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JUVENILE JUSTICE IN CALIFORNIA: AN EVALUATION OF THE PROPOSED JUVENILE COURT RULES AND A PLEA FOR DELAY

by Ralph E. Bochés* and Gary T. Wienerman**

I. INTRODUCTION

In May of 1976 California's Judicial Council¹ tentatively adopted "Proposed Juvenile Court Rules" (hereinafter referred to as Rules or Proposed Rules).² The Rules are intended to govern court administration, practice, and procedure in the juvenile courts throughout California.³ Late in June the Proposed Rules were released to the general

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1. The Judicial Council exists pursuant to article VI, section 6 of the California Constitution which provides in relevant part:

The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, 3 judges of courts of appeal, 5 judges of superior courts, 3 judges of municipal courts, and 2 judges of justice courts, each appointed by the Chief Justice for a 2-year term; 4 members of the State Bar appointed by its governing body for 2-year terms; and one member of each house of the Legislature appointed as provided by the house.

The council may appoint an Administrative Director of the Courts, who serves at its pleasure and performs functions delegated by the council or the Chief Justice, other than adopting rules of court administration, practice and procedure.

To improve the administration of justice, the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute.

CAL. CONST. art. VI, § 6 (1974).

2. ADVISORY COMMITTEE JUVENILE COURT RULES PROJECT, PROPOSED JUVENILE COURT RULES (Tentatively Adopted May 1976) [hereinafter cited as PROPOSED RULES]. Revised Final Rules, effective July 1, 1977, were adopted by the Judicial Council on November 13, 1976. Further revisions may be made prior to the effective date. For comments on the final form see notes 174-187 *infra* and accompanying text. The comments in this article are to the Proposed Rules and reflect the state of the law as of May 1, 1976. They are generally applicable to the Final Rules.

3. PROPOSED RULES, *id.*, at v.

public for comment, with a comment deadline of October 1, 1976.⁴ If adopted by the Judicial Council the Proposed Rules will take effect January 1, 1977.⁵

The procedural highlights of the Rules are: separate procedures for wardship and dependency cases;⁶ standards for intake, settlement, informal supervision and filing of petitions;⁷ referee procedures⁸ and detention procedures are clarified;⁹ guidelines for discovery are established;¹⁰ procedures at jurisdictional hearings are clarified;¹¹ in Welfare and Institutions Code section 600¹² dispositions the probation officer must recommend a plan for reuniting the family;¹³ and procedures relating to annual review, intercounty transfer, supplemental petitions, orders of modification, and appeals are clarified.¹⁴

This article will evaluate the Proposed Rules with a focus upon their procedural highlights. The limitations of this article,¹⁵ as well as its purpose, can only be understood in terms of the conclusions which the authors have reached: that the Proposed Rules are a good start on a basic working document;¹⁶ that an expanded, broad-based, advisory committee needs to work over the Rules, revise and expand them, and to incorporate comments;¹⁷ and that final adoption of the Rules must be delayed for several months to let this be accomplished.¹⁸

II. THE PROPOSED RULES—PRELIMINARY CONSIDERATIONS

The Judicial Council derives its rule-making authority from the California Constitution, article VI, section 6, which authorizes the Judicial

4. *Id.*

5. *Id.* See discussion in text at notes 173-80 *infra* for the Judicial Council's actions subsequent to the writing of this article.

6. *Id.* at vii-viii.

7. *Id.* at viii.

8. *Id.*

9. *Id.*

10. *Id.* at ix.

11. *Id.*

12. CAL. WELF. & INST'NS CODE ANN. § 600 (West 1972).

13. PROPOSED RULES, *supra* note 2, at ix.

14. *Id.* at x.

15. Since the article is intended to make a case for detailed review by a broad based committee, it becomes unnecessary to attempt to find every defect or omission in the Rules; the authors make no claim to have done so. The Rules became available for comment in late June of 1976; the comment deadline of October 1, 1976, does not permit complete analysis.

16. See text accompanying notes 42 *infra*.

17. See notes 29-42 *infra* and accompanying text.

18. See note 46 *infra* and accompanying text.

Council to "adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute."¹⁹ This authority is made mandatory by the Arnold-Kennick Juvenile Court Law as originally enacted in 1961.²⁰ It provides that "[t]he Judicial Council *shall* establish rules governing practice and procedure in the juvenile court not inconsistent with law."²¹ That mandatory provision,²² never implemented, still remains in full force and effect.

In spite of this explicit and mandatory authority there has been a fifteen year delay in promulgation of the Rules. The cause of the delay rests primarily in the ancient maxim of life that "the wheel that squeaks the loudest is the one that gets the grease." The reality is that the low-profile juvenile justice system has not, until recently, done much squeaking. Participants in the system often have little to gain by substituting uniformity of procedure for systems which function to their satisfaction in their respective spheres. A combination of public indifference, indifference on the part of the bench and the bar, funding problems and questions of priorities contributed to the delay.²³

19. CAL. CONST. art. VI, § 6 (1974).

20. Stats. 1961, c. 1616, p. 3459, § 2, *codified at* CAL. WELF. & INST'NS CODE ANN. §§ 500-945 (West 1972).

21. CAL. WELF. & INST'NS CODE ANN. § 570 (West 1972) (emphasis added).

The Arnold-Kennick Juvenile Court Law, CAL. WELF. & INST'NS CODE ANN. §§ 500-945 (West 1972) was adopted following a two year study by the Governor's Special Study Commission on Juvenile Justice. The Commission was authorized to

study, evaluate and make recommendations respecting all matters related to juvenile justice and the protection of minors together with dependent children, minor offenders against the law including their apprehension, detention, prosecution, supervision, treatment, and rehabilitation.

First Interim Report of the Special Study Committee on Juvenile Justice, appendix A at 30 (Feb. 2, 1959).

A quick perusal of CAL. WELF. & INST'NS CODE ANN. §§ 500-945 (West 1972) demonstrates that the law is essentially devoid of procedural guidelines. *See, e.g., id.* §§ 630.1 (notice to counsel), 634.5 (appointment of counsel).

22. CAL. WELF. & INST'NS CODE ANN. § 15 (West 1972) provides that "shall" is mandatory.

23. The official explanation is contained in the introduction to the Proposed Rules:

Due to insufficient staff and other priorities which developed within the judicial system, the Judicial Council in the past has been unable to act effectively in promulgating rules relating to the juvenile courts. The availability of federal funds, however, made possible the necessary staffing for the Juvenile Court Rules Project on a full-time basis. In January 1975, Chief Justice Donald R. Wright, Chairman of the Judicial Council, appointed a project advisory committee to assist the Council in developing proposed juvenile court rules.

PROPOSED RULES, *supra* note 2, at vi.

The following is a somewhat more detailed explanation. Between 1961 and 1967, lawyers in California seldom appeared in the juvenile court. Since each county operated its own system which became well known to those who participated in it, those in the

The present significance of the past delay is that the system has managed to survive without rules, however difficult that may have been. Further delay can be tolerated by the system if that delay is necessary in order that rules of the highest quality are produced. The process of adoption requires all deliberate speed, not unseemly haste.

The Rules have been put together by an Advisory Committee consisting of six superior court judges and two full-time juvenile court referees.²⁴ All of the judges have extensive juvenile court experience. The Chairman is the leading California judicial writer in the area.²⁵ Some of the judges were not actively involved in juvenile court matters during the time they were on the Committee.²⁶ Both referees were involved in the juvenile court on a full-time basis. Staff attorneys from the Administrative Office of the Courts have been used to provide staffing for the project.

system felt no pressing need for rules. Indeed, rules represented a potential threat since invariably some changes in local practice would be required. No real pressure existed to adopt rules.

In re Gault, 387 U.S. 1 (1967), handed down May 15, 1967, caused a revolution in the juvenile court. As applied to California, *Gault* was not in fact that revolutionary. The real revolution was in the 1961 law. See Boches, *Juvenile Justice in California: A Re-evaluation*, 19 *HAST. L.J.* 47 (1967). But the publicity surrounding *Gault* caused the Legislature, the Bar, and the general public to assume that lawyers belonged in the juvenile court system. See Milton, *Post-Gault: A Prospectus for the Juvenile Court*, 16 *N.Y.L.F.* 57 (1970). The lawyers came, the need for procedure followed, and the necessity of having holes in the law filled by appellate court decisions when procedural rules would have avoided the problems, put on more pressure to develop rules. See, e.g., *In re Edgar M.*, 14 Cal. 3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975); *Joe Z. v. Superior Court*, 3 Cal. 3d 797, 478 P.2d 26, 91 Cal. Rptr. 594 (1970); *Neil G. v. Superior Court*, 30 Cal. App. 3d 572, 106 Cal. Rptr. 505 (1973).

Sometime prior to 1970, the Judicial Council began to gear up to work on juvenile court rules. Suddenly the Legislature enacted the Family Law Act, CAL. CIV. CODE § 4000 *et seq.* (West 1970), and rules for it were required. Adults seeking dissolution of marriage and their lawyers are a far more powerful lobby than juveniles. The work on juvenile rules was set aside, and thereafter not taken up because of a lack of funds. See PROPOSED RULES, *supra* note 2, at vi.

Enter the Committee on Juvenile Justice of the State Bar of California. Dissatisfied with the long delay in rule preparation, the Committee in 1973 transmitted a request to the Board of Governors of the State Bar of California that the Board strongly urge the Judicial Council to prepare and promulgate Rules; the Board did so.

By the summer of 1974, the Judicial Council had been moved to seek and obtain a grant to prepare rules from the Law Enforcement Assistance Administration and the California Office of Criminal Justice Planning. Federal grants were obtained and work finally began. See PROPOSED RULES, *supra* note 2, at ii, vi.

24. See PROPOSED RULES, *supra* note 2, at iii.

25. Judge Homer B. Thompson, author of *JUVENILE COURT DESKBOOK* (1972).

26. E.g. Judge Hogoboom, who left the Juvenile Court bench on January 1, 1975, to become Assistant Presiding Judge of the Los Angeles Superior Court, and Judge Carkeet, who is retired.

The introduction to the Rules suggests that comments on the Proposed Rules as drafted were obtained only from judges and referees prior to tentative adoption.²⁷ It seems fair to assume that the Proposed Rules were reviewed by few other persons.

The basic approach of the draftsmen, including a statement of goals, is described in the introduction to the Proposed Rules:

[T]he advisory committee identified two major objectives of the Juvenile Court Rules Project: (1) to encourage greater uniformity in applying the juvenile court law in the several counties, and (2) to provide guidance to juvenile court judges and referees and to attorneys, probation officers and social workers appearing in the juvenile court. To accomplish those goals, the committee attempted to develop a model set of court rules within the basic scheme of the present juvenile court law. The framework of the proposed rules is a contextual restatement of existing statutory provisions as interpreted by case law. To the extent the statutes may now be misleading, confusing, or ambiguous, an effort was made . . . to clarify their intent. In those area where little procedural guidance exists in the statutes, it has been provided.²⁸

Unfortunately the Rules reflect these relatively limited objectives. Note that the two major objectives have been defined by the authors of the Rules and the Advisory Committee as (i) to encourage greater uniformity, and (ii) to provide guidance to the participants in the system. The authors take issue with a priority system which does not consider the administration of justice to all parties before the court as the primary objective.

III. A PERSPECTIVE ON THE UNDERLYING PROBLEMS

Basic errors in the Committee composition and approach have caused the underlying problems of the Rules. The narrow composition of the Advisory Committee has given rise to fundamental difficulties. As mentioned previously, its members are all superior court judges, or referees of the juvenile court.²⁹ There is no representation of the other participants

27. The PROPOSED RULES state:

The advisory committee met almost every month for more than a year to complete a tentative draft for dissemination to participants attending the March 1976 Juvenile Court Institute. At the Institute, comments regarding the draft were obtained from juvenile court judges and referees before the proposed rules were submitted to the Judicial Council. Generally, the participants were very receptive to the proposed rules, both as to content and format. At the same time, several constructive suggestions were made for clarifying or otherwise improving the proposed rules, many of which were incorporated into the proposed rules.

