

## Probation Intake: Gatekeeper to the Family Court

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**ONE OF THE UNIQUE** features of the Family Court is the preliminary procedure commonly known as probation intake. Generally unused in the criminal court, the probation intake system is designed to screen inappropriate cases out of the formal court process, and is the first contact the juvenile usually has with the juvenile term of the family court. Virtually all juvenile cases in which an application is made for a court petition are first seen by an intake officer, who is usually a probation officer. "The evaluation is often referred to as intake screening because it occurs at the entry point of the juvenile court and its primary function is to determine who is referred to the court for a hearing by the filing of a petition and who is screened out of the court system" (Binder, A., G. Geis & D.D. Bruce Jr., 2001:257).

Subject to jurisdictional limitations that vary widely from state to state, the intake officer possesses the discretion to divert those cases from the court that do not require judicial intervention or lack the jurisdictional requirements for court action. In effect then, the intake officer serves in the critical role of gatekeeper of the juvenile court.

(Besharov, D.J., 1974:157) notes that "intake ... is a court related process which diverts from the juvenile court those cases which are considered inappropriate or better handled elsewhere. Its predominant purpose is to stand between the complainant and the court to prevent the initiation of unnecessary proceedings."

Trivial offenses are most likely to be dismissed or handled informally, especially when the juvenile does not have a prior record. Many of the diverted cases are referred to social service or health providers in the community. Some are given a warning, and no referral is made. A second function of the intake officer is to provide short-term counseling or oversight for those cases not referred to court, but in need of social work assistance. This is viewed as informal probation. The role of the intake officer in the juvenile court, therefore, is to decide, within limitations, whether the case should:

1. Have a petition drawn and referred to court for a hearing; or,
2. Be adjusted and, therefore, diverted from the court, with no legal action taken. This might include a referral for counseling or other social services; or,
3. Be held open for a period of short-term
4. counseling or oversight (informal probation); or,
5. The intake officer might recommend that a petition be drawn with a referral for detention.

Complaints may enter the intake system from a wide variety of sources, including law enforcement, parents, schools, and others. The two most common categories of cases in the

juvenile term are juvenile delinquents and status offenders (also known as persons in need of supervision). The name of the status offender varies according to the state. In New York it is a PINS (Person in Need of Supervision), with variations in other states such as JINS (Juvenile in Need of Supervision), CHINS (Child in Need of Supervision), MINS (Minor in Need of Supervision) or similar titles.

Some states may have other categories of cases, but their numbers are far fewer. For example, New York State also has the category of the "Designated Felony Offender," which relates to more serious cases. Moreover, these cases require prosecutorial or prosecutorial/judicial approval for an adjustment.

### **The Probation Intake Interview**

The interview/investigation is conducted by a probation officer and the parties present usually are the complainant, the respondent, and the youth's parents. An attorney may be present, but this is rare (Family Court Rules of the State of New York , Section 205, 22(a)). In an allegation of juvenile delinquency, a police officer also usually appears.

If the probation officer refers a case to the prosecutor for a petition and the prosecutor finds that the court does not possess jurisdiction or that there is no legal basis for the action, he/she may reject the petition. (Although the content of this article is limited to the juvenile court, it should be noted that intake programs are also maintained in other parts of the Family Court, including the Support Term and Family Offenses Proceedings.) At the conclusion of the intake interview, the probation officer prepares a brief report to assist the court in determining what action to take. The intake report, which contains statements made in the intake process, is confidential and may not be opened until a finding is made. This is similar to the limitations on the court. Unlike the presentence investigation report, which is prepared after conviction to assist the judge in sentencing, the intake report includes no field or collateral visits, and few sources of investigation. The only contacts are usually by telephone.

### **A Historical Overview of the Intake Procedure**

The intake procedure, although informal in the early years of the Family Court, played a significant role in controlling the nature and number of cases appearing before the judiciary. Moreover from the beginning many recognized its value and heaped praise upon its contribution. Without the caseload controls imposed by the intake process, some juvenile courts might be so inundated with cases as to grind to a halt.

One of the strongest and earliest advocates of the Cook County Juvenile Court was Judge Julien W. Mack (1925:317),

who stated that:

It is the last thing to do with the wayward child to bring him into any court. The wise probation officer will save him from the court ... Of course in the end some will have to be brought into court. That court is successful in its work that has the least number of cases.

