

Legal Questions about Youth's Capacities

Module 4

Toward Developmentally Appropriate Practice:
A Juvenile Court Training Curriculum

by the National Juvenile Defender Center in
partnership with Juvenile Law Center

ModelsforChange
Systems Reform in Juvenile Justice

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VII. Transfer¹⁵ to Criminal Court

A. Purposes and Types of Transfer

1. **Transfer of some youths from juvenile court to be tried in criminal court has been employed throughout the history of the juvenile justice system.** Historically, transfer was applied for more serious offenses or to youth with significant offense histories, and tended to be used primarily with youth who were near the maximum age for juvenile court jurisdiction. Transfer has been justified on several grounds:
 - a. *Public safety.* The lower level of security in some juvenile justice facilities may afford less assurance of public safety with regard to some types of young offenders.
 - b. *Rehabilitation.* Methods that are appropriate for rehabilitating most youth might not be as effective with youth who are more mature and sophisticated in criminality, especially when they are close to reaching the maximum age for juvenile court jurisdiction, thus limiting the time available for rehabilitation.
 - c. *Welfare of other delinquent youth.* Placing some mature youth in juvenile institutions along with less mature youth may endanger the less mature youth and impede rehabilitation efforts.
 - d. *Punishment.* The juvenile justice system does not provide sufficient punishment for those who commit serious violent crimes.
2. **Youth may be transferred by way of several legal mechanisms:**
 - a. *Judicial discretion.* Almost all states provide legal criteria allowing juvenile court judges the discretion to transfer some youth to criminal court for trial.
 - b. *Statutory exclusion.* About three-fourths of states provide for the “automatic” filing of charges in criminal court for certain offenses allegedly committed by youth of certain ages or offense histories.
 - c. *Prosecutor’s direct file.* Some states allow prosecutors the discretion to file certain types of cases in either juvenile or criminal court.
 - d. *Sentencing by juvenile court.* A few states allow juvenile courts to provide criminal justice sentences for youth found guilty of certain offenses in juvenile court.
 - e. *“Reverse transfer.”* Many states with statutory exclusion and prosecutor’s direct file have created provisions for “reverse transfer” to juvenile court. Typically, a juvenile has to file for a “reverse transfer” hearing within a certain time-frame and then has the burden of proving that jurisdiction should be in juvenile court rather than criminal court. Additionally, some states allow for a minor convicted in criminal court to be sentenced as a juvenile.

¹⁵ States differ in their use of terms to refer to the process of referring youth to criminal courts. While the term “transfer” is often used, other terms include waiver, certification, bindover, and fitness (referring to “fitness to be tried in criminal court” or “not a fit and proper subject” for custody in juvenile court).

B. Legal Criteria for Transfer

1. *Kent v. U.S.*, 383 U.S. 541 (1966) established due process requirements for transfer hearings, but not the criteria for transfer. However, *Kent's* addenda established a terminology that has prevailed in states' subsequent criteria, focusing on two primary factors: adequate protection of the public, and likelihood of reasonable rehabilitation by "procedures, services, and facilities currently available to the juvenile court." (383 U.S. at 1060). The phrase "sophistication and maturity of youth" used by the Court in *Kent* has also had a significant impact on states' development of criteria for transfer. (383 U.S. at 1060).
2. State laws that control transfer by judicial discretion vary, but include:
 - a. *Threshold conditions* regarding age (e.g., 14 or older), type of charge (e.g., particular level of felony), and sometimes past offense history (e.g., at least one prior adjudicated delinquency or commitment to the state's youth authority).¹⁶
 - b. *Discretionary conditions* that include one or both of two criteria that focus on (a) the degree of danger to the community associated with retaining the youth in juvenile court; and (b) the degree to which the youth is amenable to rehabilitation within the resources available to the juvenile court.