PROPOSED RULES, *supra* note 2, at vii.

28. PROPOSED RULES, *supra* note 2, at vii.

29. See note 24 *supra* and accompanying text.

Contrast the composition of the following committees. The Advisory Committee

in the juvenile justice system: appellate court judges, district attorneys and county counsel, public defenders and the private defense bar, probation officers and social workers, law enforcement officers, school officials, or psychiatrists and psychologists. Additionally, there is no representation of those who come before the court: mainly the poor,³⁰ or the public in general. Thus, initially, the Rules must be viewed as the product of trial court judges.

To compound the problem, the Advisory Committee is not even representative of the juvenile court bench. All members of the Committee are male; no woman judge or referee serves on it. Of the eight members,³¹ three come from counties having a population under 200,000³² and only two come from large urban counties.³³ Most major urban counties—San Diego, San Francisco, Alameda, Sacramento and Fresno—excepting Los Angeles are unrepresented.

Given the composition of the Advisory Committee, it is hardly surprising that the primary purposes of the Rules are defined so narrowly.³⁴ Promoting uniformity in operation and providing guidance for those engaged in the system are laudable objectives. They are objectives particularly suited to consideration by a state-wide committee consisting solely of trial judges. But they are far too narrow in scope, and ignore

for the FEDERAL RULES OF CIVIL PROCEDURE consists of two senior circuit judges, three circuit judges, two senior United States district court judges, three United States district court judges and six practicing attorneys. FEDERAL RULES at XI (West Publishing Co. 1975).

The Advisory Committee for the FEDERAL RULES OF CRIMINAL PROCEDURE consists of one senior circuit judge, three circuit judges, three United States district court judges, two associate justices (both retired), one professor of law, two practicing attorneys, and the Director of the Federal Defender Program, Inc. FEDERAL RULES at XIII (West Publishing Co. 1975).

30. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 55-77 (1967).

31. The counties from which the eight members are drawn and the populations as of April 1, 1970 are as follows:

(a) Los Angeles County	7,036,987
(b) Santa Clara County	1,066,714
(c) San Bernardino County	681,535
(d) Ventura County	378,497
(e) Santa Barbara County	264,324
(f) Tulare County	188,322
(g) Butte County	101,969
(h) Tuolumne County	22,169

CAL. DEPT. OF HEALTH, *VITAL STATISTICS OF CALIFORNIA* 9 (1971).

32. Hon. Ross A. Carkeet (Tuolumne County); Hon. Jean Morony (Butte County); Hon. Leonard M. Ginsburg (Tulare County).

33. Hon. Homer B. Thompson (Santa Clara County); Hon. William P. Hogoboom (Los Angeles County).

34. See text accompanying note 36 *infra*.

broader concepts such as the doing of justice,³⁵ making the system *seem* fair to those enmeshed in it,³⁶ and minimizing delay and appeals.

The trial judge composition of the Advisory Committee also explains why "[t]he framework of the proposed Rules is a contextual restatement of the existing statutory provisions as interpreted by case law."³⁷ Trial judges function within the framework of existing law and have a natural urge to codify it in its existing form. Such an approach is particularly unwise in the juvenile justice system where existing case law has developed poorly and in a haphazard fashion.³⁸ Had the Committee included a supreme court justice, one might have expected some thrust to expand the law.³⁹ Those who devote their time to defense of juveniles might have been inclined to focus on elements of the system which have the greatest practical effect on their clients, such as provisions relating to pre-trial detention. Probation officers, psychiatrists and psychologists might have focused primarily on aspects which most markedly affected rehabilitation. However, nowhere in the Rules

35. Sir Frederick Pollock asserts that the law presupposes ideas of justice. F. POLLOCK, *JURISPRUDENCE AND LEGAL ESSAYS* (1961).

36. It has been noted that:

Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel.

S. WHEELER & L. COTTRELL, *JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL* 33 (1966) cited in *In re Gault*, 387 U.S. 1, 26 (1967).

37. PROPOSED RULES, *supra* note 2, at vi.

38. Much of the interpretation of statutory law has been the direct result of the lack of rules to fill the gap. As the Supreme Court stated:

The absence of procedural rules based upon constitutional principle has not always produced fair, efficient and effective procedures.

In re Gault, 387 U.S. 1, 18 (1967).

Almost invariably the interpreting court has been acting in a narrow context, on a piecemeal basis, without any particular attempt to consider how a given interpretation will fit into the overall scheme of the law, and without reaching a conclusion which necessarily precludes some other approach by means of rules. See, e.g., *Joe Z. v. Superior Court*, 3 Cal. 3d 797, 478 P.2d 26, 91 Cal. Rptr. 594 (1970); *In re Dennis H.*, 19 Cal. App. 3d 350, 96 Cal. Rptr. 791 (1971); *In re Larry W.*, 16 Cal. App. 3d 290, 94 Cal. Rptr. 31 (1971).

By choosing the approach of simply restating the law with little change, the staff and the Advisory Committee have followed an inertia approach. This approach accounts in large measure for many of the defects of the Proposed Rules and for their overall lack of creativity.

39. See, e.g., *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), where the California Supreme Court eliminated certain status limitations on negligence liability over Justice Burke's objection in dissent that

[s]weeping modifications of tort liability law fall more suitably within the domain of the Legislature

Id. at 121, 443 P.2d at 569, 70 Cal. Rptr. at 105 (dissenting opinion). See also *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (the court threw out the restrictive "zone of danger" test as previously applied to the standing issue).

is there a desire to boldly determine what changes are required in the juvenile justice system, or to struggle with the question of whether the desired changes can properly be made through rule-making.

The nature of the Advisory Committee also explains its apparent consensus. Since the members all are drawn from one source, namely the trial bench, it is hardly surprising that the comments to the Rules reflect neither debate, dissent, nor consideration of statutes or rules of other jurisdictions. Rather than serving to substantially advance the state of juvenile justice in California, the result is a set of Rules so bland as to be little more than the existing mess of pottage codified.⁴⁰

The final impact of having a committee consisting solely of trial judges lies in the procedures contemplated for adoption of the Rules. Here, the last chance for balance was missed. The Committee chose to reveal the Proposed Rules only to the juvenile court judges and referees of the State and to obtain only their comments before formally submitting the Rules to the Judicial Council for tentative approval.⁴¹ True, public comments now are being sought. However, the process of obtaining public comments, which were due by October 1, 1976,⁴² all but precludes careful and deliberate consideration by the Judicial Council of anything but "omitted comma" type comments unless the entire timetable is rolled back.

IV. METHOD AND APPROACH TO ANALYSIS OF THE RULES

The following analysis of the Rules has two objectives. The primary objective is to demonstrate that large areas of significance have not been appropriately handled and that, as a result, promulgation of the Rules ought to be delayed until a broad-based committee has thrashed out those issues. In most instances the problems arise from the failure of the Advisory Committee to do anything more than attempt to codify

40. The authors claim no great familiarity with juvenile court practices in the small rural counties of California. Perhaps the members of the Advisory Committee, most of whom come from smaller counties, see the changes as a significant advancement in favor of delinquents and allegedly neglectful parents. From the vantage point of those practicing in Los Angeles County and accustomed to practice in other large counties, this simply is not so.

41. PROPOSED RULES, *supra* note 2, at v.

According to Karl J. Uebel, Project Counsel, a few non-judges were present at the Juvenile Court Institute, and a copy of the Proposed Rules was released to the Chairman of the State Bar Committee on Juvenile Justice in April of 1976. Nevertheless, it seems clear there was no widespread effort to obtain comment from the Bar or other non-judges on the Rules as drafted prior to tentative adoption.

42. PROPOSED RULES, *supra* note 2, at v.

existing law, or are the result of simply avoiding issues and leaving them unresolved. A secondary objective is to point out a variety of areas where the Rules need further work. The problems range from the serious to the very technical, thereby supporting the proposition that delay in promulgation of the Rules is required for correction.

V. ILLUSTRATIVE INTEGRATED ANALYSIS—RULES DEALING WITH DETENTION HEARING INVOLVING ALLEGED DELINQUENCIES

A. *Introduction and Method of Approach*

This section will analyze the rules dealing with the pre-trial detention of minors in delinquency cases. This area has been selected because excessive pre-trial detention of delinquents, for whom bail is not presently available,⁴³ represents one of the most troubled areas of the juvenile justice process in California⁴⁴ and in the United States.⁴⁵ Rather than analyzing the Rules in the subchapter one by one, they will be analyzed as a whole.

B. *Analysis of the Existing Situation and the Functioning of the Rules*

A minor accused of being pre-delinquent⁴⁶ or delinquent⁴⁷ usually has first contact with a peace officer.⁴⁸ The officer may release the minor, have the minor and his parent sign a notice to appear before the probation officer, and then release the minor, or "take such minor without unnecessary delay before the probation officer."⁴⁹ In determining which alternative to follow "the officer shall prefer the alternative which least restricts the minor's freedom of movement, provided such alternative is compatible with the best interest of the minor and the community."⁵⁰

The system rarely functions in strict accordance with the statute. A minor interfaces with a peace officer in the field. The officer decides to release, or to cite, or brings the minor into the station for further

43. *In re William M.*, 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).

44. See notes 95-97 *infra* and accompanying text.

45. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 55-77 (1967).

46. CAL. WELF. & INST'NS CODE ANN. § 601 (West Supp. 1976).

47. CAL. WELF. & INST'NS CODE ANN. § 602 (West 1972).

48. Boches, *Juvenile Justice in California: A Re-Evaluation*, 19 HAST. L.J. 47, 49 (1967).

49. CAL. WELF. & INST'NS CODE ANN. § 626 (West 1972).

50. *Id.*

interrogation.⁵¹ Other informal procedures, not contemplated by the law, may be followed.⁵² Taking the time to thoroughly interrogate the minor is viewed as necessary delay. In rural areas considerable delay may occur before a vehicle is available to transport the minor to the juvenile hall. At juvenile hall the minor is again interrogated by a probation officer. While the probation officer is directed to file a petition "immediately"⁵³ upon determining that "the minor shall be retained in custody,"⁵⁴ in fact the petition normally is not filed until the end of the 48-hour time limit.⁵⁵ The reality of that limit is that a minor taken into custody at 1:00 a.m. on Saturday is not "filed on" until some time on the following Tuesday, with a detention hearing on Wednesday. If Monday were a holiday, the petition could be filed on Wednesday and the hearing held on Thursday. If the minor demands that a *prima facie* case be put on, the hearing may be continued for three judicial days, and for up to five judicial days if a material witness is unavailable.⁵⁶

1. Interrogation by the Officer in the Field

In order for the officer to interrogate the minor in the field, either the minor must waive his right against self-incrimination,⁵⁷ or there must be some privilege preventing use of the information so revealed against the minor, thereby making waiver unnecessary.⁵⁸ The simple fact of the matter is that minors generally do not understand their right to remain silent, and even if they do, they will nevertheless talk.⁵⁹

51. *Id.*

52. In one rural town in Fresno County a few years ago, youths involved in minor offenses were set to work washing squad cars on Saturday mornings. In May of 1976, a member of a Los Angeles County law enforcement agency stated to one of the authors: "I've given up bringing in minors whom I find possessing marijuana. It doesn't do any good. So I just make them eat it. I enjoy watching them spill out their guts on the ground."

53. CAL. WELF. & INST'NS CODE ANN. § 630 (West Supp. 1976).

There is no clarification in the code of how much time the term "immediately" allows the probation officer before he must either file the petition or release the minor.

54. *Id.*

55. CAL. WELF. & INST'NS CODE ANN. § 631 (West 1972).

This time limit excludes any non-judicial days. Non-judicial days are Saturdays, Sundays and legal holidays.