Mangold, G.B. (1936:371), another early advocate of the intake process, concluded that:

Many cases are everywhere settled out of court. In some cities the character of the law allows complaints on flimsy and unwarranted charges, but on investigation many of these grievances are settled amicably without judicial intervention.

Over the years many others have supported the intake process by demonstrating the removal of inappropriate cases from the court. (Gregory, I.L., 1906:587); New York State Probation Commission (1928); Williamson, M. (1935: 14-15). Judge W. Waalkes, for example, wrote in a journal article that:

Intake is a permissive tool of potentially great value to the juvenile court. It is unique because it

permits the court to screen its own cases... It can cull out cases which should not be dignified with further court process. It can save the court from subsequent time consuming procedures to dismiss a case....It provides machinery for referral of cases to other agencies when appropriate and beneficial to the child: (April 1974:123).

In numerous jurisdictions during many of the early years of the juvenile court, the intake officers possessed great powers in the decision-making process. These powers were due, at least in part, to the numerous options they might exercise, including warnings, diversion, community service referrals, informal probation, and the possibility of recommending the filing of a court petition (Bartol, C.R. & A.M. Bartol, 1998:310).

#### *Advocacy of the Juvenile Court Intake System .*

As the years passed, the probation intake process gained increasing recognition as an integral factor contributing to the success of the juvenile court. Among those pronouncing the intake process a success were The Directors of the Columbia Law Review Association 1979:275-6; McCarthy and McCarthy, 1991:338; Task Force Report on Juvenile Delinquency, 1967; Siegel, L. & L. Senna, 1997; Champin, D.J. 1998:150 & 510.

The promise of a formalized intake process, gradually enacted into the law in many states, offered great promise to advocates of the juvenile justice system. Probably the most influential support for intake programs came from the prestigious Task Force on Juvenile Delinquency, (1967:96-7), which reported that: "If there is a defensible philosophy for the juvenile court it is one of judicious nonintervention."

Over the years, many scholars praised the intake system. The members of The President's Commission on Law Enforcement and Administration (1967) strongly supported the concept of diversion of the juvenile, when appropriate, and recommended that the ... "formal sanctioning system and pronouncement of delinquency should be used only as a last resort. In place of the formal system, dispositional alternatives to adjudication must be developed for dealing with juveniles".

In about as strong a statement favoring intake as could be made, The Directors of the Columbia Law Review Association (1969:275-6); held that "another advantage of intake was that they believed that the probation intake staff was better able to screen inappropriate cases out to the court system than was the judiciary"

#### *How Beautiful Is The Rose, But For The Thorns*

Despite strong early advocacy for the intake procedure, it has also developed a negative body of criticism over the years. Watkins (1998:132) warns that this form of "warn and release" worked reasonably well until the 1960s, when it began breaking down because of the more recent social disintegration in society. He cites the many homes with single parents, drug use, school dropouts, voluntary unemployment, and other negative forces (Oct.1976:396-7).

A common criticism is the absence of formal guidelines for objective decision making. Frequently, in borderline serious cases an officer's decision is based on his personal value system. Some officers are unusually punitive toward certain types of negative juvenile acts, while others might harbor innate prejudices against certain respondents because of their race, religion, dress, personality, or economic status. In addition, faulty decision-making might flow from a lack of training or experience. Critics noted that at each decision points (especially juvenile intake) a set of highly subjective factors can come into play. Non-legal factors such as the juvenile's ties to family, school, and community influence whether an arrest is made; whether diversion occurs; and the nature of the placement ordered. This decision-making process has been criticized because it can lead to erroneous, inequitable, and inconsistent decisions (The Juvenile Court: Analysis and Recommendations, The Future of Children: Vol. 6, No. 3, Winter 1996).

Similarly, Kobetz and Bossarge (1973:245) recommend that "state legislatures establish legal

non-discriminatory written guidelines to govern pre-judicial intake." They note that even "Where those guidelines do exist, their relevance and justice is open to question." Pabon (1978:28) argues that statutory regulations do not provide officers with operating guidelines to assist in decision making. This lack of specificity contributes to broad and excessive discretion on the part of the intake officer, resulting in judgments based on the personal inclinations and values of a specific officer.

Rubin (1980:226) sums up this position in these words: "Both intake norms and intake procedures have come under increasing attack as being subjective, irregularly and unequally administered, and as subversive of legal protections.

