UNC SCHOOL OF GOVERNMENT

2014 Advanced Juvenile Defender Training

March 12-14, 2014 / Chapel Hill, NC

ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

2014 Advanced Juvenile Defender Training

March 12-14, 2014
UNC School of Government, Chapel Hill, NC
Cosponsored by the UNC-Chapel Hill School of Government &
NC Office of Indigent Defense Services

WEDNESDAY, MARCH 12

12–1:00 pm	Check-in
1:00–1:15	Welcome, Introductions, and Announcements Austine Long, Program Attorney UNC-Chapel Hill School of Government, NC Eric Zogry, Juvenile Defender Office of Indigent Defense Services
1:15–2:15	**PLENARY SESSION: Ethics: Client-Centered Representation through All Stages of the Case** [60 min.] Tamar Birckhead, Associate Professor of Law UNC–Chapel Hill School of Law
2:15–3:00	**PLENARY SESSION: Brainstorming the Facts in a Delinquency Case** *(Work on Fact Problem)* [45 min.] John Rubin, Professor UNC-Chapel Hill School of Government, NC Shaunis Mercer, Assistant Juvenile Defender Office of Indigent Defense Services
3:00–3:15	Break
3:15—5:00	**WORKSHOPS: Brainstorming the Facts of Your Case** [105 min.]
5:00	Recess for Day
6:00-7:00	**Networking Social at Top of the Hill, Chapel Hill** Sponsored by the North Carolina Advocates for Justice
7:00	Dinner at Top of the Hill, Chapel Hill (Individual Pay)

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THURSDAY, MARCH 13

9:00—9:45 am	**PLENARY SESSION: Juvenile Capacity** [45 min] Mitchell Feld, Attorney Council for Children's Rights, Charlotte, NC
9:45–10:15	**PLENARY SESSION: Juvenile Capacity** Group Discussion (Work on Fact Problem) [30 min.] Austine Long, Program Attorney UNC-Chapel Hill School of Government Shaunis Mercer, Assistant Juvenile Defender Office of Indigent Defense Services
10:15—10:30	Break
10:30—11:15	**PLENARY SESSION: Developing a Theory of Defense** *(Work on Fact Problem)* [45 min.] Whitney Fairbanks, Assistant Legal Counsel Administrative Office of the Courts
11:15—12:15 pm	**WORKSHOPS: Developing a Theory of Defense** [60 min.]
12:15–1:15	Lunch (provided in building)*
1:15—2:00	**WORKSHOPS: Developing a Theory Cont.** [45 min.]
2:00–2:45	**PLENARY: Probable Cause Hearings** [45 min.] Julie Boyer, Assistant Capital Defender Office of Capital Defender, Winston-Salem, NC
2:45—3:00	Break
3:00–5:00	**PLENARY SESSION: Suppression Issues** [120 min.] **Includes demonstration and facilitated group discussion** Randee Waldman, Director, Barton Juvenile Defender Clinic Emory University School of Law, Atlanta, GA
5:00	Recess for Day

*IDS employees may not claim reimbursement for lunch

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FRIDAY, MARCH 14

9:00–9:45 am	**PLENARY: Closing Argument** [45 min.] Eric Eller, Attorney Boone, NC
9:45–11:00	**WORKSHOPS: Closing Argument** [75 min.]
11:00–11:15	Break
11:15–12:15 pm	**PLENARY: Dispositional Advocacy** [60 min.] Barb Fedders, Professor UNC-Chapel Hill School of Law
12:15–1:15	Lunch (provided in building)*
1:15–2:15	**WORKSHOPS: Dispositional Advocacy** [60 min.]
2:15–2:30	Break
2:30–3:30	**PLENARY: The Terrible Toll it Takes (SA/MH)** [60 min.] Lyana Hunter, Assistant Public Defender Office of Public Defender, Wilmington, NC
3:30	**Closing Remarks**

CLE HOURS
General Hours: 13
Ethics Hours: 1
Substance Abuse/Mental Health: 1
Total CLE Hours: 15

*IDS employees may not claim reimbursement for lunch

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ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

NC Office of Indigent Defense Services
http://www.ncids.org/

UNC School of Government
http://www.sog.unc.edu/

Indigent Defense Education at the UNC School of Government
http://www.sog.unc.edu/node/117

TRAINING

Calendar of Live Training Events (including biannual criminal law webinars providing case and legislative updates; next webinar December 6, 2013)
http://www.sog.unc.edu/node/643

Online Training (4 hours of CLE credit available per year for watching archived sessions)
http://www.sog.unc.edu/node/644

MANUALS

2013 Juvenile Defender Resource Guide, National Juvenile Defender Center
http://www.njdc.info/2013_juvenile_defender_resource_guide.php

Reference Manuals (including Defender Manual, Volumes 1 and 2; Juvenile Defender Manual; Civil Commitment Manual; Guardianship Manual; Immigration Consequences Manual; Child Support Enforcement; Abuse, Neglect, Dependency, and Termination of Parental Rights)
http://www.sog.unc.edu/node/654

UPDATES

NC Criminal Law Blog
www.sog.unc.edu/node/487

Criminal Law in North Carolina Listserv (to receive summaries of new criminal appellate cases and new criminal legislation)
http://www.sog.unc.edu/crimlawlistserv

TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)
www.sog.unc.edu/node/490

Index of School of Government Criminal Law Materials (includes Criminal Case Compendium, Legislative Summaries, Justice Reinvestment Resource Page, and faculty papers)
http://www.sog.unc.edu/node/1500

Motions, Forms, and Briefs Bank
http://www.sog.unc.edu/node/657

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)
http://www.ncids.org/Defender%20Training/Training%20Index.htm

DEMONSTRATION PROBLEM

2014 Advanced Juvenile Defender Training
In re R.C. Fact Problem

The Petition

The petition alleges that on February 7, 2014 at approximately 10:00 p.m. the juvenile unlawfully, willfully and feloniously did steal, take, and carry away currency in the amount $80, the personal property of Quickie Mart, Inc., from the person of Alice Tubbs, clerk, by taking it from a cash register in her possession, protection, and control, a violation of 14-72(b)(1), a Class H felony. It also alleges that on February 7 at approximately 10:00 p.m. the juvenile unlawfully and willfully did steal, take, and carry away a six pack of beer, the personal property of Quickie Mart, Inc., by concealing it in a backpack and leaving the store without paying for it, a violation of 14-72(a), a Class 1 misdemeanor.

Interview of Client and Family Members

Your client is Ronny Clements. He is 13 years old, white, 5'0" tall and 100 lbs. He wears his hair in a "mohawk" and often wears a necklace with a big silver cross on it. He lives in an apartment in downtown Raleigh with his mother and brother. He says that he got in trouble for taking something from school last year.

Ronny says that he was not at the Quickie Mart on the night of February 7. He was home with his 20 year-old brother, Jordan Clements, from 8:00 p.m. on. (His mother was working an extra shift and was gone all day, arriving home after midnight.) When asked what he and Jordan were doing at home that night, Ronny initially says "Nothing, hanging out," but when pressed, admits he was helping his brother put marijuana into bags, which his brother sold to people who came to the house. He only knows the people by their first names and does not know how to contact them. He did walk over to the Quickie Mart early before it got dark but he did not see Harland White. He bought two honey buns and a grape soda.

Mrs. Clements says that Ronny is in the seventh grade, but academics are a struggle for him because he has a learning disability. He is failing three out of five classes and may not be promoted to the eighth grade. Ronny has a 70 IQ and was diagnosed with attention-deficit hyperactivity disorder when he was 7 years old. Mrs. Clements had to take time off from work for school meetings about his Individual Education Plan. She wishes that he would get involved with sports but so far he does not show any interest. She is worried that he is spending too much time with his older brother Jordan, who has had drug trouble and may not be a good influence. Ronny's father died of cancer when Ronny was six years old, which was very hard on him. He has always been a small boy, and she thinks his size combined with not having a father around made him a target for bullies. He is an obedient son who takes pride in cleaning her car.

Although Ronny has no prior juvenile adjudications, he had one petition for misdemeanor larceny in August 2013, which was dismissed by the State because the complaining witness did not show.

Jordan Clements has a record for drug offenses, including two felony convictions of sale of

cocaine for which he recently served 12 months in prison. He also pled guilty to forging checks belonging to an elderly neighbor in 2012. Jordan confirms that Ronny was at home with him on the night of February 7, and remembers that they were watching basketball on TV. Other than that, he claims he does not remember what they were doing or whether anyone visited the apartment.

Information about Alice Tubbs, Quickie Mart Clerk (From talking with Officer Davis and from his report)

Tubbs is a 60 year-old African American woman who has been working at the Quickie Mart on South Blount Street in downtown Raleigh for two years. On February 7, she was working as the cashier at the Quickie Mart at 10:00 p.m., when five teenage males came in. Two of them were black and three were white. Some of them had on baggy pants and necklaces and they were "cutting up". She had the feeling they were up to no good and started watching them on the mirrors in the corners of the store. They spread out in different aisles, cracking jokes and laughing loudly while they handled merchandise.

Two of the white males went to the beer cooler and Tubbs focused on them because they did not seem of age to buy alcohol. One was wearing a black T-shirt with an eagle on it and no hat. His hair was dark but he had long hair in the back dyed blonde, which stood out to Tubbs as unusual. The other was wearing an oversized white T-shirt, a backpack, and a Durham Bulls cap. The one in the cap looked shorter (between 5'2" and 5'5") and thinner than the male in the black T-shirt, who was at least 6 feet tall and more muscular. The one in the cap started to walk in the direction of the store exit, but the taller male yanked him by the backpack, pulled off the backpack, and stuffed it in the smaller male's hands. Ms. Tubbs could not hear what they were saying, except that the taller male addressed the other, "Boy!" in a stern voice. The one in the cap then unzipped his backpack and held it open while the taller male took a case of Pabst beer from the cooler, put it in the backpack, and zipped it. The smaller male in the cap put the backpack on and they both started walking toward the checkout counter. The other three males rushed to the counter first to pay for a box of candy and soda. Ms. Tubbs totaled the items, took the money, and opened the cash register to give the change. At that moment she saw the two white males, who had put the beer in the backpack, walk by the checkout counter and toward the door. They were about five feet from the exit when Ms. Tubbs said in a loud voice, "You need to pay for what's in that backpack." One of the boys at the counter reached across and took money, about $80, from the cash register. They all started to run except the young male in the Bulls cap, who froze. Someone yelled, "Boy, you better run!" and pulled him by his backpack strap out of the store. All five then took off running down the block.

Ms. Tubbs called 911 and reported the theft. Officer Davis arrived and learned that the store's video camera was not functional. Ms. Tubbs said the owner of the Quickie Mart was so cheap and mean that he would sooner see his employees get killed than pay a dime for proper security. She had called him to report the theft right after she called the police and he had berated her for causing the store to lose money. She had had it with that man and was going to quit. Now that she thought about it, those kids had done her a favor and she wished they had gotten away with more merchandise.

Report of Officer Davis

I knew from Ms. Tubbs' description that the male in the black T-shirt with the eagle on it was Harland White. White has short, dark hair with a long "rat tail" peroxided white, and a muscular build from playing high school football. I have dealt with White many times before. In fact, I asked him some questions about break-ins in the neighborhood earlier this week when I ran into him on Fayetteville Street. I thought he might want to provide a little cooperation since he has a court date coming up for misdemeanor B & E and he already has one on his record.

On Monday, February 10, I went to White's home and told him he had been caught on videotape stealing beer from the Quickie Mart. He said, "Man, that was all Ronny Clements. You can't pin that shit on me. I was just in the store and had no idea that boy was going to pull that stunt. You know he's joined the family business, dealing smack with his brother Jordie. They are messed up." We discussed the possibility of a PJC for White's pending charge in exchange for his honest testimony against Ronny Clements and information about Jordie's drug dealing.

That afternoon, I went to Shaw Middle School to interview Ronny Clements. When I arrived at the school, Ronny Clements was in the office with Officer Short, the SRO (school resource officer) and the principal, Mrs. Boyd. I called earlier and spoke to Officer Short and told him I was investigating an incident that occurred at the Quickie Mart last night. He verified that Ronny Clements was at school. Mrs. Boyd advised me that Officer Short brought Ronny to her office about an hour before I arrived. Officer Short and Mrs. Boyd met with Ronny in her office. Officer Short told Ronny he might be in trouble and he should tell them what he was doing last night. Ronny said he was scared and wanted his mother to come to the school. Mrs. Boyd called Mrs. Clements and she said she would try to get there in 30 minutes. Officer Short continued to ask Ronny what he was doing last night, assuring him he could leave with his mother if he told the truth. Ronny told Officer Short he went to the Quickie Mart and then was home watching TV.

I interviewed Ronny alone in Mrs. Boyd's office from approximately 12 noon to 12:30. Ronny Clements is a young, white male, 5'0" and slight of build, consistent with Ms. Tubbs' description. He was wearing a silver chain with a cross on it. I told Ronny I was here to talk about what happened on Friday at the Quickie Mart. I asked Ronny if he went to Quickie Mart on Friday. He did not respond. I asked him what he was doing on Friday night. He did not respond. I then told him that he was caught on videotape stealing beer from the Quickie Mart and that Harland White was prepared to testify against him. Ronny still did not respond and continued to hold his head down. I then asked Ronny if he knew Harland White and he said "yes, my brother got in a fight with him." I again asked Ronny to tell me what happened on Friday. Ronny asked "Is my mother here yet?" I told him I did not know. A few moments later, Mrs. Clements arrived and said that she was taking Ronny home and no one else was going to talk to him.

I obtained a yearbook from Shaw Middle School for the previous school year. I went to the Quickie Mart and met with Mrs. Tubbs. When I showed Mrs. Tubbs the yearbook, it was on pages 6 and 7, which included pictures of several girls, 3 white males and two black males. I asked her if she recognized any of them as the teenagers that stole the beer and money from the

store. She pointed to Ronny Clements' picture and said "That looks like one of the boys with the backpack."

I thereafter filed a complaint with the court counselor's office alleging Felony and Misdemeanor Larceny for Ronny Clements.

ETHICS

December, 2009

Buffalo Law Review

57 Buffalo L. Rev. 1447

Article: Toward a Theory of Procedural Justice for Juveniles

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BIO:

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TEXT:

Introduction

The juvenile court has historically been a hybrid institution in terms of its purpose and procedures, incorporating aspects of both the civil and criminal court systems. In the late nineteenth century, the founders of the first juvenile courts in the United States were motivated by a desire to provide a forum--separate and discrete from that of adult criminal defendants--for the adjudication and disposition of child and adolescent offenders. The initial result was an informal system emphasizing the rehabilitation and remediation of wayward youth, with little focus on the court's fact-finding role vis-a-vis the alleged criminal offense and even less consideration given to the rights of the accused. As the decades passed and the juvenile court became increasingly punitive, child advocates challenged the informality of delinquency proceedings, and critical due process rights were ultimately granted to young offenders. In the 1960s and early 1970s, the United States Supreme Court held in a trio of foundational cases that juveniles have basic due process rights in delinquency proceedings and before transfer from juvenile to adult criminal court. Certain rights--including trial by jury--were not extended to juveniles, however, premised on the contention that the unique and beneficial aspects of juvenile court would be compromised if all the formalities of the criminal system were "superimposed" upon it. As the juvenile court system has expanded and the realities of limited resources and inadequate staffing have become apparent, the concern expressed by Justice Fortas in 1966 that juveniles were receiving "the worst of both worlds" continues to resonate.

The debate over how to weigh the potential benefits of juvenile court against the risks associated with the denial of due process rights has animated critical analysis of the juvenile justice system for the past forty years. Some courts and commentators have applied the contractual concept of quid pro quo ("something for something") when deciding whether a particular procedural protection, such as the right to a jury trial, is constitutionally mandated for juvenile offenders. It is suggested in these opinions--usually in explicit terms--that with the granting of each "new" right to juveniles, there is less of a need for a separate children's court. Alternatively, courts have denied specific procedural protections to juveniles when convinced that young offenders have received rehabilitative services, and not punitive treatment, in return. Other courts have moved away from a strict rendering of quid pro quo and toward a more flexible balancing of competing interests when determining whether to provide a particular procedural right to juveniles; in these cases, the decision often hinges upon the court's sense of what is required to achieve a "fundamentally fair" result. The question rarely posed, however, is whether weighing rehabilitative against punitive theories of delinquency court is the proper calculus.

Will certain procedural protections "spell the doom" of the juvenile court system, or should the analysis be focused on completely different factors?

In 2008, the Kansas Supreme Court held that juveniles have a constitutional right to a jury trial, bringing the total number of states that either provide jury trials to juveniles by right or allow them under limited circumstances to twenty. In re L.M. was premised on the contention that punitive legislation passed during the previous quarter-century had eroded the distinctions between the juvenile and criminal justice systems and thereby compromised the juvenile court's "benevolent, parens patriae character." After closely comparing the language and purpose of the state's juvenile and criminal codes, the Kansas court concluded that because of the similarities between the two systems, young offenders must be afforded the protection of trial by jury under the Sixth and Fourteenth Amendments. While In re L.M. is considered by many juvenile justice advocates to have been a clear victory for young offenders, its holding may also be seen as perpetuating the concept of quid pro quo, in which the rehabilitative ideal of juvenile court is directly juxtaposed against the due process protections provided to adults under the adversarial model. Yet, instead of concluding that the jury trial right would compromise the beneficial nature of juvenile court, the Kansas Supreme Court found that there was so little left to distinguish the juvenile system from the adult system that this right could no longer be denied. In this way, the decision may also be seen as taking a step toward the more radical notion that because of its shortcomings and ineffectiveness, the juvenile court system should be abolished as a separate procedural entity and replaced with a criminal court for minors.

This Article critically examines the ways in which courts have determined whether juveniles should be granted certain procedural rights, and it argues that rather than subscribe to the wooden concept of quid pro quo or utilize a subjective balancing approach, courts should allow empirical research evaluating adolescents' appraisals of the fairness of a decision-making process--also known as procedural justice--to inform the decision. Part I analyzes United States Supreme Court case law that has addressed this issue and discusses the recent Kansas Supreme Court case that rejected precedent, but fails to shift the juvenile justice paradigm.

Part II argues that social science research provides a useful perspective from which to analyze whether specific procedural rights should be granted to juveniles. The first section examines research on why people obey the law. The second section discusses the legal socialization of adolescents and its influence on patterns of reoffending. The third section suggests that when juveniles perceive that they have been treated fairly by law enforcement and the courts--a judgment shown not to be dependent upon the outcome of the case--they are less likely to recidivate.

Part III begins the task of applying procedural justice theory and related findings by social psychologists to the juvenile court, an analysis that has not previously been presented by legal scholars. The first section examines how the theory could reframe the debate over whether juveniles have a constitutional right to a jury trial. The second section applies the theory to the practice of allowing juveniles to waive counsel and admit to criminal charges at arraignment, which has been justified as enabling juveniles to receive treatment without the delay that often results from litigation of the charges. The third section applies the theory to the practice of allowing school-based actors such as teachers and administrators to serve as law enforcement without providing traditional due process protections to youth. The fourth and final section considers how procedural justice theory might affect the role of the parent in juvenile delinquency proceedings.

Part IV concludes by acknowledging the limits of procedural justice theory as applied to juveniles; it offers caveats and raises questions for moving ahead.

I. From Quid Pro Quo to Subjective Balancing and Back

Perhaps because it was created to remedy the harsh and unforgiving manner in which the criminal court system dealt with young offenders, the juvenile court system during the first half of the twentieth century was notable for its procedural informality and lack of administrative oversight. As juvenile dispositions became more punitive, the quid pro quo exchange of rights for rehabilitation inevitably broke down, resulting in juveniles receiving neither effective treatment nor the procedural protections of adults. From 1966 to 1970, the United States Supreme Court entered the breach with a series of decisions that relied upon the Due Process Clause for their grounding. This Part discusses these decisions as well as the recent Kansas case in which the court utilized quid pro quo analysis to hold that juveniles do have a Sixth Amendment right to a jury trial.

A.Defining Fundamental Fairness

During a four-year period beginning in 1966, the United States Supreme Court addressed important aspects of the juvenile delinquency process in three formative cases, each of which relied upon the Due Process Clause rather than the

Sixth Amendment for its holding. The first, Kent v. United States, held that before a juvenile's transfer to adult criminal court, she must be given an opportunity for hearing, counsel must be given access to relevant records, and the court must accompany its transfer order with a statement of reasons or considerations for its decision. While stopping short of mandating that all constitutional guaranties applicable to adult criminal defendants be applied to juveniles, the Court held that it would be "extraordinary" if society permitted children to be transferred to adult court without these basic protections.

The second and most comprehensive case of this period was In re Gault, widely celebrated by attorneys and advocates, which rejected the assertion that the substantive benefits of the juvenile court process "more than offset" the denial of due process rights to juveniles. Instead, upon holding that such due process rights as the right to counsel, the privilege against self-incrimination, and the opportunity for cross-examination of witnesses apply to juvenile delinquency proceedings, the Court stated that these protections may, in fact, be "more impressive and . . . therapeutic" for the juvenile than the long-assumed benefits of the juvenile system--namely, its informality and the benevolence and compassion of the judge. Citing a 1966 report on juvenile delinquency by sociologists Stanton Wheeler and Leonard Cottrell, the Court recognized that when harsh punitive measures come on the heels of "procedural laxness," a child may feel that she has been "deceived or enticed." As Wheeler and Cottrell have stated, "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."

The Court was careful to situate its decision, however, within the framework of due process balancing by concluding that the provision of basic due process protections to juveniles would by no means require that "the conception of the kindly juvenile judge be replaced by its opposite."

The third case in this trio, In re Winship, decided three years after Gault, held that because the Due Process Clause requires application of "essentials of due process and fair treatment," juveniles--like adults--are constitutionally entitled to proof beyond a reasonable doubt during the adjudicatory hearing. Again acknowledging that there is "no automatic congruence between the procedural requirements imposed by due process in a criminal case, and those imposed by due process in a juvenile case[]," the Court in Winship concluded without much explication that to afford juveniles the protection of the highest standard of proof would not "risk destruction of beneficial aspects of the juvenile process."

It is significant that the Court in each of these three cases arrived at the decision to provide procedural protections to juveniles based not on the specific Sixth Amendment guarantees of notice, confrontation, counsel, and trial by jury that are required for "all criminal prosecutions," but on the general language of the Due Process Clause of the Fourteenth Amendment. Some commentators have suggested that applying this more subjective or "interpretive approach" to the juvenile delinquency process means that as long as procedural mechanisms can be shown to be as "fair" as the Sixth Amendment's adversarial model, they too may satisfy constitutional requirements--even if demonstrably different.

On the heels of cases that relied on conceptions of "fairness" to grant procedural rights to juveniles, the United States Supreme Court rejected the notion that juveniles have a right to a jury trial in delinquency court. The Court was divided as to the basis of McKeiver v. Pennsylvania, however, as a plurality of justices agreed on the result based on policy considerations and the presumed negative impact of jury trials on juvenile court proceedings, while concurring justices determined that the touchstone should be both the Sixth Amendment and the concept of fundamental fairness as established by the Due Process Clause. Meanwhile, the McKeiver dissenters relied squarely on the Sixth and Fourteenth Amendments to conclude that juveniles who are prosecuted for criminal acts potentially triggering loss of liberty are entitled to the same protections as adults accused of crimes.

As suggested earlier, a critical part of the subtext underlying the decisions of Kent, Gault, Winship, and McKeiver is the matter of whether juvenile courts have the necessary resources to perform in a parens patriae capacity. Also explored is the question of whether the juvenile court system is performing so well in regard to rehabilitation and recidivism that due process safeguards afforded to adult criminal defendants may be justifiably withheld from young offenders. In the three United States Supreme Court cases that have extended due process protections to juveniles, these questions are answered in the negative, with the Court stating that the system has become sufficiently punitive and ineffective to warrant additional procedural protections for juveniles. In McKeiver, however, while the Court acknowledges that "the fond and idealistic hopes of the juvenile court proponents and early reformers" have not been realized, it qualifies its admission by contending that "this is to say no more than what is true of criminal courts in the United States. But failure is most striking when hopes are highest." More recently, the Kansas Supreme Court also answered these questions in the negative, rejecting McKeiver's reasoning not by shifting the paradigm but by applying traditional quid pro quo analysis.

B.Kansas Fails to Shift the Paradigm

Although the Kansas Supreme Court did not provide a detailed account of the facts of In re L.M. in its opinion, they are worth recounting for they are typical of juvenile cases that are tried before a judge--a significant number of which may be characterized by the insufficiency of the evidence presented, resulting from judges who fail to apply the beyond a reasonable doubt standard consistently and prosecutors who overcharge young offenders. Sixteen-year old L.M. was charged with one count of aggravated sexual battery, a felony under Kansas law, and one count of possessing alcohol as a minor, a misdemeanor. The testimony showed that L.M. met the victim, who was a decade his senior, late at night outside a bar where she had been drinking and arguing with her boyfriend. After the victim gave L.M. a cigarette and told him her name, he tried to kiss her and licked the side of her face. During the assault, L.M. had his arms around her, but did not grab or touch any other part of her body or touch any part of his own body. After the victim rejected his advances, L.M. let her go; she then waited outside her home for her boyfriend to return, as she did not have a key. Although the victim did not sustain any injuries and felt it unnecessary to report the incident, her boyfriend called the police. L.M. was subsequently taken into custody without incident; he was questioned by police into the early hours of the morning, showing signs of being intoxicated and confused.

L.M., who had never before been arrested, was held in a juvenile detention facility from the day of the incident, August 11, 2005, until his first trial date on January 5, 2006, when he was released pending a new trial date one week hence. On January 12, 2006, after his motion for a jury trial was denied and the case was tried before a judge, L.M. was convicted of aggravated sexual battery and again ordered detained until final disposition on February 7, 2006. The district court then sentenced him as a "Serious Offender I to a term of eighteen months in a juvenile correctional facility, but stayed the sentence and ordered L.M. to be placed on probation" until age twenty. Pursuant to Kansas law, L.M. was required to comply with the conditions of sex offender treatment and sex offender registration.

Although not addressed in any detail by the Kansas Supreme Court in its decision, the collateral consequences of L.M.'s juvenile adjudication for aggravated sexual battery were particularly punitive. In addition to the fact that juveniles generally are more likely to be subject to incarceration--and receive longer terms--than young adult offenders charged with the same crimes and the fact that juvenile delinquency adjudications can be used to enhance sentences in adult criminal court, L.M. faced repercussions resulting from the very nature of the offense charged. The Kansas Offender Registration Act contains public disclosure provisions that the Kansas Supreme Court had previously considered "punishment" for purposes of ex post facto analysis, giving credence to the argument that the community notification provisions would be particularly harmful to juveniles. Research on adolescent development also suggests that public notification inflicts a harm on juveniles that is disproportionate to the offense.

Rejecting McKeiver's contention that the benevolent parens patriae character of the juvenile justice system distinguishes it from the adult criminal system, the Kansas court based its holding recognizing a jury trial right for juveniles on the Sixth Amendment, rather than upon general notions of fairness and due process. The court held that since 1984, when Kansas adopted the United States Supreme Court's reasoning in McKeiver, the legislature had changed the language of the Kansas Juvenile Offender Code by "negating its rehabilitative purpose" and aligning its dispositional provisions with those of the criminal sentencing guidelines, thereby creating a juvenile court so similar to its adult counterpart that the jury trial right could no longer be discretionary. While acknowledging that most other state courts have declined to extend this constitutional right to juveniles, the majority remained "undaunted in its belief" that because the Kansas juvenile justice system was now patterned after the adult criminal system, McKeiver was no longer binding. In this way In re L.M. demonstrates that when the expansion of juveniles' rights is based solely on the Sixth Amendment, the most likely model will be adult criminal court, thereby failing to shift the juvenile justice paradigm. Alternatively, when an extension of rights is premised on procedural justice theory, the new model can more readily be drawn from outside the parameters of the criminal justice system.

While the Kansas decision establishes a bright line with its reasoning, practical factors--including the power of judicial precedent, fiscal constraints on the state's ability to provide juvenile jury trials upon request, and law makers' reluctance to appear "soft" on crime--have been paramount in the determinations of other jurisdictions. Some have clearly distinguished the terminology and purpose of their state's juvenile code from its criminal code, whether under due process, quid pro quo analysis or both. Others have definitively held that the Sixth Amendment does not mandate the right to a jury trial for juveniles. Courts and legislatures that choose instead to rely on subjective interpretations of due process when analyzing this issue will inevitably revisit the question of how best to define 'fairness.' Under what standard should it be determined that a specific procedural right is as fair as the adversarial model envisioned by the Sixth Amendment? Such a query may be answered -- at least in part -- by recent empirical research by social scientists.

II. Evidence from the Social Sciences

Academic disciplines approach the study of crime and criminal behavior from differing perspectives. Sociology -- one of the many disciplines from which to choose -- considers broad-spectrum structural explanations for human behavior, with sociologists typically trained to focus on the question of why people break the law. Social psychologists, on the other hand, perhaps due to their reliance on surveys of the general population, are more likely to ask why people obey the law. The focus of this Part is on the latter rather than the former question, premised on the notion that in a world of limited resources, it is more pragmatic to examine the reasons why adolescents comply with the law, rather than dwell on the causes of their noncompliance. The discussion begins by examining social science research in the area of procedural justice theory, takes up an analysis of how children and adolescents develop ties to the law and legal actors and concludes by demonstrating a causal relationship between juveniles' perceptions of fairness and their likelihood of reoffending.

A.Why Obey the Law?

Since the 1970s, preeminent social and behavioral scientists who study criminal procedure have examined a series of intersecting questions that relate to the central problem of which legal system--adversarial, inquisitorial, investigative, or a hybrid --is the most effective in reducing crime.The inquiry has been grounded in procedural justice theory, the notion that people are more likely to comply with law and policy when they believe that the procedures utilized by decision-makers are fair, unbiased, and efficient. Its proponents contend that procedural fairness plays a "key role" in people's willingness to cooperate with a wide range of decisions, from United States Supreme Court rulings to corporate drug-testing policies.The empirical research has focused on exploring why people are either satisfied or dissatisfied with a particular dispute outcome and whether there is a relationship between the type of process used and one's perceptions of systemic fairness; the finding that people care enormously about the process and greatly value the opportunity to "tell one's story," regardless of the outcome, has been replicated across a wide range of methodologies, cultures, and settings.

During the past two decades, researchers have continued to advance this work, applying procedural justice theory to a wide range of literatures, including law, medicine, business, education, and social work. The empirical studies of Tom Tyler, for instance, have explored the differences between the instrumental perspective on why people follow the law, which is dominated by deterrence literature linking human behavior to incentives and penalties (follow the law only if you are likely to get caught), and the normative perspective on this question, which relies both on personal morality (follow the law because it is right) and adherence to legitimacy (because we have confidence in the police and the courts, we should follow the law). By focusing on the extent to which normative factors influence compliance with the law separate and apart from deterrence, the work of Tyler and others has suggested that people obey the law when the rules and procedures are consistent with their personal values and attitudes; in other words, when people are personally committed to obeying the law, they voluntarily assume the obligation to follow legal rules, irrespective of the risk of punishment.

In subsequent empirical work, Tyler has explored the factors that contribute to the likelihood of deference to authority among a variety of ethnic groups. His results suggest that the behavior of and processes used by police officers and judges--if perceived to be fair and benevolent--can encourage voluntary acceptance of decisions made by legal authorities, which in turn can lead to lower rates of reoffending. While it is arguable whether his findings are consistent with human intuition, it is potentially useful to have multiple data sets demonstrating that treating people with dignity and respect makes them more likely to view procedures as fair and the motives behind law enforcement's actions as well-meaning. It is also of likely utility to have data showing that when people consider police and court procedures to be equitable and the motives of authorities trustworthy, they are more likely to obey the law.

Tyler references and builds upon the work of seminal figures in the fields of psychoanalysis, sociology, and economics to argue that social norms and values become part of a person's internal motivational system and guide behavior separate from the impact of the threat of power on human behavior, which relies instead upon a traditional system of incentives and sanctions. In this way, self-control replaces the need for control by others. According to Tyler, one's sense of obligation to a certain set of rules is the key element in the concept of legitimacy, as it leads to voluntary deference.

Of further significance to the argument here are the innumerable benefits gained through a procedural system that garners compliance that is voluntary and self-regulating. Empirical evidence in this area suggests that when forced compliance or coercive power is used on its own to shape behavior, it is costly in terms of staffing, time, and resources. When people defer to legal norms out of a sense of personal morality and legitimacy, however, fewer resources are required. Thus, procedural justice theory provides a savings in both human capital and material costs when it is used to

influence behavior, as the research confirms that people are more likely to police themselves if they believe that laws are fair, legitimate, and ought to be followed.

While the work of Tyler and others has focused primarily on adult populations, the influence of personal morality on behavior toward the law has also been examined in social science literature on child development and juvenile delinquency. Several studies have laid the groundwork for exploring whether children who are influenced by instrumental considerations of reward and punishment are more likely to break the law than those who are influenced by a sense of personal obligation, but the literature is thin and more research is needed. Thus, while it may be suggested that normative concerns relating to children's feelings of personal morality and legitimacy influence compliance with the law in many of the same ways as they do for adults, this connection has not yet been made.

B.The Legal Socialization of Children

Behavioral psychologists who have studied adolescent populations have generally focused on a question closely related to that of why people obey the law--what factors shape adolescent criminal behavior? While these researchers have agreed that children's compliance with the law is promoted by the processes of maturation and psychosocial development, some have recognized further that legal socialization is a process that is not static between childhood and adolescence but variable, changing over time and developing concurrently with a child's cognitive and moral maturation; it is profoundly affected by one's peers, family unit, and neighborhood culture; and it is interactive and integrative, a process in which children internalize information that is assimilated from their own experiences, from the attitudes and factual claims of others, and from the ways in which others react and respond to them. The core argument underpinning the literature in this area is that children develop an orientation toward the law and legal actors early in life, and that this orientation shapes their behavior towards authority from adolescence through adulthood.

Research in this area has shown that a myriad of factors combine to shape and influence the law-related behavior of children and adolescents, including institutional legitimacy, an obligation to obey the law from a normative perspective, legal cynicism, one's sense of whether it is acceptable to act outside the law and social norms, and the impact of moral ambiguity and disengagement, processes by which adolescents detach from the system of internal controls and moral values and become more open to illegal behavior. Additional factors shaping criminal behavior include the deterrent effect of punitive sanctions, in which punishment that is perceived to be "swift, certain, and severe" inhibits criminal activity, and the theory of rational choice, whereby behavior is determined by the weighing of the costs and benefits associated with violating the law. Research has suggested, however, that active adolescent offenders may be less sensitive to the threat of sanctions and rational choice theory than either adults or young people who have not previously engaged in criminal activity; the reasons are twofold--immaturity causes youth not only to underestimate the level of risk but also to downplay the threat of punishment that is oriented toward the future rather than the present. Intellectual and psychosocial deficits caused by developmental delays, mental illness, and drug dependency can also "impair or skew" rational calculations of risk and reward made by adolescents.