56. CAL. WELF. & INST'NS CODE ANN. § 637 (West Supp. 1976); PROPOSED RULES, *supra* note 2, Rule 1336(c).

57. CAL. WELF. & INST'NS CODE ANN. § 625 (West 1972).

58. *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 1109 (Supp. 1976).

59. Despite the general lack of understanding on the part of minors, those who have been through the system once—particularly those who have learned that their ill-advised statements directly resulted in a case being made against them—are learning. More and

Certainly no competent attorney would permit a minor to speak to law enforcement officers until counsel has had the opportunity to talk to the minor. The law ought to provide the unrepresented minor with the protections competent counsel would provide.

The easiest answer is to provide that no admission or confession made by a minor in the absence of his attorney and not joined in by the attorney shall be admissible against the minor. Such a provision is not without precedent.⁶⁰ Nor is it without strong rational justification. The juvenile court stands *in loco parentis* to the minor.⁶¹ The only justification for permitting widespread waiver is the belief that minors should not be permitted to exercise their constitutional rights if such action can be avoided. If the minor were provided counsel at the time of apprehension, counsel surely would screen, if not prevent, statements. The law should do the same indirectly.

If waivers are to be permitted, at least a revised standard form of the *Miranda* warning should be required as a condition of admissibility. First, the warning should be put into language which is more likely to be understandable by the minor.⁶² Secondly, the minor should be advised of the right to consult with a parent, as well as an attorney, before deciding to waive his rights.⁶³

2. Delivery by the Police Officer to the Probation Officer

The law requires the police officer to take a minor who is to be de-

more law enforcement agencies in Los Angeles County complain that minors have learned to say nothing. *But see* Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970):

Generally, delinquents consciously know they have a right to remain silent. Nonetheless, 29% of the delinquents felt they had to talk to police when arrested (question a). Apparently knowledge is often subordinate to mental state at the time of arrest confrontation. Perhaps the difference between knowledge of the right to silence and subjective feeling of a necessity to talk is explained by the findings that 60% felt it would go against them if they remained silent (question b); 74% felt it would benefit them to talk (question c), and 55% were told by the arresting officer that it would be better for them to talk (question d).

Id. at 51.

60. *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 1109 (Supp. 1976).

61. *See* Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-120 (1909); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 174.

62. In the case of *In re Dennis M.*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969), the California Supreme Court recommended that "juvenile officers and police be prepared to give their compulsory *Miranda* warning in terms that reflect the language and experience of today's juveniles." *Id.* at 464 n.13, 450 P.2d at 308 n.13, 75 Cal. Rptr. at 13 n.13.

63. *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 1109 (Supp. 1976).

tained to the probation officer "without unnecessary delay."⁶⁴ Unnecessary delay is undefined. Input and assistance from peace officers and probation officers is needed to determine how much time reasonably is needed, but a period four hours from the time the minor is taken into custody would not seem unreasonable. Exceptions are required for cases in which the officer is prepared to release the minor to a parent as soon as one can be found and in cases where the officer is prepared to release the minor as soon as his physical condition (*i.e.*, sobriety, degree of influence from drugs) will reasonably permit.

Taking the minor to the probation officer involves more than delivering the warm body of one juvenile. The probation officer has an obligation to investigate,⁶⁵ something which is impossible to do if the minor is delivered by a transportation officer who knows nothing of the case and brings no police report with him. Law enforcement should be required to either bring with them a complete arrest report or to have the minor transported by an officer having knowledge of the facts who can and should be required to complete a report at the time the minor is delivered.

3. Having a Probation Officer Available

Having the officer deliver the minor to a probation officer is of little value if in fact there is no probation officer available to immediately investigate. This is not as acute a problem in major metropolitan counties as it is in smaller counties. The Rules should require that a probation officer be on duty or on call at all hours of the day and night to investigate the cases of minors who are detained.

4. Ability of Judge or Referee to Order Release

At the present time there is no convenient provision allowing judges and referees to order the release of detained juveniles from custody prior to the filing of a petition or the holding of a detention hearing. The Rules could easily establish such provisions. These provisions would not impinge on the rights of the probation officer. Under existing law, relief can already be sought by means of a writ of habeas corpus accompanied by an application for warrant of arrest.⁶⁶

64. CAL. WELF. & INST'NS CODE ANN. § 626(c) (West 1972).

65. *Id.* § 628(a).

66. *See* CAL. CONST. art. 1, § 11 (1974); CAL. PENAL CODE § 1501 (West 1970).

5. Speeding Up Detention Hearings

At present, the greatest gap in the detention process is the long delay between being taken into custody and the holding of the detention hearing, if maximum time deadlines are utilized. In many cases minors are apprehended on the weekend, and the minor who is apprehended early Saturday can be held for hearing until Tuesday; or if apprehended on a holiday weekend, can be held for hearing until the following Wednesday.⁶⁷ While Rule 1321(b) reiterates the existing law in requiring the probation officer to immediately file the petition, Rule 1321(a) retains the forty-eight hour rule. Therefore, nothing in this Rule can be expected to change existing practice.⁶⁸

The problem is not one of more time being required for investigation; rather, the problem is a combination of probation department inertia and understaffing coupled with the widespread idea that all one need do is to comply with the forty-eight hour requirement.

A number of distinct and independent suggestions that might be incorporated into the Rules to solve the problem are: (1) Rewrite Rules 1321(a) and 1321(b) to place major emphasis on the duty to immediately investigate and file, rather than on the forty-eight hour limit; (2) permit the filing of handwritten detained petitions so that filing delays will not result from the inability to find typists; (3) require every petition to be filed within twenty-four hours of the date and hour on which the minor is received (non-judicial days included) by the probation officer in the absence of extreme good cause; (4) require the probation officer to immediately advise by telephone a designated judge or referee of the juvenile court and the Public Defender when a minor has been detained for more than twenty-four hours without a petition being filed;

67. See note 56 *supra* and accompanying text.

68. Serious constitutional problems are presented. In the case of *In re William M.*, 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970), the California Supreme Court stated that:

The California Juvenile Court Law, as properly administered, provides an adequate system for the prehearing release of juveniles without the requirement of posting bail. . . . Hence, we decline to consider whether juveniles are constitutionally entitled to bail.

Id. at 26 n.17, 473 P.2d at 744 n.17, 89 Cal. Rptr. at 40 n.17 (emphasis added) (citations omitted).

That case involved post-detention hearing release, not pre-detention hearing release. An adult is entitled to be released on bail as a matter of right. If the present scheme of pre-detention hearing for juveniles can be justified at all, it can be justified only if it operates quickly at the hands of the probation officer and is followed by immediate judicial review.

and (5) require the office of the county clerk to be open during reasonable hours of the weekend so that petitions can conveniently be filed.

All of these suggestions necessarily involve inconvenience and more work for existing personnel in the system. However, it is very easy to forget that the system is run for the benefit of the youth which it serves. There is a certain irony in the fact that commissioners are on duty throughout the weekend in Los Angeles County to reduce bail or release adult offenders on their own recognizance,⁶⁹ while youngsters languish in juvenile halls awaiting the arrival of the work week and the return of judicial personnel to the courthouse.

C. *The Initial Detention Hearing*

The concept advanced by the Proposed Rules of an initial detention hearing followed by a rehearing⁷⁰ is not new, however, the terminology is.

1. Explanation of Proceedings

Rule 1324(a) provides for an elaborate explanation of the minor's rights and a reading of the petition at the beginning of the detention hearing. These formalities customarily are abbreviated when the minor is already represented by counsel. Specific provisions should be made to permit waiver if the minor's counsel assures the court that the necessary explanations have already been given. If the Rules are intended to absolutely prohibit waiver then they should explicitly provide for this result.

2. Right to Counsel

Rule 1324(b) and 1324(c) do nothing more than restate the law relating to the appointment and waiver of right to appointment of counsel.⁷¹ The Rule is woefully insufficient. It is hard to imagine any case in which a minor could prudently waive the right to counsel if the case is so serious as to merit the possibility of detention. Given that the parents, if able, may resist the idea of being required to reimburse the county⁷² and the lack of knowledge on which a minor can draw to make

69. LOS ANGELES COUNTY SUPER. CT. R. 18 § 3.

70. PROPOSED RULES, *supra* note 2, Rule 1326(c). For the text of the rule, see note 81 *infra*.

71. CAL. WELF. & INST'NS CODE ANN. § 634 (West 1972).

72. *See id.* § 903.1; *People v. Amor*, 12 Cal. 3d 20, 523 P.2d 1173, 114 Cal. Rptr. 765 (1974). Section 903.1 indicates that parents are liable for legal costs and *Amor*

an intelligent decision, the Rules ought to provide that, in at least all detained cases, the minor cannot waive his right to counsel unless the minor has first conferred with counsel and counsel joins in the waiver or the minor otherwise convinces the court that he is capable of handling his own defense.

3. Evidence at the Original Detention Hearing

It is clear from Welfare and Institutions Code section 635 that at the original detention hearing the court must hear "such relevant evidence as the minor . . . desires to present . . ." ⁷³ However, Rule 1323 restricts such evidence to that which is relevant to the grounds for detention of the minor. Further weighing the scales against the minor and on the side of detention is Rule 1326(b). This Rule allows the court, in finding the prerequisites of detention, to rely solely on written police reports, probation reports or other documents submitted by the probation officer. At this stage the minor is not given an opportunity to confront the preparers of such documents unless his defense counsel has had the unusual good fortune of adequate time and resources to subpoena them.

Assume that through the diligence of counsel the minor has present at the detention hearing all known witnesses to the event in question, including the victim and the arresting officer. It must be maintained that, under those circumstances, the minor is free to put these witnesses on the stand to show that he should not be detained because there is *no probable cause* to believe that he committed the offense in question. Consider another situation. The minor offers three alibi witnesses. The court must hear them, but according to the Rules their testimony goes only to the issue of detention. The Court should balance their testimony against any hearsay statements contained in the report of the police officer and decide whether to dismiss the petition. Now take a third example. Assume that the minor is the only witness to testify. He concedes the truth of everything in the police report involving an entry into a school. His only claim is that he saw the door blowing in the wind, entered the schoolyard to fasten it shut, and, as he was about to do so, was grabbed by a peace officer. The court should consider this testimony even though it goes to the allegations rather than to the issue of detention.

establishes the constitutionality of a similar provision in CAL. PENAL CODE § 987.8 (West 1970).

73. CAL. WELF. & INST'NS CODE ANN. § 635 (West 1972).

Rule 1323(a) must be revised to make it clear that testimony offered by the minor which goes directly and unequivocally to the issue of probable cause for detention is to be heard at the initial detention hearing. Rules 1323(b) and 1326(b) also need to be revised to explicitly allow for such evidence.

4. Continuing the Detention Hearing for a Rehearing

Rule 1326(c) permits the minor to confront "preparers of reports or documents relied on by the court"⁷⁴ in ordering detention. This confrontation takes place at what now is styled as a detention "rehearing," the purpose of which is to establish whether a *prima facie* case can be made to show the minor is a person described by Welfare and Institutions Code sections 601⁷⁵ or 602.⁷⁶ In accordance with law,⁷⁷ the detention rehearing is held within three judicial days of the date of the original detention hearing, with an additional continuance of five judicial days if the witnesses are unavailable.

The first defect of this Rule is that it places no stress on holding the hearing as quickly as possible. There is no reason to always allow the three day delay (which is the most convenient for court calendaring) if the witnesses are in fact available the day following the original hearing. Availability normally could readily be determined by the District Attorney or probation officer telephoning the persons in question on the spot.

The second defect is in the failure to define the term "unavailable." The term needs definition to eliminate excuses such as "the officer will be on vacation" or "the officer is out of the county on business." "Unavailability" should have precise meaning, such as the one provided in the California Evidence Code.⁷⁸

74. PROPOSED RULES, *supra* note 2, Rule 1326(c).

75. CAL. WELF. & INST'NS CODE ANN. § 601 (West Supp. 1976).

76. *Id.* § 602.

