge approach can preempt the prosecutor from opposing the recommendation.

The court at a non-evidentiary dispositional hearing usually receives documentary evidence and oral argument. The documentary evidence ordinarily consists of the probation officer's pre-sentence report and any other reports prepared for or by the probation department or the prosecutor, such as a mental health report. In addition, defense counsel is routinely permitted to submit a sentencing memorandum, which should set forth the respondent's proposed disposition and the grounds and reasons supporting it. See § 38.16(b) *supra.*

Counsel should make certain that all documents read by the judge are marked for identification at the hearing. Counsel should also read all these reports carefully and object to the admission of any parts of them that s/he believes should be excluded. See § 38.20 *supra.* Counsel should introduce into evidence all reports prepared by the defense and any letters, evaluations, and other exhibits on which counsel intends to rely.

The principal feature of the non-evidentiary hearing will be counsel's oral argument to the court supporting a particular order of disposition. This argument may be based on law – contending, for example, that in light of the respondent's ties to the community and prior record, there is no statutory basis to enter any order of disposition other than probation – or it may be based on fact, or on a combination of law and facts.

The most difficult cases, of course, are those in which the respondent opposes the probation department's recommended disposition. In these cases a key fact that counsel needs to know in order to determine how to proceed is the degree of familiarity that the judge already has

with the written reports submitted before the hearing. Some judges will have read everything before the case is called. Some will have read nothing. Counsel should learn about the particular judge's practices by asking experienced lawyers who have appeared before that judge in the past. Depending on the jurisdiction, counsel's own sentencing memorandum may or may not have been submitted in advance of the hearing date.

Like any effective presentation, counsel's oral argument should develop a theme and support it appropriately. Section 38.16(b) *supra* suggests that there are more and less persuasive points that counsel can make in supporting or opposing a particular disposition. Frequently, the most effective argument to make orally is that the respondent has learned an important lesson from his or her misconduct and has changed for the better since being arrested. Because judges have heard this argument so often in other cases, it is crucial to support the argument with facts. Counsel should be prepared to cite specifically the portions of all documents and exhibits that support counsel's contentions.

If counsel has attached exhibits to the sentencing memorandum, see § 38.16(b) *supra,* counsel should make use of them in the oral presentation. If, for example, the respondent has produced works demonstrating artistic talent, counsel should have them in court so that s/he can display them during the presentation.

Even in jurisdictions that do not ordinarily conduct evidentiary hearings, there is the possibility of offering live testimony. It can be very effective strategy for counsel to bring witnesses to court and have them sit in the courtroom during the hearing. Once a witness is in court, counsel can ask the judge for permission for the witness to address the court; alternatively, counsel can inform the judge that the witness is present in case the judge would like to hear from him or her or has any questions to ask. Of course, the fact that people have bothered to show up in court at all, particularly in a jurisdiction in which it is uncommon to see witnesses at dispositional hearings, is likely to impact favorably on the judge. The more prestigious the witness, the more likely it is that the judge will display the courtesy of permitting the witness to speak.

If counsel's strategy is to argue that a particular facility is a more appropriate placement than the one proposed by the probation department, bringing someone to court who is familiar with the facility is similarly effective. At the least, counsel should weave the person's identity and expertise into the oral presentation and point to the individual when doing so in order to emphasize counsel's preparedness for the hearing.

§ 38.26 WHAT THE RESPONDENT SHOULD SAY WHEN ADDRESSING THE COURT AT THE DISPOSITIONAL HEARING

As in adult criminal sentencing, juvenile court judges commonly give the respondent an opportunity to address the court. *See In re Tavione H.*, 2016 WL 3129962, at *4 (Md. Ct. Special App. June 3, 2016) (dictum) ("While, of course, a juvenile court has wide discretion to control its