Not surprisingly, procedural justice also plays a significant role in the process of legal socialization, as social scientists have demonstrated that perceptions of fair treatment enhance children's evaluations of the law, while unfair treatment triggers negative reactions, anger, and defiance of the law's norms. Specifically, researchers have found that children's perceptions of fair procedures are based on the degree to which the child was given the opportunity to express her feelings or concerns, the neutrality and fact-based quality of the decision-making process, whether the child was treated with respect and politeness, and whether the authorities appeared to be acting out of benevolent and caring motives. In this way, procedural justice directly affects compliance with the law, while indirectly affecting whether one views the law as legitimate. The next step is to explore empirically whether a causal relationship exists between juveniles' perceptions of fairness and rates of recidivism.

C. Recidivism and Adolescents' Perceptions of Fairness

In recent decades, social scientists have focused their research more deliberately upon the question of whether a causal connection between procedural justice and rates of reoffending by juveniles may be shown through data analysis. A sampling of recent research in this area includes studies conducted among the following samples: children and adolescents ages ten through sixteen from two racially and socio-economically contrasting neighborhoods in Brooklyn, New York; serious juvenile offenders ages fourteen to eighteen in Phoenix, Arizona and Philadelphia, Pennsylvania; young male prisoners ages fifteen to twenty-four at a German detention center; Canadian youth ages fifteen to seventeen with cases pending in one of the large youth courts in Toronto, Ontario; and young people ages fourteen to sixteen enrolled in an Australian public high school with an ethnically and economically diverse population. The data from these studies, which have focused to varying degrees on the relevance of adolescents' views of the legitimacy of legal institu-

tions and legal actors, suggest a causal connection between procedural justice and recidivism that is not outcome-dependent. While all such studies have their limitations, a consistent trend based on multiple data sets may be seen.

Relevant to this work is social science research emphasizing a link between an adolescent's capacity to stand trial and her ability to take responsibility for her actions and thereby cooperate with rehabilitative services. The connection between a child's mental or emotional capacity and her sense of accountability relates not only to the criminal prosecution of young offenders, but also to the civil context when commitment or long term in-patient treatment is under consideration. Under these circumstances, evidence suggests that allowing adolescents to direct their own care enhances the ultimate effect and impact of therapy. Examining such issues from a therapeutic perspective highlights the importance of ensuring that juveniles have the opportunity for meaningful and knowing participation in the legal system, whether the threat to a minor's liberty comes from incarceration or institutionalization.

As stated earlier in the context of discussing In re Gault, sociologists and social psychologists acknowledged the connection between a juvenile's belief that she was fairly treated and the likelihood of her future compliance with the law and legal actors more than forty years ago. However, while the United States Supreme Court recognized the import of procedural justice theory and its potential impact on juveniles' recidivism rates in 1967, this connection has not been advanced in Supreme Court jurisprudence since Gault. While a handful of lower federal courts and some state courts have referenced the work of social scientists when determining whether juveniles should be granted specific due process protections, this is only one of many areas in which lawmakers and legal authorities would benefit from a fuller understanding of social psychology. The next Part demonstrates that having a deeper appreciation of the factors that motivate juveniles' deference to the law can better enable authorities to act in ways that encourage children's cooperation.

III. Applying Procedural Justice Theory to Juvenile Court

Children's limited knowledge and understanding of the criminal justice system, which has been explored at great length in both social science research and legal scholarship, underscores the importance of creating a system that young offenders perceive as fair and impartial. This goal is further supported by empirical evidence suggesting a possible causal connection between procedural justice and lowered recidivism rates for juveniles. This Part begins the process of exploring how these findings can guide judges and lawmakers when they are evaluating procedural practices that impact juveniles.

A. A Jury of One's Peers?

As discussed earlier, courts typically have not drawn on social science research generally, or procedural justice theory specifically, when determining whether to extend due process rights to juveniles. Instead, jurisprudence in this area has followed the traditional approach of considering the question in terms of quid pro quo exchanges of rights for treatment, or in terms of due process balancing that is not tethered to what is known empirically about child development, or a combination--or blurring--of the two. While some legal scholars have asserted that juveniles should have the right to a jury trial, their arguments--though well-meaning--have been premised on abstract notions of "fairness" rather than upon empirical data related to procedural justice theory. Likewise, others have contended that the jury trial right should not be extended to juvenile court, based on suppositions and anecdotal evidence regarding likely trial outcomes, rather than empirical findings related to adolescents' perceptions of the system and rates of reoffending.

To engage in a rigorous examination of how procedural justice theory could reframe this particular debate would require an interdisciplinary approach that most courts and lawmakers have thus far resisted or have failed to acknowledge as having potential value from a public policy perspective. Funding empirical studies that focus on the question of how juveniles perceive the jury trial right would be an apt starting point. Specific areas of inquiry could include an examination of whether young offenders denied the right believed that the juvenile justice system was fair; whether those with the right were satisfied with the handling of their cases; and whether the right to a jury trial appears to reduce recidivism. These findings could then be used to inform judges and lawmakers when deciding whether, and on what basis, to extend the jury trial right to juvenile offenders.

This is not to say, however, that such an examination would be easy or that it would clearly point in one direction or another. As stated earlier, social science data is limited in its utility. It is undeniable, however, that allowing such data to inform and potentially reframe the discussion can add much-needed texture and nuance. In addition, an empirical examination of whether jury trials heighten juveniles' perceptions of fairness, thereby lowering rates of reoffending, need not end there but can serve as the opening for considering other adjudicative options and procedural strategies for

juvenile court--from victim-offender mediation, restorative justice programs, and the therapeutic role that apology and remorse can play to waiving counsel, appearing pro se, and admitting at arraignment.

Further, given the informality of most juvenile courtrooms, an unanswered question is how much traction procedural justice theory can achieve in this setting. In a regime that functions largely by means of streamlined admissions and not protracted--or even contested--hearings, introducing notions of procedural justice in a meaningful way poses distinct challenges. Unless the delinquency court process can be retooled so that even those offenders with straightforward, readily resolved matters are given the space to experience procedural justice, the endeavor will not succeed. The values of procedural justice theory must be transparently communicated to all children and adolescents who find themselves under the jurisdiction of the juvenile court; this may, in fact, be the greatest hurdle to overcome.

B.Waiving Counsel and Admitting at Arraignment

If juveniles' perceptions of fairness are not outcome-dependent, as empirical studies have suggested, and if the opportunity for a young offender to speak in open court and be heard is a critical component to achieving a meaningful court experience, what of the oft-touted option of allowing children and adolescents to waive their right to counsel and admit to pending charges at arraignment? How might empirical data inform judges and law makers as to whether juveniles consider such a scheme to be fair, thereby increasing the likelihood of successful rehabilitation, or unfair, suggesting that reoffending rates would increase? Do young offenders perceive this to be a just balancing, as services could potentially be provided more quickly and a protracted adversarial process avoided? Or do juveniles view the summary imposition of such programs as punitive and lacking in beneficial value?

The current state of United States law on the right of juveniles to waive counsel in delinquency court is somewhat mixed. While In re Gault requires that every state provide counsel to juveniles accused of crime, at least at the adjudicatory phase, this does not mean that young offenders must accept legal representation, but only that they have the right to counsel if they request representation. Very few states require mandatory appointment of counsel in juvenile cases with no option for waiver. In these states, a juvenile may neither waive counsel nor represent herself even for the limited purpose of pleading guilty, as such are considered to be "intentional relinquishment" of known rights that are inapplicable to juveniles. In a substantial minority of states, waiver of counsel may only occur under limited circumstances, requiring a rigorous inquiry into the validity of the waiver or proof by clear and convincing evidence that the juvenile waived knowingly and intelligently and that the waiver was in her best interests. In the remaining majority of states, children may waive their right to counsel at any stage of the proceedings, as long as it is determined to be--based on a variety of criteria--voluntary, knowing, and intelligent.

As found in a review of legal scholarship on the juvenile's right to a jury trial, very few law review articles on the role of counsel in juvenile court are grounded in empirical evidence or reference the connections among perceptions of fairness, procedural justice theory and recidivism. Again, while there are many who argue against allowing juveniles to waive counsel, these well-intentioned critiques are generally premised on claims--whether corroborated or not--that children and their parents lack the ability to intelligently waive their rights, the assumption that lawyers for children invariably improve their clients' adjudicative outcomes, or a combination of the two. Similarly, those who contend that juveniles should be allowed to waive the right to counsel often do so based on abstract notions of adolescent autonomy without grounding in social science research.

Barry Feld is one of the few scholars who has conducted empirical work on the impact that counsel has on the adjudications and dispositions of juvenile clients. While he acknowledges the study's limitations, his findings and those of others suggest--somewhat surprisingly--that juveniles with counsel are more likely to be incarcerated and to receive other punitive sanctions than those without counsel. While the causes are difficult to determine conclusively, Feld surmises that the presence of juvenile defense lawyers may antagonize judges, and conversely, that judges may be more lenient towards juveniles who are not represented. Feld does not reason, however, that this justifies allowing juveniles to waive counsel; on the contrary, he argues that waiver should not be allowed and that a mandatory representation model would "wash out" the apparently negative effects of assistance of counsel. Recognizing that non-waivable counsel for all juveniles may not be realistic in practice, Feld suggests instead that a per se requirement of consultation with counsel prior to waiver be introduced or, in the alternative, a prohibition on removing a child from her home or incarcerating her without providing the advice of counsel.

The right to waive counsel and appear as a pro se defendant was established by the United States Supreme Court in Johnson v. Zerbst and Faretta v. California when it held that a criminal defendant has a constitutional right to waive counsel when the decision is made knowingly and intelligently. The Court has not directly ruled on whether this right extends to juveniles, but it has held that minors can waive their pre-trial right to counsel during interrogation under the

"totality of the circumstances" standard. Empirical research has shown, however, that juveniles are not as competent as adults to waive their right to counsel in a manner that is knowing and intelligent. Further, the "relative paucity" of appellate case law governing the waiver of counsel by juveniles is likely a reflection of the absence of counsel to preserve the issue for appeal in waiver cases as well as the general infrequency with which juvenile appeals are brought.

Thus, given the limited number of research studies in this specific area, it is difficult--if not impossible--to draw any definitive conclusions as to juveniles' perceptions of fairness vis-a-vis the right to waive counsel in juvenile court. Some of the unanswered questions include whether young offenders are more or less likely to be given a voice when they are represented by counsel, enabling them to participate meaningfully in juvenile court proceedings; whether judges and prosecutors are more or less sympathetic or empathetic to the unrepresented juvenile than to the one with a contentious--or incompetent -- attorney; and whether a juvenile's perceptions of the fairness of the process are dependent upon having the option to waive counsel and resolve the case pro se at the first court hearing. Suffice it to say, more research is needed in this area, which is arguably at the core of the juvenile justice system.

C.Schoolhouse Justice

Another area in which judges and law makers would benefit from review and consideration of empirical data on juveniles' perceptions of fairness and rates of reoffending is that of the administration of justice within educational institutions. There is a storied record of United States Supreme Court opinions recognizing that a critical function of the educational system is to instill, as stated in Brown v. Board of Education, "the very foundation of good citizenship" in its students. The Court has characterized teachers, administrators, and other school actors as serving as role models for their students, "exerting a subtle but important influence over their perceptions and values." The Court has also acknowledged that a vital part of this process involves respecting students' "fundamental rights," so as to ensure that students, in turn, learn "to respect their obligations to the State."

Much has changed in recent decades, however, and as school actors increasingly serve side-by-side with or in lieu of law enforcement, a vicious cycle has been perpetuated: when students are disciplined without meaningful process, they inevitably view their treatment as having been unfair and, as a result, are more likely to act out and reoffend because they do not respect the authority of their teachers and administrators. In determining whether and to what degree school officials should be allowed to infringe upon the privacy and due process rights of students, courts have relied upon a subjective balancing test, whereby fairness to the young person is weighed against the urgent need to maintain school discipline. Yet, few have asked whether this is the most effective--or efficient--standard by which to judge the procedures that we impose upon children and adolescents in educational settings. How do students themselves perceive the current framework for addressing violations of disciplinary regulations and state criminal statutes on school property? Are there fair and balanced ways of addressing such infractions that would promote both procedural justice and school safety? Which processes and procedures are most likely to result in improved student conduct, increased cooperation with teachers and administrators, and greater academic success?

Establishing the historical legal context of these issues provides a helpful frame for discussing their nuances. Until the late 1960s, our public educational institutions punished and disciplined students within the walls of their own buildings without the involvement of law enforcement or the courts, except in the most egregious and violent cases. In 1975, the United States Supreme Court decided Goss v. Lopez, holding by a slim majority that notice and an opportunity for "some kind of hearing" were required before a school could suspend a student, even for fewer than ten days. The right to counsel and the standard of "proof beyond a reasonable doubt" were not extended to these hearings, however, and the Goss dissenters warned that even the modest requirement of a barebones hearing could potentially undermine school discipline. During the 1990s, the era of the juvenile "super-predator" brought an increase in the criminalization of adolescent behavior, leading to more school-based arrests and resulting in greater numbers of suspensions and expulsions. Many schools, particularly in urban and low-income areas, became more prison-like, with an increased police presence and more institutional personnel dedicated to maintaining security. Such circumstances were further exacerbated by the relaxation of rules governing the confidentiality of juvenile court records and the proliferation of zero tolerance policies, allowing schools to become "direct feeders" of youth into juvenile and adult criminal courts.

A review of social science research on the perceptions of children and teenagers vis-a-vis their rights in the school setting reveals that the data is compelling but incomplete. Studies abound that illustrate that students of color are disproportionately punished in United States schools and subjected to the most punitive sanctions, including suspensions and expulsions. There are also studies that indicate that because American schools increasingly define and manage the problem of student misbehavior through the perspective of crime control, students who are repeatedly disciplined begin to view themselves as future criminals or prisoners on the "criminal justice 'track.'" Such studies recognize that antici-

patory labeling of students as prospective criminals can be a self-fulfilling prophesy, as research shows that frequently suspended students are more likely to face juvenile or adult incarceration. More research, however, is needed, particularly that which explores the impact of specific procedures and practices utilized by school administrators and law enforcement on students' perceptions of fairness.

D.Home Rule

A final area in which courts, lawmakers, and even parents would benefit from greater knowledge and appreciation of social psychology concerns the role of the parent in the juvenile justice system. Consistent with social science studies relevant to other areas impacting juveniles, the applicable data demonstrates that if a child or adolescent considers disciplinary measures within the home to be unfair, a pattern of behavior similar to that seen in other contexts will ensue: lack of respect for the authority figure, disengagement from the disciplinary structure, cynicism towards the system, and subsequent and continued rule-breaking. Research has shown that children typically perceive family decision making to be unfair when parents deny them the opportunity to express their views; when procedures are perceived to be inconsistent across situations or family members; and when parents are considered to be biased, underhanded, or dishonest. Additional fairness concerns stem from the child's perception that the parent's decision-making process is based on unreliable information, or the parent does not consider the child to be a valued member of the family. As seen in other areas, the empirical research demonstrates that adolescents care deeply about being treated with dignity and respect and having their voices heard during the family's decision making process, regardless of whether it affects the ultimate outcome. Studies have also shown that children who perceive their parents' disciplinary practices to be fair are more likely to internalize their family's values and beliefs. While extrapolations from such extralegal research may be made, unfortunately there is very little data specifically focused on how young offenders view the role typically assumed by adult family members in juvenile court, that of the party to whom judges and probation officers frequently defer and whom they resist evaluating critically.

The role of the parent in a juvenile case has been closely analyzed in legal literature, and the consensus is that it is fraught with tension and inherent contradictions. Most obviously, it is clear that from a therapeutic perspective, the "participatory and dignitary interests" of an accused child are highly likely to conflict with those of the child's parent in juvenile court. This is certainly the case when, as happens frequently, the parent is the alleged victim of the offense for which the juvenile is charged or has a relationship--familial, sexual, or otherwise--with either the alleged victim or another suspect in the investigation; the parent is repeatedly provided the opportunity to communicate directly with the judge, prosecutor, or probation officer, while the juvenile is allowed only to speak through her attorney; and the juvenile's attorney takes direction from the parent rather than the child as to the goals and objectives of the juvenile's case. Yet, admittedly, there are also instances in which the parent acts as the stooge for the juvenile, diverting responsibility for the child's crime to herself, covering for the child's negative behavior at home or at school, and interfering with or sabotaging candid communication between the juvenile and her lawyer in the name of "protecting" the child.

Further complicating matters is the reality that long-term damage to the parent-child relationship can result from both the process and the ultimate resolution of a juvenile delinquency proceeding. Excluding parents from the attorney-client dynamic, which is caused inadvertently as well as deliberately by defense counsel, can lead parents to disengage from their supportive roles altogether, leaving the parent-child bond more fractured than it had been before the family's involvement with the juvenile justice system. Likewise, frustrated or put-upon parents may insist that their rights and authority over their children are a form of compensation for the burdens of providing basic food, shelter, health care, affection, and education to their delinquent children, further splintering critical alliances. Similarly, parents may place blame wholly upon the child for alleged violations of juvenile court probation or post-release supervision out of a reasonable fear that they may face criminal charges for contempt of court or other punitive sanctions. Whatever the case, the circumstances are complex and the effects potentially profound.

Thus, while there is a fair amount of social science research exploring the perceptions that adolescents have of their parents as disciplinarians within the home environment, further studies examining how juveniles perceive the role of the parent in the context of delinquency court--both in theory and practice--are clearly warranted. Similarly, research on whether juveniles' attitudes and receptivity toward the court are predetermined by their judgments of disciplinary measures at home could be fruitful. Judges and law makers would be better equipped to outline the parameters of the parental role in juvenile court if they were informed by, among other factors, the child's perspective on these issues as seen through the lens of procedural justice theory.

IV. Caveats and Questions for Moving Ahead

A. Which Model to Use?

While sociologists have long recognized the importance of juveniles' believing that they have received procedural justice from the courts, this Article has demonstrated that the answer is not merely to superimpose adult due process standards onto delinquency proceedings, but it is something much more nuanced and challenging. There is first the difficult question of whether an adversarial or an inquisitorial model (or a hybrid of the two) would be more conducive to achieving an equitable juvenile justice system. Complicating this question, at least in terms of juvenile court systems in the United States, is the reality that an evidence-based determination of whether a juvenile committed an alleged offense is often a prerequisite to the state's providing a low-income family with rehabilitative and therapeutic services. While this does not mandate that juvenile court forever be modeled on an adversarial criminal justice system, addressing and separating out all the strands of the problem would require law makers and public policy experts to critically rethink and potentially restructure the current juvenile court model.

Further, juveniles adjudicated delinquent (as well as their parents) often consider services provided by the court--which are of varying quality and utility--to be burdens rather than benefits; this view is compounded by the knowledge that if the juvenile missteps, the punishment is likely an extension of the term of probation, detention, or commitment. As discussed previously, social science research has suggested that such deterrent structures are both less effective and less efficient than systems perceived by children and adolescents to be fair and unbiased. Again, resolving this question would require that law makers and juvenile justice advocates closely consider whether granting specific due process protections to juveniles would advance the goals of procedural justice theory.

There is also the critical question of how far--and in precisely which direction--to go. While there is a well-established movement devoted to applying the theory of therapeutic jurisprudence ("TJ") to juvenile court practice, legal scholars and social psychologists should distinguish and differentiate between TJ and procedural justice theory, both in the spirit of clarity and to avoid counter-productive "border disputes." According to the work of leading scholars in these areas, TJ is a discipline that examines the "therapeutic impact of the law on the various participants involved[,]" with the goal of promoting well-being. In the context of criminal defense practice, TJ emphasizes the importance of lawyers considering rehabilitative efforts on behalf of their clients and provides lawyers with practice tips on how to guide their clients along "a promising rehabilitative path." In regard to the juvenile justice system, TJ was developed to counter the paternalistic ideology of the traditional delinquency court and to encourage and facilitate the child's sense of individual autonomy, self-determination, and choice. Procedural justice theory is more of a touchstone or a guide that is focused on achieving legal processes that juveniles perceive as legitimate, premised on the recognition that when a child feels that the system has treated her fairly, she is more likely to accept responsibility for her actions and take steps towards reform.

Yet, there is more overlap between these two theories than contrast or tension. Suffice it to say that this Article's focus has been on juveniles' perceptions of fairness as they relate to the juvenile justice system as a whole and as determined by an examination of a well-developed body of data, rather than on models of advocacy or the therapeutic consequences of legal rules and procedures. Yet, the two disciplines of course are interconnected, as the quality (or lack thereof) of the attorney-client relationship inevitably influences whether the juvenile is impacted in a therapeutic manner, which in turn affects the child's perceptions of the adjudicatory process itself. Likewise, adherents of both TJ and procedural justice theory rely on empirical research by behavioral scientists, striving to "avoid a narrow doctrinal focus . . . and to influence legislators and administrators as well as the courts." In this way, both disciplines are "truly interdisciplinary." So, while this Article's focus has not been upon client-centered juvenile defense advocacy or children's mental health per se, its arguments rely upon the recognition that these values and goals are of great significance to determining whether a child feels that her experience was fair. Or, in other words, the enterprise of therapeutic jurisprudence is an important aspect--though just one aspect--of ensuring that juveniles receive procedural justice.

B.Shortcomings and Limitations

As with any body of social science research, particularly that which attempts to draw a causal connection between abstract human perceptions (i.e., fairness and legitimacy) and subsequent compliance with authority, there are inherent limitations regardless of whether the analysis is centered on adults or adolescents. A basic one is that there have been very few longitudinal studies on procedural justice theory. While it has been shown that ex ante assessments of the fairness of a decision-making process can be very different than ex post, the relevance of this phenomenon to procedural justice theory remains an open question. Another limitation stems from the fact that the focus of much procedural justice research is upon political power and authority rather than upon law-abiding behavior. In other words, most studies seek to mine the perceptions of the law held by individuals within the general population rather than those of individuals already actively engaged in criminal behavior. This can be a critical drawback, as offenders have more experiences within the system and presumably more and various kinds of outcomes than do non-offenders. Yet, studies have found

consistent procedural justice effects across race, gender, ethnicity, and socioeconomic status. In addition, studies specifically examining the impact of procedural justice on juvenile offenders have indeed been conducted; the hope is that with renewed interest in this data, more research will be funded and the sample sizes expanded, thereby enhancing the reliability of the results.

A further limitation is the narrow focus of procedural justice theory on the ways in which an individual's perceptions are influenced by her own experiences and interactions rather than upon the impact and effect of her peer group, neighborhood, and extended social network. Such factors are potentially significant because a major predictor of delinquent behavior by juveniles is the number and quality of their mentors and peers. Studies in this area generally utilize interviews conducted with or surveys completed by individual juveniles in which the questions are designed to assess the youth's feelings regarding her treatment by the defense lawyer, prosecutor, and judge; questions are also posed that are intended to determine the degree to which the young person feels the law and the courts are legitimate. As a result, such methods that focus on the individual's level of confidence either in her lawyer or in the system, without assessing the impact of peers or other external forces on the juvenile's perceptions, may have limited efficacy.

In addition to these methodological limitations, there are critics of procedural justice theory who have raised questions directed more squarely at the discipline's most basic assumptions. For instance, it has been asserted that when people experience a process to be fair, they can be led or manipulated into ignoring objectively unfair outcomes, particularly if the majority of outcomes experienced by a given group have been consistently negative. So, for instance, a narrow focus on the importance of providing juvenile offenders with the opportunity to have a "voice" may obscure a more global need to give them meaningful control over judicial decisions. Proponents of this concept of "false consciousness" argue that a preoccupation with due process diverts attention from broader questions of social inequality. Other critics have suggested that procedural justice has more legitimacy for adults than juveniles based on developmental status and competence; these commentators view juveniles as incapable of appreciating "fairness" in a way that is normatively reliable.

In sum, while there are clear limitations to the utility of applying procedural justice theory to juveniles, and while there are open questions regarding which procedural model to use for delinquency court, these should be considered as cautions rather than roadblocks. In other words, rather than restrict ourselves to suppositions based on abstract notions of fairness and subjective balancing or on unyielding quid pro quo calculations, why not make use of the empirical data being produced by experts in the social sciences? Why not be open to an interdisciplinary and multilayered analysis of whether to extend specific due process rights to juveniles, rather than one that is cabined by the same traditional approaches that have been used for decades by courts and legislatures? Regardless of one's perspective, all sides--judges, prosecutors, defense attorneys, victims, and juveniles themselves--stand to benefit.

Conclusion

Courts and legislatures have long been reluctant to make use of the data, findings, and recommendations generated by other disciplines when determining questions of legal procedure affecting juveniles, particularly when the research has been produced by social scientists. However, given the United States Supreme Court's recent invocation of developmental psychology in Roper v. Simmons, which invalidated the juvenile death penalty, there is reason to believe that such resistance is waning. In 2005 the Simmons Court found, inter alia, that based on research on adolescent development, "juveniles are not as culpable as adults and[, therefore], cannot be classified among the 'worst offenders,' deserving of" the ultimate penalty. In the 2009-10 Term, the Court will take up the arguably related question of the constitutionality of life imprisonment without the possibility of parole for juvenile offenders, making it likely that social psychology will play a role yet again in a Supreme Court decision.

Such developments may be viewed as paving the way for judges and law makers to utilize empirical research more consistently when determining whether due process rights should be extended to juveniles. By evaluating adolescents' appraisals of the fairness of courts and the law, social scientists have generated potentially invaluable data relating to recidivism rates and, thus, to the safety of our neighborhoods and communities. While research in these areas is incomplete and has its inherent limitations, that which exists can serve as yet another factor to inform decisions regarding jury trials, waiver of counsel, the school disciplinary process, and the role of the parent in juvenile court. It is not a stretch to suggest that children and adolescents would view the opportunity to have more information rather than less when crafting important juvenile court procedures to be the preferable--and fairer--choice.

NATIONAL JUVENILE DEFENDER CENTER

Fall 2012

Encouraging Judges to Support Zealous Defense Advocacy from Detention to Post-Disposition

An Overview of the *Juvenile Delinquency Guidelines* of the National Council of Juvenile and Family Court Judges

The *Juvenile Delinquency Guidelines* (*Guidelines*) issued in 2005 by the National Council of Juvenile and Family Court Judges (NCJFCJ) set forth essential elements of effective practice in juvenile delinquency courts. In addition to creating a mandate for juvenile court judges, the *Guidelines* provide standards and support for improving juvenile indigent defense systems and daily court practice. Here, the National Juvenile Defender Center has summarized NCJFCJ's recommendations regarding the role of the juvenile defender and has extracted key quotations from the *Guidelines*, organized topically, to assist defenders in navigating and citing this extensive resource. Please feel free to use and adapt these materials for your own purposes.

Background

The *Juvenile Delinquency Guidelines (Guidelines)* of the National Council of Juvenile and Family Court Judges is a comprehensive benchbook of best practices developed by a committee of judges, prosecutors, defense attorneys, and other key juvenile justice stakeholders. Released in July 2005, the *Guidelines* can assist juvenile court systems nationwide in planning for improvement and change.

In the *Guidelines*, the nation's leading professional organization of juvenile court judges promotes the active participation of defense counsel in creating fair and efficient delinquency courts. The *Guidelines* identify 16 core principles that characterize a juvenile court of excellence. The seventh principle states that "*youth charged in the formal juvenile delinquency court must have qualified and adequately compensated legal representation*."[1]

The *Guidelines* recognize zealous defense advocacy as a necessity for children in delinquency proceedings. To this end, the *Guidelines* support policies such as appointment of counsel prior to the detention hearing, adequate training and resources for defenders, and continuity of representation through post-disposition and reentry. Juvenile defenders can use the best practices endorsed in the *Guidelines* to advance systemic changes in their jurisdictions and outstanding defense practice in every court appearance.

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Access to Qualified Counsel

In its core principles and throughout the *Guidelines*, NCJFCJ unequivocally supports the need for qualified defense counsel in establishing a delinquency court of excellence. The *Guidelines* acknowledge that accused children's right to counsel is frequently underutilized and youth who waive the right are less likely to secure other elements of a fair trial.[2] Although courts often subscribe to the misperception that defense advocacy slows down court processing, the *Guidelines* suggest that early access to counsel leads to early case resolution.[3]

NCJFCJ therefore holds delinquency judges responsible for providing children with access to counsel at every stage of the proceedings, from before the initial hearing through post-disposition and reentry.[4] The *Guidelines* advise judges to be "extremely reluctant" to permit waiver of counsel by youth.[5] Judges should accept waivers from children only on "rare occasion[s]" and should do so only after the child has consulted with an attorney about the decision and persists in a desire to waive the right.[6] The court should always take independent steps to ensure that the child understands the waiver decision and its possible consequences.[7]

Moreover, the court process should be sensitive to the individual characteristics of each child. Judges are also expected to ensure that all courtroom professionals, including defense attorneys, receive adequate training.[8] Youth should have access to defenders who are culturally competent, and to foreign language interpreters if necessary for conversing with the court and counsel.[9] NCJFCJ repeatedly states that defenders must also have manageable caseloads in order to represent child clients effectively.[10]

In addition, NCJFCJ notes that youth must have access to experienced attorneys who can provide effective assistance.[11] Thus, "representation of youth in juvenile delinquency court should not be an entry-level position that eventually graduates attorneys to other areas of defense work."[12] Defenders should be "selected on the basis of their skill and competence" and should have both an interest and training in juvenile law, adolescent development, education, substance abuse, and mental health issues.[13] In short, the *Guidelines* acknowledge that juvenile delinquency defense is a specialized area of law requiring highly skilled lawyering.

Zealous Representation

Juvenile defenders may find that their active representation of child clients is sometimes resisted by other courtroom participants. However, the diverse stakeholders who framed the *Guidelines* recognize that zealous defense advocacy helps resolve cases efficiently and benefits all courtroom participants.[14]

Managers and front-line defenders can use the *Guidelines*, as well as other professional standards, to educate their jurisdictions about the role of counsel for the child. According to NCJFCJ, juvenile defenders must:

- Represent the position expressed by the child client,
- Appear in all hearings as if for an adult client accused of the same act,
- Advocate to prevent the child from being inappropriately detained,
- Promptly investigate and actively pursue discovery,
- File all appropriate pre-trial motions,
- Know about disposition options and inform the court of the child's needs.[15]

By articulating these duties, the *Guidelines* make clear that no court should frown upon a defender's pursuit of these core responsibilities. Defenders can refer to the *Guidelines* in individual cases or when influencing policy debates to explain why limitations on legitimate advocacy efforts are inappropriate and inefficient.

Quick Reference:

NCJFCJ *Juvenile Delinquency Guidelines* Related to the Role of Counsel

References to the Role of Counsel can be found on the following pages of the *Guidelines*:

Access to counsel: 25
Early appointment of counsel: 77-79, 90-91
Waiver of counsel: 25
Primary responsibility to child client: 30, 122, 137, 161
Detention alternatives: 81-84
Detention advocacy: 90
Adjudication: 122, 126
Disposition: 137
Appeals: 161-62
Post-disposition: 169, 181
Reentry: 187
Probation/parole violations: 196-97

Practice Recommendations on Elements of Zealous Defense:

- Meet with the child prior to the detention or initial hearing
- Have the opportunity, in every hearing, to cross-examine prosecution witnesses, present evidence, and make arguments
- Inform the court of each youth's special needs
- Zealously represent each child client's expressed interests
- File appropriate pre-trial motions
- Actively pursue discovery
- Appear in all hearings where the attorney would appear for an adult accused of the same crime
- Know the available disposition resources
- Secure the child's appeal rights and explain them to the child

Expressed Interests of the Child

Many juvenile justice practitioners mistakenly believe that juvenile defenders are obliged to argue for a child's "best interests" in court. The *Guidelines* join other professional standards in recognizing that a juvenile defender's primary responsibility is to the child client.[16] At every stage of court proceedings, a defender is ethically bound to advocate for the legitimate interests and goals expressed by the child.[17] Defenders may not substitute their own judgment, or that of the client's caretakers, for the preferences of the child.[18]

Although parents also have important interests and can play a significant role in delinquency proceedings, at times their position may be adverse to the child's. In such cases, the *Guidelines* make clear that defense counsel's primary duty is to the child. Under the *Guidelines*, where there are conflicts of interest or opinions between a child client and his or her caretaker, defenders need not discuss the case with parents[19] or represent the views of a parent that are contrary to the child's wishes.[20]

Courtroom Culture

Assessments of state juvenile indigent defense systems conducted by the National Juvenile Defender Center and their partners routinely find that juvenile courts across the country are chaotic, extremely informal, and perceived as less important than adult criminal courts.[21] One juvenile court clerk in Louisiana summed up the issue: "Families and children have no meaningful idea what is going on here. They move through the system quickly and are humiliated and demeaned in the process."[22]

NCJFCJ recognizes that substandard proceedings in delinquency courts are unacceptable. The judge "must explain and maintain strict courtroom decorum and behavioral expectations for all participants … [and] ensure that the juvenile delinquency court is a place where all … participants are treated with respect, dignity, and courtesy."[23] Courtroom facilities should be secure and offer separate supervised waiting areas for witnesses and family members, with defense and prosecution witnesses waiting separately. The *Guidelines* repeatedly stress the need for delinquency courts to treat all participants, including defenders and youth, with politeness and cultural understanding.[24] These provisions are a resource for defenders to combat common misperceptions of juvenile court and to insist upon appropriate decorum in the proceedings.

Detention Advocacy

Early appointment of defense counsel is critical to resolving cases fairly and efficiently. The *Guidelines* specify that in a delinquency court of excellence, counsel is appointed *before* any initial or detention hearing and has enough time to prepare.[25] Only if unavoidable should children meet with counsel for the first time on the day of the hearing, and only if they are then afforded time to discuss the case outside the courtroom.[26] Zealous and prepared detention advocacy is so important that NCJFCJ advises judges and public defenders to take a leadership role in promoting systemic reforms that will redirect resources toward early appointment of counsel, for example by diverting less serious cases from formal processing.[27]

The *Guidelines* discuss several compelling reasons for early appointment of counsel, especially courtroom organization and quality of representation. NCJFCJ

recognizes that early appointment of counsel conserves judicial resources by preventing delays and minimizing additional hearings.[28] Moreover, timely appointment helps defenders meet their ethical obligations and secure due process for children. Defenders are expected to:

- Spend time with the child before the hearing to review the delinquency petition, explain the child's rights, and discuss whether the child wants to admit or deny the allegations;[29] and
- Based on these early interactions, help the court recognize when there are competency issues that require further assessment.[30]

Defenders can invoke these arguments to encourage reforms that will enable courts to appoint counsel earlier or to gain additional time to talk with each child client before a detention hearing. Given the critical importance of attorney-client interaction, the *Guidelines* also stress that juvenile court facilities should provide private spaces where attorneys can meet with clients and families.[31]

The harmful effects of secure detention on children's case outcomes and life chances are well documented. Youth placed in secure detention are more likely than non-detained youth to be formally processed and to receive more punitive sanctions at disposition, controlling for demographic and offense characteristics.[32] Secure detention is far more costly than community-based alternatives. Jurisdictions that have pioneered reforms find that these community-based alternatives do not harm public safety and may lower recidivism rates.[33] The *Guidelines* acknowledge the harmful consequences of overcrowding in detention centers, which endangers youth and prevents services from being delivered.[34] The burdens of detention fall disproportionately on African American youth and other racial minorities, who are locked up at higher rates than white youth accused of comparable offenses.[35]

The *Guidelines* discuss at length the desirability and availability of alternatives to secure detention, including temporary shelters for children whose guardians cannot be located but for whom secure detention is unnecessary.[36] One of the key functions of juvenile defenders is drawing the court's attention to appropriate alternatives for each child, and the *Guidelines* emphasize that overuse of secure detention wastes public funds.[37] These arguments have long been raised by defenders, but have added persuasion when seconded by NCJFCJ.