77. *Id.* § 637. Under the Rules the five judicial day period is calculated from the date of the initial detention hearing, not from the date of the detention rehearing. PROPOSED RULES, *supra* note 2, Rule 1326(c). This interpretation is very much to the favor of the minor.

78. CAL. EVID. CODE § 240 (West 1966) defines "unavailable as a witness":

(a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is:

1. Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;
2. Disqualified from testifying to the matter;
3. Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;

5. Evidence at the Detention Hearing

The Rules provide that at the rehearing the minor shall have the right to examine "preparers of reports or documents relied upon by the court in support of its initial decision."⁷⁹ This strips the rehearing provisions of all meaning. This effect is best understood by an example. Assume that Officers A and B are summoned by a householder who reports having seen a burglar try to enter his home. The officers scour the neighborhood, find a likely suspect, and transport the suspect back to the householder, who identifies the minor. Cross-examination of Officers A and B is useless since they have personal knowledge only of the *hearsay statement* by the alleged victim. The petitioner should have the burden of producing in court the maker of the statement for examination by the minor's counsel. Even worse, assume that Officers A and B orally transmit the information to Officer C, who in turn prepares the written report submitted to the court. The cross-examination of Officer C, whose statements are double level hearsay, is more than useless since he has no personal knowledge of anything, and cannot even testify as to the demeanor of the complainant.

Rule 1326(b) (allowing the court to base detention on written documents)⁸⁰ and Rule 1326(c) (limiting cross-examination to the preparers of the document)⁸¹ assertedly encompass case law governing the

4. Absent from the hearing and the court is unable to compel his attendance by its process; or

5. Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the declarant from attending or testifying.

Id.

79. PROPOSED RULES, *supra* note 2, Rule 1326(c). For the text of the rule, see note 81 *infra*.

80. PROPOSED RULES, *supra* note 2, Rule 1326(b) states:

In making the findings prerequisite to an order of detention at the detention hearing, the court may rely solely upon written police reports, probation reports or other documents submitted by the probation officer.

Id.

81. PROPOSED RULES, *supra* note 2, Rule 1326(c) states:

After a decision of detention has been made, the minor or the minor's counsel may request further evidence regarding the prima facie case or the grounds of detention by invoking the right to confront and to cross-examine the preparers of reports or documents relied upon by the court in support of its initial decision. If that request is made, a rehearing shall be held within three judicial days to consider testimony by those persons. If the rehearing cannot be held within three judicial days due to the unavailability of a witness, the court may continue the

actual conduct of detention hearings; in reality, they do not. Rather, they come close to a restatement of the statutory law⁸² while ignoring the case law. As will be shown, the law as correctly interpreted requires that upon demand, the petitioner must produce at a detention rehearing sufficient *live* or otherwise admissible testimony to establish a *prima facie* case against the minor.

In the case of *In re William M.*⁸³ the Supreme Court of California stated that

the Legislature has now clearly indicated that the probation officer, at the detention hearing, is charged with the duty of adducing facts which will support detention under Section 636.⁸⁴

The court then cites with approval the statement of one of the authors that "[t]his requirement for full evidentiary hearings . . . should, in and of itself, do more than anything else to remedy California's over-detention practices."⁸⁵ It should be obvious that the salutary objective of *full* evidentiary hearings cannot be accomplished when the officer who prepares the report and who testifies does not in fact have first-hand knowledge of the underlying facts contained in the report, and is instead a hearsay declarant offering hearsay.⁸⁶

In the case of *In re Dennis H.*⁸⁷ the court characterized the case of

rehearing for a period not to exceed five judicial days from commencement of the detention hearing. If the preparer of any report or document is not made available for purposes of confrontation and cross-examination by the minor, the report or document shall not be considered by the court in making its detention decision.

Id.

82. See CAL. WELF. & INST'NS CODE ANN. §§ 635-36 (West 1972); *id.* § 637 (West Supp. 1976).

83. 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970).

84. *Id.* at 28, 473 P.2d at 745, 89 Cal. Rptr. at 41.

CAL. WELF. & INST'NS CODE ANN. § 636 (West 1972) states:

If it appears upon the hearing that such minor has violated an order of the juvenile court or has escaped from a commitment of the juvenile court or that it is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another that he be detained or that such minor is likely to flee the jurisdiction of the court, the court may make its order that such minor be detained in the juvenile hall or other suitable place designated by the juvenile court for a period not to exceed 15 judicial days and shall enter said order together with its findings of fact in support thereof in the records of the court.

Id.

85. *In re William M.*, 3 Cal. 3d 16, 28 n.20, 473 P.2d 737, 745-46 n.20, 89 Cal. Rptr. 33, 41-2 n.20 (1970), quoting Boches, *Juvenile Justice in California: A Re-Evaluation*, 19 HASTINGS L.J. 47, 49 (1967).

86. This problem did not exist in *In re William M.*, 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970) because there the minor was accused of selling marijuana to an undercover officer who, it may be assumed, was the author of the police report.

87. 19 Cal. App. 3d 350, 96 Cal. Rptr. 791 (1971).

*In re Larry W.*⁸⁸ as holding that documentary evidence might be used in a detention hearing in place of oral testimony, but that this device could not be used to deprive the minor of his right to demand physical presence of the declarants.⁸⁹ The court did not have occasion to pass on whether a demand could properly have been made of the petitioner for production of the victim since the public defender only demanded to confront the maker of the police report. Certainly, the court did not hold that there was no obligation on the petitioner to produce first-hand witnesses if that was necessary to avoid depriving the minor of his right to the physical presence of the declarant.

Both *Larry W.*⁹⁰ and a 1975 opinion of the California Attorney General⁹¹ reiterate the right of the minor to seek a reasonable continuance to produce witnesses at the detention hearing. However, both opinions predate the amendments to the Welfare and Institutions Code which went into effect in 1976,⁹² and are premised on the assumption that the law as constituted simply would not give the probation officer time to produce witnesses on the day of the detention hearing.⁹³ The amendments to the Welfare and Institutions Code effective in 1976 provide for continuances for any party to produce witnesses.⁹⁴ With provision now existing for granting the probation officer continuances there is no reason to interpret the law as placing the burden on the minor to produce the witnesses.

On the surface, the issue presented is one of who has the burden of producing witnesses. But the reality of the system is that slight shifts in administrative convenience significantly affect action. Thus we may assume that law enforcement officers will exercise far greater restraint in detaining minors if they know that they will be called upon to help round up witnesses for the detention hearing. Hard-pressed defense counsel, generally lacking the necessary resources, are in a poor position to corral those witnesses themselves. The District Attorney, Probation Department, and law enforcement agencies involved have unlimited resources with which to subpoena necessary witnesses. The minor is left to the resources of his own counsel's efforts or the regular

88. 16 Cal. App. 3d 290, 94 Cal. Rptr. 31 (1971).

89. *In re Dennis H.*, 19 Cal. App. 3d 350, 355, 96 Cal. Rptr. 791, 794 (1971); *see In re Larry W.*, 16 Cal. App. 3d 290, 293, 94 Cal. Rptr. 31, 32 (1971).

90. 16 Cal. App. 3d 290, 94 Cal. Rptr. 31 (1971).

91. 58 OP. ATT'Y GEN. 306 (1975).

92. Stats. 1975, c. 1129, § 1.

93. *In re Larry W.*, 16 Cal. App. 3d 290, 293-94, 94 Cal. Rptr. 31, 32 (1971); 58 OP. ATT'Y GEN. 306, 309 (1975).

94. CAL. WELF. & INST'NS CODE § 637 (West Supp. 1976).

subpoena facilities of the sheriff, marshal or constable. The Civil Process divisions of the latter agencies normally are not set up to provide quick service as is required under the circumstances. It therefore becomes evident that beneath the surface is the true issue of whether the court is going to assist or hamper the juvenile in his attempt to exercise his constitutional right to confrontation and cross-examination of the witnesses against him.

6. Standards for Detention

California detains three times as many children as the average number detained by all states.⁹⁵ The vague standards for detention established by Rule 1327 will do little to correct the situation. Rule 1327 is an improvement in some areas. It makes it clear that the court has the power to release the minor in all cases, including those involving an alleged violation of a court order.⁹⁶ But the Rule generally is so vague as to provide little guidance.⁹⁷ It would help to preface the Rule with a statement that detention is not favored, that all intendments are against detention, and that doubtful cases should be resolved in favor of release.

VI. ANALYSIS OF THE REMAINING RULES

A. Introduction

This section is intended to deal with problems the Rules present on a topical basis. The analysis is made with the primary objective of demonstrating the need for delay in promulgating the Rules, and the

95. CAL. YOUTH AUTHORITY, HIDDEN CLOSETS, A STUDY OF DETENTION PRACTICES IN CALIFORNIA 1 (1975).

96. Whereas CAL. WELF. & INST'NS CODE ANN. § 635 (West 1972) seems to suggest that the court must detain if the grounds exist, CAL. WELF. & INST'NS CODE ANN. § 636 (West 1972) uses the permissive term "may" and underscores the court's discretionary power to determine, on a case by case basis, whether a minor should be detained. The Proposed Rules give full recognition to the power of the court in this area. PROPOSED RULES, *supra* note 2, Rule 1327.

97. Certain other problems exist. PROPOSED RULES, *supra* note 2, Rule 1327(a)(3) points to the likelihood of the minor to flee as one factor justifying detention. A factor in determining whether a minor is likely to flee is whether the minor has a prior history of failure to obey court orders. *Id.* Rule 1327(d)(4). There is simply no causal connection between most such violations and the likelihood of flight. Another factor in determining likelihood of flight is whether the minor "would probably be released in an adult court on modest bail". *Id.* Rule 1327(d)(8). This is an inappropriate factor in the determination. The correct test is whether the court would release the minor on normal bail. Modest bail is generally determined by the nature of the offense, not the likelihood of flight. So, too, in Rule 1327(e)(5) the geographical location of the residence of the minor bears no causal connection to the protection of the minor.

secondary objective of providing comments for the benefit of the Judicial Council should they determine to proceed with the promulgation of Rules.

B. *Problems Involving Basic Approach to the Rules*

The preliminary provisions⁹⁸ raise a number of problems. The greatest problem stems from the decision to accompany the Rules (in draft form) with comments, while failing to state whether the comments constitute a part of the Rules or whether they will even be printed with the Rules.⁹⁹ In some instances possible ambiguities in the Rules can be resolved only with the benefit of the comments.¹⁰⁰ In other cases the comments can serve to illuminate the meaning of the Rules.

Another problem presented by the comments stems from their length. They read more like a committee report than the terse comments one normally would anticipate as an integral part of court rules. If they are made a part of the Rules then they need to be significantly condensed.

An additional difficulty grounded in the basic approach to the Rules is posed by the Advisory Committee's decision to attempt to restate the law.¹⁰¹ The result, once again, is to unnecessarily elongate the Rules.

98. PROPOSED RULES, *supra* note 2, Rule 1301.

99. It is important to define the effect of the Advisory Committee comments in the Rules. The authors take the position that the comments are not part of the Rules and therefore there is no need to analyze them. If it is intended that the comments constitute part of the Rules, or are to be an aid in interpretation, the Rules should so provide and further review would be required.

100. *See, e.g.*, PROPOSED RULES, *supra* note 2, Rule 1307(b)(1)(c). This Rule seems to imply that if it appears to the probation officer that sufficient evidence is present to bring the minor within the jurisdiction of the court and the matter is considered serious, the probation officer *must* file a petition. However, upon referral to the corresponding comment, it becomes evident that the factors suggested in the Rule are not intended to eliminate the discretion of the probation officer.

See also id. Rule 1309(b) where it is stated that:

[T]he Code of Civil Procedure relating to variance and amendment of pleadings in civil actions shall apply to petitions and proceedings in the juvenile court

Id. Only in the comment thereto is any consideration given to the possible due process violation which could arise if a minor is detained prior to adjudication beyond the statutory period prescribed by CAL. WELF. & INST'NS CODE ANN. § 657 (West 1972). The comment states that

because due process requires that the minor, parent or guardian receive timely notice of the specific issues to be met at a hearing . . . courts should be cautious in permitting an amendment of a petition to conform to proof once a hearing begins

PROPOSED RULES, *supra* note 2, at 2-22 (citations omitted).