### **Additional Criticisms of the Intake Process**

Other authors have been critical of the actual practices in the intake process. Prescott (1981:88) expressed concern for juveniles who committed minor acts, but were diverted from the court without any help because the limited resources of the system were directed only to the most serious cases.

Silberman (1978:333) often found intake programs that were unable to fulfill their mission. Many programs "did not add up to very much." Often programs rated as "exemplary" and claiming to provide intensive counseling failed to deliver as promised.

An inherent difficulty encountered in the intake process is the problematic nature of the cases brought before the intake officer. Many are insoluble, at least within the abilities and limitations of the juvenile justice system. In many instances the family is extremely dysfunctional, the youngster belongs to a gang, and/or the juvenile suffers from severe emotional illness, retardation, or developmental disabilities. Many of these cases are referred to the court as a last resort. Prescott (1981:88) termed the counseling function of intake as "but another of the system's dismal inadequacies." He noted that an initial hour-long interview will be followed by fifteen-minute sessions once a week, then once a month, if ever." Furthermore, he found that although probation referred many to community agencies, the quality of work of the agency was generally unknown to the probation officer.

Prescott further believed that many cases are so minor or trivial in nature that they could easily be remedied outside of the court. For example, a dispute over a broken window could be settled for ten dollars, but because of emotional overtones, it might take some hundreds of dollars of court time. "It is also believed that intake dispositions are often determined by the prior record rather than by the seriousness of the offense or the social background of the child. This practice departs from the philosophy of *parens patriae*": (Siegel, L.J., B.C. Walsh, & J.J. Senna, 2003:427, Watkins, J.C., Jr., 1998:131).

#### *New York State Practice*

In New York State the rules of the court govern the

procedures under which "...the probation service may confer with any person seeking to have a petition filed, the potential respondent and other interested persons concerning the advisability of requesting a petition be filed" (Family Court Act, Section 308.1(1).

In the early years of the intake service in New York, there were few statutory restrictions on the officer's right to adjust a case. Of course, it was assumed that in all but the most unusual cases an officer would not adjust a serious or violent criminal act.

Over time, the intake officer's powers were statutorily limited. Today, the statute bars the probation service from adjusting "... a case in which the child has allegedly committed a designated felony act unless it has received the written approval of the court and or the prosecutor" (F.C.A., Sec. 308. 1(3)).

Further limitations on the officer's adjustment powers are set forth in F.C.A., Sec. 308.1(4).

Among these are age. (It should also be noted that the age limitations varies among states.) In New York a juvenile delinquent is defined as "a person over seven and less than sixteen years of age at the time the act was committed. If a child is charged with being a status offender, there is no minimum age and a maximum age of less than eighteen years of age (F.C.A., Sec. 301.2(1)).

The Family Court Act further provides that the intake service cannot deny "any person who wishes to request that a petition be filed from having access to the appropriate presentment agency for that purpose" (F.C.A., Sec. 308.1(8)). This section serves as a check on the intake service so as to prevent an inappropriate diversion or to insure that a person is not improperly denied court services. However, it does not guarantee a person the right to file a petition, but only the right to have the application reviewed by the presentment agency. Should the presentment agency deny access to the court, that decision is controlling.

The statute also contains protections for the parties to the action, through limitations on the intake officer. For example, the statute provides that "The probation service may not be authorized under this section to compel any person to appear at any conference, produce any papers, or visit any place" (F.C.A, Sec. 308.1(11)). The rules of the court further provide that efforts at adjustment "... may not extend for a period of more than two months without leave of the court which may extend the period for an additional two months" (F.C.A., Sec. 308.1(9)). This is designed to protect the juvenile from indefinite informal probation.

In some cases children are detained prior to the filing of a petition. This does not preclude the intake officer from adjusting the case and "upon adjusting such a case the probation service shall notify the detention facility to release the child" (F.C.A., Sec. 308.1(5)).

At approximately the same time, statutes were being revised in some jurisdictions to restrict some elements of the intake officer's discretion while increasing the powers of the prosecutors. In terms of power and control, the decision-making process would soon become radically different from that which operated in the early years of the intake process.