docket, to limit the presentation of evidence and argument, and to avoid repetitive presentations, there are limits to this discretion. Thus, while the juvenile court may limit argument by the juvenile offender or the juvenile offender's counsel, the court may not preclude it. . . . ¶ Juvenile offenders are often alienated from and may feel ignored by society. Reintegrating and helping them to 'becom[e] responsible and productive members of society' . . . is a key objective of the juvenile system. Society wants juvenile offenders to learn appropriate methods of interacting with the world, including appropriate interaction with and toward authority. Juvenile offenders must be counselled to be respectful toward the court. But the court must also be respectful toward the juvenile offenders. Silencing, or even appearing to silence juveniles, is inconsistent with our vision of the appropriate social interaction that the juvenile system should be modeling."). In any event, this is a procedure that counsel would ordinarily want to request. It is important for counsel to prepare with the respondent what s/he will say and how to say it. Especially with inarticulate respondents, a brief statement is appropriate. The most important things for the respondent to say have to do with (1) the lesson(s) s/he learned from the wrongdoing, (2) his or her repentance for committing a crime, and (3) any constructive plans for the future. It is particularly crucial for the respondent to express remorse when the pre-sentence report states inaccurately that the respondent does not feel any remorse. *But cf*. *State v. Burgess*, 156 N.H. 746, 759-60, 943 A.2d 727, 737-38 (2008) (discussed in § 38.05(a) *supra*); *Johnson v. Fabian*, 735 N.W.2d 295, 297, 310-12 (Minn. 2007) (discussed in § 38.05(a) *supra*); *State v. Washington*, 832 N.W.2d 650, 652, 661-62 (Iowa 2013) (discussed in § 38.05(a) *supra*). If the respondent has spent some time in a detention facility, expressions of fear or of having learned that crime doesn't pay are often things the judge wants to hear.

Although counsel should prepare the respondent to address the court, it is generally wise to let the respondent say pretty much what s/he wants to say, within reason. It is useful to have a dry-run rehearsal of what the respondent will say, but the statement should not be so rehearsed that it sounds canned.

Respondents who continue to deny any wrongdoing pose a difficult problem. In preparing them to address the judge at sentencing, counsel should advise them to talk about anything commendable that they are currently doing in the community (or, in the case of detained respondents, anything commendable that they were doing in the community before being detained or any programs in which they have successfully participated since being detained) and about realistic, constructive plans for the future. It is usually wise for the respondent to avoid any direct reference to the crime during his or her initial remarks. If the judge asks the respondent directly about the crime, it is, of course, necessary for the respondent to reply. Counsel should work with the respondent on a reply. Even when the respondent denies wrongdoing, it may be possible for the respondent to admit to an indiscretion of judgment, for example: (a) hanging out with the wrong crowd, (b) being out of his or her home at the wrong hours, or (c) being in the wrong part of town. These or any similarly worded expressions of regret can usefully split the difference between denying any responsibility for the crime (and thereby, in a bench trial, challenging the judge directly as factfinder) and insincerely admitting acts that the respondent, in fact, denies having committed.

Of course, there will be cases in which even this much concession is infeasible. If the respondent claims that s/he is a victim of mistaken identity and stands by the alibi defense that s/he presented at trial, there is not much s/he can say at the dispositional hearing about the crime itself. In these cases the respondent's only practicable courses of action are to continue to assert innocence or to waive the right to address the court in person and rely solely on counsel's presentation. The question whether the judge is permitted to attach adverse inferences or consequences to a respondent's silence at a dispositional hearing – and, if so, what inferences and consequences are permissible – is a vexed question in the light of *White v. Woodall*, 572 U.S. 415 (2014), which muddies the apparent implication of *Mitchell v. United States*, 526 U.S. 314 (1999), that a defendant cannot be penalized in any way for failing to address the court in a sentencing proceeding. In this state of the law, counsel should be alert to note anything said by the judge which suggests that he or she is penalizing the respondent for remaining silent; such comments are grist for appeal and other post-hearing challenges to an unfavorable disposition.

§ 38.27 WHAT THE PARENT SHOULD SAY WHEN ADDRESSING THE COURT

As explained in § 38.05(b) *supra,* counsel's task in preparing a parent for the dispositional process and the dispositional hearing differs depending on what sentence the parent wants to see imposed. If the parent, as well as the respondent, desires the least restrictive sentence, then the parent should be prepared to address the court with an emphasis upon the positive things that s/he can say about the respondent. The parent is in the best position to tell the judge about the respondent's attitude at home and his or her relationship with family members. When the parent has observed any favorable changes in the respondent's behavior since coming to court, the parent should report those changes. If, for example, the respondent has stopped hanging out with an individual or a group of adolescents of whom the parent disapproved and whose influence was, in the parent's opinion, partly responsible for the respondent's criminal activity, the parent should be prepared to tell this to the judge. The parent can also inform the judge about any community activities, school programs, and church activities in which the respondent participates, emphasizing those activities that the respondent has taken up (or has taken more seriously) since his or her arrest. If the respondent has begun any treatment or community-based program since his or her arrest, the parent should be prepared to comment upon the program and its perceived beneficial effects on the respondent.