101. PROPOSED RULES, *supra* note 2, Rule 1301(c)(1). *See, e.g., id.* Rule 1308 which

The practical ramifications are great, since an intensive integration of the statute into the Rules will create a nightmare as the statutes are revised from time to time and the Rules must be revised accordingly. It may be that the Advisory Committee elected to incorporate and restate the statute because it is sufficiently complex that lay probation officers and social workers practicing before the court¹⁰² need a document which is better organized than is the statute. If that is the problem, a better solution would be a separate guide to the law for those not trained in it.

An allied problem of approach stems from the fact that the Rules are not accompanied by mandatory or suggested forms. Often the best way to illustrate the meaning of a rule and to guarantee the automatic compliance with rules as a matter of course, is to build the rules into forms. Yet no suggested forms have been provided. This unfortunate oversight needs correction. If the subject of forms had been taken into account, then the Advisory Committee might have considered the desirability of requiring that certain documents, (*i.e.*, the critical notice of hearing which is served on the parties along with the petition), contain a notice in Spanish warning of the nature of the proceedings and the need to take action. It is somewhat ironic to require a warning in Spanish when a parent faces the loss of his chattels, but none when the matter at stake is the freedom and custody of his child.

C. Problems Relating to the Commencement of Proceedings

Proceedings in the juvenile court are commenced by the probation officer filing a petition with the clerk of the juvenile court.¹⁰³ The process is not a mechanical one. The probation officer has the viable alternative of not filing a petition,¹⁰⁴ either because he believes that filing is unwarranted or the evidence is insufficient, or of setting up a program of voluntary supervision in lieu of filing a petition.¹⁰⁵ The

restates CAL. WELF. & INST'NS CODE ANN. § 650 (West 1972); PROPOSED RULES, *supra* note 2, Rule 1309(a) which restates CAL. WELF. & INST'NS CODE ANN. § 626 (West 1972).

102. In many counties, counsel is not present to represent the petitioner in most cases, and cases are presented in court by the probation officer or social worker. The Rules purport to provide guidance for "probation officers and others practicing in the juvenile court." PROPOSED RULES, *supra* note 2, Rule 1301(b).

103. CAL. WELF. & INST'NS CODE ANN. § 650 (West 1972).

104. For juvenile court proceedings to commence it takes definite action by the probation officer—the filing of a petition. *Id.* In most cases, "the determination whether or not to file a petition shall be in the sole discretion of the probation officer." PROPOSED RULES, *supra* note 2, Rule 1307(f).

105. CAL. WELF. & INST'NS CODE ANN. § 654 (West Supp. 1976).

majority of cases do not result in a petition being filed.¹⁰⁶ The basic concept of the law is that the decision to file, and by necessary implication the decision not to file, is one to be made by the probation officer using his own professional expertise and guidelines as his standard. The language of Rule 1307(f) seems to take into account this problem by providing:

[T]he determination whether or not to file a petition shall be in the sole discretion of the probation officer.¹⁰⁷

However, the Rules as a whole are contradictory. They tend to confuse the probation officer's traditional prerogatives with the functioning of the juvenile court judge.

The framers of the Arnold-Kennick Juvenile Court Law¹⁰⁸ gave very careful consideration to the question of the role that ought to be played by the juvenile court judge (and inferentially by the Judicial Council in framing rules). They came to the conclusion that the essential role of the judge was to "act as a judicial check on an administrative agency."¹⁰⁹ This important concept seems lost throughout Chapter II of the Rules¹¹⁰ which appears to mandate the tests to be followed by the probation officer in filing or not filing.¹¹¹

106. CAL. YOUTH AUTHORITY, HIDDEN CLOSETS, A STUDY OF DETENTION PRACTICES IN CALIFORNIA 1 (1975).

107. PROPOSED RULES, *supra* note 2, Rule 1307(f).

108. CAL. WELF. & INST'NS CODE ANN. §§ 500-945 (West 1972).

109. GOVERNOR'S SPECIAL STUDY COMMISSION, REPORT OF THE GOVERNOR'S SPECIAL STUDY COMMISSION ON JUVENILE JUSTICE 39 (1948) [hereinafter cited as COMMISSION REPORT].

110. *See, e.g.*, PROPOSED RULES, *supra* note 2, Rule 1307(g). That provision appears to limit the discretion of the probation officer if the minor exhibits criminal sophistication, if the disposition imposed by the juvenile court cannot be completed before the minor reaches age 21, if the minor has a previous delinquent history, if the minor hasn't responded well to previous rehabilitative attempts, and/or if the minor is alleged to have committed a grave offense.

111. The tests mandated are themselves often either erroneous or unclear.

Proposed Rules, *supra* note 2, Rule 1307(b)(1)(C) provides that matters not serious enough to require official action may be referred to a nonjudicial agency available in the community. This poorly worded subdivision seems to imply that if it appears to the probation officer that sufficient evidence is present to bring the minor within the jurisdiction of the court and the matter is considered serious, the probation officer *must* file a petition. The result of this interpretation of the subdivision contradicts Rule 1307(f) by removing the probation officer's individual discretion to divert minors in appropriate cases. An example of the poor results that might come about from the interpretation above is the situation where a minor, aged ten years, is involved in armed robbery with other older minors and is taken into custody. The minor has no previous contacts with the law and it appears to the probation officer that CAL. WELF. & INST'NS CODE ANN. § 654 (West Supp. 1976) informal probation would be in order. However, if this Rule is

The snare into which the draftsmen of the Rules have fallen is well illustrated by Rule 1307(a), which provides:

The presiding judge of the juvenile court shall initiate meetings and cooperate with the probation department, welfare department, prosecuting attorney, law enforcement and other persons and agencies performing an intake function to establish and maintain a fair and efficient intake program . . . and to initiate whatever course of action appears necessary and desirable.¹¹²

The judge of the juvenile court cannot be a judicial check on an administrative system and at the same time have the basic responsibility for establishing and coordinating activities relating to intake policy. It was exactly this kind of practice that was so strongly criticized by the Governor's Special Study Commission.¹¹³ If the Advisory Committee is intent on following this approach, it should provide that no superior court judge who acts as a meeting "initiator"¹¹⁴ or "cooperator"¹¹⁵ shall hear juvenile court matters.

D. Hearings Before Referees

California uses referees in its juvenile courts.¹¹⁶ The Rules continue to validate their use. Referees are subordinate judicial officials¹¹⁷ whose authority is ill-defined by law¹¹⁸ but clearly is less than that of a juvenile court judge.¹¹⁹ They must be members of the California Bar with five years experience,¹²⁰ but under various "grandfather provisions"¹²¹ some non-lawyer referees still serve. Referees generally hear all types of matters, including contested trials and hearings to determine the fitness of a minor to remain in the juvenile courts.

Rule 1316(a) provides that referees shall "perform subordinate judicial duties."¹²² The question of exactly how "subordinate judicial

interpreted to mean only non-serious crimes can be diverted, and armed robbery is considered to be a serious crime, then the probation officer under the Rule must file a petition.

112. PROPOSED RULES, *supra* note 2, Rule 1307(a).

113. COMMISSION REPORT, *supra* note 109.

114. A function provided for by PROPOSED RULES, *supra* note 2, Rule 1307(a).

115. *Id.*

116. PROPOSED RULES, *supra* note 2, Rule 1316(a).

117. *Id.*

118. See CAL. WELF. & INST'NS CODE ANN. § 554 (West Supp. 1976).

119. *Id.*

120. CAL. WELF. & INST'NS CODE ANN. § 553 (West 1972).

121. *Id.*

122. PROPOSED RULES, *supra* note 2, Rule 1316(a).

duties" should be defined is beyond the scope of this article. The question is not an easy one, but it is one that the Rules, not the appellate courts, should deal with. A narrowly drawn definition would prevent any challenge from arising in the first place. From a pragmatic viewpoint it is more important to focus on the *types* of cases a referee should handle, rather than on the *scope* of his powers. If one were to take such an approach, the result would be that, over the objections of the minor or his parents, a referee would be permitted to hear only cases in which the probation officer certified that removal of the minor from the home would not be sought. If removal were sought, the minor, if he so desires, ought to have the right to be heard before a constitutional officer,¹²³ one who does not serve at the mere whim and pleasure of the juvenile court judge.¹²⁴

The Committee, unfortunately, did not choose to grapple with the problem presented in this area, and as a result simply restated, in almost the same words, the ambiguous and relatively uninterpreted law. For example, the California Supreme Court in the case of *In re Edgar M.*¹²⁵ held that referees may perform only subordinate judicial duties, and threw the law into a state of chaos by failing to clearly set forth the boundaries thereof. Rule 1316(a) simply provides that referees may perform "subordinate judicial duties" without giving any amplification or clarification.

In the only area where the law is clear, but its application is not, the Committee failed to properly set guidelines for application. This area pertains to how the decision is to be made on whether proceedings before a referee are taken down by a court reporter. Rule 1317 (a)(1) states that proceedings are to be reported when directed by the judge. This repeats existing law.¹²⁶ The preferable approach would be to establish uniform statewide standards. In Los Angeles County every proceeding is reported. Practice in other counties varies. There is no justification for varying standards. From the viewpoint of the minor there could be no objection if he had an absolute right to a reporter

123. Fears that the juvenile court system would collapse under demands for judge-supervised trials are simply unrealistic. The trial bench always has demonstrated creativity in coping with unreasonable demands. No competent lawyer will want to antagonize a judge by refusing to have most cases tried before a competent referee, particularly if the court adopts the practice of assigning such cases to a judge generally considered undesirable. However, the presence of such provisions will guarantee that referees are of the highest quality.

124. CAL. WELF. & INST'NS CODE ANN. § 553 (West 1972).

125. 14 Cal. 3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975).

126. CAL. WELF. & INST'NS CODE ANN. § 677 (West 1972).

if he so desired, and an absolute right to the absence of a reporter if he so desired. From a policy viewpoint, assuming a ready availability of reporters throughout the state, there is no reason for variation.

E. Rehearings of Orders of Referees

The extent to which decisions by a referee are subject to review by a judge depends on a number of factors. The most important factor is whether the proceedings before a referee are taken down by a court reporter. The Rules provide that if the proceedings are not fully reported the minor is entitled as a matter of right to a rehearing.¹²⁷ Such hearing is in the nature of a trial *de novo* before the juvenile court judge.¹²⁸ If the proceedings are fully reported, the Rules give the judge power to decide whether or not to grant a rehearing after reading a transcript of the proceedings.¹²⁹ The application for rehearing must be acted upon within twenty days following its receipt¹³⁰ unless the court, for good cause, extends the period to forty-five days.¹³¹ If the application is not denied within the prescribed time periods, it is deemed granted.¹³²

The Proposed Rules do clear up one area. They require that if a rehearing is granted it must be commenced within ten days of the date of the order granting it, except that the rehearing must commence within two days in the case of a detention hearing.¹³³ In the case of detention hearings, however, the Rule appears to make a bad situation worse. At the present time detention orders of a referee normally are reviewed via habeas corpus, which involves no delay.¹³⁴ Rehearing is an inadequate remedy because of the twenty to forty-five day period available to the court in which to review the decision. Most detained minors come to trial within twenty-one calendar days,¹³⁵ thereby mak-

127. PROPOSED RULES, *supra* note 2, Rule 1319(b).

128. CAL. WELF. & INST'NS CODE ANN. § 560 (West 1972).

129. PROPOSED RULES, *supra* note 2, Rule 1319(c). See also CAL. WELF. & INST'NS CODE ANN. § 558 (West 1972).

130. CAL. WELF. & INST'NS CODE ANN. § 558 (West 1972).

131. *Id.*

132. *Id.*

133. PROPOSED RULES, *supra* note 2, Rule 1319(e).

134. See *In re Dennis H.*, 19 Cal. App. 3d 350, 96 Cal. Rptr. 791 (1971).

135. CAL. WELF. & INST'NS CODE ANN. § 657 (West 1972) states:

[T]he petition must be set for hearing within 15 judicial days from the day of the order of the court directing such detention.