The *Guidelines* note that a police affidavit in support of a request to detain a child should specify the reasons why a youth should be securely confined.[38] Defenders should urge courts to hold police to this standard. Moreover, defenders should ensure that children are detained only when statutory criteria are met and that judges enter written findings regarding the detention decision.[39]

Throughout the *Guidelines*, NCJFCJ encourages early and effective defense advocacy as a means of conserving public resources and streamlining court processing. Defenders can use these principles, propounded by judges, for judges, to expand their jurisdiction's acceptance of a vigorous defense role in delinquency court. This expansion is especially needed in detention hearings, which are too often dismissed as merely a prelude to the main show.

Plea Agreements

Youth have many misconceptions about the process of entering a plea agreement. The *Guidelines* recommend that all courtroom participants, including defenders, ensure that plea negotiations do not give the child the impression that he or she will be able to manipulate the system or avoid consequences by taking a plea offer.[40] Based on this principle, judges are expected to conduct a thorough colloquy in understandable language any time a youth is entering a plea.[41] The *Guidelines* state that judges should determine whether a child's plea is knowing and voluntary in light of the child's age, educational attainment, literacy level, and trauma history.[42]

Policy Recommendations for Juvenile Defense:

- Limitation of waiver of counsel to rare occasions, only following a colloquy and consultation with an attorney
- Appointment of counsel prior to the detention or initial hearing
- Diversion of less serious cases from the formal delinquency system
- Continuity of representation, including availability of counsel for appeals and post-disposition reviews
- Manageable caseloads for defense counsel and other participants

The *Guidelines* hold defenders responsible for telling each youth that the plea agreement is not a way to achieve gain and that the court makes a final decision about whether to accept an agreement.[43] The *Guidelines* thereby imply that defenders need adequate time to counsel child clients regarding the momentous direct and collateral consequences of admitting delinquency charges. Defenders can refer to these portions of the *Guidelines* to request additional reasonable time from the court to fulfill all of these responsibilities for each child client.

The *Guidelines* emphasize that it is "unacceptable practice" for prosecutor or counsel to begin plea discussions for the first time on the day of adjudication or as a result of inadequate preparation for adjudication.[44] The court should receive any proposed plea agreement, with a plea petition signed by the child, at least one week ahead of the scheduled adjudication date.[45] However, the *Guidelines* also recognize that untimely plea discussions may be "caused by unmanageable caseloads."[46] These provisions provide defenders with policy arguments in favor of caseload reductions. The *Guidelines* recommend diverting less serious cases from the formal delinquency system in order to conserve resources.[47]

Using the NCJFCJ *Guidelines* in Court

Invoking the *Guidelines* in a courtroom presentation may feel awkward. A defender does not want to appear to be telling the judge how to do his or her job. With a little forethought, there are ways to raise the *Guidelines* with finesse and respect.

For example:

- *Your Honor, as you are probably aware, the National Council of Juvenile and Family Court Judges encourages courts to ….*
- *Your Honor, I would appreciate the opportunity to present [argument on a motion, defense witness, defense evidence, etc.], in accordance with the guidelines for excellence set out by your National Council of Juvenile and Family Court Judges.*

Adjudication

The *Guidelines* expect juvenile defenders to be qualified and to prepare thoroughly for each child's adjudication.[48] Diligent preparation includes factual investigation, discovery, requests for experts if needed, and communication with the child.[49] Remaining conscious of the need to minimize a child's time in detention, defenders can cite this provision when urging the court to set an adjudication date that will provide adequate time to prepare a client's defense. The *Guidelines*' expectations for defenders also provide grounds for policy reforms to fund defense investigators or experts and to set reasonable caseload standards.

The *Guidelines* specify that defenders should have the opportunity to cross-examine all witnesses presented at adjudication or to present contrary evidence on the child's behalf.[50] Statements made by children during intake or detention processing should not be admissible against them at adjudication.[51] Defenders, like prosecutors, must be afforded the opportunity to present closing arguments.[52] The *Guidelines* also note that in delinquency adjudications, like criminal trials, the state has the burden of proof.[53] It is clear from the *Guidelines* that defenders should never be inhibited from conducting vigorous cross-examination, challenging admissibility of evidence, demanding that the state prove every element of the crime beyond a reasonable doubt, or otherwise engaging in a zealous defense. The process that is due to a child in delinquency court demands an effort comparable to the process that would be provided in adult criminal court. It is not acceptable for courts to conduct informal adjudications that compromise the protections required in an adversarial system.

Disposition

NCJFCJ recognizes the importance of thorough preparation and advocacy at disposition. Defenders should notify the court at the time of adjudication if additional evaluations or expert witnesses will be needed for disposition.[54] The *Guidelines* recommend that a pre-disposition investigator should contact defense counsel for information, and should give a copy of his or her report and recommendations to defense counsel *at least three days before* the disposition hearing.[55] In addition, defenders are responsible to consult with the child client regarding options and preferences.[56] Defenders can use these best practices as a benchmark to argue that the court should not proceed with a rushed disposition hearing. In particular, the *Guidelines* provide that a case should not proceed from adjudication immediately to

disposition unless all necessary preparation has been completed beforehand.[57]

At the disposition hearing, defenders must inform the court about each child's needs and preferences regarding services and providers.[58] As in other hearings, defense counsel must have the opportunity to represent the child actively by cross-examining prosecution evidence and presenting evidence on the child's behalf.[59] The *Guidelines* show that these are necessary steps for which courts should provide adequate time in every case. Moreover, the *Guidelines* offer a basis for policy reforms to help give defenders the resources and time necessary for the comprehensive preparation that is expected of them at the disposition stage.

Although the *Guidelines* acknowledge that parents' views may be relevant, they state that defense counsel has no obligation to present to the court the disposition preference of a parent that is contrary to the child's wishes.[60] NCJFCJ thus reinforces other professional standards in concluding that, at any stage of delinquency proceedings, defense counsel's primary allegiance is to the child client and to the representation of his or her legitimate expressed interests.

Appeals

As in other stages of the proceedings, defenders' responsibility at the appellate stage is to the child client.[61] NCJFCJ recognizes that it is part of defense counsel's role to take appeals when necessary to protect a client's rights or clarify legal rules.[62] However, judicial performance affects the likelihood of appeal. Delinquency judges can help to avoid the necessity of an appeal by ensuring that there are correct procedures and clear communication throughout the proceedings.[63]

The *Guidelines* expect defenders to consult with a child client about the possibility of appeal, to obtain and review critically the adjudication transcripts, and to take the procedural steps necessary to safeguard the client's right to appeal.[64] Juvenile defenders can invoke these principles to advocate for systemic reforms that will secure more resources for appellate representation in juvenile cases.

Post-Disposition, Reentry, and Probation/Parole Violations

NCJFCJ urges judges to ensure that counsel is available to children at every stage of delinquency proceedings, specifically including post-disposition and reentry hearings.[65] Indeed, the *Guidelines* state that a court of excellence will ensure that the *same lawyer* remains assigned to the case and appears for progress reports, hearings, and conferences.[66]

Whether children remain in the home or are placed outside the home, defense counsel should not rely on probation reports but should actively seek information about the child's progress through independent interviews.[67] At progress review hearings, defenders should state the child's agreement or disagreement with the progress report, have the opportunity to challenge prosecution evidence, and present any additional information or testimony needed.[68] Presenting the child's perspective during post-disposition should not be an unusual event, but a routine step of any progress review. When a child is placed outside the home, the *Guidelines* state that defense counsel should be invited to participate in planning for reentry to the community.[69]

Likewise, children should be represented at hearings on probation or parole violations by the *same lawyer* who represented the youth on the original law violation.[70] This defender should be afforded time to question and present evidence on whether the child violated probation or parole.[71] The defender should have the opportunity to respond to reports about the child's progress.[72]

The *Guidelines* anticipate that defense representation will be as vigorous during the post-disposition phases of a case as in earlier stages. NCJFCJ further envisions that delinquency systems will receive and allocate sufficient resources to ensure that children have continuity of representation throughout their involvement with the delinquency system. These recommendations are a clear condemnation of current practice in many jurisdictions, in which defenders of indigent children are expected or required to abandon the case after disposition.

The following section is comprised of key quotations from the *Juvenile Delinquency Guidelines*. Defenders should use these as tools but bear-in-mind that representation of child-clients, as with adult clients, is client-driven and juvenile defenders are ethically bound at every stage of the legal proceedings to consult with their client and zealously represent the client's expressed interests.

Role of the Juvenile Defender

Counsel's Ethical Obligations

- "Whether performed by a public defender or the private bar, counsel for youth is responsible to be an advocate, zealously asserting the client's position under the rules of the adversary system[.]" (page 30)
- "[C]ounsel for the youth's primary responsibility is to the youth client[.]" (page 122)
- At disposition, "[c]ounsel for the youth is not obligated to present the view of the parent, if this view is in opposition to the view of counsel's client." (page 137)

Counsel's Specific Responsibilities

"Counsel for youth must be able to explain the juvenile delinquency court process in terms the youth can understand." (page 30)

"Whether performed by a public defender or the private bar, counsel for youth is responsible to:

- Promptly and thoroughly investigate the client's case in order to be an effective advocate;
- Ensure the juvenile delinquency court has been informed of the youth's special needs;
- Be knowledgeable of all the disposition resources available in the jurisdiction;
- Appear as an attorney in all hearings concerning a juvenile accused of an act where the defense attorney would appear if an adult committed the same act. This includes, but is not limited to, hearings for detention, speedy trial, motions, dismissal, entry of pleas, trial, waiver, disposition, post-disposition reviews, probation or parole violation hearings, and any appeal from or collateral attacks upon the decisions in each of these proceedings;
- Before the trial/adjudication hearing, file all appropriate pre-trial motions in order to protect the youth's rights and preserve the fairness of the trial/adjudication hearing. Such motions may include efforts to obtain discovery materials, to suppress physical evidence and confessions, or to challenge the circumstances of a pretrial identification, etc; and
- Actively pursue discovery from the prosecutor under informal procedures, court rule, and motions practice as appropriate. Effective representation of the client's interests is frustrated when counsel for the youth is ignorant of information contained in discovery materials. Where the jurisdiction requires reciprocal discovery, counsel for youth should provide such materials as promptly as possible." (page 30-31)

Defender's Relationship to Client's Parents

"Although counsel for the youth's primary responsibility is to the youth client, in most instances it is in the youth's best interest that his or her parents also be informed. Consequently, in most cases, in order to serve the client's needs, counsel must include the parent. In some instances, such as when a parent is the victim, it may not be appropriate for counsel for the youth to engage the parent. In this instance, the prosecutor would be the most appropriate person to inform the parents of the proceedings, their rights, the youth's rights, and the consequences if the youth is adjudicated on the petition, since the parent will probably be a prosecution witness." (page 122)

Counsel's Qualifications

Experience:

- Counsel for youth should be "an experienced attorney in order to provide effective legal assistance. The representation of youth in juvenile delinquency court should not be an entry-level position that eventually graduates attorneys to other areas of defense work." (page 30)
- "[Counsel] should be selected on the basis of their skill and competence[.]" (page 30)

Specialized knowledge and interests:

- "Counsel for youth should have a particular interest in youth and family systems, focus on juvenile law, and be trained in the development, education, substance abuse and mental health of youth." (page 30)
- "Qualified counsel has an understanding of child development principles, cultural differences, mental health, trauma, mental retardation, and maturity issues that relate to juvenile competency to stand trial issues; treatment options that could serve as effective alternatives to detention; and special needs issues including prior victimization and educational needs." (page 78)
- "Qualified counsel understands juvenile delinquency court process and knows enough about disposition resources to advocate for a disposition response that will meet the youth's needs." (page 78)

Juvenile Defense Policy

Access to Counsel

- "Alleged and adjudicated delinquent youth must be represented by well trained attorneys with cultural understanding and manageable caseloads." (page 25)
- "Juvenile delinquency court administrative judges are responsible to ensure that counsel is available to every youth at every hearing, including post-disposition reviews and reentry hearings." (page 25)

Waiver of Counsel

- Judges "should be extremely reluctant to allow a youth to waive the right to counsel." (page 25)
- "A waiver of counsel should only be accepted after the youth has consulted with an attorney about the decision and continues to desire to waive the right." (page 25)
- "On the rare occasion when the court accepts a waiver of the right to counsel, the court should take steps to ensure that the youth is fully informed of the consequences of the decision." (page 25)
- "Juveniles who are not represented by counsel are not likely to effectively exercise their due process rights." (page 78)

Leadership Role of Delinquency Judges

- Judges "are responsible to ensure that counsel is available to every youth at every hearing, including post-disposition reviews and reentry hearings." (page 25)
- If the system does not permit the provision of qualified and effective counsel for youth in formal delinquency proceedings, delinquency judges "should work with the public defender, private bar, funding sources, and the legislature to overcome the barriers to creating [an adequate] system." (page 79)
- An important principle of timeliness in case management and docketing is "to respect and efficiently use the time of … counsel for youth" and all other court participants. (page 44)

Court Capacity

- "Juvenile delinquency systems must have sufficient numbers of … public defenders [and other personnel]… to create manageable caseloads and timely process." (page 24)
- "Juvenile delinquency systems … must have private meeting space for youth and counsel[.]" (page 24)

Juvenile Court Jurisdiction

- "The *Delinquency Guidelines* recommend that all juveniles who have not yet turned 18 should be under the original jurisdiction of the juvenile delinquency court." (page 37 (citing *Roper v. Simmons*))
- Key Principle 2 states that "Juvenile delinquency court judges should ensure their systems divert cases to alternative systems whenever possible and appropriate." (page 38)

- "Juvenile delinquency courts should encourage law enforcement and prosecutors to consider diversion for every status offender, every first-time, non-violent misdemeanant offender, and other offenders as appropriate." (page 38)
- NCJFCJ takes the policy position: "The determination as to whether a juvenile charged with a serious crime should be handled in juvenile delinquency court or transferred to criminal court is best made by a juvenile judge in a judicial hearing with the youth represented by qualified counsel." "Accordingly, prosecutorial waiver, mandatory transfers, and automatic exclusions are not recommended." (page 39)

General Issues Relating to the Court Process: Confidentiality, Timeliness, Minority Youth

- "[H]earings should be presumed to be open to the general public, unless sufficient evidence supports a finding that an open hearing will harm the juvenile and that the juvenile's interests outweigh the public's interest." (page 40)
- "Because of [adolescent] developmental dynamics, timeliness throughout the juvenile justice process is critical[.]" Timeliness reinforces the lesson of accountability and protects youth from experiencing a period of prolonged uncertainty and anxiety. (pages 43-44) "Delays in the response of the juvenile justice system lessen the impact of an intervention." (page 66)
- "Although it remains true that societal issues may subject minority youth to risk factors for delinquency, ongoing work in many juvenile delinquency court jurisdictions shows that the practices of individual justice agencies can exacerbate or alleviate the disparity at each decision point." (page 50)

Appointment of Counsel Prior to Detention or Initial Hearing

- "In a juvenile delinquency court of excellence, counsel is appointed prior to the detention or initial hearing, and has time to prepare for the hearing." (page 90)
- "Delays in the appointment of counsel create less effective juvenile delinquency court systems." (page 90)
- "Effective counsel becomes involved in the case prior to the first hearing, has a manageable caseload, and is present at all juvenile delinquency court hearings." (page 78)

Providing Early Access to Counsel

- When the child is served with a summons, "information should also be provided to the youth and family that describes … why counsel for the youth is important, and options to obtain legal representation for the youth prior to the hearing." (page 74)
- "The *Delinquency Guidelines* recommends that the youth, parent, and counsel for the youth meet prior to the initial hearing to determine the position they will take at the hearing." (page 74, 90)
- "The better the preparation prior to the hearing, the more timely and efficient the process will be." (page 74)
- If meeting before the hearing is not possible, then "the second preference is to provide access [to counsel] on the day of the first hearing with sufficient time for the youth, family, and counsel to discuss the case before entering the courtroom." (page 90)

Consequences of Untimely Appointment of Counsel

- "Juvenile delinquency courts that do not create systems that enable counsel to be obtained in advance of the initial hearing, and as a consequence, allow counsel to be absent or unprepared at the first hearing, make it difficult for time-specific hearings to be set and adhered to, cause additional unnecessary hearings to be set which wastes juvenile delinquency court resources, and delay timely justice. Such systems end up with unnecessary continuances, waste expensive resources due to extensive waiting times, and are disrespectful to its citizens." (page 74)
- "When juvenile delinquency courts do not create systems that enable counsel to be appointed and engaged in advance of the initial hearing, they cause additional unnecessary hearings to be set. Families who can afford private counsel do not have these barriers and rarely appear at the first juvenile delinquency court hearing without prior consultation with counsel." (page 222)

Need for Systemic Change to Allow Early Appointment of Counsel

- "[Principle 7] is anticipated to be one of the more controversial recommendations of the *Delinquency Guidelines* because juvenile delinquency systems may believe they simply do not have the resources to comply. In addition, juvenile delinquency court personnel have sometimes perceived that when counsel represents youth, the court process is delayed and made more cumbersome. In contrast to this perception, juvenile delinquency courts have found that providing qualified counsel facilitates earlier resolution of summoned cases." (page 221-22)
- NCJFCJ suggests systemic reforms that will allow for earlier appointment of counsel (pages 78-79, 222):
    - Change relevant rules or statutes
    - Develop Memorandum of Understanding between the court and public defender
    - Provide interim legal services
- "When a juvenile delinquency court improves its system in these ways, there is a strong likelihood that existing resources for appointment for counsel for youth can handle a greater percentage of formal cases with reduced caseloads that allow a higher degree of quality." (page 222)

Practice of Juvenile Defense at Each Stage of a Case

Initiating the Court Process

- "*Key Principle 7: Youth Charged in the Formal Juvenile Delinquency Court Must Have Qualified and Adequately Compensated Legal Representation* applies regardless of whether the youth is released or detained." (page 77)
- "In some instances, the youth does not need to be detained but a parent or custodian or relative cannot be located. When this occurs, intake should arrange the release of the youth to an appropriate shelter care or non-secure holdover facility until the parent, custodian, or a relative can be located." (page 77)

Detention or Initial Hearing

Preparation for the Hearing:

- "In a juvenile delinquency court of excellence, counsel is appointed prior to the detention or initial hearing, and has time to prepare for the hearing." (page 90)
- "When qualified counsel represent youth and have prepared before the hearing, counsel will have also carefully reviewed the petition and rights with the youth and family. Counsel will have significant information from these interactions to assist in identifying whether there are questions of competency to stand trial that need to be addressed." (page 92)
- "Consultation between the youth, parent or guardian, and counsel regarding whether the youth wishes to admit or deny the charge should have occurred before entering the courtroom." (page 94)

Competency:

- "[W]hen counsel, prosecutor, or the juvenile delinquency court judge observe indicators that competency to stand trial may be an issue, each is obligated to pursue the question further." (page 93)
- "Counsel for the youth is obligated to request a clinical assessment of decisional capacity if the youth's competency to stand trial is in question." (page 93)

Conducting the Detention or Initial Hearing:

- Present at the hearing (page 91):
    - Youth
    - Counsel for the youth
    - Certified interpreters if youth or parent does not speak English or is hearing impaired

- "If the youth is on probation or involved in services, it may not be necessary for the probation officer or other worker to be present as long as there is a system to ensure that all necessary information is available to the judge, prosecutor, and counsel[.]" (page 91)
- "[I]f the youth in consultation with the parent or guardian and counsel chooses to waive any right, the youth, parent or guardian, and counsel should sign a written waiver." (page 92)
- "Both prosecutor and counsel for the youth should turn over all discovery materials according to juvenile delinquency court rule and as properly requested as soon as possible as well as pursue discovery under informal procedures as appropriate[.]" (page 95)
- Among the questions that must be answered at this hearing: "Has the youth had access to, and been appointed qualified legal counsel?" (page 96)
- Written findings and orders should include: "If counsel was not present, the plan to ensure the presence of counsel at the next hearing[.]" (page 97)

Waiver of Jurisdiction and Transfer Hearing

Counsel's Qualifications and Duties:

- "Counsel for the youth must become sufficiently knowledgeable of the alleged incident and of the youth's circumstances in order to be properly prepared for cross-examination and to determine whether or not to call witnesses for the defense. In order to complete these critical steps, prosecutors and counsel for youth must have reasonable caseloads, with resources to investigate all necessary aspects of the case, and counsel for youth must have been appointed prior to the detention hearing[.]" (page 103)
- "Counsel must understand child and adolescent development, developmental disabilities, victimization and trauma, mental health, mental retardation and maturity issues, and the treatment services that are available in the juvenile justice system. Counsel must also understand the criminal court system in order to determine whether counsel believes the youth will be better served in juvenile delinquency court or criminal court." (page 105)
- "If… an attorney does not represent the youth at the detention or initial hearing, the court must appoint legal representation for the alleged offender prior to the probable cause hearing on a waiver motion." (page 105)

Preparation for the Hearing:

- "Because of the very serious potential consequences if the juvenile delinquency court decides to waive jurisdiction and transfer the youth to the criminal court, including lengthy incarceration, and possible abuse in adult prison of immature or special needs youth, it is critical that counsel has the time and resources to prepare for the probable cause hearing." (page 105)
- "Prior to the probable cause hearing on a motion to waive juvenile delinquency court jurisdiction and transfer a case to criminal court, counsel should investigate all circumstances of the case relevant to the appropriateness of transfer. Counsel should also seek disclosure of any reports or other evidence that will be submitted to, or may be considered by the court, in the course of transfer proceedings. If circumstances warrant, counsel should have requested appointment of an investigator or expert witness to aid in the preparation of the defense, and any other order necessary to protect the youth's rights, during pre-trial proceedings. Counsel should also fully explain the nature of the proceedings and the consequences of transfer to the youth and the youth's parent or legal custodian." (page 105)

Conducting the Probable Cause Phase:

- Present at the hearing (page 105):
    - Youth
    - Counsel for the youth
    - Certified interpreters if youth or parent does not speak English or is hearing impaired
- "The burden of proof is on the state, and consequently, the youth is not required to present any witnesses or to prove that he or she did not commit the offense. Counsel may choose, however, to present evidence that challenges the evidence of the prosecutor." (page 106)
- "As with the prosecutor's evidence, any evidence presented by counsel should be under oath and subject to cross-examination." (page 106)

- After the prosecutor's rebuttal, "the prosecutor and counsel for the youth may present closing arguments regarding the probable cause phase.

Conducting the Waiver/Transfer Phase:

- Present at the hearing (page 112-13):
    - Youth
    - Counsel for the youth
    - Certified interpreters if youth or parent does not speak English or is hearing impaired
- "The evaluation reports should be provided to the prosecutor and counsel for the youth not less than three days before the hearing. It is recommended that the social and physical evaluations be provided to the prosecutor and counsel for youth prior to the forensic evaluation in order to provide as much review and preparation time as possible." (page 113)
- "It is important that the prosecutor and youth's counsel have sufficient time to determine whether … they wish to challenge the conclusions by either questioning the evaluator or presenting additional information through written reports or testimony." (page 113)
- "If additional written reports are to be presented by the prosecutor or youth's counsel, they should similarly have been provided to all parties prior to the hearing." (page 113)
- If the probation officer or other person who prepared the evaluations testifies, then "the prosecutor and counsel for the youth should have the opportunity to question the preparer." (page 113)
- "After each [prosecution] witness' testimony, the defense should have the opportunity to cross-examine." (page 113)
- "If there is evidence that counsel for the youth can present to defend his or her client against waiver, or to challenge the information in the evaluations, it should be presented at this time [after the prosecution's case]." (page 113)
- "Counsel should present an alternative plan for the court to consider that would continue juvenile delinquency court jurisdiction." (page 113)
- "The prosecutor and counsel for the youth may present closing arguments." (page 114)

Interlocutory Appeals Should Be Allowed:

- "[B]ecause of the potentially serious consequences of a juvenile's charges being transferred to criminal court, counsel for the youth should have the opportunity to request expedited interlocutory appellate review of the juvenile delinquency court's decision if counsel believes that the juvenile delinquency court judge has made an error in process or judgment." (page 107)
- "[A]ppellate courts should work with juvenile delinquency courts, prosecutors, and public defenders to design an expedited appellate review of interlocutory orders to waive juvenile delinquency court jurisdiction and transfer a youth to criminal court. This should be a streamlined and speedy memorandum review process that would allow counsel for the youth's memoranda to be reviewed within two weeks." (page 163)

Trial/Adjudication Hearing

Preparing for the Hearing:

- "A case should not go to trial in the juvenile delinquency court without a prosecutor and counsel for the youth who are qualified and who have exercised due diligence in preparing for the proceeding." (page 122)
- "Prior to the trial, counsel completed all of the following responsibilities:
    - Investigated all circumstances of the allegations;
    - Sought discovery of any reports or other evidence to be submitted to or considered by the juvenile delinquency court at the trial;
    - If circumstances warrant, requested appointment of an investigator or expert witness to aid in the preparation of the defense and for any other order necessary to protect the youth's rights; and
    - Informed the youth of the nature of the proceedings, the youth's rights, and the consequences if the youth is adjudicated on the petition." (page 122)

Conducting the Trial/Adjudication Hearing:

- Present at the hearing (page 124):
    - Youth
    - Counsel for the youth
    - Certified interpreters if youth or parent does not speak English or is hearing impaired
- "Unless waived by counsel, the statements of a juvenile or other information or evidence derived directly or indirectly from statements made during the juvenile delinquency court intake or detention processing of the case should not be admissible at the trial." (page 125)
- "After each [prosecution] witness' testimony, counsel for the youth should have the opportunity to cross-examine." (page 125)
- "The burden of proof is on the prosecutor and consequently the youth is not required to present any witnesses or to prove that he or she did not commit the alleged offense. Counsel for the youth may choose to present evidence that challenges the evidence of the prosecutor or proves the youth's innocence." (page 126)
- "All evidence presented at the trial should be under oath and subject to cross-examination." (page 125)
- After the prosecutor's rebuttal, "the prosecutor and counsel for the youth may present closing arguments." (page 126)

Plea Agreements

- "Part of the role of counsel for the youth is to tell the youth that he or she should not expect gain in exchange for a plea agreement. Counsel must also advise the youth that the juvenile delinquency court has the final determination over whether to accept the plea agreement." (page 123)
- "When a plea agreement is appropriate, the prosecutor and counsel for the youth should negotiate plea agreements prior to the time the trial is set. … It is unacceptable practice for last minute plea agreements to occur because the prosecutor or counsel for the youth has not adequately prepared in advance of the trial. It is also unacceptable practice to wait routinely to first address the question of a plea agreement until the day of the trial." (page 123)
- "If a plea agreement has been proposed, the prosecutor and counsel for youth should submit to the juvenile delinquency court judge, at least one week before the scheduled trial, a proposed plea agreement and a signed plea petition that, in addition to listing rights waived, has a section completed by the youth that describes what occurred, that has a statement of admission, and that is signed by the youth. The juvenile delinquency court judge should immediately review the plea petition and proposed plea agreement[.]" (page 124)

Disposition Hearing

Role of Defense Counsel:

- "Counsel for the youth plays an important role in the disposition hearing with the responsibility to ensure that all significant needs relating to the delinquent behavior of the adjudicated delinquent youth have been brought to the attention of the juvenile delinquency court." (page 137)
- "[C]ounsel for the youth is not obligated to present the view of the parent, if this view is in opposition to the view of counsel's client." (137)

Preparing for the Hearing:

- "If additional evaluations or expert witnesses are needed to aid in the preparation of the disposition hearing, counsel is responsible to request this assistance at the end of the adjudication hearing." (page 137)
- Prior to the hearing, counsel should:
    - "[F]ully explain the possible disposition options to the youth and the youth's parents or legal custodian." (page 137)
    - "[A]sk them what options they feel would be appropriate and which service providers the youth and family will feel most comfortable working with." (page 137)
    - "[Determine] whether to agree with the recommendation [of the pre-disposition report] or to present a different recommended disposition." (page 142)

    - "[Determine] whether to call witnesses to testify as to the appropriateness of her or his recommendation or to challenge the conclusions or recommendations of the pre-disposition report." (page 142)
- "Whenever a juvenile delinquency court can obtain the "buy-in" of youth and family by considering their opinions, needs, recommendations, and preferences, and give them options to choose from, the court enhances the youth's chances of a successful outcome." (page 135)
- "Pre-disposition investigations should include … [c]ontacting the prosecutor and counsel for the youth for additional information, and their perspectives and recommendations[.]" (page 138)
- "The pre-disposition investigator should provide the pre-disposition report, recommendations, and proposed probation or initial reentry plan to the prosecutor and counsel for the youth *not less than three days before the disposition hearing*." (page 140, emphasis added)

Conducting the Disposition Hearing:

- Present at the hearing (page 141):
    - Youth
    - Counsel for the youth
    - Certified interpreters if youth or parent does not speak English or is hearing impaired
- "The prosecutor and counsel for youth have the opportunity to ask the [pre-disposition] investigator questions." (page 142)
- "Counsel for the youth has the opportunity to cross-examine evidence or testimony presented by the prosecutor" (page 142)
- "Counsel for the youth indicates agreement or disagreement with the recommendation and presents any evidence or testimony accordingly." (page 142)
- "The juvenile delinquency court judge gives the … youth [and other participants] … the opportunity to address the court." (page 142)

Appeals Process

Process and Procedure:

- "[T]he juvenile delinquency judge should do everything possible to ensure that the juvenile delinquency court does not err in process nor create circumstances due to lack of clear communication that would create the necessity of counsel filing an appeal. It is important to clarify that this statement is not intended to discourage appeals where they are needed for counsel to adequately represent her or his client, protect the client's rights, or refine points of law." (page 145)
- "If the juvenile delinquency court accepted waiver of counsel, the youth and parents should be informed of their right to counsel to assist in the filing of the appeal." (page 161)
- "If inadequate representation by counsel is an issue on appeal, procedures should be in place to avoid further delay in appointing new counsel." (page 161)

Role of Counsel:

- "In order to shorten the time [for appellate review] as much as possible, counsel for youth should file the appeal as soon as possible and in no case, more than 30 days from disposition." (page 160)
- "Counsel for the youth is responsible to review the juvenile delinquency court's orders of adjudication and disposition critically. Counsel must explain the orders to the youth, doing everything possible to help the youth understand the nature and impact of each component of the juvenile delinquency court's orders. It is counsel's responsibility to explain to the youth the right to appeal, the pros and cons of filing an appeal, and counsel's opinion as to the likely outcome of an appeal." (page 161)

Counsel's Interaction with Client's Parents:

- "Although counsel is not required to explain appeal issues to the youth's parents, in most instances it will be helpful to the youth if the parents also understand all of these issues. Consequently, in order to best represent the client, counsel should, unless contraindicated, include the parents in explanations and recommendations regarding the appellate process." (page 161-62)

Post-Disposition Review

"All parties and key participants who were involved in hearings prior to and including the disposition hearing should be involved in post-disposition review, including the prosecutor and counsel for the youth." (pages 167, 178)

Youth Remains at Home

Preparing for the Post-Disposition Review:

- "The prosecutor and counsel for the youth are always invited to negotiation interventions; however, they would be notified of, but not invited to family conferencing, unless the youth or family asked them to attend." (page 168)
- "*Key Principle 7: Youth Charged in the Formal Juvenile Delinquency Court Must Have Qualified and Adequately Compensated Legal Representation*, not only states that all youth must be represented by counsel in the formal juvenile delinquency court but that counsel should be involved in every juvenile delinquency court hearing. A juvenile delinquency court that has incorporated this *Key Principle* ensures that counsel stays assigned to a case when a progress report due date, progress conference, or progress hearing is set at disposition." (page 169)
- "The probation officer should provide copies of the [progress] report to the juvenile delinquency court two weeks prior to the juvenile delinquency court's scheduled review of the report. The juvenile delinquency court should immediately forward the report to the prosecutor, counsel for the youth, parent, legal custodian, service provider, and tribal council representative, if applicable. Each legal party and key participant should have the opportunity to prepare a response to the report if they choose to do so, and to submit the response for the juvenile delinquency court judge's consideration at the same time the judge reviews the progress report." (page 170)
- "When the juvenile delinquency court has set any of these methods [specifically progress review conferences, case staffings and dispute resolution alternatives] for post-disposition review, the probation officer should ensure that the youth, parents, legal custodian, prosecutor, counsel for the youth, tribal representative, if applicable, and primary service providers are included." (page 170)

Role of Counsel:

- "In order for counsel to be effective at this [post-disposition] stage of the juvenile delinquency court process, counsel must not only rely on the information provided by the probation officer, but should also independently speak with the youth, the youth's parent or legal custodian, and the service provider." (page 169)
- Prior to the progress hearing, "[c]ounsel has discussed the reports with the youth, parent, and legal custodian…. The prosecutor and counsel have determined whether they agree with the reports or will present other information either by report or through testimony." (page 171)

Conducting the Review Hearing:

- Present at the review hearing (page 170):
    - Youth
    - Counsel for the youth
    - Certified interpreters if youth or parent does not speak English or is hearing impaired
- "The prosecutor and counsel for youth have the opportunity to question the probation officer or caseworker." (page 171)
- "Counsel for the youth indicates agreement or disagreement with the report and present any additional information or testimony, if needed." (page 171)
- "The juvenile delinquency court judge gives the … youth the opportunity to address the court." (page 171)
- "The juvenile delinquency court's findings and orders should be set out in writing and made available to all legal parties and key participants at the conclusion of the hearing." (page 172)

Youth Placed Outside the Home

Preparing for the Post-Disposition Review:

- "For the first 30 days following the youth's release, the juvenile delinquency court judge should calendar the case for weekly progress hearings with mandatory attendance by the youth and family (if reunification has or will occur), and participants of the reentry team, including prosecutor and counsel for the youth." (page 183)
- "[T]he juvenile delinquency court should immediately provide copies of the [progress] report to the prosecutor, counsel for the youth, parent or legal custodian, future custodian, and tribal council representative, if applicable. Each of these individuals should have the opportunity to prepare a response to the report if they choose to do so, and to submit the response to the juvenile delinquency court. The juvenile delinquency court should give two weeks for submission of responses[.]" (page 184)

Role of Counsel:

- "A juvenile delinquency court should ensure that counsel remains active when a youth is placed out of the home under the continuing jurisdiction of the juvenile delinquency court." (page 181)
- "In order for counsel to be effective at this [post-disposition] stage of the juvenile delinquency court process, counsel must not only be informed by the case manager, but should independently speak in-depth with the youth, the youth's parent, legal custodian, future physical custodian, probation officer, child protection worker, and placement staff." (page 181)
- Prior to the progress hearing, "[c]ounsel has discussed the reports with the case manager, probation officer, child protection worker, or corrections authority staff, and with the youth and parents. …. The prosecutor and counsel have determined whether they agree with the reports or will present other information, either by report or through testimony." (page 185)

Conducting the Review Hearing:

- Present at the review hearing (page 184):
    - Youth
    - Counsel for the youth
    - Certified interpreters if youth or parent does not speak English or is hearing impaired
- "The prosecutor and counsel for youth have the opportunity to question the case manager." (page 185)
- "Counsel for the youth has the opportunity to cross-examine any witnesses or challenge any reports presented by the prosecutor." (page 185)
- "Counsel for the youth indicates agreement or disagreement with the report and present any additional information or testimony, if needed." (page 185)
- "The juvenile delinquency court judge gives the … youth … the opportunity to address the court." (page 185)
- "The juvenile delinquency court's findings and orders should be set out in writing and made available to all legal parties and key participants at the conclusion of the hearing." (page 186)

Reentry Planning:

"[C]ounsel for the youth should also be invited to participate [in the final reentry planning process]." (page 187)

The *Delinquency Guidelines* have separate recommendations for youth at low and high risk to reoffend.