C. Research Related to Transfer

1. **"Dangerousness."** There has been much research on factors that are related to future aggression among delinquent youth as a group,¹⁷ but little research on the validity of combining those factors for making valid estimates of future violence of an individual youth during the remainder of adolescence or as an adult.
2. **Amenability to rehabilitation.** There is substantial research on "what works" for the rehabilitation of youth in juvenile justice,¹⁸ but little research that allows a determination as to which youth are more or less likely to benefit from various rehabilitation methods.
3. **Effect of transfer in reducing recidivism.** There is substantial research that demonstrates that transfer is less successful than juvenile court retention in deterring future crime.¹⁹
4. **Judicial transfer decisions.** No definitive evidence is available regarding how judges weigh the danger and amenability criteria for transfer. Such studies are especially difficult in the absence of

¹⁶ Threshold conditions for age vary widely across the states. Some states allow transfer of children and youth of any age; other states set 15 as the threshold age for transfer; while other states set different ages depending upon the seriousness of the offense. Offense thresholds in some states allow for transfer for all felony offenses, while other states only allow for transfer in first degree murder cases.

¹⁷ For example, youth whose offense records begin before early adolescence are more likely to continue to offend beyond their adolescent years than those whose first offenses are in middle-adolescence (Elliott, 1994; Moffitt, 1993). For a comprehensive review of risk factors for estimating future delinquency and violence among youth, see Borum & Verhaagen, (2006).

¹⁸ For a comprehensive review of rehabilitation methods that work with delinquent youth, see Greenwood, (2006).

¹⁹ There are several comprehensive reviews of research on the effects of transfer on continued recidivism (Bishop & Frazier, 2000; McGowan et al., 2007; Task Force on Community Preventive Services, 2007).

requirements, in most states, for written opinions explaining transfer decisions. One research study, however, found enormous inconsistencies in judicial decision-making about youth with similar characteristics (Beyer, 2006). The study compared the sentencing and outcomes of youth who were transferred to juvenile court versus similar youth who were maintained under juvenile court jurisdiction (Beyer, 2006).

D. Critical Issues in Transfer Cases

Courts often confuse amenability and dangerousness, and it is important to distinguish between them. Courts should be given the reasons why this particular youth can be rehabilitated and then how likely she is to be dangerous after she has completed the recommended treatment plan.

1. **Dangerousness.** Attorneys should be aware of several difficulties raised by the need to evaluate the “dangerousness” question in transfer.

a. Clinicians should not be allowed simply to state an opinion about “dangerousness.” The questions, whether youth represent a risk of aggression in the immediate future (the next few weeks), for the remainder of their adolescence or in the very long range (into their adulthood) should be addressed separately. Accuracy of such estimates decreases as the distance into the future increases and, therefore, great care should be taken not to compress the question and risk getting an answer that is inaccurate as to all three time-periods at issue.

It is important to indicate the conditions under which the youth is likely to be more aggressive and what conditions reduce the youth’s aggression. Furthermore, if dangerousness is the conclusion on a first aggressive offense, it is imperative to indicate that the youth has not been aggressive before and to show what the unique circumstances of the offense were that suggest a low likelihood of aggression in the future (e.g., a youth with no prior arrests and no disciplinary reports in school who kills his mother’s boyfriend because of continued domestic violence against his mother). In addition, the specific treatments for a youth to address the sources of his aggression should be presented.

b. Conflicts may arise if current charges are used as part of the evidence for future aggression or criminal behavior. Allowing mental health examiners to interview the youth about the alleged offense often provides important information, especially regarding amenability to rehabilitation and aggression, (sometimes mitigating), but also risks self-incriminating complications with regard to future hearings.

- If a youth charged with a serious offense plans to plead in juvenile court and is not likely to get less than juvenile life, it may make sense for the youth to disclose to the evaluator her perspective on how the alleged offense unfolded, but only if the evaluator for transfer could gain useful information regarding amenability to rehabilitation and dangerousness. However, the evaluator will then have to assess discrepancies between the youth’s version and that of others regarding what happened.

2. **Amenability to rehabilitation.** Attorneys should be aware of special issues and questions that may arise regarding judgments about the youth’s “amenability to rehabilitation” in the juvenile justice system.