Id.

ing an application for rehearing moot. Ideally the Rules should be revised to establish some specific procedure for obtaining quick review of detention orders.¹³⁶ If not, at least Rule 1319(f) should be revised to remove the inference that habeas corpus is not available until a request for a rehearing has been made and acted on in detention matters.¹³⁷

Rule 1319(d), restating Welfare and Institutions Code section 559,¹³⁸ provides that the judge of the juvenile court on his own motion under certain circumstances may hold a rehearing of a matter decided before a referee. The major problem arises when a referee has acquitted a minor, and on the motion of the district attorney or probation officer, often made *ex parte* and without notice,¹³⁹ a rehearing is granted. A number of cases have upheld this procedure.¹⁴⁰ *Breed v. Jones*¹⁴¹ has seriously undermined the rationale of those cases. In *Breed* the United States Supreme Court held that once an adjudicatory hearing began the minor was in jeopardy. It then became too late to try to move the case to the adult courts for the minor to be tried as an adult.¹⁴² The court reasoned that the minor already had begun to run the gauntlet when the trial began. The same rationale is true here. The minor will have been put to the emotional strain and expense of putting on his entire case and winning, only to be forced to start anew because the juvenile court judge wants to start anew. The problem

136. PROPOSED RULES, *supra* note 2, Rule 1319(e) provides that a rehearing granted on detention shall be heard within two days after the granting of a rehearing. The problem here is that the granting of a rehearing on detention may take as long as *forty-five days*. Thus, with the additional two days after the granting of a rehearing on detention, the minor may be detained up to forty-seven days. It appears that on the issue of detention a different and more appropriate procedure for faster review should be created. Perhaps a procedure providing for automatic review before a judge of the juvenile court of a detention order made by a referee, to be heard within two judicial days of the detention hearing, would be the best way to deal with the problem. The minor should be provided with a speedy procedure for review of a detention order since an order of detention is not reviewable on appeal.

137. That Rule is not as clear as it could be, particularly because of the use of the undefined term "should." It reads as follows:

Any person seeking review of the order and findings of a referee should apply for a rehearing by the juvenile court judge under this rule prior to appealing or seeking other appropriate relief from the Court of Appeal.

PROPOSED RULES, *supra* note 2, Rule 1319(f).

138. CAL. WELF. & INST'NS CODE ANN. § 559 (West 1972).

139. See R. WALKER, CALIFORNIA JUVENILE COURT PRACTICE §§ 154-56 (Supp. Nov. 1975).

140. See, e.g., *In re Edgar M.*, 14 Cal. 3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975); *Donald L. v. Superior Ct.*, 7 Cal. 3d 592, 498 P.2d 1098, 102 Cal. Rptr. 850 (1972); *In re Dale S.*, 10 Cal. App. 3d 952, 89 Cal. Rptr. 499 (1970).

141. 421 U.S. 519 (1975).

142. See CAL. WELF. & INST'NS CODE ANN. § 707 (West Supp. 1976).

can be remedied by not permitting the judge to grant a rehearing on his own motion when the minor has been acquitted.

F. *The Granting of Immunity to Witnesses at Hearings*

Rule 1342(d) authorizes the juvenile court to grant witnesses "use immunity" to protect them from use of their testimony against them in criminal or juvenile proceedings. As the comments to the Rule point out,¹⁴³ the law authorizes the granting of the much broader transactional immunity in both felony and misdemeanor proceedings.¹⁴⁴ The rulemakers claim that "it would seem to be beyond the scope of the rulemaking power to establish by rule in the juvenile courts a basis for granting transactional immunity to a witness."¹⁴⁵ None of the cases cited by the Advisory Committee stand for the proposition that the Judicial Council lacks the power to grant such immunity.¹⁴⁶ The mandate to prepare rules is broad, and should be fully exercised to avoid the unfortunate result of granting use immunity alone.¹⁴⁷

G. *Time Periods and Dismissals of Petitions*

The law provides for strict time periods for bringing cases to trial¹⁴⁸ but does not state the consequences of a dismissal for failure to do so. In a similar vein, the law provides for the probation officer to file the petition,¹⁴⁹ but it is silent on how, if at all, the probation officer may dismiss the petition before the time of trial, with or without prejudice. These problems need to be remedied.

The importance of time limits in the juvenile court cannot be overstated. The goal is one of speedy hearings. Procedures which permit cases to be dismissed without prejudice as a matter of course and imme-

143. PROPOSED RULES, *supra* note 2, at 5-12.

144. CAL. PENAL CODE §§ 1324, 1324.1 (West 1970).

145. PROPOSED RULES, *supra* note 2, at 5-12.

146. *See* cases cited in PROPOSED RULES, *supra* note 2, at 5-11 to 5-13.

147. The granting of use immunity in the juvenile court, rather than transactional immunity as in adult criminal cases, could have a rather bizarre effect on a minor who has a co-participant who is also being tried in the juvenile court. In the case of *In re Eugene M.*, 55 Cal. App. 3d 650, 127 Cal. Rptr. 851 (1976), the court stated that the uncorroborated testimony of a co-participant is sufficient to establish that a crime has been committed. Thus, if Minor "A" is given use immunity and must testify as to his part in a robbery which implicates his co-participant, Minor "B," then Minor "B" could also be given use immunity thereby allowing him to testify against "A". Both minors will convict each other.

148. CAL. WELF. & INST'NS CODE ANN. § 657 (West 1972).

149. *Id.* § 650.

diately refiled totally destroy this objective of the law.¹⁵⁰ The Rules should provide that all dismissals for failure to meet time deadlines are with prejudice. There is no other way to ensure that the juvenile justice system will move forward quickly.¹⁵¹

A related problem involves the power of a probation officer to dismiss a petition once it is filed. The investigation by counsel for the minor often establishes that a petition never should have been filed. This occurs because it is established that informal supervision would be appropriate¹⁵² or because the minor is innocent or because venue would better lay in a different county. The probation officer may then take the position that he lacks the power to dismiss. The Rules should grant the power to dismiss, either with or without prejudice, subject to approval by the court in such circumstances.

H. Reading Dispositional Reports Before Trial

Frequently the probation officer will prepare a complete dispositional report prior to trial, setting forth a social history and recommended disposition on the assumption that the allegations of the petition will be proven. In the case of *In re Gladys R.*¹⁵³ the Supreme Court of California held that it was prejudicial error in a delinquency proceeding for the judge to read the report because it could improperly affect his judgment. Subdivision (d) of Rule 1355 raises an analogous problem. It provides that a judge or referee will not be barred from hearing a case because he has read a social study concerning the same minor in a previous case.

The problem can be best illustrated by an example: In January, Peter is charged with armed robbery. In February, a dispositional hearing is held following Peter's admission that the allegations are true, and the petition is sustained. In June, Peter again is charged with a more recent armed robbery. Under the Rule as written, the judge who originally tried him for the old offense could try him for the new offense, despite the fact that the social history information, which *Gladys R.* says can be prejudicial at the adjudicatory hearing, is still fresh in

150. *Contra*, Neil G. v. Superior Ct., 30 Cal. App. 3d 572, 106 Cal. Rptr. 505 (1973).

151. One of the more outrageous cases recently encountered by the authors involved a case set for trial on the last day permitted by law. The district attorney came in demanding a continuance, his only excuse being that through an office foul-up none of his witnesses had been subpoenaed. The court granted the continuance, reasoning that if it did not do so, the prosecutor would merely file again.

152. CAL. WELF. & INST'NS CODE ANN. § 654 (West Supp. 1976).

153. 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970).

the judge's mind. The Proposed Rule needs to be changed to prevent the same judge from hearing the new petition.

I. *Right to Counsel for Parents in Dependency and Neglect Cases*

The right of parents to counsel in dependency and neglect cases is unclear. The decision in *Cleaver v. Wilcox*¹⁵⁴ laid down a rule summarized by the Advisory Committee as follows:

[I]n *Cleaver*, it was held that an indigent parent in a dependency case has a due process right to court-appointed counsel whenever the parent is unable to adequately present the case and faces a substantial possibility of the loss of custody or of prolonged separation from a child. Factors suggested for a juvenile court to consider when deciding whether to appoint counsel for the parent in these cases include the complexity of the case, the likelihood of removal of the child, the probability of prolonged removal and whether the parent intends to contest the matter.¹⁵⁵

Subsequently, in the case of *In re Simeth*,¹⁵⁶ the California Court of Appeals held that there was an automatic right to counsel on appeal for parents in Welfare and Institutions Code section 600¹⁵⁷ dependency proceedings. Rule 1334 should make appointment mandatory at the trial level unless there is a knowing and intelligent waiver of the right to counsel by the parents after conferring with prospective defense counsel. In the experience of the authors, who have handled over one hundred cases arising under Welfare and Institutions Code section 600,¹⁵⁸ there has not been a single case in which the parent could have adequately represented himself or herself. What parent is adequately able to present the case? The law is complicated. Rules of evidence must be understood. Lines of defense may not be obvious. The simplest case, when properly prepared, often becomes complex. The likelihood of removal of the child from the home is always hard to estimate. Even if the likelihood of removal in a given case seems slight it may still be obvious that the groundwork for removal is being laid for "next time." Given the success of the Los Angeles program where all parents are represented, and the anomaly of an automatic right to free counsel on appeal but no automatic right to counsel at the trial level, the Rules should

154. 499 F.2d 940 (9th Cir. 1974).

155. PROPOSED RULES, *supra* note 2, at 7-33 to 7-34.

156. 40 Cal. App. 3d 982, 115 Cal. Rptr. 617 (1974).

157. CAL. WELF. & INST'NS CODE ANN. § 600 (West 1972).

158. *Id.*

provide for free counsel at the trial level except when there is an intelligent waiver following consultation with prospective defense counsel.

J. Other Matters

In addition to all the foregoing, which present policy matters of major substance and importance, the Rules contain numerous other substantive and technical defects of less concern to general readers. These defects are of importance because they demonstrate an additional reason why more time must be taken to revise the Rules. Following are some examples of these defects.

1. Rule 1302(a)(3): Definition of "Detained"

The definition of "detained" leads to odd results. The term is defined as "any removal of the minor from the person or persons legally entitled to the physical custody of the minor."¹⁵⁹ This definition creates ambiguities in the law. For instance, suppose the mother of a minor child, through dissolution proceedings, is awarded custody of a minor but, after a period of time, the mother decides to let the father have custody of the minor without any court action. While staying with the father, the minor is taken into custody for commission of a criminal offense. Under the proposed definition of "detained" this minor is not "detained" because he was not removed from the person legally entitled to physical custody. Another example of the definition's impact arises from the situation where a grandparent may have physical custody of a minor child because the parents have recently passed away. No formal guardianship has been created and the minor child then gets into some sort of problem and is taken into custody. Again, under the definition, the minor is not detained. This definition obviously needs to be changed.

2. Probation Officers and Social Workers Serving as Deputy County Clerks

The present undesirable practice of having probation officers and social workers appointed deputy county clerks for convenience in filing petitions and sending out notices to be signed by the clerk has not been noted or forbidden by the Proposed Rules. There should be a provision in Rule 1309(c)¹⁶⁰ preventing a probation officer or social worker from

159. PROPOSED RULES, *supra* note 2, Rule 1302(a)(3).

160. *Id.* Rule 1309(c) deals with the required content of a notice of hearing.

acting in a dual role as a deputy county clerk and as probation officer or social worker. This would prevent improper acts of the probation officer or social worker in attempting to get around requirements for filing petitions. When a probation officer or social worker also acts as a county clerk, there is opportunity for mischief such as backdating a petition to be timely filed. This Rule would prevent any possible indiscretions by such officers by requiring them to separate their roles and duties, thus providing further protection for the minor. It would also prevent unseemly claims of indiscretion, whether true or false.