For youth at low risk to reoffend, there may or may not be a hearing:

- "For youth who are low risk to reoffend at the time of reentry, if the juvenile delinquency court judge or any legal parties or key participants have concerns regarding the reentry plan, the juvenile delinquency court judge should determine whether to set a hearing, case staffing, progress conference, or dispute resolution alternative to address the concerns." (page 188)
- If there is a hearing, "[a]t the end of the hearing, the juvenile delinquency court judge generates written findings and orders that approve a final reentry plan, either as proposed or as modified, and distributes the findings and orders immediately to all legal parties and key participants." (page 188)

- "If the plan is acceptable to everyone when distributed and no hearing is required, the juvenile delinquency court judge should generate a copy of the written findings and orders that approve the proposed final reentry plan and immediately provide the findings and orders to all legal parties and key participants." (page 188)

For youth at high risk to reoffend, there should always be a hearing:

- "At the time of plan approval, the juvenile delinquency court should set a hearing not later than the date of release to review the plan with all participants, to ensure that all components of the plan are in place and ready to begin, and to ensure that all persons involved in the reentry plan are aware of their responsibilities." (page 189)

Probation or Parole Violations

Role of Counsel:

- "[C]ounsel should be involved at every hearing. The same attorney who represented the youth on the petition that resulted in the court order of probation or parole should represent the youth on a probation or parole violation." (page 196)

Conducting Hearings on Probation or Parole Violations:

- Present at the hearing (pages 196-97):
    - Youth
    - Counsel who represented the youth on the law violation that resulted in the order of probation or parole
    - Certified interpreters if youth or parent does not speak English or is hearing impaired
- "The juvenile delinquency court's findings and orders should be set out in writing and made available to all legal parties and key participants at the conclusion of the hearing." (page 198)

Information on the Alleged Violation:

- During the prosecution case:
    - "Sworn testimony is not required unless requested by counsel for the youth." (page 197)
    - "Counsel for the youth has the opportunity to ask questions related to the information presented." (page 197)
- "The youth's counsel, if desired, should call on individuals to provide information that supports a finding that the youth did not commit the alleged violation." (page 197)

Information on Progress and/or Sanction Recommendations:

- "The prosecutor and counsel for the youth have the opportunity to ask questions and present their recommendations if different from the probation or parole officer's recommendation." (page 197)
- "The juvenile delinquency court judge gives … the youth [and other participants]… the opportunity to address the court with information, recommendations, and questions." (page 197)

Resources

Juvenile Delinquency Guidelines

- Download in sections, for free, from http://www.ncjfcj.org/content/view/411/411/.
- Purchase a printed copy for $35:
  Contact NCJFCJ at JDG@ncjfcj.org or by phone at (775) 784-6012.
  Order from the NCJFCJ online store at http://www.ncjfcj.org/store/index.php.

Many of the *Guidelines* recommendations are supported by other bodies of professional standards. You may also want:

National Juvenile Defender Center, ***National Juvenile Defense Standards*** (2012), *available at* www.njdc.info/pdf/Standards.pdf.

American Council of Chief Defenders & National Juvenile Defender Center, ***Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems*** (2005), *available at* www.njdc.info/pdf/10_Principles.pdf.

Institute of Judicial Administration & American Bar Association, ***Juvenile Justice Standards*** (1979). The text of the original 24 volumes of standards is available from online legal databases, and a condensed and annotated single-volume version can be purchased from the American Bar Association website at www.ababooks.org.

Endnotes

1 National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* 25 (2005) [hereinafter *Guidelines*].
2 *Id.* at 78.
3 *Id.*
4 *Id.* at 25.
5 *Id.*
6 *Id.*
7 *Id.* at 25, 78.
8 *Id.* at 28.
9 *Id.* at 25.
10 *Id.* at 25, 78.
11 *Id.* at 30.
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 30-31 (listing the duties of defense counsel), 122 (counsel's primary responsibility is to the child client); *see also* IJA-ABA *Juvenile Justice Standards*, *Standards Relating to Counsel for Private Parties*, Standard 3.1.
16 *Guidelines*, *supra* note 1, at 30 (describing the role of counsel); *see also* Institute of Judicial Administration & American Bar Association, *Juvenile Justice Standards*, *Standards Relating to Counsel for Private Parties* 3.1 (1980), Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 255-59 (2005) (charting the emergence of a professional consensus regarding the role of counsel for the child and the persistence of contrary practice).
17 *Guidelines*, *supra* note 1, at 122 (duty to represent child's expressed interests at adjudication), 137 (duty to represent child's expressed interests at disposition), 161 (duty to represent child's expressed interests during appeals).
18 *See also* Henning, *supra* note 16, at 245 (considering competing models of attorney-client interaction and ultimately advocating for a collaborative approach to client counseling).
19 *Guidelines*, *supra* note 1, at 122.
20 *Id.* at 137.
21 *See*, *e.g.*, National Juvenile Defender Center, *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 27-28 (2003); National Juvenile Defender Center, *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 41 (2003); National Juvenile Defender Center, *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 58-59 (2003); National Juvenile Defender Center, *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* 31-32 (2001);

22 National Juvenile Defender Center, *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* 62 (2001).
23 *Guidelines*, *supra* note 1, at 123.
24 *See*, *e.g.*, *id.* at 25 (a core principle is that all members of the court shall treat participants with respect, dignity, courtesy and cultural understanding).
25 *Id.* at 77, 90.
26 *Id.* at 90.
27 *Id.* at 67, 78-79, 222.
28 *Id.* at 78, 90-91.
29 *Id.* at 78, 92.
30 *Id.* at 92.
31 *Id.* at 91.
32 C.E. Frazier & J.C. Cochran, *Detention of Juveniles: Its Effects on Subsequent Juvenile Court Processing Decisions*, 17 Youth & Soc'y 286-305 (1986); C.E. Frazier & D.M. Bishop, *The Pretrial Detention of Juveniles and its Impact on Case Disposition*, 76(4) J. Crim. L. & Criminology 1132-1152 (1985).
33 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 56-58, 62-64 (2004) (summarizing research on the costs and effects of detention).
34 *Guidelines*, *supra* note 1, at 83.
35 Calvin, *supra* note 19, at 67 (analyzing data from the Office of Juvenile Justice and Delinquency Prevention, *Easy Access to Juvenile Court Statistics* data package, 1999).
36 *Guidelines*, *supra* note 1, at 81-84.
37 *Id.* at 81.
38 *Id.* at 75.
39 *Id.* at 97 (judges should make written findings about the need for detention).
40 *Id.* at 123.
41 *Id.* at 125.
42 *Id.*
43 *Id.* at 123.
44 *Id.*
45 *Id.* at 124.
46 *Id.* at 123.
47 *Id.* at 122.
48 *Id.*
49 *Id.*
50 *Id.* at 125.
51 *Id.* at 125-26.
52 *Id.* at 126.
53 *Id.*
54 *Guidelines*, *supra* note 1, at 137.
55 *Id.* at 138, 140.
56 *Id.* at 137, 142.
57 *Id.* at 137.
58 *Id.*
59 *Id.* at 142.
60 *Id.* at 137.
61 *Id.* at 161-62 (explaining the counsel is not required to explain appeal issues to parents, but should do so if necessary to represent the child).
62 *Id.* at 145.
63 *Id.*
64 *Id.* at 160-61.
65 *Id.* at 169, 181, 196.
66 *Id.* at 169 (in the home), 181 (outside the home).
67 *Id.* at 169 (in the home), 181 (outside the home).
68 *Id.* at 171 (in the home), 185 (outside the home).
69 *Id.* at 187.
70 *Id.* at 196.
71 *Id.* at 197.
72 *Id.*

The National Juvenile Defender Center (NJDC) is a non-profit organization that is dedicated to ensuring excellence in juvenile defense and promoting justice for all children. NJDC provides support to public defenders, appointed counsel, law school clinical programs and non-profit law centers to ensure quality representation in urban, suburban, rural and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination. To learn more about NJDC, please visit www.njdc.info.

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BRAINSTORMING: DEVELOPING THE FACTS TO BUILD A THEORY OF DEFENSE

Ira Mickenberg, Esq..
Attorney and Consultant,
Saratoga Springs, NY

Revised by John Rubin
UNC School of Government

WHY BRAINSTORM YOUR TRIAL CASES?

Every good trial lawyer realizes that we win cases on the *facts*, not on the law. Judges in bench trials and jurors in jury trials are persuaded not by legal technicalities, but by a theory of defense that is rooted in the facts of the case and by a good, factual story that convinces them that our client is not guilty.

One of the greatest obstacles to winning trials is that we often tend to accept or buy into the prosecution's version of the facts. When we do this, the judge or jury hears a story that is framed by police testimony and ends with our client being the guilty party. To win a criminal or delinquency trial, we must develop a different factual narrative from that offered by the prosecution.

Developing a different factual narrative from that of the prosecution and devising a theory of defense based in the facts of your case are only possible if you have first explored and analyzed those facts in depth. Brainstorming is the method we suggest for developing your facts.

The basic reasons we advocate starting your trial preparation by brainstorming the case are simple:

- When we are preparing for trial, we have already become so involved in the facts, issues, and personalities of the case that it is easy to overlook ideas and facts that might help us win.

- Because we get so close to the cases we litigate, it is difficult for us to find new factual perspectives and develop new ideas without help from others. Or to put it another way:

- When preparing for trial, many heads are a lot better than one.

WHAT BRAINSTORMING IS NOT

- Brainstorming is not a "touchy-feely," informal get together.

- Brainstorming is not a theoretical or academic exercise. It is meant to generate practical ideas that will allow you to develop a persuasive theory of defense and a persuasive storyline that will ultimately convince the judge or jury to reach the conclusion you want.

- Brainstorming is not the equivalent of hanging out in the office and discussing your case with a co-worker.

- Brainstorming is not meant just to reinforce the ideas you have already developed about your case. To the contrary, it is meant to develop new ideas and perspectives about your case.

WHAT BRAINSTORMING IS

- Brainstorming is a formal process for developing and analyzing the facts of your case and for gaining new, creative perspectives on your case.

- Brainstorming is a way to reality-check the strategies and tactics you are considering for your case and to make an intelligent decision about what will work and what will not work.

- ***Inclusive*** – At the start of your brainstorming session the goal is to get as many facts and perspectives as possible. You want quantity at this stage, not necessarily quality. As you progress with your case, you will be making decisions as to what can be used and what cannot be used. But at the brainstorming phase, all you want is to get as much on the table as possible, to give you as many options as possible when you get around to making decisions about strategy and tactics. Quantity at the start of the process helps generate quality at the end. Subjects worth brainstorming include:

  --Crime facts, events, actions
  --People (personalities, motivations, interrelationships, influences)
  --Places, objects
  --Investigative and other procedures
  --NOT LAW

- ***Non-Judgmental*** – Some of us have been taught that all facts can be divided into good facts, bad facts, and facts beyond change. While this formulation may be useful later on, the brainstorming phase is much too early to make these judgments. In fact, one goal of brainstorming is to be able to make an intelligent decision about what facts are really good, what facts are really bad, and what facts are really beyond change. One of the best things about the brainstorming process is that we often find that our initial judgments about these factors is incorrect. Facts we thought would be bad can be made good. Facts initially thought to be beyond change can be successfully challenged. So when brainstorming the facts of a case, do not reject any idea out of hand, and do not be too quick to shoehorn facts into pre-determined categories.

- ***Associative*** – One of the best things about brainstorming is that if you are truly inclusive and non-judgmental, you will begin to start associating between ideas and facts that are being brainstormed. One person's suggestion will give rise to a different and possibly better formulation. Brainstorming should encourage this kind of creativity and association, which is another reason to be inclusive and non-judgmental.

HOW TO BRAINSTORM YOUR CASE

1. Find at least 3 other people to do the brainstorming.

a. There should be at least three to facilitate a real exchange of ideas and perspectives.

b. They do not have to be lawyers. In fact, non-lawyers often provide a more realistic perspective on what jurors will and will not accept.

2. Set aside a specific time to do the brainstorming.

a. It should be at least an hour or two.

b. Give everyone sufficient time to prepare and set aside the time.

3. If there are any essential documents, such as police reports, a confession, an indictment or other charging document, etc., be sure to give all of the brainstormers copies in advance.

4. Start the brainstorming session by giving everyone a 5-10 minute summary of the facts of the case. If there is a particular problem you want to address, define the problem, but do not restrict the ability of the group to redefine the problem if they want.

5. After you spend 5-10 minutes describing the facts, give the group another 10-15 minutes to ask you questions about the case.

6. When the time for questions is over, stop asking and answering questions. This will sometimes be hard to do, but if the questions go on for too long, the group may forget to do any real brainstorming, and all you wind up doing is reinforcing the original answers and perspective of whoever's case it is.

7. Have the group brainstorm the case. This will involve analysis, free-association, and generally tossing around facts that attract your interest and ideas about what those facts mean and how they can be used.

8. When the group starts to brainstorm, the person whose case is being brainstormed should keep quiet. The purpose of the session is not for him or her to defend his or her original ideas. It is to gain new perspectives from the others. Let everyone else talk. Listen to them.

9. Write down everything everyone says. Be as close to verbatim as possible. The purpose of this is twofold: (1) To make sure that nothing is forgotten by the end of the session; (2) To permit participants to compare and make associations between things that were said at various times in the session.

WHAT TO DO WITH THE FACTS YOU HAVE BRAINSTORMED

- Brainstorming should provide enough facts and enough ideas about those facts to enable you to develop a persuasive theory of defense.

- Brainstorming should provide enough facts and enough ideas about those facts to enable you to develop a storyline that will persuade the judge or jury to return the verdict you want. To this end, the brainstorming should help you define the characters in the story of your case and the role those characters will play; the setting in which your story takes place; and the sequence in which you will tell the story of your case at trial.

FOLLOWING UP – WHAT COMES NEXT

Preparing a case for trial is not a linear process. As we learn more about the case, our views change. We revise our theory of defense, adjust our strategies and tactics, and go out to do more investigation. Brainstorming is an important first step in the process. After brainstorming, you may see the need to gather and investigate more facts, interview more witnesses, obtain more documents. If this is what happens after the brainstorming session, the session has been a success—you have obtained a better idea of what needs to be done to win the trial. After brainstorming, you may feel that you are ready to develop a theory of defense that will guide future strategic and tactical decisions. If brainstorming has put you in a position to construct a theory of defense, it has also been a success.

JUVENILE CAPACITY

Chapter 7:

Capacity to Proceed

7.1 Overview

A juvenile who lacks the mental capacity to proceed may not be subjected to an adjudicatory or dispositional proceeding in juvenile court. Several provisions of the Criminal Procedure Act, "Incapacity to Proceed," apply to the court's determination of whether a juvenile is capable of proceeding. G.S. 7B-2401. These statutes are G.S. 15A-1001, providing that proceedings cannot go forward when the juvenile is incapacitated; G.S. 15A-1002, setting forth procedures for determination of incapacity; and 15A-1003, containing procedures for the court to determine whether civil commitment proceedings should be instituted if the juvenile is found incapable of proceeding.

In practice, evaluation of a juvenile's capacity to proceed may be quite different from that of an adult client. A juvenile may be functioning at a lower level than an adult simply by virtue of age or immaturity. It can be difficult to determine if the juvenile is simply immature or lacks the capacity to proceed, although extreme immaturity could be grounds for a finding of lack of capacity. *See infra* 7.5B (Test of Capacity).

This chapter will review the standard for capacity to proceed, the test for capacity, judicial procedures for a hearing on capacity, and considerations for counsel in representing a juvenile whose capacity may be in question.

7.2 North Carolina Defender Manual

The North Carolina Defender Manual, published by the School of Government, explores in detail the issue of capacity to proceed in criminal cases. *See* Vol. 1, Ch. 2 of the North Carolina Defender Manual, hereinafter "Defender Manual," at www.ncids.org. The issues and case law discussed there generally apply to juvenile proceedings, as capacity to proceed

in delinquency cases is determined pursuant to the designated statutes in the Criminal Procedure Act, G.S. 15A-1001, 15A-1002, and 15A-1003, and constitutional requirements.

This chapter is largely based on Chapter 2 of the Defender Manual, "Capacity to Proceed," which has been adapted to take into account the juvenile court context and vocabulary. Most of the citations from the Defender Manual are to criminal cases and thus use the terms employed in criminal proceedings. These cases are applicable to juvenile cases to the extent that they involve the three relevant provisions of Chapter 15A and applicable constitutional considerations.

7.3 Terminology Used in This Chapter

Incapacity to Proceed is defined under North Carolina's statutes to mean a juvenile who "by reason of mental illness or defect . . . is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." G.S. 15A-1001(a). The term "incapable of proceeding" is used interchangeably. The term "incompetent" (see definition below) has a separate and distinct legal definition under current North Carolina law and is not interchangeable with "capacity," but is sometimes used as such. Older North Carolina cases, as well as opinions from federal court and courts of other states, may also use the terms interchangeably.

Incompetent refers to an individual who has been adjudicated incompetent to make or communicate important decisions concerning one's person, family, or property pursuant to the procedures of Chapter 35A, "Incompetency and Guardianship," and who has been appointed a guardian pursuant to that chapter. *See* G.S. 35A-1101(7), (8).

Individualized Education Program (IEP) is the unique plan developed for each public school child with a disability who needs special education and related services. The IEP is developed by a team of qualified professionals and the child's parents to address the specific needs of the child within the school setting. The IEP must be designed to meet the requirements of the Individuals with Disabilities Education Act (IDEA), Part B. *See A Guide to the Individualized Education Program*, U.S. Department of Education, at www.ed.gov/parents/needs/speced/iepguide/index.html.

7.4 Motions Pending Capacity Proceedings

G.S. 15A-1001(b) permits the court to go forward with any motions that the juvenile's counsel can handle without the assistance of the juvenile pending determination of capacity to proceed. *See also Jackson v. Indiana*, 406 U.S. 715, 740–41 (1972) (indicating that counsel may proceed even with dispositive motions that do not require the defendant's assistance, such as a motion challenging the sufficiency of the indictment).

7.5
Standard for Capacity to Proceed to Adjudication

A. Requirement of Capacity

Due process and North Carolina law prohibit the trial or punishment of a person who is legally incapable of proceeding. *See Drope v. Missouri*, 420 U.S. 162 (1975); Ch. 15A, Art. 56 commentary (North Carolina statutes on capacity to proceed codify the principle of law that a defendant may not be tried or punished if lacking mental capacity to proceed).

The requirement of capacity to proceed applies to all phases of a juvenile proceeding. A juvenile may not be "tried, convicted, sentenced, or punished" if mentally incapacitated as defined by statute. G.S. 15A-1001(a); G.S. 7B-2401.

B. Test of Capacity

Generally. G.S. 15A-1001(a) sets forth the general standard of capacity to proceed. Under the statute, a juvenile lacks capacity to proceed if, by reason of mental illness or defect, the juvenile is unable to:

- understand the nature and object of the proceedings,
- comprehend his or her situation in reference to the proceedings, or
- assist in the defense in a rational or reasonable manner.

Mental illness or defect. The above test has two parts. First, the juvenile must have a mental illness or defect. *See State v. Aytche*, 98 N.C. App. 358 (1990) (statute does not authorize general physical examination to see if physical problems exist); *but see Timothy J. v. Superior Court*, 150 Cal. App. 4th 847 (2007) (under former California Rule of Court 1498(d), minor not required to have mental disorder or developmental disability to invoke right to hearing on competency); 4 Michael L. Perlin, Mental Disability Law: Civil And Criminal § 8A-6.4, at 89–90 (Michie Co., 2d ed. 2001) (physical disorders may impinge on brain functioning to degree affecting defendant's mental capacity to stand trial). The California Court in *Timothy J.* found that in determining whether the juvenile was capable "of understanding the proceedings and of cooperating with counsel," the developmental immaturity of the juvenile could be considered without proof of a mental disorder or developmental disability. 150 Cal. App. 4th at 862. The Court discussed at length testimony presented concerning the developmental stage of the juvenile's brain and thinking processes. *Id*. at 853–54.

The North Carolina statute states that lack of capacity must be based on "mental illness or defect." G.S. 15A-1001(a). The statute was drafted with adult cases in mind. Although immaturity in an adult, without evidence that it amounts to a mental defect such as mental retardation, might not be sufficient for an adult to be found incapable of proceeding, extreme immaturity in a juvenile could be viewed as the equivalent of a mental defect. Counsel might argue that the factors stressed by the California court—lack of physical maturity of the juvenile brain and the concurrent inability to maintain executive brain functions necessary to understand and make decisions concerning a court proceeding—are essentially a "mental

defect" for the purpose of determining capacity to proceed. Further, the gravamen of the constitutional requirement of capacity is the capacity to understand the proceedings and assist counsel, regardless of the cause. *See Timothy J., supra* (discussing constitutional test for capacity established in *Dusky v. United States,* 362 U.S. 402 (1960)).

Capabilities. Second, the mental condition must render the juvenile unable to perform at least one of the functions specified in G.S. 15A-1001(a). The existence of a mental condition alone does not necessarily mean that the juvenile lacks the capacity to proceed. *See State v. Willard*, 292 N.C. 567, 576–77 (1977) (amnesia does not per se render defendant incompetent, although temporary amnesia may warrant continuance of trial); *In re I.R.T.*, 184 N.C. App. 579 (2007) (although one evaluation noted "progressive decline in intellectual abilities," both reports indicated juvenile could understand legal terms and procedures if explained in concrete terms); *In re Robinson*, 151 N.C. App. 733 (2002) (evidence sufficient to support court's finding of capacity to proceed although private psychologist found moderate mental retardation and schizophreniform disorder).

This second part of the test for capacity is in the alternative. A juvenile's inability to meet any one of the statutory conditions—ability to understand proceedings, comprehend situation, or assist counsel—bars further proceedings. *See State v. Shytle*, 323 N.C. 684 (1989); *State v. Jenkins*, 300 N.C. 578 (1980).

The cases sometimes refer to a fourth condition of capacity: the ability to cooperate with counsel to the end that any available defense may be interposed. *See, e.g., State v. Jackson*, 302 N.C. 101 (1981); *State v. O'Neal*, 116 N.C. App. 390 (1994). The North Carolina Supreme Court has held that trial courts need not make a specific finding on this fourth condition. *See Jenkins*, 300 N.C. 578 (1980). Nevertheless, the courts still appear to consider the condition to be a requirement of capacity, treating it as a subset of the statutory test. *See, e.g., Shytle*, 323 N.C. 684 (1989).

C. Medication

A juvenile may have capacity to proceed even though capacity to proceed was achieved through medication. *See State v. Cooper*, 286 N.C. 549 (1975) (medication was necessary to prevent exacerbation of mental illness and did not dull defendant's mind). The North Carolina courts have not specifically addressed the use of medication or forced medications to achieve capacity to proceed in a juvenile delinquency proceeding. *See generally Sell v. United States,* 539 U.S. 166 (2003) (constitution allows the government to force a mentally ill defendant facing serious criminal charges to take antipsychotic drugs to render the defendant competent to stand trial if the treatment is medically appropriate, substantially unlikely to have side effects that would undermine fairness at trial, and the least intrusive way to further important governmental interests).

D. Time of Determination

The juvenile's capacity to proceed is evaluated as of the time of the adjudicatory hearing or other proceeding. The question of capacity may be raised at any time by the juvenile, the court, or the prosecutor. *See* G.S. 15A-1002(a); *Drope v. Missouri*, 420 U.S. 162 (1975)

(competency issues may arise during trial). When the question of capacity arises before the adjudicatory hearing, the court should determine the question before proceeding with the hearing. *See State v. Silvers*, 323 N.C. 646, 653 (1989); *State v. Propst*, 274 N.C. 62, 69 (1968).

Because capacity to proceed is measured as of the time of the proceeding, more recent examinations or observations of the juvenile tend to carry more weight. *See State v. Silvers*, 323 N.C. 646 (1989) (conviction vacated where trial court based finding of competency entirely on psychiatric examinations conducted three to five months before trial and excluded more recent observations by lay witnesses); *State v. Reid*, 38 N.C. App. 547 (1978) (trial court's finding of competency *not* supported by evidence where State's expert testified as follows: defendant was suffering from chronic paranoid schizophrenia; defendant was competent at time of examination two to three months earlier, but condition could worsen without medication; and State's expert had not reexamined defendant and had no opinion on defendant's competency at time of competency hearing).

E. Compared to Other Standards

Incapacity to proceed distinguished from insanity defense. Incapacity to proceed is determined after a juvenile has been alleged to have committed a delinquent act and prior to or during the adjudicatory hearing on the allegations. The incapacity refers to the juvenile's ability to understand and participate in the adjudicatory hearing and other proceedings. An insanity defense relates to the juvenile's state of mind at the time the alleged delinquent act occurred. A juvenile who is "insane" at the time of hearing might be found incapable of proceeding. An insanity defense cannot be raised, however, unless the juvenile is capable of proceeding to the adjudicatory hearing. *See State v. Propst*, 274 N.C. 62 (1968) (comparing capacity to proceed with insanity).

Capacity to proceed and capacity to admit. The standard of capacity for admitting the allegations at the adjudicatory hearing is the same as the standard of capacity to proceed with the added proviso that the juvenile also must act knowingly and voluntarily in making any admission. *See* G.S. 7B-2407 (When admissions by juvenile may be accepted).

F. Burden of Proof

The juvenile has the burden of proof to show incapacity to proceed. *See In re H.D.*, 645 S.E.2d 901 (2007) (unpublished), *citing State v. O'Neal*, 116 N.C. App. 390 (1994); *see also Medina v. California*, 505 U.S. 437 (1992) (burden of proof to show incompetence may be placed on defendant). The burden may not be higher than by the preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348 (1996).

7.6
Investigating Capacity to Proceed

A. Duty to Investigate

Counsel has a duty to make a "reasonable investigation" into the juvenile's capacity to proceed to an adjudicatory hearing. *See Becton v. Barnett*, 920 F.2d 1190, 1192–93 (4th Cir. 1990) (counsel must make reasonable investigation into defendant's capacity to proceed and must use reasonable diligence in investigating capacity; counsel may not rely on own belief that defendant was incapable of proceeding). Counsel should first try to discuss with the juvenile the issue of raising capacity and its consequences. As an officer of the court, however, counsel has a duty to raise the issue if there is a "good faith doubt" as to capacity to proceed. *See* ABA Criminal Justice Standards, Standard 7-4.2(c) (Responsibility for raising the issue of incompetence to stand trial) and Commentary; *see also infra* Appendix 7-1 (Practical Tips for Attorneys on Using Capacity, by Valerie Pearce); *see generally* 1 North Carolina Defender Manual § 2.3A (Ethical Considerations).

B. Guides for Assessment

Counsel must assess the juvenile's behavior or symptoms in terms of the legal test for capacity. A primary source of information is Thomas Grisso, *Clinical Evaluations for Juveniles' Competence to Stand Trial: A Guide for Legal Professionals* (Professional Resource Press, 2005).

C. Sources of Information

Personal interview. A face-to-face meeting—at which counsel can observe the juvenile's speech, thinking, appearance, mannerisms, and other behavior—provides the best opportunity to assess the juvenile's condition and its potential effect on capacity to proceed. Counsel may observe unusual or inappropriate behavior while interacting with the juvenile. The juvenile's inability to understand a simple explanation of the proceedings, repeatedly asking the same questions, responding to internal stimuli, giddiness, or extreme sadness may be signs of an underlying condition affecting capacity to proceed.

Counsel should obtain permission from the juvenile during the meeting to talk with parents or other people who may have information about the juvenile's condition.

Medical history. Counsel should obtain the juvenile's medical history, including any history of mental health treatment, and ask that the juvenile and the parent, guardian, or custodian sign several original release forms for medical and other records. Parents and other caretakers may be able to provide more specific information concerning past treatment and diagnoses.

Witnesses. The juvenile's family and friends may have helpful information about the juvenile's condition. Other people who see the juvenile daily, including staff at the detention center if the juvenile is in secure custody, teachers, foster parents, group home staff, and social workers, may have observations relevant to the issue of capacity to proceed.

School records. School records that reflect poor academic performance, repeated suspensions, or an expulsion may be indicative of mental illness or other disability. Past or continuing

concerns about the juvenile's level of functioning may be disclosed in school records. Counsel should review report cards, disciplinary records, and other school records that describe the juvenile's behavior.

Individualized Education Program. School records are a particularly good source of information if the juvenile has an Individualized Education Program (IEP), which is mandated by the federal government for each child in public school who has been identified as having a disability requiring a special education plan. The IEP must be tailored to the juvenile's needs as determined by evaluations and assessments by qualified professionals.

Commitment proceedings. The juvenile may have been voluntarily admitted or involuntarily committed in the past. To obtain court records from prior proceedings, counsel may make a motion to the district court that heard the case. *See* G.S. 122C-54(d). For medical records not in the court file, counsel must submit a release to the appropriate hospital or other facility. Counsel also may make a motion to the juvenile court to compel production of records from other court proceedings or medical records in the possession of a nonparty. *See generally* 1 North Carolina Defender Manual § 4.7A (Evidence in Possession of Third Parties).

Other records. Several other types of records may contain relevant information, including prior juvenile records. Counsel should also ask whether the juvenile's parent receives a monthly payment from the Social Security Administration as a result of the juvenile's disability.

7.7 Consequences of Questioning Capacity

While counsel has a good faith duty to ensure that the juvenile is legally capable of proceeding, counsel should be aware of the potential repercussions, positive and negative, of questioning capacity.

A. Potential Benefits

Some of the benefits of questioning capacity to proceed include the following:

- The petition may be dismissed by the prosecutor.
- The examination may lead to needed treatment.
- A juvenile found incapable of proceeding cannot be adjudicated delinquent, precluding both an adjudication and the subsequent dispositional order.
- Even if the juvenile is found capable to proceed, the examination and hearing may generate evidence in support of a mental health defense, a favorable disposition, or a motion to suppress a confession on the ground that the juvenile did not knowingly and voluntarily waive *Miranda* or statutory rights.
- Information about the juvenile's mental condition may have a positive impact on discussions with the prosecutor and the juvenile court counselor.

B. Potential Adverse Consequences

Some of the adverse consequences that result from questioning competency include the following:

- The evaluation may result in disclosure of information that is damaging to the juvenile at disposition and could potentially be admitted during the adjudicatory hearing. Counsel should seek to minimize this risk by moving for an *in camera* review of the evaluation and for an order limiting the use of the evaluation. *See infra* § 7.9E (Limiting Scope and Use of Examination).
- An evaluation on capacity to proceed prior to the juvenile's making of a motion for funds for an expert (*see infra* § 7.8A (Procedures to Obtain Expert Evaluation)) may hurt the juvenile's chance for success on a motion for an expert or may result in the appointment of the examiner who performed the capacity exam.
- If found incapable of proceeding and involuntarily committed, the juvenile will be confined for some period, even though there might have been no confinement if adjudicated delinquent, or the confinement might be for a longer period than under a dispositional order, particularly if the underlying offense is a misdemeanor or the juvenile does not have a significant history of delinquency.
- The juvenile may be confined while proceedings to determine capacity are pending. *See* G.S. 15A-1002(b)(2) (court may commit defendant to state hospital for up to 60 days for evaluation, although the stay is ordinarily shorter); G.S. 15A-1002(c) (court may order defendant confined after evaluation and pending hearing). It is not uncommon for a juvenile to be placed in a detention facility pending an evaluation. Counsel should request a hearing to review secure custody and argue for release if the juvenile does not meet the statutory criteria. *See infra* § 8.5C (Criteria for Secure Custody Pending Adjudication).
- A finding of incapacity to proceed and subsequent involuntary commitment may stigmatize the juvenile.

7.8 Obtaining an Expert Evaluation

A. Procedures to Obtain Expert Evaluation

There are three ways that counsel may obtain expert assistance to evaluate capacity.

Ex parte motion. Counsel may obtain the assistance of a mental health expert for the juvenile by filing an *ex parte* motion with the court. *See* 1 North Carolina Defender Manual § 5.4 (Obtaining an Expert *Ex Parte*) (May 1998), at www.ncids.org. The motion does not ask the court to determine the defendant's capacity. Rather, it seeks funds for counsel to hire an expert of counsel's choosing to provide assistance on all applicable mental health issues. Once the expert has evaluated the juvenile, counsel will be in a better position to determine whether there are grounds for questioning capacity to proceed. Moving for funds for an expert affords counsel the best opportunity to obtain an expert who is well versed in

evaluating, diagnosing, and treating children and adolescents. Counsel should include in the *ex parte* motion the amount necessary to pay for expert's services. *See infra* Appendix 7-2 (Motion and Order for Funds to Hire an Expert).

One of the principal benefits of the above procedure is greater confidentiality. Because the motion is *ex parte,* it does not reveal to the prosecution that counsel has a question about the juvenile's mental condition. Also, if counsel decides not to raise lack of capacity or call the expert as a witness, the prosecution generally does not have a right to the results of the examination. *See* 1 North Carolina Defender Manual § 4.9C (discussing general prohibition in criminal cases on disclosure of nontestifying expert's report and circumstances in which disclosure may be allowed) (May 1998 & Supp. Sept. 1999), at www.ncids.org.

Motion requesting court to appoint a particular expert. Theoretically counsel could file a motion questioning the juvenile's capacity to proceed and asking the court to appoint a particular expert to examine the juvenile. *See* G.S. 15A-1002(b)(1) (court may appoint one or more impartial medical experts). Typically, however, the court uses the local mental health center to perform evaluations of capacity to proceed.

Motion for examination by local examiner or state facility. Counsel may begin the evaluation of capacity to proceed by obtaining an examination of the juvenile at a state or local mental health facility rather than moving for funds for an expert. *See infra* § 7.9 (Examination by Local Examiner or State Facility). Examination by a local examiner or state facility may be the only means of obtaining an expert's assistance in some cases. Counsel should ask if the local examiners use testing designed to evaluate children and adolescents and request that testing and techniques designed especially for children and adolescents be employed.