### **The Decline of the Intake Officer's Role**

In recent years, in many states, the role of the intake officer has significantly declined, with a corresponding growth in the power of the prosecutor. As noted by Lotz, R. (2005:291): "Traditionally, the role of the intake officer has been handled by a probation officer, and this still holds true in many jurisdictions. But in other systems, the prosecutor handles the decisions of intake or at least oversees the choices."

This is partially due to the due process revolution in the juvenile court. The United States Supreme Court juvenile cases in the 1960s -1970s gave juveniles many of the same rights as adults in the criminal court. This reconstructed the court into a more formal and adversarial forum, and narrowed the disparity between the juvenile and criminal courts. In addition, many juvenile courts have moved from a rehabilitation model to a crime control model. Moreover, many new laws have had a strong impact in the sentencing for serious or violent juvenile crimes. Retribution has often replaced rehabilitation as the primary court goal.

As early as 1980, Rubin, H.T. (1980:226) stated that:

"In a growing number of states, the probation department's dominance of the intake function is yielding to the prosecutor... It may now be suggested that the prosecutor is becoming the most powerful functionary in the juvenile court process."

The traditional role of the juvenile intake officer has been under fierce attack from both Juvenile and Family Court Judges, with an assist from the National District Attorney's Office. In publishing guidelines for what a model juvenile court should look like, both organizations have bluntly stated that it is the prosecutor's office that should play the role of case initiator. Indeed, in cases in which the prosecutor's office does not directly screen cases, the office should nevertheless have the power to veto decisions to proceed or to override a decision not to. (National Council of Juvenile and Family Court Judges: Guidelines, 2005:66). With the growth

of prosecutorial control of intake in many jurisdictions, it would appear that prosecuting attorneys have supplanted or supplemented the probation officers and are playing a larger role earlier in the intake process (Champion & Mays,1991; Lotz, R.,2005:292; Siegel, L.J., B.C. Welsh, & J.J. Senna, 2003:428-429).

More punitive legislation has also been passed elsewhere. An April 1980 report of the United States Department of Justice: Office of Juvenile Justice and Delinquency Prevention (72-73) wrote that:

State policy makers have felt compelled to deal with the serious delinquent by major changes in their juvenile law like those of California , Florida , New York , Colorado , Delaware , and Washington . ... The relevant procedures in these States are designed either to treat serious juvenile offenders as adults or to put some kind of mandatory/determinate sentencing scheme within the juvenile justice system.

In 1976 and 1978, the State of New York similarly made major changes to the punitive aspects of its Family Court Act.

Pabon, 1978:32 strongly supports the reduced role of probation in the intake system. He suggests the creation of a Juvenile Case Assessment Unit, "Staffed by specially trained assistant prosecuting attorneys," who would determine whether there was a legally sufficient case and whether it should be prosecuted. He advocates that probation be limited to the performance of social service functions and referrals with respect to cases sent to probation for adjustment by the juvenile case assessment unit after screening. Similarly, Silberman, 1978:331 f.n., reports finding "some sentiment in favor of taking the screening function away from probation departments and assigning it to an independent agency, located in the executive rather than judicial branch of government."

While the number of cases diverted by the intake process varies from jurisdiction to jurisdiction, the adjustment rate has traditionally been approximately 50 percent over the years (Lash, Sigal & Dudzinski:1980). This rate continued until the early 1990s (Snyder & Sickmund, 1995:131); In 1991, on a nationwide basis, of 1,338,200 cases, 50 percent (664,700) were petitioned while 50 percent (673,500) were non-petitioned (Clement, M.J. 2002:135). But in the years since 1991, the national percentage of cases adjusted at intake has declined from 50 percent to 44 percent (Office of Juvenile Justice and Delinquency Prevention). The decline in the national diversion and the resultant increase in the number of cases forwarded for prosecution are not surprising given the get-tough movement of the past few decades.

The New York City intake adjustment rate was consistent with the nationwide percentage of 50 percent over many years. But in the 1980s and 1990s the adjustment rate in New York City rapidly and markedly declined. In 1983, when the national diversion rate at intake was 47 percent, New York City was diverting only 31 percent of its juvenile cases. By 1996, the New York City diversion rate was only 13 percent, compared to the national average of 44 percent.

#### *A Nationwide Increase in the Number of Petitioned Cases*

One of the major changes in the juvenile term of the family courts has been the increased numbers of cases. Family courts handled 1.6 million delinquency cases in 2002 - up from 1.1 million in 1985. Moreover, Juvenile Courts handled four times as many delinquency cases in 2002 as in 1960. Courts were asked to respond not only to more cases but also to a different type of caseload - one with more person offenses and drug cases. In recent years juvenile court cases have decreased in most offense categories (Juvenile Offenders and Victims: 2006 National Report: 158).