3. Provisions for the Disqualification of Referees

The California Supreme Court in the case of *In re Edgar M.*¹⁶¹ held that the disqualification procedures of Code of Civil Procedure section 170.6¹⁶² do not apply to juvenile court referees or to superior court commissioners sitting as juvenile court referees. There is no rational reason why litigants in every other field of the law should be able to make such disqualifications as a matter of law merely by filing an affidavit stating that in the opinion of counsel a fair and impartial trial cannot be had before the referee in question. Such a rule would be a rule of procedure well within the rule-making power of the Judicial Council.

4. Rule 1318(a): Effective Date of Referee Orders

A rather irrational rule has been adopted providing that the order of a referee remains in full force and effect even though the judge has granted a rehearing and the case is to be retried.¹⁶³ This rule goes directly against present case law. It was stated in the case of *In re Dale S.*:¹⁶⁴

It appears to us that it was the legislative intent in providing for the right to apply for a rehearing, to insure that a child, his parent or guardian, has that safeguard in every case heard before a referee. In short, we conclude that any order of a referee, approved or not, is conditional until the time for granting a rehearing pursuant to section 558 has elapsed. And, where a rehearing is granted, as here, the referee's order becomes a *nullity* and there is no double jeopardy.¹⁶⁵

161. 14 Cal. 3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975).

162. CAL. CODE CIV. PRO. § 170.6 (West Supp. 1976).

163. PROPOSED RULES, *supra* note 2, Rule 1318(a).

164. 10 Cal. App. 3d 952, 89 Cal. Rptr. 499 (1970).

165. *Id.* at 956-57, 89 Cal. Rptr. at 502 (emphasis added).

A juvenile court judge has the power to detain a minor and if the minor was previously placed outside the parents' home, the judge may continue that placement pending the new detention hearing.¹⁶⁶ Since an order granting a rehearing allows the minor a completely new hearing, it follows that to invalidate any order of a referee predicated on the previous adjudication is appropriate. If the Committee adopts the *Dale S.* procedure, then it will be necessary to adopt additional rules to define the time limitations applicable upon granting a rehearing.

5. Service of Notice of Hearings

Service of notice of hearings on the attorney for the minor is deemed service on the parents,¹⁶⁷ despite the fact that a conflict of interest may exist and the attorney for the minor might have strong motivation to see that the parents never receive notice. This Rule should provide that upon service of the minor's attorney, the attorney must make all diligent efforts to notify the parents. In any event, if the parents and minor are separately represented by counsel, how could notice on the attorney for the minor be deemed constitutionally sufficient notice on the minor's parents? Again, it should be noted that this is a restatement of the statute.¹⁶⁸ However, to add the above interpretation to the Rules would not be inconsistent with the statute—it would only interpret it in a manner which would eliminate any constitutional problems.

6. The Right to Advisory Juries

Rule 1313(c) recognizes the power of the juvenile court to impanel an advisory jury. However, it fails to give any guidance as to when or how such a jury should or should not be impaneled. There should be a procedure established to determine how these proceedings are to be conducted. The Rule could provide that a jury must be impaneled whenever the petitioner is contemplating removal of the minor from the parent's custody.

7. Appointment of Counsel

Rule 1353(c) provides for counsel for a minor "unless there is an intelligent waiver of the minor's right to counsel by the minor

166. See CAL. WELF. INST'NS CODE ANN. § 636 (West 1972).

167. PROPOSED RULES, *supra* note 2, Rule 1309(i).

168. CAL. WELF. & INST'NS CODE ANN. § 570 (West 1972).

. . . .”¹⁶⁹ Waiver of counsel is too important a step to be entrusted to the minor, even after consultation with his parents. Since this is a delicate area, the Rules should set out a standard, minimum requirement to be satisfied before a waiver is to be accepted by the court. Perhaps the court should appoint counsel to speak with the minor before waiver of counsel will be accepted, thereby protecting the minor’s right to make an intelligent waiver.

Rule 1353(d) states that:

In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and the minor that one attorney could not properly represent both, the court shall take appropriate action to eliminate the conflict of interest.¹⁷⁰

What “appropriate action” should be taken remains undefined. Guidance as to what should be done is needed.

8. Procedures for Handling Suppression Motions

Rule 1354(b) provides for the hearing of motions to suppress prior to the attachment of jeopardy. It leaves the procedural details to be established by local court rules. The problem with leaving such important procedures to local court rules is that often no rules are prepared or the rules that are prepared are so administratively restrictive that they may deny a minor an opportunity to be heard. An example of this latter problem exists in the Los Angeles County local rules where, for a motion to suppress, there is a requirement of ten days written notice prior to the adjudicatory hearing.¹⁷¹ This form of notice puts an undue burden on defense counsel in a detained matter to file a written notice to suppress within ten days of the detention hearing. Such a practice, at least in misdemeanors, goes directly against case law.¹⁷² To avoid these problems, the Rules should establish a uniform and fair procedure for motions to suppress.

9. Rules of Pleading

One of the most difficult areas in Welfare and Institutions Code section 600 hearings is knowing what is a sufficient allegation so that, if

169. PROPOSED RULES, *supra* note 2, Rule 1353(c).

170. *Id.* Rule 1353(d).

171. JUVENILE COURT POLICY MEMORANDUM OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Revised Detention Court Policy Memorandum*, subsection 9 (April 27, 1976).

172. *See People v. Manning*, 33 Cal. App. 3d 586, 109 Cal. Rptr. 531 (1973).

it were found true, the court could take jurisdiction over the minor. For instance, is an allegation that a parent has a dirty home sufficient to bring a minor within the jurisdiction of the court? This problem comes up every day in the juvenile court and is not dealt with in these Rules. The authors urge that the Advisory Committee take a position as to what allegations would be sufficient to allow the court to take jurisdiction. This could be done, in part, by use of sample forms.

10. Further Problems

The foregoing discussion dealt with examples of further defects in the Rules that need attention. These examples are by no means exhaustive.¹⁷³ However, they do highlight the need for further consideration of the Rules.

173. Following is a listing of other problems with the Rules that need attention.

The definition of "notice" improperly has substantive law built into it. Rule 1302(a)(6) provides that notice, when required, "shall be given to or made on the party's attorney of record, if any" PROPOSED RULES, *supra* note 2, Rule 1302(a)(6). This is not properly a definition and therefore does not belong in the definitional section.

While the terms "shall" and "may" are defined by Rule 1302(b)(1), the term "should" is left undefined. Some Rules in which the term "should" appears are: PROPOSED RULES, *supra* note 2, Rules 1307(e), 1307(f), 1308(b), 1319(f), 1321(b), 1328(a), 1331(c), 1338(a), 1341(h), 1342(c), 1364(b), 1378(d). The term "should" must either be defined or replaced as appropriate with the terms "shall" or "may."

The term "affidavit" is also left undefined. Since there is some confusion among attorneys as to the distinction between "affidavit" and "declaration," it would seem appropriate for the Rules to define the term. This will provide guidance to the practicing attorney in the juvenile court.

In Rule 1307 general rules of venue are laid down. But there is no preference stated to be followed in selecting the court. If no preference is intended, the Rule should so indicate.

There are also numerous problems in the Rules dealing with the review and filing of petitions. Rule 1307(f) provides that "[p]rior to the filing of a petition under section 602 by the probation officer, the district attorney or other designated legal officer shall review the petition for legal sufficiency." PROPOSED RULES, *supra* note 2, Rule 1307(f). The problem inherent in this Rule is that there is no provision for the legal officer to sign the petition thereby indicating he has reviewed it.

Rule 1307(g)(2) provides that probation officers, in deciding whether or not they are to file petitions, must take into account whether the offense charged would be a felony if committed by an adult. The correct test ought to be whether the district attorney in the adult courts would be likely to charge the offense as a felony. Most felonies are in fact felony/misdemeanors and commonly are charged as misdemeanors.

Filing of a petition is mandatory in cases certified by the municipal court, CAL. WELF. & INST'NS CODE ANN. § 604(c) (West Supp. 1976), and in cases involving aggravated assault or battery on a public school employee, *id.* § 653.5. However, no procedure is supplied for dismissing such petitions which are improvidently filed. Such a procedure should be provided for in the Rules.

Rule 1312(d) provides for free transcripts for indigents but no procedures are outlined for obtaining such transcripts.

Rule 1318(b) provides that orders by a referee removing a minor from the home re-

VII. CONCLUSION

The Advisory Committee and the staff are to be commended for turning out a document that can serve as the starting point for drafting a meaningful set of Rules for the Juvenile Court. The Rules in their final form are compiled in a logical sequence, and help to create organization out of statutory provisions which are organized in a helter-skelter fashion. The Rules and the comments of the Advisory Committee will serve as a springboard for a meaningful discussion.

However, the Rules are in no way ready for adoption. They simply have not received input and consideration from the various broad elements that are involved in the juvenile justice system. The result is that diverse viewpoints do not even appear to have been considered. What is needed is an expanded, broad-based Advisory Committee to take on the further revision of the Rules. Such a committee should include not only the eight trial judges on the present Advisory Committee, but also prosecutors, public defenders, county counsel, defense attorneys and legal scholars, as well as probation officers, social workers, and law enforcement officers. Finally there should be citizen input from both adults and minors.

Rules are needed. But fifteen years have passed since they were mandated, and another year of delay is well worth it as the price for a set of rules which rise to the level one expects for the State of California.

VIII. SUBSEQUENT DEVELOPMENTS AND SOME SUGGESTIONS

A. *Adoption of the Rules as Revised*

The Proposed Juvenile Court Rules, revised in the fashion hereinafter

quire the approval of a judge. However, the Rules lack guidelines for what a juvenile court judge should consider in making the determination to approve or disapprove a previous order of a referee. There is a need to establish the procedure and requirements for a judge to act under this subdivision. For instance, if a judge is to approve a referee's order to remove a minor from his parents' home, must the judge review the transcript of the proceedings? Must the judge speak personally with the referee or get something in writing that explains the referee's reasoning? This area needs guidelines since the case law has not provided the court with a clear method of operation. *See, e.g., In re Edgar M.*, 14 Cal. 3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975).

Rule 1319(c) restates CAL. WELF. & INST'NS CODE ANN. § 558 (1972) which specifically requires good cause to be shown for an extension of up to forty-five days for the granting of a rehearing. Yet, this subdivision is silent as to what is good cause in the area of extension of time beyond the original twenty days. Is reporter's delay on transcription good cause for this extension? Guidance is needed in this area.

Discovery provisions in the Rules need attention. Rule 1341(b) provides that the pe-

tioner furnish favorable information in his "possession or control." The phrase "possession and control" needs to be clarified so that attorneys are put on notice as to what materials must be furnished.

Other discovery provisions are vague or ineffective. Rule 1341(e) provides for a motion requiring timely disclosure if requested disclosure is refused. It further provides that local rules may be established for the manner and limitation of such motions. Since this section does not make it mandatory for a county to establish local rules, this Rule should establish specific requirements for the manner and limitations, absent local rules to the contrary. Alternatively, the Rules should make it mandatory for the county to establish local rules.

If a party is granted discovery under Rule 1341(h) and the request proposes a time for compliance, the moving party should have the right to a specific compliance date. Therefore, the phrase "may prescribe terms and conditions" should be replaced with "shall upon request of either party prescribe terms and conditions." Thus, all orders granting discovery, where a compliance date is requested, will include specific compliance dates.

Rule 1352, providing grounds for continuance of a jurisdiction hearing, is unclear as to its effect on detained cases. It is uncertain whether the seven day continuances may extend the fifteen day limitation on detained matters. The Rules cannot expand statutes. By not making this clear as to the time limits on detained minors, the Rule is expanding the time limits beyond the statutory time limits. This would be beyond the authority of the Rules. See CAL. WELF. & INST'NS CODE § 570 (West 1972).