B. Choosing Which Motion to Make

In appropriate cases, counsel should consider obtaining an evaluation of the juvenile by moving *ex parte* for funds for an expert rather than moving initially for an examination at a state or local mental health facility. In determining whether to seek funds for the juvenile's own expert, counsel should consider factors such as the seriousness of the charges, the presence of other mental health issues, the importance of keeping the juvenile's statements confidential, the likelihood that the case will go to trial, and the opportunity to obtain an examiner who employs tools and techniques specifically tailored to evaluate children and adolescents.

C. Choosing an Expert

Most examiners have much more experience evaluating the capacity to proceed of adult defendants. Counsel should consider using an evaluator who employs tools and techniques specifically tailored to evaluate children and adolescents. *See* Thomas Grisso, *Clinical Evaluation for Juveniles' Competence to Stand Trial: A Guide for Legal Professionals* (Professional Resource Press, 2005) 15–16.

D. Contents of Motion

Counsel should detail the specific conduct or information that warrants funds for an expert or a capacity examination at a state or local facility, including observations of counsel. *See* Juvenile Defender/Motions & Forms/Motion And Order To Determine Competency at www.ncids.org (Juvenile Defender). If the showing contains confidential information, including information contained in the course of privileged attorney-client communications, counsel may ask the court to review the information *in camera*. If the motion is for funds for an expert, the motion and accompanying showing should always be made *ex parte*. *See infra* Appendix 7-3 (Motion and Order to Determine Competency).

7.9
Examination by Local Examiner or State Facility

Counsel may begin the evaluation of capacity to proceed by obtaining an examination of the juvenile at a state or local mental health facility (rather than moving for funds for an expert, discussed *supra* § 7.8). It is important that the examiner be someone who is trained in child development and evaluation.

A. Moving for Examination

Time limit. There is no formal time limit on a motion questioning the juvenile's capacity and requesting an examination. Lack of capacity may be raised at any time. *See* G.S. 15A-1002(a). A court may be unreceptive, however, to a last-minute motion. *See, e.g., State v. Washington,* 283 N.C. 175 (1973) (characterizing as "belated" a motion for initial examination two weeks before trial). A sample motion is included in Appendix 7-3 *infra*. *See also* Form AOC-CR-208 (Motion and Order Committing Defendant to Dorothea Dix for Examination on Capacity to Proceed) (March 2007), at www.nccourts.org/Forms/Documents/1023.pdf.

Second examination. The juvenile may be able to obtain a second examination if the report from the first examination has become stale or the juvenile's condition has changed. *See supra* § 7.5D (Time of Determination).

Motion for examination by prosecutor. The prosecution may request an evaluation of capacity to proceed. As with a motion by the juvenile for an examination, the prosecutor must detail the specific conduct warranting an examination. *See* G.S. 15A-1002(a). Counsel for the juvenile should be given notice of the motion. *See State v. Jackson,* 77 N.C. App. 491 (1985) (disapproving of entry of order for examination without notice to defendant); *see also infra* § 7.12B (discussing Sixth Amendment right to notice of examination). If the motion is granted, the juvenile may be able to limit the scope of the examination. *See infra* § 7.9E (Limiting Scope and Use of Examination).

B. Who Does Examination

Misdemeanors. If the underlying offense alleged is a misdemeanor, the juvenile must first be evaluated by a local forensic screener. *See* G.S. 15A-1002(b)(1), (2). The local screener may

find the juvenile capable or incapable of proceeding or may recommend that the juvenile be evaluated further at a State psychiatric facility. Local examinations tend to be short, consistent with the idea that they serve as a screening device. They may last less than a day, primarily involving an interview of the juvenile.

Felonies. If the underlying offense alleged is a felony, the court may order a local evaluation or may commit the juvenile to a State psychiatric facility. To commit the juvenile to a State facility without ordering a local evaluation first, the court must find that commitment is more appropriate. *See* G.S. 15A-1002(b)(2).

Courts do not generally use the option of commitment to a State facility, as there is no forensic unit for juveniles at any of the four State psychiatric hospitals. The juvenile statute specifically prohibits placement where the juvenile will come in contact with adults committed for any purpose. G.S. 7B-2401.

C. Providing Information to Examiner

Counsel should ensure that the examiner has access to relevant information concerning capacity to proceed, and may provide copies of records, if necessary. Observations of counsel concerning the juvenile's capacity that might be relevant may also be provided.

The National Juvenile Defender Center recommends that counsel submit a written request to the examiner outlining the specific areas to be addressed in the evaluation. *See* Juvenile Defender Delinquency Notebook at 51–55 (National Juvenile Defender Center, June 2006), at www.njdc.info/delinquency_notebook/interface.swf.

D. Confidentiality

Subject to certain exceptions, an examination at a state or local mental health facility is confidential. *See* G.S. 122C-52 (Right to confidentiality). Disclosure is allowed to a "client" ("an individual who is admitted to and receiving service from, or who in the past had been admitted to and received services from, a facility") or pursuant to a written consent to release of information to a specific person, in certain court proceedings, and for treatment and research. *See* G.S. 122C-53 through 122C-56. For juvenile court purposes, the most significant of these exceptions are as follows:

- The facility may provide a report of the examination to the court and prosecutor in the circumstances described in subsection F below. *See* G.S. 122C-54(b).
- The results of the examination, including statements by the juvenile, could be admissible at subsequent court proceedings. *See infra* §§ 7.11 (Hearing on Capacity to Proceed), 7.12 (Admissibility at Adjudication of Results of Capacity Evaluation); *see also* G.S. 122C-54(a1) (use in involuntary commitment proceedings).
- The facility may disclose otherwise confidential information if a court of competent jurisdiction orders disclosure. *See* G.S. 122C-54(a).

E. Limiting Scope and Use of Examination

A central part of any court-ordered examination is the interview of the juvenile. The interview likely will cover the alleged offense, as the juvenile's understanding of the allegations may bear on capacity to proceed. For suggestions on keeping confidential information from general disclosure, *see* Lourdes M. Rosado and Riya S. Shah, *Protecting Youth from Self-Incrimination when Undergoing Screening, Assessment and Treatment within the Juvenile Justice System* (2007), at www.jlc.org/files/publications/protectingyouth.pdf.

Discussed below are options for limiting the scope of an examination. For a discussion of the admissibility of the examination results, *see infra* § 7.12.

Refusal to discuss offense. The North Carolina courts have not addressed the question of whether the juvenile may refuse to discuss the alleged offense when the examination concerns only capacity to proceed. The juvenile's refusal may result in an incomplete report, however, and may make it difficult to show incapacity.

Presence of counsel. The North Carolina Supreme Court has held that there is no constitutional right to the presence of counsel during an examination concerning capacity to proceed. *State v. Davis*, 349 N.C. 1, 20 (1998). Counsel may request, however, that the examiner allow counsel to be present during the interview portion of the evaluation. If the examiner refuses, counsel may ask the court to exercise its discretion to order that counsel be permitted to attend the interview portion of the examination.

Court order. Counsel for the juvenile may request a court order limiting the scope and use of the evaluation. Such an order might provide that the examiner is to report to the court on the issue of capacity to proceed only and is not to inquire into any area not necessary to that determination, that the results are to be used for the determination of capacity only and for no other purpose, and that information obtained during the evaluation regarding the alleged offense may not be divulged to the prosecution. Additionally, counsel should request that the evaluation be submitted and remain under seal in the juvenile court file, to be disclosed only pursuant to further order of the court.

F. Report of Examination

A copy of the examination report is to be provided to the clerk of court in a sealed envelope addressed to the attention of the presiding judge. G.S. 15A-1002(d). Additionally, a copy of the report is to be provided to defense counsel or to the defendant if not represented by counsel. *Id.* G.S. 15A-1002(d) then states that "if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney." This statutory scheme contemplates that the court and the defense are to get a copy of the report automatically after a capacity examination, but that the prosecutor is to get a copy of the report only if capacity is questioned after the examination and further court proceedings are necessary.

The above-quoted provision of G.S. 15A-1002(d) was intended by the General Assembly to limit the prosecution's access to capacity evaluations. Previously, the statute provided for reports to be sent automatically to the defense and the prosecution. *See* S.L. 1979-1313

(S 941). In 1985, however, the General Assembly added the current language of the statute as part of a bill entitled: "An act to provide that an indigent defendant's competency evaluation report will not be forwarded to the district attorney." S.L. 1985-588 (S 696). Therefore, the prosecutor should receive a copy of the evaluation only if capacity continues to be an issue and a hearing is necessary.

In 2003, the General Assembly amended G.S. 122C-54(b) to require facilities to disclose a capacity examination as provided in G.S. 15A-1002(d). This change was part of a larger act dealing with mental health system reform. *See* S.L. 2003-313, sec. 2 (H 826), at www.ncga.state.nc.us/Sessions/2003/Bills/House/HTML/H826v4.html. Previously, G.S. 122C-54(b) stated that a facility "may" send the capacity report to the specified persons as provided in G.S. 15A-1002(d). Now, G.S. 122C-54(b) provides that the facility "shall" send the report as provided in G.S. 15A-1002(d). Thus, the disclosure provisions in G.S. 122C-54(b) continue to be linked to the requirements of G.S. 15A-1002(d), authorizing the facility to disclose a capacity examination report only to the extent provided in G.S. 15A-1002(d).

Note: It appears that some facilities have interpreted the 2003 change to G.S. 122C-54(b) as authorizing automatic disclosure of capacity evaluations to the prosecutor. Therefore, when requesting a capacity evaluation, defense counsel should ask the court to enter an order prohibiting the facility and examiners from disclosing the evaluation to the prosecutor except on further order of the court.

Note: Beware of older AOC forms for a psychiatric evaluation, which still may be in circulation, directing examiners to send a copy of the report to the prosecutor.

7.10 Post-Examination Procedure

A. After Examination Finding Juvenile Capable of Proceeding

G.S. 15A-1002(b) states that a hearing "shall" be held after a court-ordered evaluation of capacity to proceed, but a hearing may not occur if the evaluation states that the juvenile is capable of proceeding and counsel does not request a hearing. The court must initiate a hearing on its own motion only when the evidence suggests that the juvenile lacks capacity to proceed. *See State v. Heptinstall*, 309 N.C. 231 (1983) (judge has constitutional duty to initiate competency hearing when evidence indicates that defendant may be incompetent); *State v. Young*, 291 N.C. 562 (1977) (defendant may waive hearing by failing to request one); *Meeks v. Smith*, 512 F. Supp. 335 (W.D.N.C. 1981) (setting aside state-court conviction on ground that incompetent defendant may not waive right to competency determination).

B. After Examination Finding Juvenile Incapable of Proceeding

The provisions of Chapter 15A-1004 through 15A-1009, which list the options available for resolution of a criminal case when the defendant is found incapable of proceeding, are not

incorporated into the Juvenile Code. *See* G.S. 7B-2401. Counsel may consider the following alternatives.

Dismissal. Counsel may advocate to the prosecutor that dismissal is the appropriate resolution of the case when the juvenile lacks capacity to proceed. Arrangement for treatment or other plans to address the juvenile's underlying problems will bolster this argument. Although there is no specific provision in the Juvenile Code for the prosecutor to dismiss the petition on a finding of lack of capacity, there is no bar to doing so and it would be within a prosecutor's authority. Dismissal is most appropriate if the juvenile's incapacitating condition is permanent or long-term, or if the juvenile is in ongoing or residential treatment. *See also* 1 North Carolina Defender Manual § 2.8A (May 1998) (discussing constitutional grounds for dismissal of charges against defendant who is unlikely to gain capacity to proceed), at www.ncids.org.

Hearing on capacity to proceed. If the prosecutor is unwilling to stipulate to lack of capacity, or the court is unwilling to accept a stipulation, counsel must request a formal hearing on the juvenile's capacity to proceed. G.S. 15A-1002(b).

7.11
Hearing on Capacity to Proceed

A. Request for Hearing

A hearing on capacity is typically calendared on receipt of the examiner's report, but if one has not been calendared, counsel should specifically request a hearing on capacity to proceed. Some criminal cases have upheld the denial of a hearing for counsel's failure to make a specific request for one or failure to supply sufficient supporting detail. *See State v. Rouse,* 339 N.C. 59 (1994) (counsel moved for examination during trial, but motion did not specifically request hearing and did not genuinely call defendant's capacity into question).

B. Nature of Hearing

A hearing on capacity to proceed must, at a minimum, afford the juvenile the opportunity to present any evidence relevant to capacity to proceed. *See State v. Gates*, 65 N.C. App. 277 (1983). Generally, the court holds an evidentiary hearing, at which the parties may call and cross-examine witnesses and the court makes findings of fact. *See State v. O'Neal*, 116 N.C. App. 390 (1994) ("better practice" is for judge to make findings).

C. Evidentiary Issues

Generally. The rules of evidence are more relaxed at a hearing on capacity to proceed than at an adjudicatory hearing. The judge may not base findings on inadmissible evidence, however, so counsel should continue to object when appropriate. *See State v. Willard*, 292 N.C. 567, 574–75 (1977) ("safer practice" for court to follow rules of evidence during hearing on pre-trial motion).

Examination results. Either party may call the examiner from a court-ordered examination, and the examiner's report is admissible on the question of capacity to proceed. *See* G.S. 15A-1002(b); *State v. Taylor*, 304 N.C. 249 (1981).

Expert opinion. An expert may give an opinion on whether the juvenile is able to perform the functions listed in G.S. 15A-1001(a): to understand the proceedings, comprehend the situation, and assist in the defense. The expert may specifically use those terms in testifying. The expert may not testify, however, that the juvenile is or is not "competent" or does or does not have the "capacity to proceed," as those terms are considered improper legal conclusions. *See State v. Smith*, 310 N.C. 108, 114–15 (1984).

Lay opinion. Testimony by lay witnesses may support or even override expert testimony. Lay witnesses may relate their observations of and dealings with the juvenile. Further, if they have a reasonable opportunity to form an opinion, lay witnesses may give their opinion about whether the juvenile is able to perform the functions listed in G.S. 15A-1001(a). *See State v. Silvers*, 323 N.C. 646 (1989) (vacating conviction and remanding case for failure to allow defendant to present testimony of lay witnesses); *State v. Smith*, 310 N.C. 108 (1984) (expert and lay witnesses may testify in terms of factual descriptions in statute); *State v. Willard*, 292 N.C. 567 (1977) (upholding finding of competency based in part on testimony of lay witnesses). If the court disallows the testimony of the lay witness, counsel must make an offer of proof to preserve the testimony of the witness in the event of an appeal. *In re H.D.*, 645 S.E.2d 901 (2007) (unpublished) (although proper foundation laid to ask opinion of lay witness, issue not preserved for appellate review because no offer of proof).

Counsel's observations and opinion. Defense attorneys may offer their own observations and opinions about the juvenile's capacity, but such statements without more may be unpersuasive and may not even be permitted. *See State v. Gates,* 65 N.C. App. 277 (1983) (upholding capacity finding where counsel offered own observations of defendant's behavior but presented no medical evidence); *In re H.D.,* 645 S.E.2d 901 (2007) (unpublished) (counsel's statement that he felt juvenile lacked capacity was not competent evidence and did not provide basis for reversing finding of capacity; Court also found no error in trial court's ruling that counsel could not testify about his juvenile client's capacity unless he withdrew from representation); *but see State v. McRae,* 163 N.C. App. 359 (2004) ("Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent"); N.C. Rules of Professional Conduct, Rule 3.7(a)(3) (lawyer may act as advocate at trial in which lawyer is likely to be necessary witness if disqualification of lawyer would work substantial hardship on client), Rule 1.14(c) (lawyer is impliedly authorized to reveal confidential information about client with diminished capacity to extent reasonably necessary to protect client's interest).

D. Objection to Finding of Capacity

To ensure that the issue is preserved for appeal, counsel should object to a finding of capacity to proceed on entry of the order at the conclusion of the capacity hearing and again at the beginning of the adjudicatory hearing. *In re Pope*, 151 N.C. App. 117 (2002). In *Pope*,

although the juvenile's attorney filed a motion alleging incapacity to proceed and an affidavit in support of the motion, which in most contexts would be sufficient to preserve the issue for appeal, the Court held that counsel had waived the issue by not objecting to the finding of capacity after the hearing or objecting to capacity at the adjudicatory hearing. This ruling appears to resurrect the requirement that counsel state an "exception" to the court's ruling, at least with respect to a finding of capacity. *Compare infra* § 11.2C (Renewal of Objection at Hearing) (counsel must object to evidence that was the subject of an unsuccessful suppression motion when the evidence is offered at the adjudicatory hearing).

E. Effect of Finding of Incapacity by Court

Currently, there is no authority that sets out the court's options when a juvenile is found incapable of proceeding. In most jurisdictions, the charges are dismissed without leave. In other jurisdictions, the charges are dismissed with leave.

While the court may hospitalize a juvenile after making findings that the juvenile requires commitment, there doesn't seem to be any procedure by which the juvenile is brought back to court after the juvenile becomes "capable." *See generally* North Carolina Civil Commitment Manual (2006).

7.12
Admissibility at Adjudication of Results of Capacity Evaluation

The admissibility at the adjudicatory hearing of the results of a court-ordered capacity examination is a complicated topic, reviewed only briefly here. Several arguments, legal and factual, exist for excluding or at least limiting the use of the examination, including the juvenile's statements to and the opinions formed by the examiners. Although evidence from the examination may be less likely to be offered or admitted in juvenile court for issues other than capacity, counsel should anticipate the possibility that the results of a court-ordered examination of capacity to proceed may be admitted. *See supra* § 7.9E (Limiting Scope and Use of Examination).

A. Doctor-Patient Privilege

The doctor-patient privilege does not protect the results of a court-ordered evaluation of capacity to proceed. *See State v. Williams*, 350 N.C. 1, 20-21 (1999); *State v. Taylor*, 304 N.C. 249, 271-72 (1981).

B. Fifth and Sixth Amendment Protections

Subject to certain key exceptions (discussed in C, below), the Fifth Amendment privilege against self-incrimination generally applies to evaluations of capacity to proceed and precludes use of the results at the guilt-innocence or sentencing phase of a criminal trial. *See Estelle v. Smith*, 451 U.S. 454 (1981).

The Sixth Amendment right to counsel also precludes a psychiatric examination of the juvenile without notice to the juvenile's counsel of the scope and nature of the examination. *Estelle*, 451 U.S. 454, relied on this additional ground in holding that the results of a competency examination were inadmissible at trial, reasoning that the defendant was denied the assistance of his attorney in deciding whether to submit to the examination.

C. Rebuttal of Mental Health Defense

If the juvenile relies on a mental health defense and presents expert testimony in support thereof, the results of a court-ordered examination on capacity to proceed are admissible to rebut the testimony. The courts have held that the Fifth Amendment does not apply in this instance. *See Buchanan v. Kentucky*, 483 U.S. 402, 422–23 (1987); *State v. Huff*, 325 N.C. 1, 44 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990); *see also State v. Atkins,* 349 N.C. 62, 107–08 (1998) (no violation of Fifth Amendment by prosecution's use of capacity examination to rebut mental health evidence offered by defendant at sentencing phase of capital trial). The courts have also held that the Sixth Amendment does not bar use of the examination results because counsel should have anticipated and advised the client that the examination could be used to rebut a mental health defense. *See State v. Davis,* 349 N.C. 1, 43–44 (1998).

Under the reasoning of *Buchanan* and *Huff,* the Fifth Amendment may protect the examination results if the juvenile relies on a mental health defense but does not introduce expert testimony. Courts have also held that the prosecution may only offer evidence from the evaluation of capacity to proceed with respect to the mental condition raised by the defendant; the evidence cannot be submitted on the issue of guilt. *See* Criminal Justice Mental Health Standards Standard 7-3.2 commentary (American Bar Association, 1989) (citing cases).

D. Waiver

Estelle v. Smith and other Supreme Court decisions involving psychiatric examinations suggest in dicta that a defendant (or juvenile respondent) might be able to waive Fifth Amendment rights after proper *Miranda*-style warnings. 451 U.S. 454 (1981). In none of those cases, however, did the Court actually allow admission of the evaluation results based upon a waiver of rights, and this dicta is unlikely to be followed.

Counsel should argue against any suggestion that a juvenile could waive this important constitutional right in the context of a capacity evaluation. *See* 1 North Carolina Defender Manual § 2.9E (Waiver) (May 1998 and Supp. Sept. 1999) (discussing authorities and arguments against waiver).

Appendix 7-1

Practical Tips for Attorneys on Using Capacity

By Valerie Pearce

1. Meet with client as soon as possible after appointment to case.
2. Take time to get to know client, establish rapport and trust. (See interview tips and information about what information to look for in the interview)
3. Observe client and family members.
4. After talking with client, interview family and other interested parties and obtain as much detailed information as possible.
5. Get releases signed for records.
6. Obtain and review discovery, including written statements and audio/video recordings of statements.
7. Decide if there is competency to proceed, capacity to proceed, or capacity limited to suppression issue.
8. If so, file appropriate motions for evaluations.
   - Evaluations should be completed by a competent, experienced evaluator knowledgable about juvenile capacity. The evaluator must be skilled at doing culturally sensitive assessments of adolescent development. Mental health professionals qualified to diagnose mental disorders in adults are not necessarily qualified to identify adolescent developmental disabilities or mental illness. Be particularly attentive to qualifications of mental health examiners and the quality of their evaluations. You may need to obtain an order for the court to pay for a specific examiner who is qualified to do these types of evaluations in children. An expert witness will be helpful in explaining the research and its implications in juvenile court.
9. Gather complete records from the Department of Social Services, Schools, Medical records, Mental Health and Developmental Disability records, Substance Abuse records, Department of Juvenile Justice records, any psychological or psychiatric testing, including IQ tests, Special education records and IEP's, any written or oral statements made by the juvenile, any audio or video recording of interviews, investigator notes of all officers involved in interviewing, investigating, or transporting the juvenile, detention records, case management records, and any other agency or program involved with the juvenile that may be relevant.
10. You may need court orders to obtain some records.
11. Provide records to the evaluator.

12. Go over the statements and any audio or video recordings with a fine tooth comb, paying close attention to the interrogation environment, tone of voice, verbal and non verbal communication between the juvenile and the officers, terms used, and observations of the juvenile's reactions.
13. File a written motion to suppress with an affidavit and request that a pre-trial hearing be set.
14. Consider putting together a memorandum of law to provide to the court, as well as copies of case law and research articles on this issue.
15. Be specific and detailed in laying out the circumstances for the judge that show that this was NOT a voluntary, knowing, or intelligent waiver.
16. Prepare for the hearing and subpoena witnesses. Use records and have copies for the court when helpful
17. Prepare your expert. The expert will need to be able to explain the research in simple layman terms and how it applies in this particular case.
18. Decide whether or not you will put the juvenile on the stand and if so, prepare him for what to expect in the courtroom.
19. Be prepared for adverse reactions from the Court and from court personnel. Be prepared to hear such comments as;
    - "If you do this, you will open up the floodgates."
    - "Are you going to raise capacity in every case?"
    - "This is just juvenile court, this court is about treatment and not punitive."
    - "The child needs to accept consequences for his actions and this is a door to services"
    - "Why are you trying to make this court like adult court?"
    - "This is just a delay tactic."
    - "This is a waste of court time and money."

    Some suggested responses:
    - "It is our job as juvenile defenders to ensure that the most vulnerable in our society are given every protection allowed under the Constitution."
    - "Justice naturally requires that we assure accuracy. It would be unfair to the alleged victims and to the courts if this child made statements that were inaccurate and the real suspects went unpunished because we assumed that the statements were true."

    Keep the court focused on this individual child and their individual circumstances.
20. Just because a child says they understand does not make it true.
21. The ability to read does not equal understanding.
22. The law presumes that children under the age of 18 are not capable of deciding about medical treatment, entering into binding legal contracts, or operating automobiles.

Why then do we assume that they are capable of understanding complicated legal concepts and waive their constitutional rights?

23. When involved in the suppression hearing, be sure to flesh out all of the details that add up to the totality of the circumstances. Most officers have not been trained on how to interview children. They are focused on obtaining a confession in order to prove their theory of the case and are trained in using adult tactics. Focus on what they did not pick up on and what they did not do as well as what they said and did in the interrogation of the child. Keep the focus on the fact that this was a "child" and not an adult.
24. If the juvenile client takes the witness stand, keep the child focused on how they felt and what their perception was of the interrogation. You want the judge to see through the eyes of the child.
25. If the judge denies the motion to suppress, continue to object for the record so that you do not waive the issue at trial and preserve the issue for appeal.

Appendix 7-2

Ex Parte Motion and Order for Funds to Hire an Expert

STATE OF NORTH CAROLINA [ ] COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. [ ]
STATE OF NORTH CAROLINA)) v.)) [JS, A JUVENILE])	EX PARTE MOTION AND ORDER FOR FUNDS TO HIRE AN EXPERT

NOW COMES the Juvenile, by and through his counsel, and respectfully moves this Honorable Court, pursuant to N.C. Gen. Stat. § 7A-454, Article I of the North Carolina Constitution, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, for an ex parte Order allowing him to retain the services of a competent and qualified physician, psychologist or psychiatrist to assist counsel in the preparation of his defense.

As grounds for this Motion, the Juvenile alleges:

1) He is indigent and is represented in this matter by appointed counsel.

2) He faces charges of [LIST CHARGES] in the above-captioned case.

3) In *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985) the United States Supreme Court determined that a Defendant was entitled to make his showing for the necessity

of money for an expert's assistance ex parte 470 U.S. at 82, 84 L.Ed. 2d at 66.

4) The North Carolina Supreme Court reiterated the rule of *Ake* in *State v. Ballard*, 333 N.C. 515 (1993), in which the court reversed the defendant's murder conviction for failure of the trial court to allow the defense to make an ex parte showing of the need for the assistance of an expert witness.

5) Privately employed counsel representing a non-indigent juvenile would not be required to reveal to the prosecution her employment of or consultation with an expert witnesses, except as required by the rules of discovery. Equal protection guarantees of the United States Constitution and of the North Carolina Constitution require that appointed counsel not be forced to reveal their thoughts, reasoning and strategy as to expert assistance to the State during a hearing on application to the court for funds for those experts.

6) Further, for the court to require an in-court showing of the need for expert assistance would pose a risk to the juvenile's privilege against self-incrimination and to confidential communications between attorney and client.

7) After speaking with the Juvenile and otherwise reviewing the case, counsel has reason to believe that an expert in the field of psychology, psychiatry and/or medical testing is crucial to the preparation of his defense. *See Williams v. Martin*, 618 F. 2d 1021 (4th Cir. 1980)(the obligation of the government to provide an indigent defendant

with the assistance of an expert is firmly based on the Equal Protection Clause).

8) The State has used and is expected further to utilize the services of numerous experts, including criminal investigators, medical experts, and others in the investigation, preparation and trial of this case.

9) Without the funds to hire experts to conduct investigations necessary for the preparation of a defense, the Juvenile's constitutional rights to a fair trial and to present a defense are rendered meaningless. *See*, e.g., *Westbrook v. Zant*, 704 F.2d 1487, 1496 (11th Cir. 1983)(permitting an indigent defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable).

10) The Juvenile is entitled to expert assistance to assure him of his rights under the North Carolina Constitution, Article I, Sections 14, 23, and 27 as well as his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. These rights include that of effective assistance of counsel, to be confronted by the witnesses against him and to obtain witnesses in his favor, to present a defense, to due process, to equal protection, and to individual, reliable sentencing.

11) Because of the nature of the charges and the age and mental characteristics of the Juvenile, an expert in the areas of psychology or psychiatry with a specialization

in cognitive functioning is essential to the preparation of an adequate defense and to a fair trial and is a necessary expense of
representation under N.C. Gen. Stat. § 7A-450.

12) The Juvenile requests that the Court authorize him to spend up to [AMOUNT] for the consultation with such an expert in this case.

Wherefore, the Juvenile, requests this Honorable Court enter an Order authorizing him to retain the services of a qualified expert for the preparation of his case and to expend no more than [AMOUNT] for this purpose.

This the [ ] day of [ ], [ ].

_____

[ATTORNEY]
[ADDRESS]
[CITY, STATE, ZIP]
[TELEPHONE]

STATE OF NORTH CAROLINA [ ] COUNTY	IN THE GENERAL COURT OF JUSTICE DISTIRCT COURT DIVISION FILE NO. [ ]
IN THE MATTER OF) [JS, A JUVENILE])	) ORDER EX PARTE

This motion came on to be heard upon motion of the attorney for the Juvenile and was heard by the undersigned District Court Judge and for good cause shown and detailed in the Juvenile's Motion, it is ORDERED, ADJUDGED and DECREED as follows:

1. Counsel for the Juvenile is authorized to retain [EXPERT] as investigator to assist him and that the State of North Carolina shall pay for such services and expenses in the amount of [AMOUNT] an hour, not to exceed [AMOUNT].

2. If counsel demonstrates need for further services of the investigator, he shall seek leave of this court.

3. The Order and accompanying Motion and Affidavit are to be sealed and placed in the record.

This the [ ] day of [ ], [ ].

_____
[JUDGE]
District Court Judge

Appendix 7-3

Motion and Order to Determine Competency

STATE OF NORTH CAROLINA [ ] COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. [ ]
STATE OF NORTH CAROLINA)) v.)) [JS, A JUVENILE])	MOTION AND ORDER TO DETERMINE COMPETENCY

NOW COMES the Juvenile, by and through his attorney, and requests this Honorable Court to grant him a competency determination. In support of said motion the Juvenile states the following:

BACKGROUND

1. On [date], the Juvenile was charged with [CHARGE], in violation of N.C. Gen. Stat. § [STATUTE NUMBER].
2. Juvenile's counsel, [name of counsel], was assigned to represent him on [date].
3. On [DATE] at approximately [TIME], Counsel visited JS at the home of his grandmother.
4. Throughout the interview, JS seemed very distracted and preoccupied and appeared unable to concentrate. While Counsel was interviewing JS and explaining the pending charges to him, JS was inattentive and at times appeared confused. When she asked JS to read the police

report with her, JS refused and asked her to read it to him. While Counsel read the police report, JS did not pay attention but instead looked away and fidgeted with his hands and with nearby objects. *Id.*

5. There were several times during their meeting when Counsel had to insist that JS focus on her instead of watching television. During their conversations, when Counsel repeatedly asked JS to look into her eyes, he refused, responding, "I can't do it!" *Id.*
6. After interviewing JS, Counsel had serious questions about his ability to comprehend and understand on a rational level, as JS had persistently exhibited an extreme lack of concern, motivation, and appreciation for the ramifications of his decisions and actions. *Id.*
7. That same evening, Counsel spoke with JS's grandmother who told her that JS has an IQ of 68 and that he is considered borderline mentally-retarded. His grandmother also stated that JS has been diagnosed with attention-deficit hyperactivity disorder (ADHD) and is prescribed medication for the condition. *Id.*
8. His grandmother told Counsel that JS attends school regularly but has been suspended several times for disrupting the class and "acting out" with his teachers. JS has told his grandmother that he often finds it impossible to control his actions and that he isn't always aware of what is going on around him. *Id.*

9. As a result of the foregoing, Counsel has grave concerns about JS's capacity to fully understand the charges pending against him. Counsel questions whether JS is capable of understanding these charges and assisting her in his defense. Counsel therefore requests an evaluation to determine her client's ability to proceed with this case.

ARGUMENT

10. As set out in G.S. § 15A-1001(a) and as noted in *State v.McCoy*, 303 N.C. 1 (1981), the test of a defendant's mental capacity to stand trial is whether "by reason of mental illness or defect, he is unable to understand the nature and object of the proceedings against him, to comprehend his situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. *See also State v. McRae*, 139 N.C. App. 387 (2000) (trial court erred in not conducting competency hearing).

11. Therefore, as a result of her observations of and interactions with JS, and supported by the information provided by his grandmother, counsel contends that a psychological assessment of JS is necessary to determine whether JS has the capacity to proceed.

WHEREFORE, the Juvenile prays that this Honorable Court:

A. Grant him an assessment before proceeding with the charges brought against him.

B. Grant him any other mental or psychological evaluations that are deemed just and proper for effective defense in this case.

This the [ ] day of [ ], [ ].

_____
[Attorney]
[Address]
[City, State, Zip]
[Telephone Number]

* * * * *

Certificate of Service

I hereby certify that a copy of the foregoing motion was served on the District Attorney for the [NUMBER], Judicial District by deposit of said copy with [NAME], Assistant District Attorney.

This the _____ day of _____ [YEAR].

_____
[ATTORNEY]

STATE OF NORTH CAROLINA [ ] COUNTY	IN THE GENERAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. _____
STATE OF NORTH CAROLINA)) v.)) [JS, a Juvenile])	ORDER TO DETERMINE COMPETENCY

This matter coming before the undersigned district court judge for hearing on the Juvenile's Motion to Determine Competency, upon good cause shown, the Court finds as follows:

On [DATE], the Juvenile was charged with [CHARGES], in violation of N.C. Gen. Stat. § [STATUTE NUMBER].

1. The Juvenile is represented by [ATTORNEY].
2. For good cause shown, the Court has found that the Juvenile should be evaluated for competency before proceeding to adjudication.
3. Pursuant to the Motion to Determine Competency filed in this case on [DATE], the Court finds that the Juvenile is in need of a psychological assessment to determine whether he has the capacity to proceed to adjudication.

Therefore, it is ordered that the Juvenile be so evaluated.

This the [ ] day of [ ], [ ].

_____
[JUDGE]
District Court Judge

DEVELOPING A THEORY

If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense

by Stephen P. Lindsay

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So the file hits your desk. Before you open to the first page you hear the shrill noise of not just a single dog, but a pack of dogs. Wild dogs. Nipping at your pride. You think to yourself, "Why me? Why do I always get the dog cases? It must be fate." You calmly place the file on top of the stack of ever-growing canine files. Your reach for your cup of coffee and seriously consider upping your membership in the S.P.C.A. to "Angel" status. Just as you think a change in profession might be in order, your coworker steps in the door, new file in hand, lets out a piercing howl and says, "This one is the dog of all dogs. The mother of all dogs!" Alas. You are not alone.

Dog files bark because there does not appear to be any reasonable way to mount a successful defense. Put another way, winning the case is about as likely as a crowd of people coming to watch a baseball game at a ballpark in a cornfield in the middle of Iowa. According to the movie, *Field of Dreams,* "If you build it, they will come . . ." And they came. And they watched. And they enjoyed. Truth be known, they would come again, if invited —even if they were not invited.

Every dog case is like a field of dreams: nothing to lose and everything to gain. Believe it or not, out of each dog case can rise a meaningful, believable, and solid defense—a defense that can win. But as Kevin Costner's wife said in the movie, "[I]f all of these people are going to come, we have a lot of work to do." The key to building the ballpark is in designing a theory of defense supported by one or more meaningful themes.

What Is a Theory and Why Do I Need One?

Having listened over the last 20 years to some of the finest criminal defense attorneys lecture on theories and themes, it has become clear to me that there exists great confusion as to what constitutes a theory and how it differs from supporting themes. The words "theory" and "theme" are often used interchangeably. However, they are very different concepts. So what is a theory? Here are a few definitions:

- *That combination of facts (beyond change) and law which in a common sense and emotional way leads a jury to conclude a fellow citizen is wrongfully accused.*—Tony Natale
- *One central theory that organizes all facts, reasons, arguments and furnishes the basic position from which one determines every action in the trial.* —Mario Conte
- *A paragraph of one to three sentences which summarizes the facts, emotions and legal basis for the citizen accused's acquittal or conviction on a lesser charge while telling the defense's story of innocense or reduces culpability.* —Vince Aprile

Common Thread Theory Components

Although helpful, these definitions, without closer inspection, tend to leave the reader thinking "Huh?" Rather than try to decipher these various definitions, it is more helpful to compare them to find commonality. The common thread within these definitions is that each requires a theory of defense to have the same three essential elements:

1. a factual component (fact-crunching/ brainstorming);
2. a legal component (genre); and
3. an emotional component (themes/ archetypes).