Nationwide among intake proceedings, the cases in which delinquency petitions were drawn rose by 80 percent from 1985 to 2002.

[B]etween 1985 and 1992 delinquency cases were more likely to be handled without the filing of a petition but beginning in 1993, the reverse was true. By 2002, 934,900 (58 percent) of the

delinquency cases on a nationwide basis were petitioned whereas 680,550 (42 percent) were not petitioned (Juvenile Offenders and Victims: 2006 National Report: 177).

According to the report:

The use of formal handling has increased. In 1985, juvenile courts formally processed 45% of delinquency cases. By 2002, that proportion had increased to 58%. ...The number of petitioned delinquency cases increased 96% between 1985 and the peak in 1997 then declined 8% by 2002. (Juvenile Offenders and Victims: 2006 National Report:171).

A similar result was disclosed when we chose the Juvenile Terms of the Family Courts of the State of New York and examined the petition/non-petition delinquency rates in 6 of the counties with the largest population and 6 of the counties with the smallest population. The upper age of delinquency was 15. The 12 counties are listed below:

#### **N.Y. STATE COUNTIES WITH THE LARGEST POPULATIONS**

##### ***COUNTY DELINQUENCY PETITION NON-PETITION***

Bronx 1,457 321

Kings 1,778 655

Nassau 722 433

New York 1,125 220

Queens 1,461 311

Suffolk 967 349

#### **N.Y. STATE COUNTIES WITH THE SMALLEST POPULATIONS**

##### ***COUNTY DELINQUENCY PETITIONS NON-PETITIONS***

Schuyler 12 14

Lewis 18 25

Schoharie 8 26

Seneca 62 25

Essex 25 15

Orleans 30 37

(Easy Access to State and County Juvenile Court Case

Counts: 12/16/07 :1).

It should be noted that since 1991, delinquency cases nationwide were more likely to be handled formally, with the filing of a petition for adjudication, than informally. In 2004, juvenile courts petitioned nearly 6 of 10 delinquency cases. Between 1985 and 2004, the use of formal processing increased in all general offense categories. The increase in the number of petitioned cases may be due, at least in part, to greater prosecutorial control in many courts. As a general rule, prosecutors are more likely to lean to court involvement than probation officers, many of whom are (or at least have been) social work oriented.

Another factor contributing to an increase in the number of delinquency cases referred for petitions may be the change in many caseloads towards more person offenses and drug cases.

From 1985 to 2002, drug offense cases went from the least likely to the most likely to be petitioned. The least likely to be petitioned for formal handling by 2002 were property offense cases (Juvenile Offenders and Victims: 2006 National Report:171-172).

Also serving to drive up the number of petitioned delinquency cases was a tightening of the juvenile laws in many states. "From 1992 through 1997, statutes requiring mandatory minimum periods of incarceration for certain violent or serious offenders were added or modified in 16 States" (1999 National Report Series, Juvenile Justice Bulletin: Juvenile Justice: A Century of Change; December 1999:8-9). The deflation of discretion has generally been due to the belief that juvenile crime has both increased and become more serious. This is illustrated by the fact that "From 1992-1997, 44 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults" (Clement, M.J., 2002: 141).

In certain jurisdictions the decision makers may be conservative and punitive, whereas in other jurisdictions within the same state the decision makers may be liberal and altruistic. The tone is often set, especially in the smaller counties, by the judiciary, political leaders, departmental heads and superior officers. These factors often lead to substantial variations among counties in the same state—a reality demonstrated by the statistical charts above. The increase in petitioned juvenile cases and the trend of prosecutorial staff to increase their intake powers at the expense of the probation officers began in the 1980s. Supporting the trend has been an increase of juvenile crime and also more serious juvenile crime. Many groups, including prosecutorial organizations and members of the judiciary, now support the removal of intake probation officer decision-making powers in delinquency cases. This role would instead be carried out by the prosecutorial staff. The probation officer's role would then be limited to status offender and other non-delinquency cases. Included would be an increased social worker role of report writing, counseling, and referral to community services.

These changes may or may not occur. Only time will tell.

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