Finally, the parent should be prepared to tell the judge about any aspirations the parent has for the respondent, the love s/he feels for the respondent, and the efforts that the parent is willing to make to assure that the respondent will not get into trouble again in the future

Part E. After the Hearing

§ 38.28 PRESERVING THE RIGHT TO APPEAL

Counsel's job does not end when the court enters its final order in the case. Counsel must review the dispositional order to determine whether there are any grounds for challenging it by a

motion to vacate or for reconsideration or by appeal. Potential grounds include challenges to the substance of the order as legally unauthorized (for example, as imposing a custodial or probationary term in excess of that authorized by law, or as imposing unlawful conditions), contentions that factual findings contained in the dispositional order are not supported by the record (or are the product of mistakes not attributable to the respondent, which respondent should have an opportunity to address by additional information), and claims that the order violates applicable procedural rules (such as those enumerated in §§ 38.17, 39.17(B), 38.20, 38.22 and 38.24, or the constitutional rule against judicial vindictiveness in sentencing, *see, e.g., Austin v. Plumley*, 565 Fed. Appx. 175 (4th Cir. 2014) (analyzing and applying the complex doctrinal offshoots of *North Carolina v. Pearce*, 395 U.S. 711 (1969)).

The role of trial counsel also includes the responsibility to advise the respondent fully concerning his or her right to appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478-81 (2000) (defense counsel's failure to consult with the client about the decision whether to appeal constitutes ineffective assistance of counsel whenever there are nonfrivolous grounds for appeal or the client has indicated any interest in taking an appeal); *Garza v. Idaho*, 139 S. Ct. 738 (2019) (defense counsel's failure to file a notice of appeal when the client requests that s/he do so constitutes ineffective assistance of counsel even when the client has executed an appeal waiver as a term of a plea bargain); *Rojas-Medina v. United States*, 924 F.3d 9 (1st Cir. 2019); *Rios v. United States*, 783 Fed. Appx. 886 (11th Cir. 2019); *and see Roe v. Flores-Ortega*, 528 U.S. at 479 (recognizing that state law may "impose[ ] on trial counsel a per se duty to consult with defendants about the possibility of an appeal"); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-9.1(a)-(c) (4th ed. 2017). See also § 39.02(c) *infra* (steps to take to preserve the client's appellate remedies). Except when the respondent states explicitly that s/he does not wish to appeal or when s/he has another attorney retained or appointed for the appeal who explicitly informs counsel that the other attorney is taking the necessary steps to perfect appellate jurisdiction, counsel should take those steps within the times limited by statute or court rule. See § 39.02(c) *infra*.

§ 38.29 COUNSEL'S POST-DISPOSITIONAL ROLE

In non-evidentiary hearings as well as evidentiary hearings, counsel should request that a dispositional order of placement specify the types of rehabilitative services that the facility must provide the respondent. See § 38.24 *supra.* However, this alone will not ensure that the respondent actually receives the services. One of the most common and most frustrating aspects of the juvenile justice system is that carefully tailored court-ordered treatment programs for juveniles are not carried out by the institutions and agencies that are supposed to carry them out. Like any court order a juvenile court's final order of disposition is not self-enforcing. If a juvenile has been placed in a particular facility in order to assure that s/he gets certain treatment, it is critical that someone follow up on the placement to determine whether or not that treatment is actually being given. See § 39.07 *infra.*

For this reason counsel should consider, whenever possible, remaining on the case even

after the court enters its final order. If counsel abandons the respondent at this juncture, the respondent frequently will have no way to enforce post-dispositional rights. Of course, many court assignments to represent indigent respondents terminate upon the final order of disposition. Counsel who were so assigned may wish to request that the court enter an order expressly continuing their representation of the respondent into the placement phase of the proceeding.