In order to fully understand and appreciate how to develop each of these elements in the quest for a solid theory of defense, it

is helpful to have a set of facts with which to work. These facts can then be used to create possible theories of defense. The Kentucky Department of Public Advocacy developed the following fact problem:

State v. Barry Rock, 05 CRS 10621 (Buncombe County)

Betty Gooden is a "pretty, very intelligent young lady" as described by the social worker investigating her case. Last spring, Betty went to visit her school guidance counselor, introducing herself and commenting that she knew Ann Haines (a girl that the counselor had been working with due to a history of abuse by her uncle, and who had recently moved to a foster home in another school district).

Betty said that things were not going well at home. She said that her stepdad, Barry Rock, was very strict and would make her go to bed without dinner. Her mother would allow her and her brother (age 7) to play outside, but when Barry got home, he would send them to bed. She also stated that she got into trouble for bringing a boy home. Barry yelled at her for having sex with boys in their trailer. This morning, she said, Barry came to school and told her teacher that he caught her cheating—copying someone's homework. She denied having sex with the boy or cheating. She was very upset that she wasn't allowed to be a normal teenager like all her friends.

The counselor asked her whether Barry ever touched her in an uncomfortable way. She became very uncomfortable and began to cry. The counselor let her return to class, then met her again later in the day with a police officer present. At that time, Betty stated that since she was 10, Barry had told her if she did certain things, he would let her open presents. She explained how this led to Barry coming into her room in the middle of the night to do things with her. She stated that she would try to be loud enough to wake up her mother in the room next door in the small trailer, but her mother would never come in. Her mother is mentally retarded, and before marrying Barry, had quite a bit of contact with Social Services due to her weak parenting skills. She stated that this had been going on more and more frequently in the last month and estimated it had happened 10 times.

Betty is an A/B student who showed no sign of academic problems. After reporting the abuse, she has been placed in a foster home with her friend Ann. She has also attended extensive counseling sessions to help her cope. Medical exams show that she has been sexually active.

Kim Gooden is Betty's 35-year-old mentally retarded mother. She is a "very meek and introverted person" who is "very soft spoken and will not make eye contact." She told the investigator she had no idea Barry was doing this to Betty. She said Barry made frequent trips to the bathroom and had a number of stomach problems that caused diarrhea. She said that Betty always wanted to go places with Barry and would rather stay home with Barry than go to the store with her. She said that she thought Betty was having sex with a neighbor boy, and she was grounded for it. She said that Betty always complains that she doesn't have normal parents and can't do the things her friends do. She is very confused about why Betty was taken away and why Barry has to live in jail now. An investigation of the trailer revealed panties with semen that matches Barry. Betty says those are her panties. Kim says that Betty and her are the same size and share all of their clothes.

Barry Rock is a 39-year-old mentally retarded man who has been married to Kim for five years. They live together in a small trailer making do with the Social Security checks that they both get due to mental retardation.

Barry now adamantly denies that he ever had sex and says that Betty is just making this up because he figured out she was having sex with the neighbor boy. After Betty's report to the counselor, Barry was interviewed for six hours by a detective and local police officer. In this videotaped statement, Barry is very distant, not making eye contact, and answering with one or two words to each question. Throughout the tape, the officer reminds him just to say what they talked about before they turned the tape on. Barry does answer "yes" when asked if he had sex with Betty and "yes" to other leading questions based on Betty's story. At the end of the interview, Barry begins rambling that it was Betty that wanted sex with him, and he knew that it was wrong, but he did it anyway.

Barry has been tested with IQs of 55, 57, and 59 over the last three years. Following a competency hearing, the trial court found Barry to be competent to go to trial.

The Factual Component

The factual component of the theory of defense comes from brainstorming the facts. More recently referred to as "fact-busting," brainstorming is the essential process of setting forth facts that appear in discovery and arise through investigation.

It is critical to understand that facts are nothing more—and nothing less—than just facts during brainstorming. Each fact should be written down individually and without any spin. Non-judgmental recitation of the facts is the key. Do not draw conclusions as to what a fact or facts might mean. And do not make the common mistake of attributing the meaning to the facts that is given to them by the prosecution or its investigators. It is too early in the process to give value or meaning to any particular fact. At this point, the facts are simply the facts. As we work through the other steps of creating a theory of defense, we will begin to attribute meaning to the various facts.

Judgmental Facts (WRONG)	Non-Judgmental Facts (RIGHT)
Barry was retarded	Barry had an IQ of 70
Betty hated Barry	Barry went to Betty's school, went to her classroom, confronted her about lying, accused her of sexual misconduct, talked with her about cheating, dealt with her in front of her friends
Confession was coerced	Several officers questioned Barry, Barry was not free to leave the station, Barry had no family to call, questioning lasted six hours

The Legal Component

Now that the facts have been developed in a neutral, non-judgmental way, it is time to move to the second component of the theory of defense: the legal component. Experience, as well as basic notions of persuasion, reveal that stark statements such as "self-defense," "alibi," "reasonable doubt," and similar catch-phrases, although somewhat meaningful to lawyers, fail to accurately and completely convey to jurors the essence of the defense. "Alibi" is usually interpreted by jurors as "He did it, but he has some friends that will lie about where he was." "Reasonable doubt" is often interpreted as, "He did it, but they can't prove it."

Thus, the legal component must be more substantive and understandable in order to accomplish the goal of having a meaningful theory of defense. Look at Hollywood and the cinema; thousands of movies have been made that have as their focus some type of alleged crime or criminal behavior. According to Cathy Kelly, training director for the Missouri Pubic Defender's Office, when these types of movies are compared, the plots, in relation to the accused, tend to fall into one of the following genres:

1. It never happened (mistake, set-up);
2. It happened, but I didn't do it (mistaken identification, alibi, set-up, etc.);
3. It happened, I did it, but it wasn't a crime (self-defense, accident, claim or right, etc.);
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser included offense);
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity, diminished capacity);
6. It happened, I did it, it was the crime charged, I am responsible, so what? (jury nullification).

The six genres are presented in this particular order for a reason. As you move down the list, the difficulty of persuading the jurors that the defendant should prevail increases. It is easier to defend a case based upon the legal genre "it never happened" (mistake, set-up) than it is on "the defendant is not responsible" (insanity).

Using the facts of the Barry Rock example as developed through non-judgmental brainstorming, try to determine which genre fits best. Occasionally, facts will fit into two or three genres. It is important to settle on one genre, and it should usually be the one closest to the top of the list; this decreases the level of defense difficulty. The Rock case fits nicely into the first genre (it never happened), but could also fit into the second category (it happened, but I didn't do it). The first genre should be the one selected.

But be warned. Selecting the genre is not the end of the process. The genre is only a bare bones skeleton. The genre is a legal theory, not your theory of defense. It is just the second element of the theory of defense, and there is more to come. Where most attorneys fail when developing a theory of defense is in stopping once the legal component (genre) is selected. As will be seen, until the emotional component is developed and incorporated, the theory of defense is incomplete.

It is now time to take your work product for a test drive. Assume that you are the editor for your local newspaper. You have the power and authority to write a headline about this case. Your goal is to write it from the perspective of the defense, being true to the facts as developed through brainstorming, and incorporating the legal genre that has been selected. An example might be:

Rock Wrongfully Tossed from Home by Troubled Stepdaughter

Word choice can modify, or entirely change, the thrust of the headline. Consider the headline with the following possible changes:

Rock →	***Barry, Innocent Man, Mentally Challenged Man***
Wrongfully Tossed →	***Removed, Ejected, Sent Packing, Calmly Asked To Leave***
Troubled →	***Vindictive, Wicked, Confused***
Stepdaughter →	***Brat, Tease, Teen, Houseguest, Manipulator***

Notice that the focus of this headline is on Barry Rock, the defendant. It is important to decide whether the headline could be more powerful if the focus were on someone or something other than the defendant. Headlines do not have to focus on the defendant in order for the eventual theory of defense to be successful. The focus does not even have to be on an animate object. Consider the following possible headline examples:

Troubled Teen Fabricates Story for Freedom

Overworked Guidance Counselor Unknowingly Fuels False Accusations

Marriage Destroyed When Mother Forced to Choose Between Husband and Troubled Daughter

Underappreciated Detective Tosses Rock at Superiors

Each of these headline examples can become a solid theory of defense and lead to a successful outcome for the accused.

The Emotional Component

The last element of a theory of defense is the emotional component. The factual element or the legal element, standing alone, are seldom capable of persuading jurors to side with the defense. It is the emotional component of the theory that brings life, viability, and believability to the facts and the law. The emotional component is generated from two sources: archetypes and themes.

Archetypes, as used herein, are basic, fundamental, corollaries of life that transcend age, ethnicity, gender and sex. They are truths that virtually all people in virtually all walks of life can agree upon. For example, few would disagree that when one's child is in danger, one protects the child at all costs. Thus, the archetype demonstrated would be a parent's love and dedication to his or her child. Other archetypes include love, hate, betrayal, despair, poverty, hunger, dishonesty and anger. Most cases lend themselves to one or more archetypes that can provide a source for emotion to drive the theory of defense. Archetypes in the Barry Rock case include:

- The difficulties of dealing with a stepchild
- Children will lie to gain a perceived advantage
- Maternity/paternity is more powerful than marriage
- Teenagers can be difficult to parent

Not only do these archetypes fit nicely into the facts of the Barry Rock case, each serves as a primary category of inquiry during jury selection.

In addition to providing emotion through archetypes, attorneys should use primary and secondary themes. A primary theme is a word, phrase, or simple sentence that captures the controlling or dominant emotion of the theory of defense. The theme must be brief and easily remembered by the jurors.

For instance, a primary theme developed in the theory of defense and advanced during the trial of the O.J. Simpson case was, "If it doesn't fit, you must acquit." Other examples of primary themes include:

- One for all and all for one
- Looking for love in all the wrong places
- Am I my brother's keeper?
- Stand by your man (or woman)
- Wrong place, wrong time, wrong person
- When you play with fire, you're going to get burned

Although originality can be successful, it is not necessary to redesign the wheel. Music, especially country/western music, is a wonderful resource for finding themes. Consider the following lines taken directly from the songbooks of Nashville (and assembled by Dale Cobb, an incredible criminal defense attorney from Charleston, South Carolina):

Top 10 Country/Western Lines (Themes?)

10. Get your tongue outta my mouth 'cause I'm kissin' you goodbye.
9. Her teeth was stained, but her heart was pure.
8. I bought a car from the guy who stole my girl, but it don't run so we're even.
7. I still miss you, baby, but my aim's gettin' better.
6. I wouldn't take her to a dog fight 'cause I'm afraid she'd win.
5. If I can't be number one in your life, then number two on you.
4. If I had shot you when I wanted to, I'd be out by now.
3. My wife ran off with my best friend, and I sure do miss him.
2. She got the ring and I got the finger.
1. She's actin' single and I'm drinkin' doubles.

Incorporating secondary themes can often strengthen primary themes. A secondary theme is a word or phrase used to identify, describe, or label an aspect of the case. Here are some examples: a person—"never his fault"; an action—"acting as a robot"; an attitude—"stung with lust"; an approach—"no stone unturned"; an omission—"not a rocket scientist"; a condition—"too drunk to fish."

There are many possible themes that could be used in the Barry Rock case. For example, "blood is thicker than water"; "Bitter Betty comes a calling"; "to the detectives, interrogating Barry should have been like shooting fish in a barrel"; "sex abuse is a serious problem in this country—in this case, it was just an answer"; "the extent to which a person will lie in order to feel accepted knows no bounds."

Creating the Theory of Defense Paragraph

Using the headline, the archetype(s) identified, and the theme(s) developed, it is time to write the "Theory of Defense Paragraph." Although there is no magical formula for structuring the paragraph, the following template can be useful:

Theory of Defense Paragraph
- Open with a theme
- Introduce protagonist/antagonist
- Introduce antagonist/protagonist
- Describe conflict
- Set forth desired resolution
- End with theme

Note that the protagonist/antagonist does not have to be an animate object.

The following examples of theory of defense paragraphs in the Barry Rock case are by no means first drafts. Rather, they have been modified and adjusted many times to get them to this level. They are not perfect, and they can be improved upon. However, they serve as good examples of what is meant by a solid, valid, and useful theory of defense.

Theory of Defense Paragraph One

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. "Barry, if you just tell us you did it, this will be over and you can go home. It will be easier on everyone." Barry Rock is a very simple man. Not because of free choice, but because he was born mentally challenged. The word of choice at that time was "retarded." Despite these limitations, Barry met Kim Gooden, who was also mentally challenged, and the two got married. Betty, Kim's daughter, was young at that time. With the limited funds from Social Security Disability checks, Barry and Kim fed and clothed Betty, made sure she had a safe home in which to live, and provided for her many needs. Within a few years, Betty became a teenager, and with that came the difficulties all parents experience with teenagers: not wanting to do homework, cheating to get better grades, wanting to stay out too late, experimenting with sex. Mentally challenged, and only a stepparent, Barry tried to set some rules—rules Betty didn't want to obey. The lie that Betty told stunned him. Kim's trust in her daughter's word, despite Barry's denials, hurt him even more. Blood must be thicker

than water. All Barry wanted was for his family to be happy like it had been in years gone by. "Everything will be okay, Barry. Just say you did it and you can get out of here. It will be easier for everyone if you just admit it."

Theory of Defense Paragraph Two

The extent to which even good people will tell a lie in order to be accepted by others knows no limits. Full of despair and all alone, confused and troubled, Betty Gooden walked into the guidance counselor's office at her school. Betty was at what she believed to be the end of her rope. Her mother and stepfather were mentally retarded. She was ashamed to bring her friends to her house. Her parents couldn't even help her with homework. She couldn't go out as late as she wanted. Her stepfather punished her for trying to get ahead by cheating. He even came to her school and made a fool of himself. No—of her!!! She couldn't even have her boyfriend over and mess around with him without getting punished. Life would be so much simpler if her stepfather were gone. As she waited in the guidance counselor's office, *Bitter Betty* decided there was no other option—just tell a simple, not-so-little lie. *Sex abuse is a serious problem in this country.* In this case, it was not a problem at all—because it never happened. *Sex abuse was Betty's answer.*

The italicized portions in the above examples denote primary themes and secondary themes—the parts of the emotional component of the theory of defense. Attorneys can strengthen the emotional component by describing the case in ways that embrace an archetype or archetypes—desperation in the first example, and shame towards parents in the second. It is also important to note that even though each of these theories are strong and valid, the focus of each is from a different perspective. The first theory focuses on Barry, and the second on Betty.

The primary purpose of a theory of defense is to guide the lawyer in every action taken during trial. The theory will make trial preparation much easier. It will dictate how to select the jury, what to include in the opening, how to handle each witness on cross, how to decide which witnesses are necessary to call in the defense case, and what to include in and how to deliver the closing argument. The theory of defense might never be shared with the jurors word for word; but the essence of the theory will be delivered through each witness, so long as the attorney remains dedicated and devoted to the theory.

In the end, whether you choose to call them dog cases, or to view them, as I suggest you should, as fields of dreams, such cases are opportunities to build baseball fields in the middle of cornfields in the middle of Iowa. If you build them with a meaningful theory of defense, and if you believe in what you have created, the people will come. They will watch. They will listen. They will believe. "If you build it, they will come . . ." ▪

PROBABLE CAUSE

Chapter 9:

Probable Cause and Transfer Hearings

9.1 Overview

A probable cause hearing is required if a juvenile who is 13 years of age or older is alleged to have committed an offense that would be a felony if committed by an adult. The court must determine that there is probable cause before the case can proceed to adjudication. The probable cause hearing affords the juvenile an opportunity to assess the strength of the State's case, to challenge the sufficiency of the evidence, and to discover information for the adjudicatory hearing if probable cause is found. If there is no finding of probable cause, the petition must be dismissed.

If the court finds probable cause and the offense alleged would be a Class A felony (first degree murder), the case must be transferred to superior court for trial of the juvenile as an adult. If probable cause is found for a felony that is less than a Class A felony, a hearing

must be held for the court to determine whether to exercise its discretion according to statutory criteria to transfer jurisdiction to superior court. A discretionary order transferring jurisdiction must be immediately appealed to superior court to preserve the issue for appellate review by the North Carolina Court of Appeals.

9.2
Terminology Used in This Chapter

Probable cause is a finding by the court that a juvenile who is 13 years of age or older is alleged to have committed an offense that would be a felony if committed by an adult and that there is "probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the juvenile committed it. . . ." G.S. 7B-2202(a), (c).

Transfer is the transfer of jurisdiction over a juvenile proceeding from the district court to superior court for trial of the juvenile as an adult. *See infra* § 9.8 (Transfer of Jurisdiction to Superior Court).

9.3
First Appearance

First appearance is an initial hearing that must be held if a petition alleges that a juvenile committed an offense that would be a felony if committed by an adult. The first appearance must occur within 10 days of the filing of the petition or at the secure custody review hearing if the juvenile is in secure or nonsecure custody. A continuance may be granted for "good cause" if the juvenile is not in custody. G.S. 7B-1808(a).

At the juvenile's first appearance, the court must inform the juvenile of the allegations in the petition and the date of the probable cause hearing, if applicable, and determine whether counsel has been retained or appointed. Additionally, the court must inform the juvenile's parents that they must attend all scheduled hearings. G.S. 7B-1808(b) (1)–(4). There is no statutory provision for the court to make other determinations or to set conditions, such as to impose a curfew or to restrict who the juvenile may associate with, at the first appearance. Counsel should object if the court attempts to go beyond the statutory requirements.

9.4
Probable Cause Hearing

A. When Required

A probable cause hearing must be conducted in any proceeding in which a juvenile is alleged to have committed an offense that would be a felony if committed by an adult and the juvenile was 13 years of age or older at the time of the alleged offense. G.S. 7B-2202(a).

Although the statute requires a hearing if the criteria are met, in some districts a probable cause hearing is not routinely held unless the prosecution is moving for transfer to superior

court. In other districts, probable cause hearings are held for all felony allegations. Counsel should consider the merits of requesting a probable cause hearing if one is not routinely scheduled within the statutory time limits. *See infra* § 9.4B (Time Limits). The petition may be dismissed if the State has a weak case, or the court may find probable cause only for a lesser included offense. If the petition is not dismissed, information obtained may assist counsel in plea negotiations or in preparing for adjudication.

B. Time Limits

The probable cause hearing must be held within 15 days of the juvenile's first appearance. The court may continue the hearing for good cause. G.S. 7B-2202(a).

C. Hearing Procedures

Defender Manual. The North Carolina Defender Manual contains a chapter on probable cause hearings in criminal court that includes information generally applicable to juvenile court proceedings. *See* North Carolina Defender Manual, Vol. 1, Ch. 3 (Probable Cause Hearings) (May 1998), at www.ncids.org.

Representation. The prosecutor must represent the State at a probable cause hearing. G.S. 7B-2202(b)(1); *cf.* G.S. 7B-2404 (prosecutor must represent State in contested delinquency proceedings, including probable cause). Counsel should object if the prosecutor is not present for the probable cause hearing.

The juvenile must be represented by counsel at the probable cause hearing. G.S. 7B-2202(b)(2).

Evidence and hearsay exceptions. The State must present admissible evidence to show probable cause. G.S. 7B-2202(c). Each witness must be under oath and subject to cross-examination. G.S. 7B-2202(b)(4).

There is a statutory exception to the hearsay rule at a probable cause hearing allowing the court to receive a report by a physicist, chemist, firearms identification expert, fingerprint technician, or expert or technician in another scientific, professional, or medical field. The report must contain the result of any examination, comparison, or test performed regarding the case. G.S. 7B- 2202(c)(1).

"Reliable hearsay" as to value, ownership of property, possession of property by a person other than the juvenile, lack of consent of the owner, possessor, or custodian of property to the breaking and entering of the premises, chain of custody, and authenticity of signature is also admissible if there is "no serious contest." G.S. 7B-2202(c)(2). Counsel may object to hearsay that does not fall within an exception. Requiring the State to present non-hearsay evidence may provide an opportunity to evaluate the strength of the State's evidence and could lead to a finding of no probable cause and dismissal of the petition.

Counsel must determine whether there is a benefit to presenting evidence at the probable cause hearing. Because the State's burden of proof is relatively low, it is generally

disadvantageous to present evidence, as it might establish probable cause or reveal the defense strategy for the adjudicatory hearing.

Burden of proof. The State must show that there is "probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the juvenile committed it. . . . " G.S. 7B-2202(c).

Waiver of probable cause hearing. The juvenile, through counsel, may waive by written notice the right to a probable cause hearing. If the hearing is waived, the juvenile must stipulate to probable cause. G.S. 7B-2202(d).

Counsel should consider several factors in advising the juvenile whether to waive the probable cause hearing. These factors include:

- Whether the facts of the case are sufficiently compelling for the court to decide to transfer the matter to superior court based primarily on the facts;
- Whether the State will make some concession in exchange for waiver of the hearing, such as a favorable plea agreement either in juvenile or superior court or an agreement not to seek transfer;
- Whether there are grounds to argue that there is probable cause for a lesser included misdemeanor offense only, precluding transfer;
- Whether testimony might be elicited that could be used to impeach witnesses for the State at subsequent hearings.

D. Advocacy at Probable Cause Hearing

Preparation. Counsel should prepare to challenge the State to meet its burden of proof and should move for dismissal if the State fails to present evidence of each element of the offense alleged and of the juvenile's identification as the perpetrator. Preparation for the hearing includes becoming familiar with the elements of each offense alleged, as well as lesser included offenses. If advantageous to the juvenile, counsel should argue for a finding of probable cause for a lesser included offense. Case law or legal memoranda should be prepared to support a motion to dismiss.

Cross-examination. Because the court may not allow a great deal of latitude to counsel, cross-examination should be structured to elicit the most important information first. Sample probable cause questions appear at the end of this chapter. *See infra* Appendix 9-1 (Sample Questions for Probable Cause and Preliminary Hearings).

Questions on cross-examination will vary depending on counsel's goal for the hearing. If the desired result is dismissal for lack of probable cause, cross-examination may be limited, as extensive cross-examination could lead the witness to supply information that supports probable cause. Closed-ended questions, requiring a yes or no answer, typically provide counsel more control over the witness and are therefore desirable when counsel is seeking dismissal for lack of probable cause. Aggressive cross-examination can be risky, however, as it may cause the witness to refuse to cooperate later or harden resolve for prosecution.

Questions may also alert witnesses to problem areas in their testimony that can be addressed before or at the adjudicatory hearing.

Extensive cross-examination may be desirable where counsel's goal is to elicit answers that can be used to impeach any inconsistent testimony by the witness at a subsequent hearing or to obtain additional information. Open-ended questions may elicit the most information, with follow-up questions as needed. Obtaining information has been recognized as a legitimate purpose of a probable cause hearing in criminal proceedings. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (recognizing constitutional right to counsel at probable cause hearing based on counsel's ability to obtain discovery and develop impeachment evidence); *Vance v. North Carolina*, 432 F.2d 984, 988–89 (4th Cir. 1970) (to same effect). Other cases state that the purpose of a probable cause hearing is for the court to determine whether there is probable cause and that the opportunity for discovery is incidental to that purpose. *State v. Hudson*, 295 N.C. 427, 430 (1978). Counsel should therefore be prepared to explain how questions relate to the issue of probable cause.

Juvenile's evidence. Under G.S. 7B-2202(b)(3), the juvenile may testify and call other witnesses at the probable cause hearing. Presenting witnesses on the juvenile's behalf is not usually beneficial, however, as they may reveal the defense strategy planned for adjudication and may assist the State in meeting its burden of proving probable cause. Potential defense witnesses should ordinarily not be present at the probable cause hearing because the State may call them to testify. Counsel might want to subpoena witnesses for the prosecution if they are unwilling to be interviewed.

Record of the hearing. Counsel should ensure that the probable cause hearing is recorded as required pursuant to G.S. 7B-2410. This may aid in impeachment of a witness at the adjudicatory hearing or trial or support a claim of error on appeal. A court reporter should be requested if the hearing might not otherwise be properly recorded. Counsel could also request that an investigator or other person working on behalf of the juvenile be present to make notes of the testimony. That person could then be called to impeach a witness who subsequently gives inconsistent testimony.

9.5
Finding of No Probable Cause

The petition must be dismissed if the court finds that the State has failed to show probable cause that the juvenile committed the alleged felony unless the court finds probable cause that the juvenile committed a lesser included misdemeanor offense. G.S. 7B-2202(f)(1)–(2). Because jeopardy does not attach at a probable cause hearing, a subsequent petition is not barred by double jeopardy. *See* G.S. 15A-612(b). There may be a defense, however, for failure to file the petition within the statutory time limits. *See supra* § 6.3C (Timeliness of Filing).

If the court finds probable cause to believe that the juvenile committed a lesser included misdemeanor offense, the court may either proceed to adjudication or set a date for an

adjudicatory hearing. G.S. 7B-2202(f)(2). The juvenile may request a continuance if needed. G.S. 7B-2406.

9.6 Finding of Probable Cause

Mandatory transfer to superior court. If the court finds probable cause to believe that the juvenile committed an offense that would constitute a Class A felony if committed by an adult, the court *must* transfer the case to superior court for the juvenile to be tried by as an adult. G.S. 7B-2200.

Discretionary transfer to superior court. Upon a finding of probable cause to believe that the juvenile committed a felony that would be less than a Class A felony if committed by an adult, the prosecutor, the juvenile, or the court may move for a hearing on transfer to superior court. G.S. 7B-2200. If the juvenile has not had at least five days notice of the intent to seek transfer, the court must continue the transfer hearing at the juvenile's request. G.S. 7B-2202(e).

If the matter proceeds to adjudication in juvenile court before the judge who presided over the probable cause hearing, counsel may consider moving for recusal. The judge has ruled on probable cause and might have heard prejudicial hearsay testimony or other evidence that would be inadmissible at the adjudicatory hearing.

9.7 Appeal of Finding of Probable Cause

A finding of probable cause is not a final order and is therefore not immediately reviewable; errors relating to a determination of probable cause may, however, be the subject of an appeal following entry of the dispositional order. *In re K.R.B.*, 134 N.C. App. 328 (1999) (dismissing the juvenile's appeal from the order finding probable cause as it was not properly before the court on appeal). In the case of *In re Ford*, 49 N.C. App. 680, 683 (1980), the Court stated that "evidentiary questions presented by the juvenile-appellant's assignments of error may well merit our attention upon his appeal from a trial resulting in a disposition unfavorable to him. They are not properly before us, however, in relation to a finding of probable cause, which is not a "final order[.]"

9.8 Transfer of Jurisdiction to Superior Court

Jurisdiction over a juvenile *may* be transferred to superior court if the juvenile was at least 13 years old at the time of allegedly committing an offense that would be a felony, other than a Class A felony, if committed by an adult. There must be a motion, notice, hearing, and finding of probable cause before the court may consider transfer. G.S. 7B-2200.

Jurisdiction over a juvenile *must* be transferred to superior court if the juvenile was at least 13 years old at the time of allegedly committing an offense that would be a Class A felony (first degree murder) and the court finds probable cause. *Id.*

Following transfer, all further proceedings in the matter occur in superior court; generally adult criminal law and procedure apply. The juvenile must be fingerprinted and the fingerprints sent to the State Bureau of Investigation. G.S. 7B-2201. If the juvenile is convicted in superior court, any subsequent charges will be heard in criminal rather than juvenile court, even if the juvenile has not yet reached the age of 16. G.S. 7B-1604(b).

The juvenile may request transfer to superior court, although transfer rarely benefits the juvenile. The confidentiality of juvenile court proceedings is lost and the juvenile is exposed to the adult criminal and penal system. Future education and employment opportunities may be foreclosed by a criminal record. Juveniles who are not citizens risk deportation or harm to their immigration status if convicted as an adult. *Compare* Immigration Consequences of a Criminal Conviction in North Carolina § 4.2F (Juvenile Delinquency Adjudication) (Feb. 2008), at www.ncids.org; *see also infra* § 12.7 (Legal Effect of Adjudication). While counsel should advise clients of the adverse consequences of transfer, ultimately it is the juvenile's decision whether to request transfer.

9.9
Procedures for Transfer Hearing

A. Evidence

The prosecutor and juvenile may be heard and offer evidence at the transfer hearing. Counsel for the juvenile is allowed to examine probation or court records that may be considered as evidence by the court. G.S. 7B-2203(a). Counsel should request to review any such records immediately after appointment to a case subject to transfer.

Counsel should request other records pertaining to the juvenile's level of maturity, mental and emotional status, educational and service needs, or any other factors that might bolster the argument for retaining the matter in juvenile court. A motion for an expert witness to examine the juvenile might be filed to develop evidence supporting retention of the case in juvenile court. *See infra* Appendix 7-2 (Motion for Expert Witness).

Unless the juvenile directs counsel to seek transfer, counsel should present evidence against transfer to superior court. Evidence may include, but is not limited to, the juvenile's record, performance on court supervision, educational history, mental and emotional state, intellectual functioning, developmental issues, and family history. Witnesses who can provide helpful insight into the juvenile's character, such as teachers, counselors, psychologists, members of the juvenile's religious community, family, friends, employers, or other persons with a positive personal or professional opinion of the juvenile, may be called to testify.

Community services should also be explored. Counsel should be prepared to offer alternatives for disposition that would not be available if the matter were transferred to superior court.

B. Criteria for Determination

The court must decide whether "the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court. . . . " G.S. 7B-2203(b). The statute lists eight criteria for making this determination:

- The age of the juvenile;
- The maturity of the juvenile;
- The intellectual functioning of the juvenile;
- The prior record of the juvenile;
- Prior attempts to rehabilitate the juvenile;
- Facilities or programs available to the court prior to the expiration of the court's jurisdiction and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts;
- Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and
- The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult.

G.S. 7B-2203(b)(1)–(8).

The eight statutory criteria are neither weighted nor listed in order of importance for consideration by the court. Counsel should be prepared to argue those factors that support retention of the case in juvenile court as well as to counter the factors most likely to be relied on by the State in seeking transfer. Objections should be raised if the court considers any factors not listed under the statute.

C. Order of Transfer

If the court determines that the case should be transferred to superior court, it must enter an order specifying the reasons for transfer. A transfer of a felony offense also confers jurisdiction on the superior court to try any other offenses arising out of the underlying act or any greater or lesser included offense of that felony. G.S. 7B-2203(c).

If the court determines that under the statutory criteria the case should be retained in district court, the court must either proceed to an adjudicatory hearing or set a date for adjudication. G.S. 7B-2203(d).

9.10 Appeal of Order of Transfer

Appeal to superior court. An order transferring jurisdiction of a juvenile case to superior court may be immediately appealed to the superior court for a "hearing on the record." G.S. 7B-2603(a). The transfer order must be properly appealed to the superior court to preserve the issue for appeal to the Court of Appeals. *Id.*; *State v. Wilson*, 151 N.C. App. 219

(2002) (order of transfer to superior court not reviewable because defendant failed to preserve issue by appealing order of transfer to superior court). Prior to enactment of G.S. 7B-2603, effective July 1, 1999, the issue of transfer could be appealed to the Court of Appeals following a finding of guilt in superior court without an intermediate appeal to superior court. Counsel must be vigilant in filing a timely appeal to the superior court of the order transferring jurisdiction to preserve the issue for review by the Court of Appeals.

Notice of appeal must be given in open court or in writing within 10 days after entry of the order of transfer in district court, with entry determined in the same manner as under Rule 58 of the Rules of Civil Procedure. G.S. 7B-2603(a).

Hearing on the record. Appeal to the superior court is by review of the record under the standard of abuse of discretion. The record of the transfer hearing must be reviewed within a "reasonable time" after notice of appeal to determine whether the district court abused its discretion in transferring the matter to superior court. G.S. 7B-2603(a); *cf. State v. Green*, 348 N.C. 588, 595 (1998) (decision to transfer juvenile case to superior court under former G.S. 7A-610 was in discretion of juvenile court judge and was not reviewable absent gross abuse of discretion). There are no explicit statutory procedures for the review in superior court, although the use of the term "hearing on the record" indicates that the superior court will review the transcript of the transfer hearing and review the juvenile court file. Counsel should be allowed to appear and make arguments based on the record.

The superior court has two alternatives after the hearing on the record. It may either remand the case to district court for adjudication or uphold the transfer order. G.S. 7B-2603(c).

Appeal to Court of Appeals. If the superior court upholds the order of transfer, the order may be appealed to the Court of Appeals only if the juvenile is subsequently found guilty in superior court. G.S. 7B-2603(d); *State v. Wilson,* 151 N.C. App. 219, 222 (2002) (juvenile may appeal order of transfer to Court of Appeals only after conviction in superior court and only if issue was preserved by proper appeal of issue to superior court); *State v. Hatchett,* 177 N.C. App. 812 (2006) (unpublished) (citing *Wilson*). Under current law, the juvenile cannot preserve appeal of the transfer order if the juvenile pleads guilty in superior court, although some authority suggests that the juvenile may seek review by writ of certiorari. G.S. 15A-1444(e); *State v. Evans,* 646 S.E.2d 859 (2007) (defendant is not entitled to appellate review as a matter of right to challenge transfer when he has entered a plea of guilty to a criminal charge in superior court, but may petition for review by writ of certiorari). However, Rule 21 of the North Carolina Rules of Appellate Procedure does not allow for review by writ of certiorari in this situation and appears to negate the broad right to seek certiorari provided by G.S. 15A-1444(e). To ensure appellate review of the order of transfer, the case must be taken to trial.

9.11
Right to Pretrial Release on Transfer

Once an order of transfer has been entered, a juvenile has the same rights to pretrial release as an adult under G.S. 15A-533 and 15A-534. After entering the transfer order, the district court judge must determine the conditions under which the juvenile may obtain release, as provided in G.S. 15A-533 and 15A-534 (i.e., written promise to appear, unsecured bond, custody release, or secured bond). An order of release also must specify the person or persons to whom the juvenile may be released. G.S. 7B-2204, -2603(b).

When transfer to superior court is a possibility, counsel should work with the juvenile and the juvenile's family to have a plan for pretrial release to present to the court.

9.12
Detention Following Transfer

If the juvenile is not released, the court must order that the juvenile be held in a detention center while awaiting trial. The court may order that the juvenile be held in a holdover facility when the juvenile is required to be in court for pretrial hearings or for trial, if the court finds that it would be inconvenient to return the juvenile to the detention center. G.S. 7B-2204, -2603(b).

Appendix 9-1

Sample Questions for Probable Cause and Preliminary Hearings

These questions are not exhaustive, and are only a guide to help counsel think about what questions counsel should consider at the hearing. Counsel should make sure the answer to the question is complete. For example, if you ask an officer what was the length of the incident, and he answers 5 minutes, you can ask more detailed questions so that the officer is unlikely to change his answer later. "Officer, you say, it was 5 minutes, could it have been longer/shorter than that?" "Well, how much longer/shorter?" "What makes you say that?"