Provision for waiver of reading of formal documents when the minor is present in court with counsel is omitted. See PROPOSED RULES, *supra* note 2, Rule 1353(a). This common practice should either be permitted or expressly forbidden.

Rule 1356(b) gives the court discretion on whether to release a detained minor upon the granting of a continuance. However, the Rule gives no guidance on the standards to apply or factors to be considered in choosing to detain or release the minor. The same standard should be followed as applies originally to detention.

Rule 1361(c) provides for precedence on the calendar of the court for detained minors in CAL. WELF. & INST'NS CODE ANN. § 600 (West 1972) cases. What is meant by the calendar of the court? In Los Angeles, section 600 cases are heard in one facility with up to five courtrooms working simultaneously. Does "calendar of the court" mean in this context that a detained section 600 case must be heard before any non-detained case in the building, thereby requiring transfer from court to court ahead of non-detained matters? Or does priority in these cases mean only in the individual courtroom where the case was assigned? Or does it apply to all courts hearing juvenile cases? This area needs clarification.

Rule 1361(d) provides for a tolling of the period for a hearing if the minor's neglect or failure to appear causes a delay. The problem with the language is that it gives no consideration to the situation where the minor is hospitalized and cannot appear. It seems unfair to the parents in a CAL. WELF. & INST'NS CODE 600 (West 1972) case to not allow them an opportunity for a speedy trial where it is the minor's unavoidable absence that has caused the delay. There should be a provision for some remedy in situations such as these.

Provisions regarding pleas, PROPOSED RULES, *supra* note 2, Rule 1364(b), need to be expanded to take into account the party who stands mute. There is a need to provide that the parent or guardian be informed that if he or she chooses to remain silent, a denial of the allegation will be entered on the record.

There should be a provision in Rule 1366 requiring that upon request of counsel for the minor, parent or guardian, the court shall continue the matter for a reasonable period of time for the purpose of preparing for the dispositional hearing. This is fundamentally

noted,¹⁷⁴ were adopted in final form by the Judicial Council on November 13, 1976, effective as of July 1, 1977. The vote to adopt was unanimous. In the authors' opinions this unanimity was prompted primarily by the expiration of the terms of office of most of the members of the Council on January 31, 1977, and by the retirement of Chief Justice Wright, ex-officio Chairman of the Council, announced effective as of February 1, 1977. The possibility existed that if adoption of the Rules was delayed, an almost entirely new Council appointed by a new Chief Justice would be considering them. A new Council, which had not been involved in the development of the Rules, would not be able to effectively handle questions regarding their adoption.

The unanimous approval of the Rules at first seemed surprising. At the Superior Court Committee of the Council, which met two days earlier, the Rules had been adopted in final form by only a three to two vote, the chairman casting the deciding vote. Members of the State Bar of California in the Committee opposed adoption on the basis that, through a breakdown in communications, the State Bar had not had an adequate opportunity to review the Rules. At and following the

fair in that it will allow the minor, parent, or guardian the right to have sufficient time to prepare.

Findings allowing the court to remove a minor from the custody of his parent or guardian do not necessitate that custody of the child by the parent or guardian be to the minor's detriment. PROPOSED RULES, *supra* note 2, Rule 1372(b)(1), (2). Yet this finding is required by the California Civil Code:

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.

CAL. CIV. CODE § 4600 (West Supp. 1976). A change should therefore be made in the rules.

Rule 1376(b) requires that recommendations for removal of a minor from the parent's custody be accompanied by a plan for reuniting the minor with the family. This is an excellent provision, but no guidance is given as to what consequences may result if the petitioners fail to implement the plan through inadvertence or neglect and without fault of the minor or the minor's parents or guardian.

Rule 1377(g) provides for a fifteen day review of the case of a minor in custody who is awaiting placement. The court is "to determine whether the delay is reasonable." What if the delay is unreasonable? There is no guidance as to what a judge can or should do in this situation. Nor is it clear whether there must be informal hearings in open court with the probation officer present.

Rule 1378(a) provides that the court shall determine whether jurisdiction over the minor is to be continued or terminated annually. This annual review should take into account the return of the child to the home under supervision.

There are no guidelines in Rule 1391(b) for what allegations shall be contained in supplemental petitions sufficient to allow the court to take jurisdiction over the minor. There is need for such guidelines.

174. See notes 175-80 *infra* and accompanying text.

full council meeting on October 13, however, it was made clear that the Advisory Committee would give full consideration to any "serious" comments and suggested revision the State Bar wished to make, and that time still remained before July 1, 1977, to make any critical amendments to the Rules. Apparently on that understanding, State Bar representatives voted in favor of the Rules.

B. Nature of the Revisions

The only major revision made by the Advisory Committee and adopted by the Council was to provide for transactional immunity in Welfare and Institutions Code section 602¹⁷⁵ (delinquency) cases, rather than mere testimonial immunity.¹⁷⁶ The reason for this revision was that new legislation¹⁷⁷ categorized offenses committed by such juveniles as felonies or misdemeanors, and that, therefore, one could look by analogy to the corresponding immunity provisions of the Penal Code.¹⁷⁸

A variety of procedural and drafting suggestions were incorporated into the Rules in response to various comments, including some suggested in a draft of this article submitted to the Judicial Council.¹⁷⁹ In addition, adjustments were made to take into account a substantial amount of new legislation adopted subsequent to the preparation of the Proposed Rules and of this article.¹⁸⁰

175. CAL. WELF. & INST'NS CODE ANN. § 602 (West 1972).

176. See notes 143-47 *supra* and accompanying text.

177. Stats. 1976, c. 1071 amending CAL. WELF. & INST'NS CODE § 702 (1972).

178. See K. Uebel (Administrative Office of the Courts), Revisions in Proposed Juvenile Court Rules 6-7 (Nov. 3, 1976).

179. See *id.* at 5 n.6.

180. A summary of the effect of the legislation follows:

The Legislature was very active in the juvenile justice area during 1976, and at least a dozen bills have been signed into law by the Governor. From the standpoint of impact upon the proposed juvenile court rules, two bills were particularly significant—SB 2172 and AB 3121.

SB 2172 (Robbins) (Stats. 1976, Ch. 1068), although making no substantive changes in the juvenile court law, reorganized and renumbered substantial portions of the law so as to completely separate references to dependent children proceedings from those relating to potential wards of the court. For example, effective January 1, 1977, dependency matters will be brought under Section 300 of the Welfare and Institutions Code, instead of under Section 600. The enactment of SB 2172 required numerous technical changes within the proposed rules and the advisory committee's comments. These changes have been made and, as they are nonsubstantive in nature, they generally will not be referred to hereinafter.

In contrast, AB 3121 (Dixon) (Stats. 1976, Ch. 1071) made significant changes in the juvenile court system which, effective January 1, 1977, will have a substantial impact in most California counties. Insofar as it will affect court procedures touched upon by the proposed rules, it will do the following:

- The prosecuting attorney, rather than the probation officer, will file section 602 petitions and appear throughout those proceedings (Welf. & Inst. Code §§ 650, 681; see *e.g.*, rules 1302(a)(6); 1307(f); 1308(a); 1311(c)(d));

C. Recommended Revisions Before the Rules Come Into Effect

As noted earlier, the Judicial Council and its Advisory Committee have expressed a willingness to consider some revisions in the Proposed Rules prior to their effective date. At the same time, the Chairman of the Advisory Committee has made it clear that only "serious" proposals will be considered. Hence the objective of this portion of the article is to reiterate those few changes which are the most critical for the juvenile justice system.

First, primary attention should be focused on those provisions of the

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- Juvenile court referees, as well as judges, may now be challenged under Code of Civil Procedure sections 170 and 170.6 (Code Civ. Proc. §§ 170, 170.6; Welf. & Inst. Code § 553.2; see rule 1316(c));
 - Detention—
 - An alternative to secure detention, *i.e.*, "release on home supervision," is authorized, but the same legal protections are provided for the minor, including a detention hearing (Welf. & Inst. Code §§ 628.1, 636, 840, 841; see rules 1302(a)(3), 1321(h), 1327(a));
 - Statutory criteria for detaining minors when necessary to protect the person or property of another have been relaxed (Welf. & Inst. Code §§ 635, 636, as amended by Stats. 1976, Ch. 1071, §§ 36, 37, 39; see rules 1327(a)(f), 1337(a)(c));
 - Generally, minors against whom proceedings are brought under section 601 (so-called "status offenders") may not be placed in secure detention (Welf. & Inst. Code §§ 507(b); 880; but see Welf. & Inst. Code § 636.2; see rule 1326(a));
 - Fitness hearings for 16-17 year-old minors accused of designated violent offenses are encouraged (but not mandated); minors so accused are presumed unfit for juvenile court treatment, unless the contrary is found (Welf. & Inst. Code § 707(b); see rule 1348(e)(f)(g));
 - The rules of evidence established by the Evidence Code and judicial decisions are explicitly made applicable to juvenile proceedings (Welf. & Inst. Code § 701; see rules 1355(c); 1365(c));
 - In section 602 proceedings, the petition must allege and the court (in the case of "wobbler" offenses) must find whether the violation alleged would be a felony or a misdemeanor (Welf. & Inst. Code §§ 656.1, 702; see rules 1309(a) 1355(f));
 - A minor declared a ward of the court under section 602 may not be committed or placed in a secure institutional setting for a period in excess of "the maximum term of imprisonment which could be imposed upon an adult convicted of the offense which brought the minor under the jurisdiction of the juvenile court" (Welf. & Inst. Code § 726; see rule 1372(c)).

All of the above-listed changes have been incorporated into the proposed juvenile court rules.

In addition to those rule changes noted above, the advisory committee also considered the impact of AB 3121 upon rule 1307 relating to intake and petitioning criteria to be applied by the probation officer. Although the probation officer will no longer file petitions in section 602 proceedings, he or she is still responsible under the juvenile court law for conducting an initial investigation, making initial intake and detention decisions and, whenever appropriate, requesting the prosecuting attorney to file a petition under section 602. The criteria set forth in rule 1307, including those in rule 1307(g), are still relevant in that regard and, as so modified, rule 1307 has been retained. The revised advisory committee comment relating to rule 1307(g), however, makes it very clear that no attempt is made by the rule to influence the prosecuting attorney's discretionary decision whether or not to prosecute.

K. Uebel (Administrative Office of the Courts), Revisions in Proposed Juvenile Court Rules 2-4 (Nov. 3, 1976).

Rules dealing with detention prior to trial.¹⁸¹ Some improvement would be obtained by prefacing the portion of the Rules dealing with detention with a statement that all intendments are against detention, and that detention of any kind is to be avoided wherever possible. Broader relief would be afforded by requiring the prosecuting attorney to produce the witnesses required for a hearing prescribed by *In re Dennis H.*,¹⁸² requiring affidavits to support all requests for continuances of such hearings by the prosecuting attorney, and providing that all continuances be for only a day at a time unless a strong showing is made as to why a one day continuance would be insufficient. Second, provision should be made for appointment of counsel as a matter of right in all section 600 (dependency and neglect) cases.¹⁸³ Third, a judge should be prohibited from ordering, on his own motion, a rehearing of a case heard by a referee in which the referee has acquitted the minor.¹⁸⁴ A recent Court of Appeal case,¹⁸⁵ which the California Supreme Court has not yet reviewed, upheld this unfair practice. If the Court does not have sufficient confidence in a referee to rely upon his acquittal, the referee should not be allowed to try the case in the first place.

181. See notes 43-97 *supra* and accompanying text.

182. 19 Cal. App. 3d 350, 96 Cal. Rptr. 791 (1971).

183. CAL. WELF. & INST'NS CODE ANN. § 600 (West 1972). See notes 154-58 *supra* and accompanying text.

184. See notes 138-42 *supra* and accompanying text.

185. *Jesse Lionel W. v. Superior Ct.*, 63 Cal. App. 3d 408, — Cal. Rptr. — (1976).