- a. If the juvenile justice system has not applied various rehabilitation methods with this youth in the past, there may be a greater potential for an argument that such methods should be attempted before transfer is even considered.
- b. When various rehabilitation methods have been tried in the past with a youth without success, courts should consider that this does not necessarily mean that the youth is poorly motivated or is not amenable to rehabilitation. The quality of the previous interventions should be considered to determine whether they were simply ineffectively applied.
- c. In many states, a youth may not be found “unamenable” to rehabilitation within the juvenile justice system merely because the local juvenile justice system does not have a particular treatment method (when there is evidence that the youth might respond to that method).
- d. Youth who are near the upper age for juvenile court jurisdiction may have potential for responding to rehabilitative efforts, yet be “unamenable” because the juvenile court will lose custody of the youth before efforts can succeed. Examiners’ estimates of the time required for rehabilitation and the design of specialized services to rehabilitate this young person within that timeframe become important in such cases.

E. Essentials for the Forensic Clinician’s Evaluation in Transfer Cases²⁰

1. **Transfer evaluations are comprehensive studies of the youth.** They require a complete and thorough description of the youth’s life-long development in all important spheres: immaturity, trauma, disabilities, biological development, family history and dynamics, social and peer relations, educational course, mental health problems and their treatment, the nature and circumstances of previous delinquent behavior, and the course of any efforts at rehabilitation in juvenile justice programs. As a consequence, transfer evaluations require obtaining:
 - a. Extensive records in all of these spheres;
 - b. Interviews of individuals who have been important in the youth’s life across time;
 - c. Use of psychological tests of the highest quality;
 - d. Multiple interviews with the youth, not merely one; and
 - e. Production of an integrated narrative about the youth that is highly individualized and offers explanations for the youth’s development and past and present behavior.
2. **Assessment of risk of future aggression and illegal behavior.** The assessments should include:
 - a. Thorough knowledge of all past disruptive or illegal behaviors with a detailed analysis of what may have been labeled disruptive behavior but may have been a trauma-related reaction.
 - b. A detailed exploration of the circumstances and contexts in which the youth has engaged in these behaviors.

²⁰ For a more detailed description of transfer evaluations, see Grisso (1998, 2000).

- c. The clinician's organization of information obtained according to risk factors that are known (from research) to be of value in making estimates of the likelihood of future aggression, violence or delinquency.²¹ These risk factors should be described by the evaluator with details about the pros and cons of such risk factors and individualized information about the child. For example, having an arrest before age 13 is usually considered a risk factor, but this child could have been arrested at age 12 with her older brothers and older cousin when they were selling drugs in their apartment.
 - d. Estimates of the likelihood of future aggression or delinquency should address short-term, adolescent-limited, and long-term (adulthood) estimates, and should acknowledge important limits in our knowledge of the degree of accuracy of clinicians' judgments about youth's long-range risks of aggression or criminal behavior.
3. **Assessment of amenability to rehabilitation within the juvenile justice system.** This assessment should include:
- a. Formulation of what would need to change in order to reduce likelihood of future delinquency or criminal behavior. This should reference protective factors that can be introduced or supported in the youth's life.
 - b. All past efforts at rehabilitation, their nature, and their outcome in terms of the youth's situation and condition.
 - c. Formulation of a rehabilitation plan with the greatest likelihood of success, and explanation for this opinion; or an explanation of why each rehabilitation method available within juvenile justice jurisdiction is not likely to reduce future delinquency.
 - d. Availability of the rehabilitation plan and likelihood that it will be effective within the time-frame available before the youth reaches maximum juvenile jurisdictional age.
 - e. For a youth charged with a serious offense who is likely to be sent to a juvenile facility, the evaluator should note that the most effective evidence-based delinquency treatment programs are not residential. But the evaluator should include ways in which the facility might be able to approximate the evidence-based services that the youth needs for rehabilitation.

²¹ Several methods are available to assist clinicians in using case information to complete ratings of youth on factors that are known to be related to future aggression. An example of a method currently available that has substantial evidence for its value is the Structured Assessment of Violence Risk for Youth (SAVRY) (Psychological Assessment Resources (PAR), Inc.).