Basic Identification Questions

Opportunity to observe - for each witness or complainant

1. Time, location and length of incident?
2. What was the lighting like? (Street lights? Where? Daylight?)
3. How long did each witness observe the incident and what drew its attention to scene?
4. How far was each witness from the scene?
5. Where was each witness standing in relation to assailant? (In front? To side? Behind?)
6. Were there any obstructions to the view?
7. Witness's physical condition: Tired? Drinking/drugs? Age? Eyesight?
8. Was offender wearing a mask? A hat?
9. Was there a prior relationship between any witness and defendant?
10. For each witness and each suspect, what was the description given to police: age, height, weight, eye color, complexion, hair, clothing, build, facial hair, distinguishing features?
11. Was there a lookout? When? What was the lookout description?

Identification Procedure

1. What procedure was used? (Show-up, line-up, photo spread, second sighting?)
2. When? Where?
3. What did each witness say?
4. Any non-identifications? Misidentifications?
5. Procedure done with all witnesses together? Separately?

Drug cases

1. Did the lookout give a location for the suspect? Where was the suspect going?
2. What was recovered? Money? Pre-recorded money? Drugs? From defendant, ground or stash?
3. How many people were involved in transaction? What was defendant's role? Were other people around?
4. What was the time of arrest?
5. Identification questions, above.

Robbery

1. Was any property taken? From where? Was it recovered? From where/whom?
2. How was the property identified?
3. What was the number of victims?
4. What was the number of robbers?
5. How was the property taken? (Force? Snatch?)
6. Were any threats made?
7. What was the role of each robber?
8. What was said by each robber? To whom?
9. Were any weapons used?
10. Were any injuries sustained?
11. Identification questions, above.
12. Bias of witnesses?

UUV [Unauthorized Use of Vehicle]

1. Driver or passenger?
2. How many people were in the car?
3. How long was the vehicle followed? Attempt to elude? How were vehicle occupants signaled about police presence?
4. Where was arrest made? What was the distance from car at the time of the arrest?
5. Was there any damage to car? What was the extent of the damage (or how was it damaged)? How visible was the damage? From what vantage point did police notice damage?
6. Were any keys in the ignition? Was there damage to steering column?
7. When was the car reported stolen? By whom?
8. Who talked to the owner? What did the owner say?

9. Were fingerprints removed from the automobile?
10. Was anything recovered from the car?
11. Identification questions, above.
12. Bias of witnesses?

Burglary

1. How were the premises entered?
2. Were any tools used? Recovered?
3. Were there any marks or damage to premises?
4. Was anyone inside premises?
5. Were there any witnesses? What did they see? How far were they from the scene?
6. Was property taken? What? Was it recovered?
7. Was the property identified? How? By whom? Basis for identifying?
8. Was property secreted by windows or doors? Any property found outside?
9. Identification questions, above.
10. Bias of witnesses?

Assault

1. Was the complainant injured? How did the injury occur? What is the nature of the injury? Was the complainant hospitalized?
2. Were any threats made?
3. Was there a prior relationship between defendant and complainant?
4. What was the cause of the altercation?
5. What did the complainant say? What did the offender say?
6. Were any weapons used? Were any weapons recovered from defendant or complainant?
7. Identification questions, above.
8. Bias of witnesses?

Sexual offenses

1. What age is the victim?
2. Was there any hospital treatment? When?
3. What is the extent of the injuries? Where? How severe?
4. Lab test results?
5. Where did incident occur?

6. Was there a prior relationship between defendant and complainant?
7. What did assailant say? What did complainant say? Was there a struggle?
8. Was any weapon used?
9. Were any articles recovered from the scene?
10. When was the incident reported to police? Reported to anyone?
11. Circumstances of first report?
12. Identification questions, above.
13. Bias of witnesses?

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SUPPRESSION ISSUES

Chapter 11:

Motions to Suppress

11.1
Motions Practice in Juvenile Court

A. Goals

Advocacy through motions practice is essential to protection of a juvenile's constitutional and statutory rights. Although the Juvenile Code contains no specific procedures for filing motions, case law confirms that motions may be filed and are often vital to the outcome of the case. For general guidance on the timing, form, and contents of motions, counsel should

consult Article 52, Chapter 15A-951, *et. seq.*, which sets out procedures for motions practice in criminal court.

Filing motions can achieve several goals in a juvenile case. A pending motion may strengthen the juvenile's bargaining position with the State, while a successful motion may resolve the case, or some portions of it, in the juvenile's favor. Advocacy through motions practice will demonstrate to the court, the prosecutor, and the juvenile that counsel is dedicated to providing an effective and zealous defense. The court and the prosecutor may then be more likely to listen carefully and be persuaded by arguments of counsel. *See* "Motions Practice: Tools for Your Defense," Regional Juvenile Defender Workshops (February–May 2006), at www.ncids.org (Training and Reference Materials).

Drafting a motion requires that counsel research the statutory, constitutional, or case law bases for the motion. A written motion and argument on the record and a memorandum of law submitted to the court, along with appropriate objections, protect the juvenile's rights and preserve issues in the event of an appeal.

B. Types of Motions

A variety of motions may be filed, including a motion requesting that a hearing be closed (*see supra* § 2.6), that witnesses be sequestered (*see infra* § 12.5A), for discovery (*see supra* § 10.3), requesting an evaluation of capacity (*see supra* § 7.8), requesting that an expert be appointed (*see supra* § 7.8A), and for dismissal of the petition (*see supra* § 6.3H).

Motions to suppress are particularly important in juvenile court because the State's case often rests on a statement or admission of a juvenile or on evidence obtained from a search of a juvenile. A successful suppression motion may result in the dismissal of the petition by the State or on motion of the juvenile. This chapter focuses on filing and arguing motions to suppress.

11.2 Filing Motions and Hearing Procedures

A. Timing of Motions

No specific statutory deadlines for filing motions to suppress are provided by the Juvenile Code. If the motion to suppress would be dispositive if successful—that is, it would exclude evidence necessary for the State to prove the charged offense—the motion should be filed early in the case. If a motion to suppress is granted before the probable cause hearing, the State may be prevented from showing probable cause, and the petition will be dismissed.

There may be tactical reasons in some instances not to file a motion to suppress until the adjudicatory hearing begins. Counsel may decide to defer filing to avoid revealing to the State that certain evidence may not be admissible at adjudication. If the motion to suppress is granted at a later stage, the State may be unable to produce other sufficient evidence to prove the allegations in the petition.

B. Form and Contents of Motion

A motion to suppress should generally be in writing to give notice to the State and to inform the court of the information that is being sought to be suppressed. In preparing the motion, counsel may need to interview witnesses and review evidence provided by the State through discovery. The written motion will also place in the record the reasons that the information should be suppressed and help preserve the issue and argument in the event of an appeal.

The written motion should state the legal grounds for the motion, including constitutional, statutory, and case law references. If the motion relies on factual allegations, an affidavit setting forth those facts should be included with the motion. *See generally* G.S. 15A-977(a). Counsel may sign the affidavit alleging the facts based on information and belief rather than having the juvenile sign. *State v. Chance*, 130 N.C. App. 107, 110–11 (1998).

Counsel should prepare a memorandum of law supporting the motion to suppress. A memorandum will place before the court the legal authority supporting the motion and will also supplement the record on appeal.

C. Renewal of Objection at Hearing

By amendment to the North Carolina Rules of Evidence in 2003, the General Assembly tried to eliminate the requirement that counsel must renew an objection when evidence that was the subject of an unsuccessful motion to suppress is presented at the adjudication. N.C. R. Evid. 103(a)(2). The Court of Appeals initially enforced this rule. *State v. Rose*, 170 N.C. App. 284, 288 (2005) (defendant not required to renew objection when evidence is offered at trial after motion to suppress denied before trial); *In re S.W.*, 171 N.C. App. 335, 337 (2005) (to same effect). The Court of Appeals thereafter held, however, that the General Assembly impermissibly interfered with the North Carolina Supreme Court's exclusive authority to make rules of practice and procedure for appeals. *State v. Tutt,* 171 N.C. App. 518 (2005). Counsel should therefore continue to object if evidence that has been the subject of a previous motion to suppress is offered at the adjudication.

Counsel should also object during the hearing if evidence that has been ordered suppressed is presented, whether by design or inadvertence. The evidence has been ruled inadmissible and should be excluded from consideration by the court.

An objection must also be made during the hearing if evidence that is subject to suppression is introduced by the State without prior notice that it will be offered. If necessary, counsel should request a continuance to research and present legal authority supporting suppression.

D. Appeal of Denial of Motion to Suppress Following Admission

There is no statute in the Juvenile Code similar to G.S. 15A-979(b) of the Criminal Procedure Act providing that the juvenile may appeal denial of a motion to suppress after making an admission. G.S. 15A-979(b) provides that "[a]n order finally denying a motion to

suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty."

The North Carolina Court of Appeals in an unpublished case has implicitly recognized the right of a juvenile to appeal denial of a motion to suppress evidence following an admission. *In re J.B.*, 644 S.E.2d 270 (2007). In *J.B.*, a motion to suppress a statement made by the juvenile and evidence that was seized as a result of that statement was denied following a hearing on the motion. At a later adjudicatory hearing, the juvenile admitted the allegations in the petitions but renewed his arguments regarding the motion to suppress. The Court remanded the case for the lower court to make findings of fact necessary to support its determination that the juvenile was not in custody during interrogation so that those findings could be reviewed on appeal. The right of the juvenile to appeal the denial of the motion to suppress following admission to the allegations was not questioned by the Court.

In *J.B.*, the juvenile through counsel renewed his arguments for suppression at the time he entered an admission. This may preserve the issue for appeal. Counsel may also refer to the procedure described in G.S. 15A-979(b) for adult criminal cases. To preserve the right of appeal under that statute, defendants must expressly communicate their intent to appeal the denial of the suppression motion to the prosecutor and the court at the time of the guilty plea (or, in juvenile cases, the admission). *See State v. Brown,* 142 N.C. App. 491 (2001); *State v. McBride,* 120 N.C. App. 623, *aff'd,* 344 N.C. 623 (1996). To further protect the right the appeal, the conditional nature of the admission should be put on the record before the admission is entered and should appear in the written transcript of admission.

11.3 Bases for Motions to Suppress Statement or Admission of Juvenile

A. Constitutional Rights

A juvenile is protected by the constitutional right against self-incrimination guaranteed by the Fifth Amendment. *See In re Gault*, 387 U.S. 1 (1967); *Mincey v. Arizona*, 437 U.S. 385, 398–400 (involuntary or coerced confession not admissible); *see also supra* § 2.4A (Constitutional Right). After initiation of juvenile proceedings, the juvenile is afforded additional protection under the Sixth Amendment's right to counsel, guaranteed to juveniles under *Gault*. *See Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (statement of defendant made in violation of Sixth Amendment right to counsel properly ordered suppressed). If a juvenile has been questioned in violation of these rights a motion to suppress should be filed to prevent the court from admitting the statement as evidence. For a further discussion of these rights, *see* 1 North Carolina Defender Manual § 14.3 (Illegal Confessions or Admissions) (July 2002), at www.ncids.org.

B. Statutory Rights

Juveniles in custody who are being questioned have statutory rights that include and go beyond the requirements of *Miranda* warnings. *See* G.S. 7B-2101; *see also supra* § 2.4B (Statutory Rights). These rights are afforded only if the juvenile is "in custody," a term that is

not defined in the statutes but is the subject of case law. *See infra* § 11.4B (Definition of "In Custody").

In setting forth the information that the juvenile must receive prior to custodial interrogation, the statute tracks *Miranda* with the addition of the third provision below:

1. That the juvenile has a right to remain silent;
2. That any statement the juvenile does make can be and may be used against the juvenile;
3. That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
4. That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

G.S. 7B-2101(a); *see infra* §§ 11.4D (Right to Have Parent, Custodian, or Guardian Present), 11.4F (Right to Consult with and Have Attorney Appointed).

Questioning must cease "[i]f the juvenile indicates in any manner and at any stage . . . that the juvenile does not wish to be questioned further." G.S. 7B-2101(c). The court must find that the juvenile "knowingly, willingly, and understandingly waived the juvenile's rights" before the juvenile's in-custody statement can be admitted into evidence. G.S. 7B-2101(d); *see infra* § 11.4H (Knowing, Willing, and Understanding Waiver of Rights).

If a juvenile is under the age of 14, the presence of a parent, guardian, custodian, or attorney is required for an in-custody admission or confession to be admitted into evidence. The parent, guardian, or custodian must also be advised of the juvenile's rights if an attorney is not present. These requirements may not be waived by the juvenile or the parent. G.S. 7B-2101(b); *see infra* § 11.4E (Requirement that Parent, Custodian, Guardian, or Attorney be Present if Juvenile under 14); *see also* G.S. 15A-211 (requiring electronic recording of in-custody interrogation conducted at place of detention in homicide investigation).

11.4
Case Law: Motions to Suppress In-Custody Statement of Juvenile

A. Scope of Discussion in This Manual

This section reviews cases involving in-custody statements by juveniles. There may be additional grounds for suppressing statements that do not require that the juvenile be in custody, such as involuntary statements under the Fifth Amendment and statements in violation of the Sixth Amendment right to counsel. *See* 1 North Carolina Defender Manual § 14.3 (Illegal Confessions or Admissions) (July 2002), at www.ncids.org.

B. Definition of "In Custody"

Miranda and statutory warnings are required during questioning only when the juvenile is in custody. *See* G.S. 7B-2101. The court must first determine whether the juvenile was in custody in ruling on a motion to suppress. *In re T.R.B.*, 157 N.C. App. 609, 612–13 (2003).

The standard for determining whether a person is in custody for *Miranda* purposes is, "based on the totality of the circumstances, whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Buchanan*, 353 N.C. 332, 339 (2001). This is an objective test of "whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way," and is not based on the subjective intent of the interrogator or the perception of the person under questioning. *In re T.R.B.*, 157 N.C. App. at 613, *quoting State v. Sanders*, 122 N.C. App. 691 (1996); *State v. Buchanan*, 353 N.C. 332 (2001). The age of a juvenile has been recognized as a relevant factor in determining whether a reasonable person would feel free to leave in a search and seizure case. *In re I.R.T.*, 647 S.E.2d 129 (2007); *see infra* § 11.6B (Age as Factor in Legality of Search and Seizure). Age would appear to be equally relevant in cases concerning whether a reasonable person in the juvenile's circumstances would believe that he or she was in custody for the purpose of an interrogation.

The lower court's determination of whether a juvenile is in custody is a conclusion of law that is reviewed *de novo* on appeal. *State v. Crudup*. 157 N.C. App. 657 (2003); *In re R.H.*, 171 N.C. App. 514 (2005) (unpublished).

Failure of the trial court to make a finding on whether a juvenile was in custody before admitting the juvenile's statement to law enforcement officers into evidence has been held to be reversible error entitling the respondent to a new adjudicatory hearing. *In re T.R.B.*, 157 N.C. App. 609 (2003). In *T.R.B.*, the case was remanded for the court to make the required finding on whether the juvenile was in custody before ruling on the motion to suppress. *Id.* at 616. The Court also held that it was error to admit a juvenile's statement before determining whether he was in custody in *In re J.L.B.M.,* 176 N.C. App. 613, 625 (2006) (case remanded for findings on whether the juvenile was in custody and whether his statements were the result of interrogation). In *J.L.B.M.*, the Court further instructed the lower court that if it determined that the juvenile's statements were inadmissible then it must grant the juvenile's motion to dismiss, as the juvenile's statement was the only evidence supporting the adjudication.

There is not a requirement under the federal constitution that rights be explained to a person in custody if there is no interrogation. *State v. Jackson*, 165 N.C. App. 763 (2004) (juvenile defendant's statements were admissible because made in absence of questioning by officers or actions intended to elicit a response).

C. Application of Standard for Determining Whether In Custody

The North Carolina appellate courts have determined whether a juvenile was "in custody" for the purposes of interrogation in the cases discussed below.

School office. *In re W.R.*, 179 N.C. App. 642 (2006), *review granted,* 653 S.E.2d 877 (2007). In *W.R.*, a 14-year-old juvenile was not advised of any constitutional or statutory rights before being interrogated. He was questioned for 30 minutes in the office of the assistant principal and was under the supervision of the school resource officer (SRO) when the principal and assistant principal were not in the office. The juvenile was searched by the SRO while in the office, was not told that he could leave, and was detained in the office until his mother picked him up 90 minutes later. Under these circumstances, the Court held that a reasonable person would believe that his movement was restrained to the degree associated with a formal arrest. Therefore, the juvenile's admission that he had brought a weapon to school and on the bus the day before should have been suppressed. Because the juvenile's admission was the only evidence in the record supporting the adjudication, the orders of adjudication and disposition were vacated.

In re R.H., 171 N.C. App. 514 (2005) (unpublished). A different holding resulted when a juvenile was given additional information regarding the questioning. In *R.H.*, a police officer wearing his badge and gun questioned the juvenile in a school office regarding a misdemeanor larceny. The Court held that even though the juvenile testified that he felt intimidated and afraid to leave the room, he was not in custody and was not entitled to receive constitutional or statutory warnings before questioning because the officer told him that he was not under arrest and that he was free to leave the room. His statement to the officer was admissible, and the lower court's denial of the motion to suppress was affirmed.

Home. *In re Hodge*, 153 N.C. App. 102 (2002). A juvenile was held not to be in custody when questioned by a police officer in his home. In *Hodge*, the police officer questioned the juvenile in his home in the presence of his mother and his younger brother, who was the alleged victim. No court proceedings had been initiated, and the officer informed the juvenile that he did not have to talk to her and that she was not going to arrest him. Under these circumstances the Court held that the juvenile was not in custody and was therefore not entitled to be advised of his constitutional or statutory rights under G.S. 7B-2101.

Police station. *State v. Smith*, 317 N.C. 100, 102–03 (1986) (decided under former G.S. 7A-595, now G.S. 7B-2101), *overruled in part on other grounds*, *State v. Buchanan*, 353 N.C. 332 (2001). A juvenile was held to be in custody when two officers went to the juvenile's home, waited while he dressed, transported him in a police car with doors that could not be opened from the inside, read him his juvenile rights, and took him to the police station where he was again read his rights. Because the juvenile was in custody and his statement was made in response to questioning after he requested his mother's presence, admission of his confession was error entitling him to a new trial at which his statement would be suppressed.

D. Right to Have Parent, Custodian, or Guardian Present

Juvenile's right. The right to have a parent, custodian, or guardian present during custodial interrogation applies to all juveniles, including those who are 16 or over and no longer under the jurisdiction of the juvenile court. G.S. 7B-2101(a)(3); *In re Fincher*, 309 N.C. 1 (1983) (decided under former G.S. 7A-595(a)(3), now G.S. 7B-2101(a)(3)); *State v. Smith*, 317 N.C. 100 (1986), *overruled in part on other grounds*, *State v. Buchanan*, 353 N.C. 332 (2001). A

juvenile is a person who is under the age of 18 and is not married, emancipated, or a member of the armed forces of the United States. G.S. 7B-1501(17). The right to have a parent, custodian, or guardian present during custodial interrogation may be waived by a juvenile who is age 14 or older but may not be waived by one who is under 14 years of age. *See infra* § 11.4E (Requirement that Parent, Custodian, Guardian, or Attorney Be Present if Juvenile under 14).

There are no cases discussing who is a "parent" or "custodian" under the statute. Counsel might move to exclude a juvenile's statement taken in the presence of someone who does not have custodial rights, such as a foster parent or step-parent. The North Carolina Court of Appeals has addressed who is a guardian for the purposes of G.S. 7B-2101(a) and (b). A relative who provided shelter and otherwise provided for the juvenile was found to be a *de facto* guardian even though she had not been appointed guardian by a court. *State v. Jones*, 147 N.C. App. 527, 540 (2001) (caretaker aunt considered guardian for purpose of in-custody interrogation of 13-year-old juvenile; statement taken in presence of caretaker aunt was admissible). An aunt who had not been appointed guardian and who did not provide ongoing care, however, was held not to be a guardian. *State v. Oglesby*, 174 N.C. App. 658, 663 (2005) (aunt with whom juvenile defendant requested to speak was not guardian under interrogation statute because she had no legal authority conferred by the government and there was no showing that she fed, clothed, or housed the defendant).

Right invoked. The Court held that the juvenile defendant, who was more than 14 years old, effectively invoked his right under former G.S. 7A-595 (now G.S. 7B-2101) to have his mother present during custodial interrogation, rendering his confession inadmissible. *State v. Smith*, 317 N.C. 100, 108 (1986), *overruled in part on other grounds, State v. Buchanan*, 353 N.C. 332 (2001) (setting standard for "custody," discussed *supra* § 11.4B). In *Smith*, the juvenile defendant asked that his mother be present during questioning after he was read his rights at the police station. Before his mother arrived, two officers resumed speaking to the juvenile, making what the Court termed "particularly evocative" statements, which resulted in the juvenile making a confession. Even though the juvenile stated that he wanted to make a statement without his mother present and signed a waiver form, the Court held that the officers violated his statutory rights by resuming questioning after he had invoked the right to have his mother present.

A parent may not waive the juvenile's right to the parent's presence after the juvenile has invoked the right. *State v. Branham*, 153 N.C. App. 91 (2002). In *Branham*, the juvenile defendant requested that his mother be present as he was being questioned. Although she was in the police station, his mother did not want to be present. The Court of Appeals held that a parent may not waive the juvenile's right under G.S. 7B-2101(a)(3), and the juvenile defendant was entitled to a new trial at which his statement would be suppressed.

E. Requirement that Parent, Custodian, Guardian, or Attorney Be Present if Juvenile under 14

A juvenile who is under the age of 14 may not waive the requirement that a parent, guardian, custodian, or attorney be present when a statement is made during a custodial interrogation. The parent also cannot waive the right on the juvenile's behalf. *See* G.S. 7B-2101(b); *In re*

T.R.B., 157 N.C. App. 609, 614 (2003). In *T.R.B.*, the juvenile, who was less than 14 years of age, was questioned at the police station and made a statement without a parent, custodian, guardian, or attorney present. The lower court admitted the juvenile's statement without determining whether he was in custody on the ground that custody was irrelevant because the juvenile's father waived the right to a parent's presence by voluntarily leaving the room. In reversing and ordering a new adjudicatory hearing, the Court held that a parent cannot waive the requirement of a parent's presence during a custodial interrogation of a juvenile under the age of 14. The juvenile's statement would therefore be inadmissible at adjudication if he was found to be in custody at the time it was given.

In a case under former G.S. 7A-595(b) (now G.S. 7B-2101(b)), the Court held that the lower court must affirmatively find that the 12-year-old juvenile's custodial statement was made in the presence of a parent, guardian, custodian, or attorney before admitting it into evidence. *In re Young*, 78 N.C. App. 440 (1985).

F. Right to Consult with and Have Attorney Appointed

A juvenile has the right to consult with an attorney during questioning and an attorney must be appointed if the juvenile so requests. G.S. 7B-2101(b). Although the statute when literally construed provides for appointment of counsel during questioning, in practice questioning ceases and an attorney is appointed only if a petition is filed.

G. When Questioning Must Cease

Interrogation must cease when the right to remain silent or have a parent, guardian, custodian, or attorney present is invoked under G.S. 7B-2101(a). *State v. Branham*, 153 N.C. App. 91 (2002). In *Branham*, the 16-year-old juvenile invoked his right to have his mother present during custodial questioning. After his mother refused to enter the interrogation room, the officers informed the juvenile of her decision and told him he could continue with a statement if he chose. Although the juvenile subsequently made a written statement and signed a waiver form, the Court held that all questioning should have ceased when he requested his mother's presence. The Court remanded the case for a new trial in which his statement would be suppressed.

Questioning may resume after a waiveable right is invoked if communication is initiated by the juvenile. *State v. Johnson*, 136 N.C. App. 683 (2000). In *Johnson*, the juvenile invoked his right to silence during a custodial interrogation in his mother's presence. His mother then interrupted and told him "we need to get this straightened out today and we'll talk with him anyway." *Id.* at 686. After the juvenile "nodded affirmatively" to the officer, the officer asked if he wanted to answer questions without a lawyer or parent present. The juvenile answered "yes" and signed a waiver of rights form. The Court held that the juvenile's nod of his head re-initiated communication with the officer after he had invoked the right to remain silent, and his statement was therefore admissible.

H. Knowing, Willing, and Understanding Waiver of Rights

Constitutional and statutory requirements. Constitutional and statutory rights may be waived by the juvenile, except for the requirement that a parent, guardian, custodian, or attorney be present during custodial interrogation of a juvenile under 14 years of age. The court must make a finding that a juvenile "knowingly, willingly, and understandingly waived" rights under the statute before admitting into evidence a statement resulting from a custodial interrogation. G.S. 7B-2101(d). The State bears the burden of proving that the juvenile made a "knowing and intelligent waiver" under both *Miranda* and the statute. *State v. Lee*, 148 N.C. App. 518 (2002) (oral warnings and written waiver form were sufficient to inform juvenile defendant of his constitutional and statutory rights under the "totality of the circumstances"). The State must meet its burden by a preponderance of the evidence. *State v. Flowers*, 128 N.C. App. 697, 701 (1998).

The lower court's findings of fact that a juvenile knowingly, voluntarily, and understandingly waived rights under both *Miranda* and the statute must be supported by evidence in the record. *State v. Brantley*, 129 N.C. App. 725 (1998) (valid waiver where juvenile defendant was informed she could have parent or guardian present and signed waiver of rights form stating she had knowingly, voluntarily, and understandingly waived *Miranda* rights).

Test. In determining whether a waiver of rights was voluntary, the court must look at the "totality of the circumstances," including custody, mental capacity, physical environment, and manner of interrogation. *State v. Bunnell*, 340 N.C. 74, 80 (1995). The court must consider the "specific facts and circumstances of each case, including background, experience, and conduct of the accused." *State v. Johnson*, 136 N.C. App. 683, 693 (2000); *see infra* § 11.6B (Age as Factor in Legality of Search and Seizure). The courts have held that an interrogating officer does not have a duty to explain constitutional or statutory rights to a juvenile in greater detail than is required by *Miranda* and the statute. *State v. Flowers*, 128 N.C. App. 697, 700 (1998) (decided under former G.S. 7A-595(a), now G.S. 7B-2101(a)), *cited by State v. Lee*, 148 N.C. App. 518, 521 (2002). A rote recitation of rights by an officer, however, may not satisfy the totality of circumstances test under *Miranda* and the statute because it may be insufficient to enable a juvenile, as opposed to an adult, to make a knowing, voluntary, and intelligent waiver of rights.

A lay witness, including the interrogating officer, may offer an opinion on the juvenile's understanding of his or her rights if based on personal observation. *State v. Johnson*, 136 N.C. App. 683, 693 (2000) (opinion testimony of detectives regarding the juvenile's understanding of his waiver of rights was properly admitted because they were present when the juvenile was read his rights and when he signed the waiver form).

Express waiver not required. Although the court must make a finding that the juvenile knowingly waived rights under the statute, it is not required that the juvenile make an express waiver of rights, either orally or in writing. If there is not an express waiver, the State has a heavy burden to show a knowing and voluntary waiver. *State v. Flowers*, 128 N.C. App. 697, 701 (1998) (decided under former G.S. 7A-595(a), now G.S. 7B-2101(a)); *North Carolina*

v. Butler, 441 U.S. 369, 375–76 (1979). In *Flowers*, the Court found that the juvenile made a legally sufficient waiver when he responded that he understood after being informed of his rights and then responded to questions. There can be no waiver if a juvenile has not been properly advised of the rights at issue. *State v. Fincher*, 309 N.C. 1, 11 (1983).

11.6
Suppression of Evidence Obtained through Illegal Search and Seizure

A. Scope of Discussion in This Manual

Much of the case law regarding search and seizure is derived from criminal proceedings. The discussion in this manual is limited to age as a relevant factor in determining whether a seizure has occurred within the meaning of the Fourth Amendment and a brief review of juvenile case law regarding search and seizure in the school setting.

The North Carolina Defender Manual contains a chapter devoted to the issues surrounding warrantless search and seizure cases. *See* Vol. 1, Chapter 15 of the North Carolina Defender Manual (April 2006 and Sept. 2006 Supp.), at www.ncids.org.

B. Age as Factor in Legality of Search and Seizure

The North Carolina Court of Appeals held in a 2007 case that age is a relevant factor in determining whether a person has been seized within the meaning of the Fourth Amendment. *In re I.R.T.*, 647 S.E.2d 129 (2007). In *I.R.T.*, the juvenile was 15 years old when he was questioned by two officers with gang unit emblems on their shirts and carrying visible guns, who had arrived in marked police cars. Under these circumstances, including the consideration of the age of the juvenile, the Court found that a reasonable person would not feel free to leave and that the juvenile was therefore "seized" within the meaning of the Fourth Amendment. The Court upheld the denial of the juvenile's motion to suppress the evidence resulting from a search, however, finding that based on the juvenile's conduct and other circumstances the officers had reasonable suspicion to seize the juvenile, as well as probable cause to search the juvenile.

C. Juvenile Case Law: Search and Seizure at School

New Jersey v. T.L.O., 469 U.S. 325 (1985). In *T.L.O.*, the United States Supreme Court distinguished between a search of a student in school performed by a police officer and one conducted by a school official. Law enforcement officers must conform to the requirements of the Fourth Amendment. School officials, although held to some Fourth Amendment limitations, must meet the lower standard of whether the search is reasonable under all the circumstances.

In re Murray, 136 N.C. App. 648 (2000). Following *T.L.O.*, the North Carolina Court of Appeals applied the "reasonableness" standard in holding that a search of a student's book bag at school by a principal was not illegal.

In re D.D., 146 N.C. App. 309 (2001). The Court applied the standard of reasonableness outlined in *T.L.O.* to police officers working "in conjunction with" school officials where the officers' function was to "maintain a safe and educational environment." *Id.* at 319. The Court affirmed the lower court's denial of the juvenile's motion to suppress evidence resulting from a search on school property because the school resource officer and other police officers were involved at the request of the school principal, their involvement was minimal relative to the principal's, the officers did not initiate the investigation, and the officers did not direct the principal's actions but merely held the juveniles in place so that the principal could act.

In re J.M.F. & T.J.B., 168 N.C. App. 143 (2005). The Court, relying on *D.D.*, applied the reasonableness standard of *T.L.O.* in upholding the detention of a student by a school resource officer on school grounds.

In re S.W., 171 N.C. App. 335 (2005). The *T.L.O.* standard of reasonableness was applied in upholding a search of a student at school by a school resource officer. The officer, although an employee of the Durham County Sheriff's Department, worked exclusively as a school resource officer. For a more complete discussion of the above cases, *see* "Search, Seizure, and Interrogation Case Law," by Matt Wunsche, 2007 New Juvenile Defender Program, at www.ncids.org (Training and Reference Materials).

11.7 Suppression of Illegal Identifications

A. Constitutional Grounds

Due Process prohibits identification procedures that are impermissibly suggestive. For a discussion of applicable law and cases addressing whether identification procedures are impermissibly suggestive, *see* 1 North Carolina Defender Manual § 14.4 (Illegal Identification Procedures) (July 2002), at www.ncids.org.

B. Eyewitness Identification Reform Act

New statutory procedures for eyewitness identification were enacted, effective March 1, 2008, for use in criminal proceedings. G.S. 15A-284.50 to -284.53. The act outlines the methods law enforcement officers must use to conduct photo or live lineups for the purpose of eyewitness identification.

Although the statutes do not specify that they are applicable to juvenile proceedings, the purpose of the act is "to help solve crime, convict the guilty, and exonerate the innocent" by improving eyewitness identification procedures. G.S. 15A-284.51. As these ends are equally important in juvenile court, counsel should argue that any eyewitness identification of a juvenile by lineup must comply with the requirements of the Eyewitness Identification Reform Act.

The Act provides two remedies for non-compliance that could be argued in a juvenile case. First, failure to comply with any of the statutory requirements may be considered by the court in ruling on a motion to suppress an eyewitness identification. Second, failure to

comply with any of the statutory requirements is admissible as evidence to support a claim of eyewitness misidentification if the evidence is otherwise admissible. G.S. 15A-284.52(d)(1), (2). If a juvenile lineup does not comply with statutory requirements, counsel should cite the Act in a written motion to suppress, in argument, and in questioning regarding eyewitness misidentification.

For a further discussion of the Eyewitness Identification Reform Act, *see* John Rubin, *2007 Legislation Affecting Criminal Law and Procedure,* Administration of Justice Bulletin No. 2008/01, at 2–4 (Jan. 2008), at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0801.pdf.

DISPOSITIONAL ADVOCACY

CRITICAL QUESTIONS ABOUT DISPOSITIONAL ALTERNATIVES (N.C.G.S. § 7B-2506)

Question for all alternatives: Will it actually promote public safety and rehabilitate the client, or is the alternative just boilerplate/generic and/or selected because it's less expensive?

Curfew

- Is the client's house safe at night? (abuse/neglect, intimate partner violence, retaliation possibility from victim)
- Does the client have school, employment, or extracurricular activities during evenings?

Cooperate with community-based program

- Does the client have reliable transportation to the program?
- Can the client afford the program?
- Is the program effective?
- Are there alternatives that would better meet the client's needs?

No driver's license

- Does the client need the license for school, employment, or transporting family?
- Is obtaining a driver's license part of the transition services in the client's IEP?

Victim-offender reconciliation program

- Is a program available to the client?
- Does the client have reliable transportation to the program?
- Can the client or her family afford the program?
- Is the program effective?
- Will the client violate an order to not associate with the victim if they both attend the program?

Not associate with specified persons

- Is association inevitable because of living proximity or attending the same school?
- Is the proscription too vague, e.g., "no known gang members"?

Not be in specified places

- Is compliance impossible or unduly burdensome because the place is the client's home, school, place of worship, etc.?

Probation

- Is the client capable of complying with all of the terms?
    - E.g., A client suspended from school cannot attend school regularly
    - E.g., A client with a disability or who struggles in school and does not receive adequate educational supports may not be able to pass all of her classes
    - E.g., A client who lives with the co-defendant or victim will not be able to not associate with that person
    - E.g., A client may not be able to participate in substance abuse treatment if her family is poor and does not have insurance
- Do any of the terms impermissibly delegate authority to court counselors?
    - In re Hartsock, In re SRS: Court must set terms of probation

Supervised day program

- Is a program available to the client?
- Does the client have reliable transportation to the program?
- Can the client or her family afford the program?
- Is the program effective?
- Will the program treat the client well?
- Will the client violate an order to not associate with the victim if they both attend the program?

Training program

- Is a program available to the client?
- Does the client have reliable transportation to the program?
- Can the client or her family afford the program?
- Is the program effective?
- Will the client violate an order to not associate with the victim if they both attend the program?

House arrest

- Is the house safe?
- Is there a custody agreement in place that requires the client to spend time in different homes?
- Does the student need to leave for work, school, or other positive, rehabilitative services?

Restitution/Fine

- Is payback program available, and how will family comply?

Community service

- Are there community service programs available to the client?
- Does the client have transportation to and from the service?

Placement in:

- **Residential treatment facility**
- **Non-residential treatment program**
- **Substance abuse program**
- **Group home**
- **Detention facility**
- **Youth development center**
- **Wilderness program**

- Does the placement have the services available to meet the client's educational, emotional/psychological, and physical needs of the client?
- Will the client's family be able to visit the client?
- Does the placement have a record of mistreatment or ineffectiveness?

In the case of any juvenile who needs more adequate care or supervision or who needs placement:

- **Supervision by DSS**
- **Placement with DSS**
- **Placement with relative, private agency, or other suitable person**

- Does the placement have the services available to meet the client's educational, emotional/psychological, and physical needs of the client?
- Will the client's family be able to visit the client?

TIPS FOR DYNAMIC DISPOSITIONAL ADVOCACY

STEP 1: RESEARCH

1. Know your CLIENT

Who is s/he and what are his/her goals, dreams, aspirations?

What has shaped your Client's life?
▫ Review Family Background
▫ Request DSS Records (if applicable)
▫ Request School, Medical, Psychological Records

Why is s/he before the Court?
▫ Research Clerk's File
▫ Request DJJ File

How many places has s/he lived?
▫ Review Info/Records from other Jurisdictions

2. Know the CODE

▫ Remember the Purpose of Disposition *7B-2500*
▫ Review the Statutory Options *7B-2506*
▫ Review Client's Disposition Level *7B-2508*
▫ Remember Special Rules and Conditions--Previous YDC Commitment, Extraordinary Needs and Chronic Offenders

3. Know the COMMUNITY

▫ Research Service Providers and Placement Options
▫ Research Mentoring and Youth Enrichment Programs
▫ Be mindful of emerging trends in Juvenile Justice and Child Advocacy

4. Know the COURT ("Know thy Judge!")

▫ Be mindful of the Judge's attitude about particular charges, approach to disposition and overall philosophy regarding Juvenile system

5. Know relevant CASE LAW and CURRENT LEGISLATION

www.ncids.org
www.sog.unc.edu

STEP 2: PRESENTATION

1. Reiterate Goals and Aims of Juvenile Court *7B-1500, 7B-2500, 7B-2501*

▫ Emphasize need for appropriate services for Client and family
▫ Focus on assisting Client's journey toward becoming productive member of community

2. Reintroduce your Client to the Court

▫ Highlight Client's successes
▫ Discuss Client's goals, hobbies and interests
▫ Encourage your Client to speak

3. Remind the Court of Special Challenges and Issues affecting Client

▫ Is this a Dual Jurisdictional Child? (DSS and Delinquency cases)
▫ Discuss Family Dynamics, Counseling Needs, Physical Challenges
▫ Address Educational Concerns, Substance Abuse, Mental Health Needs

4. Prepare Your Own Report and Recommendations

▫ Ask for Dismissal
▫ Request Deferred Disposition
▫ Present Creative Alternatives to Detention, Probation, YDC
▫ Advocate for Lowest Dispositional Level or Lowest Probation Term
▫ Present Letters of Support, Testimonials, Certificates of Success

5. Protect the Record

▫ Object to Unreliable Hearsay
▫ Ask for Specific Findings of Fact

6. Project Positive Attitude

▫ Emphasize belief in Client's future success
▫ Empower Client – provide Client with copies of Dispositional Order, review special terms and conditions and give relevant contact information

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Chapter 13:

Dispositional Hearings

13.1
Overview

Following an adjudication of delinquency the court proceeds to a dispositional hearing for entry of an order of disposition within the statutory alternatives. A Level 1, 2, or 3 disposition must be imposed, based on both the seriousness of the offense adjudicated and the juvenile's history of delinquency. Specific criteria for determining the appropriate disposition level are provided by statute.

The court must order a disposition that meets the needs of the juvenile and provides for protection of the public. Statutory alternatives range from dismissal of the case to commitment to the Department of Juvenile Justice. Counsel should advise the juvenile of possible dispositions within the available dispositional alternatives, but must advocate for the disposition desired by the juvenile.

This chapter will review dispositional hearing procedures and statutory provisions for determining the classification of the offense and the juvenile's delinquency history level. Alternatives for each dispositional level and the court's discretion within the statutory mandates are discussed.

13.2
Terminology Used in This Chapter

*Delinquency history leve*l determines the permissible dispositional alternatives based on points assigned for the juvenile's prior adjudications and the classification of the current adjudicated offense. *See infra* § 13.7 (Delinquency History Levels and Offense Classification).

Department is the Department of Juvenile Justice and Delinquency Prevention. G.S. 7B-1501(7a).

Disposition is the order entered by the court following an adjudication of delinquency. A dispositional hearing is held, which may be informal, for the court to consider the predisposition report, along with evidence from the State and the juvenile. The court must order a disposition within the statutory alternatives based on both the seriousness of the offense adjudicated and the juvenile's history of delinquency.

Predisposition report is prepared by a juvenile court counselor and contains information regarding the juvenile and recommendations for disposition. The predisposition report must contain a risk and needs assessment and is submitted at the dispositional hearing. G.S. 7B-2413; *see infra* § 13.4 (Predisposition Investigation and Report).

A risk and needs assessment is attached to the predisposition report submitted by the juvenile court counselor at the dispositional hearing. It must contain information regarding the juvenile's social, medical, psychiatric, psychological, and educational history, as well as any factors indicating the probability of the juvenile committing further delinquent acts. G.S. 7B-2413; *see infra* §§ 13.4B, C (Contents of Report, Risk Factors).

13.3
Preliminary Matters

A. Continuance of Dispositional Hearing

After adjudication the court may continue the dispositional hearing for preparation of the predisposition report and risk and needs assessment or at the request of the juvenile. G.S. 7B-2413, -2501(b); *see In re Vinson*, 298 N.C. 640, 661–62 (1979) (Court stated that dispositional hearing must be continued at juvenile's request under recently enacted G.S. 7A-639 (now G.S. 7B-2413), G.S. 7A-640 (now G.S. 7B-2501(a),(b)), and G.S. 7A-632 (now G.S. 7B-2406); case decided under earlier, different version of Code and remanded on other grounds). The statute providing for continuances under hearing procedures, G.S. 7B-2406, has been held to apply to dispositional hearings, giving the court discretion to continue a dispositional hearing "for good cause." *In re R.D.R.*, 175 N.C. App. 397 (2006) (court had discretion to continue disposition on its own motion for one week, until adjudicatory date for another petition involving juvenile). This statute states that the continuance is only "for as long as is reasonably required to receive" evidence or other information. G.S. 7B-2406.

If the juvenile is opposed to a continuance of disposition, counsel should cite the statute setting forth that one of the purposes of the subchapter on delinquent juveniles is to provide "swift, effective dispositions. . . . " G.S. 7B-1500(2)(a). Additionally, G.S. 7B-2413 provides that the court "shall proceed to the dispositional hearing upon receipt of the predisposition report," indicating that the dispositional hearing should not be continued in the absence of a sufficient reason if the report has been prepared.

B. Secure Custody Pending Dispositional Hearing

The court may order the juvenile into secure custody after an adjudication of delinquency pending the dispositional hearing. G.S. 7B-1903(c). This will not be an issue if disposition immediately follows adjudication. There may be reasons for a continuance, however, such as the need for preparation of a predisposition report or the juvenile's need for time to subpoena witnesses or documents.

If the court indicates that secure custody pending disposition is being considered, counsel should make sure that the proceedings are being recorded. Counsel should argue that the criteria for secure custody pending adjudication under G.S. 7B-1903(b) apply. This is not specified by statute but can be argued as a reasonable extension. It can also be argued that secure custody pending disposition should not be more punitive than the disposition permitted for the juvenile under the statutory guidelines. *See generally In re R.D.R.*, 175 N.C. App. 397 (2006) (trial court's finding that juvenile had been adjudicated delinquent and should be in custody pending disposition or placement under G.S. 7B-2506 was sufficient to support secure custody order; predisposition report was ready at time of adjudication, but disposition was continued one week to date set for adjudication of pending petition on felony charge so that court could take comprehensive view of interests of juvenile and State).

Specific findings of fact supporting an order of detention pending disposition should be requested. This will require the court to articulate statutory reasons supporting the order

of detention and provide a record that may be the basis of an appeal. Counsel should also request a hearing to review secure custody pursuant to G.S. 7B-1906(b) if the continuance is for longer than 10 days. The statute provides that hearings to determine the need for continued secure custody will be held at intervals of no more than 10 calendar days as long as the juvenile remains in secure custody. There is no language in the statute limiting its application to pre-adjudication detention.

13.4 Predisposition Investigation and Report

A. Consent for Preparation of the Report

The juvenile court counselor must obtain consent of the juvenile, the juvenile's parent, guardian, or custodian, or the juvenile's attorney to prepare the predisposition report and risk and needs assessment (also called the disposition report) prior to adjudication. G.S. 7B-2413. In the absence of consent, the predisposition report cannot be prepared until after an adjudication, and the dispositional hearing will be continued unless the court makes a written finding that a report is not needed for disposition to proceed. *Id*. This consent is typically granted by the juvenile or a parent, guardian, or custodian at the intake meeting with the court counselor. *See infra* Appendix 13-1 (Authorization to Prepare Pre-Disposition Reports).

In most cases it will be beneficial to the juvenile for the report to be written before adjudication. If the petition is dismissed at adjudication, the report is of no consequence. If the juvenile is found to be delinquent, having the prepared report may prevent the need for a continuance. This is particularly important if the juvenile is being held in secure custody. It will also give counsel more time to review the report, affording the opportunity to bring factual mistakes to the attention of the court counselor, to provide positive information to the court counselor that was omitted, and to subpoena witnesses regarding the information in the report.

B. Contents of Report

A predisposition report prepared by the juvenile court counselor must be submitted before the dispositional hearing. A risk and needs assessment, which is a comprehensive evaluation of the juvenile, must be part of the predisposition report. The risk and needs assessment must contain information regarding the juvenile's social, medical, psychiatric, psychological, and educational history. G.S. 7B-2413.

C. Risk Factors

G.S. 7B-2413 directs that the report must include any factors indicating the probability that the juvenile will commit further offenses. Through review of the juvenile court counselor's file, counsel should review the court counselor's file and be prepared to cross-examine the juvenile court counselor and to subpoena necessary witnesses about any asserted factors.

Through cross-examination and direct testimony from the juvenile's witnesses, mistakes in the report may be corrected and positive information elicited.

Because this section of the report is more subjective, there may be more reason to cross-examine the juvenile court counselor about its contents, especially if the report concludes that there is a high risk of the juvenile committing further delinquent acts, or otherwise contains information that could be harmful to the juvenile. Cross-examination should explore whether the risk factors are based on incorrect information or faulty assumptions. Counsel should be careful in questioning, however, because it might allow the juvenile court counselor to discuss the risk factors in more detail to the detriment of the juvenile's case. An alternative is to argue that the factors listed do not put the juvenile at risk for re-offending or that the juvenile court counselor has made unwarranted or contradictory assumptions.

D. Right to Review before Dispositional Hearing

The juvenile, as well as counsel, has the right to review the predisposition report with the attached risk and needs assessment prior to the dispositional hearing. Parts of the report may be withheld from the juvenile on the court's determination that they would "seriously harm the treatment or rehabilitation of the juvenile or would violate a promise of confidentiality." G.S. 7B-2413.

In many districts the report is presented to counsel at the same time the report is presented to the court, affording counsel little time to review the report and consult with the juvenile. Counsel should consider pressing for delivery of the report prior to the date of the hearing.

Some juveniles will want to read the report, although others may be satisfied if counsel explains it to them. If the juvenile wants to read the report, counsel should review it with the juvenile to assist in interpretation.

Although the statute concerning the predisposition report does not specify a parent, guardian, or custodian as a person entitled to review the report, these persons may have the right to do so pursuant to their statutory right to review files concerning the juvenile. *See* G.S. 7B-3001. Because the statutory right is not clear, counsel should direct the parent, guardian, or custodian to address a request for the predisposition report to the court.

E. Right to Present Rebuttal Evidence to Predisposition Report

The juvenile and the juvenile's parent, guardian, or custodian are entitled to present evidence to rebut the information in the predisposition report. G.S. 7B-2413. Both the juvenile and the juvenile's parent, guardian, or custodian are generally entitled to present evidence at disposition and to present a proposed dispositional plan. G.S. 7B-2501; *see supra* § 3.5E (Disposition). Counsel should present rebuttal evidence as well as positive information regarding the juvenile.

13.5
Dispositional Hearing

A. Conduct of the Hearing

Hearing may be informal. The dispositional hearing may be informal, with the rules of evidence relaxed. G.S. 7B-2501(a). Counsel still must be vigilant in taking necessary steps to protect the juvenile's interests. An objection should be made to any parts of the predisposition report that are not within the admissible hearsay rules discussed below. The juvenile court counselor can be cross-examined as to the sources of information. If necessary, counsel should subpoena and cross-examine the people who are the sources of information in the report.

There is no statutory prohibition on the presentation of formal evidence by the juvenile. Counsel should call witnesses if testimony would be more effective than a report. Reports that are helpful to the juvenile should be offered into evidence, however, to counter negative information contained in the dispositional report.

Dispositional guidelines. It is mandated that the court consider both the protection of the public and the needs and best interests of the juvenile in developing a dispositional order. G.S. 7B-2501(c). Counsel should argue that the court should tailor the dispositional order to meet the juvenile's needs in advocating for the disposition sought by the juvenile.

Pursuant to G.S. 7B-2501(c)(1)–(5), the following factors are to be considered by the court:

- the seriousness of the offense,
- the need to hold the juvenile accountable,
- the importance of protecting the public safety,
- the degree of culpability indicated by the circumstances of the particular case, and
- the rehabilitative and treatment needs of the juvenile indicated by a risk and needs assessment.

Evidence. "Any evidence" is admissible, including hearsay evidence, that the court finds to be "relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." G.S. 7B-2501(a). Written reports concerning the needs of the juvenile are admissible. *Id.*

Counsel should continue to object to evidence that does not meet the statutory standard of relevance, reliability, and necessity. For example, statements based on double hearsay ("The mother/neighbor/co-respondent stated that the teacher/doctor/counselor said . . .") or evaluations that are no longer current may be objectionable. Inappropriate recommendations of the court counselor, such as for substance abuse treatment when there is no evidence of substance abuse, should be objected to and argued against. A motion for a continuance to subpoena a witness for cross-examination may be made if unreliable hearsay information is admitted over counsel's objection.

Right of juvenile and parent to present evidence. The juvenile and the juvenile's parent, guardian, or custodian have the right to present evidence and to make argument to the court concerning the appropriate disposition. G.S. 7B-2501(b). Counsel should talk with the parent concerning the parent's position on disposition and explain the possible consequences of the parent making negative statements regarding the juvenile at disposition. *See supra* § 3.5E (Disposition).

Defense dispositional plan. Counsel should prepare a dispositional plan and, where appropriate, a dispositional memorandum. Topics that may be included are:

- favorable information, including mitigating factors and relative culpability concerning the offense, and information regarding the juvenile's personal background, educational history, employment record and opportunities, and financial status;
- factors supporting a disposition other than confinement, such as the potential for rehabilitation or the nonviolent nature of the crime;
- the availability of treatment programs, treatment facilities, and community service work opportunities;
- challenges to incorrect or incomplete information or inappropriate references and characterizations in the State's evidence; and
- if appropriate, a counterproposal to confinement.

See Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level § 10.5 (2007) adopted by the North Carolina Commission on Indigent Defense and reprinted in Chapter 18 of this manual.

Dismissal. The court may dismiss the case after an adjudication of delinquency, although the statute provides no guidelines for doing so. G.S. 7B-2501(d). Dismissal of the case might be appropriate, for example, for a first offense that is relatively minor, when the juvenile's parents have taken adequate steps to address underlying problems, or when the experience of being in juvenile court has had a positive effect on the juvenile's behavior.

Continuance of disposition. A continuance of up to six months may also be ordered specifically to allow the juvenile's family to address the juvenile's needs. G.S. 7B-2501(d). The needs of the juvenile may be met by providing more adequate home supervision, through placement in a private or specialized school or agency, or through some other plan approved by the court. G.S. 7B-2501(d). Even if the case involves a serious offense, the court might grant a continuance of disposition under this section if a comprehensive plan is presented. If the plan has been successful when the case is rescheduled, the court may dismiss the case or impose a more lenient disposition than would have originally been entered.

Counsel should move for a continuance of disposition when appropriate and consider filing a written motion and supporting memorandum of law. Documentation outlining the family's efforts to explore community resources and the resulting proposed dispositional plan may persuade the court to continue the dispositional hearing.

B. Court-Ordered Evaluation and Treatment

Evaluation. To assist in developing an appropriate disposition, the court may order that the juvenile be examined by a physician, psychiatrist, psychologist, or other qualified expert. G.S. 7B-2502(a).

The court must allow the parent to arrange for the ordered evaluation as the first option. G.S. 7B-2502(b). If the parent accepts this responsibility, counsel should seek to work with the parent in selecting the most appropriate expert to perform the evaluation. Counsel may suggest someone who has worked with juveniles and who has performed thorough and effective juvenile court evaluations in other cases.

If the parent refuses or is unable to make the arrangements, the court may enter an order specifying who will perform the evaluation. G.S. 7B-2502(b). Counsel might suggest that the court appoint an expert with whom the juvenile has an existing relationship or an expert who has worked with juveniles and has done other juvenile court evaluations. After the court has ordered a particular expert to perform an evaluation, counsel should contact the expert to provide background material or other information that might be helpful to the juvenile's position.

The Juvenile Code suggests that the evaluation might be done on an inpatient basis, as it directs the court to consider whether it is in the juvenile's interest to remain in the county of residence "[i]n placing a juvenile in out-of-home care under this section." G.S. 7B-2502(a). Typically, the juvenile will prefer to be evaluated on an outpatient basis.

Counsel should obtain a copy of any report resulting from the examination prior to further proceedings. The expert may be contacted to provide clarifying information to supplement the report. If necessary, counsel should subpoena the expert for cross-examination regarding the evaluation.

Hearing. A hearing must be held following the completion of the examination to determine whether the juvenile is in need of medical, surgical, psychiatric, psychological, or other evaluation or treatment. G.S. 7B-2502(b). Generally, the court will review any written report regarding the evaluation or receive testimony from the evaluator regarding the report and recommendations. Counsel should cross-examine any witnesses and present evidence favorable to the juvenile's position. The juvenile might have an ongoing relationship with a counselor, therapist, teacher, or other person who could present testimony helpful to the court and to the juvenile's position. In some cases the juvenile's parent might be called on the juvenile's behalf. There is a danger, however, in presenting testimony from a parent who downplays the juvenile's problems and does not understand the need for or intend to pursue an appropriate plan.

The county manager of the county of the juvenile's residence, or other designated person, must be given notice of the hearing and be allowed to be heard. This is required because the county may be required to pay for the cost of the juvenile's evaluation and treatment, discussed next. G.S. 7B-2502(b).

Cost of treatment. If the court decides to order treatment, it must also determine who will be responsible for the cost. The statute presumes that the parent who arranges for evaluation and treatment will pay for the cost. If the court determines that the parent is unable to pay, however, the court must order the county of the juvenile's residence to pay for evaluation and treatment. In that case, the county department of social services is required to recommend the facility that will evaluate and treat the juvenile. G.S. 7B-2502(b).

C. Court-Ordered Drug Testing

If a juvenile is adjudicated delinquent for an offense that involves the possession, use, sale, or delivery of alcohol or a controlled substance, the court *must* order that the juvenile be tested for use of a controlled substance or alcohol within 30 days of the adjudication. In other cases, the court *may* order that the juvenile be tested for use of a controlled substance or alcohol. Counsel should object, however, if no evidence of drug use has been presented. If ordered, the results of these initial tests, as opposed to regular testing ordered as part of disposition, may be used for evaluation and treatment purposes only. G.S. 7B-2502(a).

A juvenile court counselor may require the juvenile to submit to drug testing if the court makes this a condition of probation. G.S. 7B-2510(a)(7)(c), -2510(b)(2); *see In re Schrimpsher*, 143 N.C. App. 461, 466–67 (2001) (court did not have authority to order as a condition of probation that the juvenile submit to urinalysis, blood, or Breathalyzer testing on request of any law enforcement officer; juvenile conceded that court had authority to order juvenile to submit to testing on request of court counselor).

D. Evaluation and Treatment of Mentally Ill or Developmentally Disabled Juvenile

Referral to area program. The court must refer a juvenile to the area mental health, developmental disabilities, and substance abuse services director (hereinafter the director) for "appropriate action" if it believes or if there is evidence presented that the juvenile is mentally ill or developmentally disabled. G.S. 7B-2502(c). The director must obtain an interdisciplinary evaluation and arrange for services to meet the juvenile's needs. *Id*. These services could include a specialized school, therapy, counseling, a personal aide, or residential treatment.

Inpatient treatment. A juvenile may be admitted to a State hospital or mental retardation center with the voluntary consent of the parent, guardian, or custodian (hereinafter the parent) if the area program evaluation determines that this is the best service for the juvenile. If the parent refuses to consent after admission is recommended by the director, the court may provide the consent and signature required for voluntary admission. G.S. 7B-2502(c).

If the juvenile is refused admission by a regional mental hospital or is discharged before treatment is complete, the hospital must report this to the court. There must be a written report outlining the reasons for denial of admission or discharge and the juvenile's diagnosis, symptoms of mental illness, indications of need for treatment, and a referral to another facility that could provide appropriate treatment for the juvenile. G.S. 7B-2502(c).

Voluntary admission of a juvenile to an inpatient facility must conform to the procedures in G.S. Chapter 122C. *See* North Carolina Civil Commitment Manual Ch. 6 (Voluntary Admission of Minors) (2006), at www.ncids.org. A district court judge must review the voluntary admission in a separate proceeding in which the juvenile is represented by counsel. *See* G.S. 122C-221 through -224.7. Special counsel generally represents juveniles at the State hospitals, and counsel is usually appointed for juveniles at other facilities. A juvenile *must* be discharged by the "responsible professional" at any time it is determined that the juvenile is no longer mentally ill or is no longer in need of treatment at the facility. This is true regardless of an order by the judge in the delinquency proceeding. The juvenile must meet and continue to meet the criteria for voluntary admission for inpatient treatment—that is, being mentally ill or a substance abuser and in need of treatment at the facility. G.S. 122C-224.7.

At the 122C hearing to review the voluntary admission, the court may concur with the admission and authorize continued treatment for up to 90 days at the initial hearing, continue the admission for an additional 15 days for additional diagnosis and evaluation, or discharge the juvenile. G.S. 122C-224.3(g).

13.6 Dispositional Alternatives

A. Purpose of Disposition

The Juvenile Code philosophy underlying dispositional alternatives was significantly changed by the repeal of former G.S. 7A-646, which required that the court impose the least restrictive dispositional alternative and order commitment to the Division of Youth Services only after other alternatives were found to be inappropriate or were proven to be unsuccessful. Under the present statute, G.S. 7B-2501, the court must balance the needs of the juvenile with the need for public safety within the permissible dispositional alternatives. It remains the role of counsel to advocate on behalf of the juvenile for the least restrictive and least punitive disposition desired by the juvenile.

B. Statutory Categories

The court must choose dispositional alternatives within the appropriate dispositional level, which is determined by the juvenile delinquency history level and the offense classification. *See infra* § 13.7 (Delinquency History Levels and Offense Classification). There are 24 dispositional alternatives. G.S. 7B-2506(1) through (24). Some Level 1 and Level 2 alternatives are identical except that a more severe disposition is allowed under Level 2. For example, alternative (4) provides for restitution up to $500, and alternative (22) provides for restitution over $500. Likewise, alternative (6) allows up to 100 hours of community service, and alternative (23) allows up to 200 hours; alternative (12) provides for a limit of five 24-hour periods of intermittent detention, and alternative (20) provides for up to fourteen 24-hour periods.

Each alternative is described briefly below, along with case law applicable to that alternative. Within the dispositional limits for each class of offense and delinquency history level under G.S. 7B-2508, the court may:

1. If a juvenile needs more adequate care or supervision, or is in need of placement:
   a. Require supervision in the home by a designated person or agency, subject to court-ordered conditions; or
   b. Make a change in the juvenile's custody; or
   c. Place the juvenile in the custody of the department of social services.
2. Excuse the juvenile from compulsory school attendance if the court finds that a suitable alternative plan can be arranged.
3. Order the juvenile to cooperate with a community-based program, an intensive substance abuse program, or a residential or nonresidential program, not to exceed 12 months.
   - *In re M.A.B.*, 170 N.C. App. 192 (2005) (court did not improperly delegate its authority under G.S. 7B-2506(3) by ordering juvenile to cooperate with placement in a residential or nonresidential treatment program as directed by juvenile court counselor or mental health agency, as court ordered participation in program but allowed another person or agency to determine specifics).
   - *In re S.R.S.*, 180 N.C. App. 151, (2006) (in violation of probation case, Court of Appeals held, citing *Hartsock*, that lower court improperly delegated authority to juvenile court counselor to decide on type and provider of counseling).
   - *In re Hartsock*, 158 N.C. App. 287 (2003) (court could not delegate its authority under G.S. 7B-2506(14) to juvenile court counselor or counselor from treatment program to place juvenile in residential treatment).
4. Require restitution up to $500 payable within 12 months.
   - *In re M.A.B.*, 170 N.C. App. 192 (2005) (court did not improperly delegate authority by ordering juvenile to pay up to $500 restitution payable within 12 months with amount to be determined upon submission of medical bills to court).
   - *In re McDonald*, 133 N.C. App. 433 (1999) (court erred in ordering juvenile to pay $200 restitution as it failed to make findings of fact regarding amount of damage suffered by victim and only evidence presented was pictures of damaged property).
5. Impose a fine.
6. Order up to 100 hours of supervised community service to be done within 12 months.
7. Order participation in the victim-offender reconciliation program.
8. Place the juvenile on probation under supervision of the juvenile court counselor. *See infra* § 13.6C (Probation).
9. Prohibit the juvenile from obtaining a driver's license for as long as the juvenile is under the court's jurisdiction.

10. Impose a curfew.
11. Order the juvenile not to associate with specified persons or be in specified places.
12. Impose intermittent detention, limited to five 24-hour periods.
    - *In re Hartsock*, 158 N.C. App. 287 (2003) (order for intermittent confinement of no effect as court failed to specify when confinement would occur; delegation of authority would have been contrary to express language of statute).
13. Order placement in a wilderness program.
14. Order placement in a residential treatment facility, an intensive nonresidential treatment program, an intensive substance abuse program, or a group home other than a multi-purpose group home operated by a State agency.
    - *In re Hartsock*, 158 N.C. App. 287 (2003) (court could not delegate its authority under G.S. 7B-2506(14) to juvenile court counselor or counselor from treatment program to place juvenile in residential treatment).
    - *In re M.A.B.*, 170 N.C. App. 192 (2005) (court did not improperly delegate its authority under G.S. 7B-2506(3) by ordering juvenile to cooperate with placement in residential or nonresidential treatment program as directed by juvenile court counselor or mental health agency, as court ordered participation in program but left specifics to another person or agency).
    - *In re S.R.S.*, 180 N.C. App. 151 (2006) (in a violation of probation case, Court of Appeals held, citing *Hartsock*, that lower court improperly delegated authority to juvenile court counselor to decide whether there would be out-of-home placement).
15. Place the juvenile on intensive probation under the supervision of a juvenile court counselor. *See infra* § 13.6C (Probation).
16. Order the juvenile to cooperate with a supervised day program under specified terms and conditions.
17. Order the juvenile to participate in a regimented training program. (There are no programs of this type, also called "boot camps," in North Carolina as of the writing of this manual.)
18. Order house arrest.
19. Suspend imposition of a more severe, permissible disposition upon the juvenile's agreement to court-imposed conditions.
20. Order confinement in detention for up to fourteen 24-hour periods, not to be imposed consecutively with any intermittent detention under (12) above.
    - *In re Hartsock*, 158 N.C. App. 287 (2003) (order for intermittent confinement of no effect as court failed to specify when confinement would occur; delegation of authority would have been contrary to express language of statute).
21. Order residential placement in a multi-purpose group home operated by a State agency.

22. Order restitution of more than $500 payable within 12 months.
    - *In re Schrimpsher*, 143 N.C. App. 461, 465–66 (2001) (court must make findings of fact to determine whether others were jointly and severally liable for damages, total amount of damages, and amount of damages attributable to juvenile).
23. Order up to 200 hours supervised community service.
24. Commit the juvenile to the Department for placement in a youth development center, also known as "training school," for a period of not less than six months.
    - *In re T.B.*, 178 N.C. App. 542 (2006) (commitment to Department of Youth Services may be ordered only for juvenile who is eligible to receive Level 3 disposition).
    - *In re D.A.F.*, 179 N.C. App. 832 (2006) (trial court had discretion to order either a Level 2 or Level 3 disposition based on juvenile's offense and delinquency history level; although juvenile court counselor did not explore community-based alternatives, juvenile offered alternative residential treatment plan; trial court did not abuse its discretion in ordering commitment to Division of Youth Services because it was a "reasoned decision" based on factors regarding juvenile's needs and risk to public safety; case reversed and remanded because court failed to advise juvenile of maximum custodial confinement possible when admission accepted at adjudication).

C. Probation

A juvenile may be placed either on probation or on intensive probation under provisions (8) and (15) of the dispositional alternatives statute. G.S. 7B-2506(8), (15). During the probationary period the juvenile is under the supervision of a juvenile court counselor and may be subject to conditions ordered by the court. The juvenile may be brought back into court on a motion alleging violation of probation, possibly subjecting the juvenile to further dispositional orders of the court. G.S. 7B-1501(22).

The conditions of probation are often one or more of the other dispositional alternatives listed in G.S. 7B-2506. *See infra* Chapter 14 (Probation).

13.7
Delinquency History Levels and Offense Classification

A. Statutory Classifications

A classification structure for juvenile offenses and delinquency history levels was enacted effective July 1, 1999. G.S. 7B-2506 to -2508. This structure requires that the court impose a dispositional alternative within one of three levels determined by the statutory classification of the offense (violent, serious, or minor) and the juvenile's delinquency history level, determined by points assigned for each adjudicated offense. *Id.*

Counsel must be familiar with the statutory scheme to be prepared to argue for the least restrictive disposition within the juvenile's delinquency level and to advise the court if an impermissible disposition is considered. The Office of the Juvenile Defender has created charts, which appear at the end of this chapter, to guide counsel in navigating the statutory dispositional structure. These charts include the guidelines for determining the appropriate dispositional level in a given case.

B. Dispositional Charts

The dispositional charts at the end of this chapter are as follows:

- Appendix 13-2: Scoring Prior Record (worksheet for assigning points for prior adjudicated offenses)
- Appendix 13-3: Disposition Chart (determining level by offense classification and delinquency history level (points))
- Appendix 13-4: Juvenile Disposition Options (permissible dispositional alternatives for each classification)
- Appendix 13-5: Application of the Disposition Chart
- Appendix 13-6: Request for Release of Department of Juvenile Justice File

C. Determining Delinquency History Levels

Generally. Available dispositional alternatives are determined by the total points assigned to the juvenile's prior adjudications and the juvenile's probation status, if any. G.S. 7B-2507(a). Counsel should review the court file to determine the juvenile's prior delinquency history level prior to the dispositional hearing. *See infra* Appendix 13-2 (Scoring Prior Record). The delinquency history provided to the court may be inaccurate and could result in an improper disposition if counsel does not object. The provisions for assigning points and determining the delinquency history level based on those points are set forth in G.S. 7B-2507(b) and (c), respectively.

Points. Points are assigned for each prior adjudication as follows:

Offense Class	Points
Class A through E felony	4 points
Class F through I felony or Class A1 misdemeanor	2 points
Class 1, 2, or 3 misdemeanor	1 point
On probation at time of offense	2 points

Delinquency history levels by points. Delinquency history levels as determined by points are as follows:

Delinquency History Level	Points
Low	No more than 1 point
Medium	2 or 3 points
High	4 or more points

The delinquency history level is determined by the classification of the offense at the time the offense was committed. G.S. 7B-2507(c).

A juvenile who is adjudicated delinquent for more than one offense in a single session of court is assigned points based only on the offense having the highest points. G.S. 7B-2507(d). If a juvenile has more than one petition filed within a short period of time, it is advantageous to have them adjudicated in the same session of court for the purpose of assignment of points. The juvenile may receive a higher point total based on the same offenses if they are adjudicated in separate court sessions.

Proof of prior adjudications. The State bears the burden of proof by the preponderance of the evidence to show that the prior adjudication exists and that the juvenile is the person who committed the offense. Prior adjudications must be proved by stipulation of the parties, an original or copy of the court record of the prior adjudication, a copy of the record maintained by the Division of Criminal Information or by the Department of Juvenile Justice, or by any other method found by the court to be reliable. G.S. 7B-2507(f).

The prosecutor must make "all feasible efforts" to obtain and present to the court the full record of the juvenile. It must be provided to the juvenile on request. G.S. 7B-2507(f). Counsel should submit a request for the Department of Juvenile Justice record directly to the chief court counselor as well as make a timely request to the prosecutor for the record that will be submitted in court. *See infra* Appendix 13-6 (Request for Release of Department of Juvenile Justice File).

Classification of prior adjudications from other jurisdictions. An adjudication of a felony in a jurisdiction outside of North Carolina is generally classified as a Class I felony. An adjudication of a misdemeanor is generally classified as a Class 3 misdemeanor. G.S. 7B-2507(e).

The juvenile may have a felony from another jurisdiction treated as a misdemeanor on proof by a preponderance of the evidence that the offense in the other jurisdiction is "substantially similar" to a misdemeanor offense in North Carolina. G.S. 7B-2507(e).

If the State proves by a preponderance of the evidence that an offense classified as a misdemeanor in another jurisdiction is "substantially similar" to an offense that is classified as a Class I felony or higher in North Carolina, the offense is treated as that specific class of felony for the purpose of assigning points. For example, if the State establishes that the offense from another jurisdiction is substantially similar to a common law robbery in North Carolina, the offense would be treated as a Class G felony. If the State proves by a preponderance of the evidence that an offense classified in another jurisdiction as a misdemeanor is "substantially similar" to an offense classified as a Class A1 misdemeanor in North Carolina, the offense is treated as a Class A1 misdemeanor for the purpose of assigning points.

D. Offense Classification

Juvenile offenses are divided into three categories:

Offense Category	Offense Class
Violent	Class A through E felony
Serious	Class F through I felony or Class A1 misdemeanor
Minor	Class 1, 2, or 3 misdemeanor

G.S. 7B-2508(a).

13.8
Dispositional Limits for Each Class of Offense and History Level

The statute delineates permissible dispositional alternatives by a tri-level system, determined by the offense classification and the points assigned under the delinquency history level. G.S. 7B-2507, -2508. The statutory dispositional framework is more clearly understood by referring to Appendix 13-4 *infra* (Disposition Chart and Dispositional Options) and Appendix 13-5 *infra* (Application of the Disposition Chart).

Levels. There are three levels of dispositional alternatives determined by the offense classification and the points assigned for prior offenses:

Level 1 (Community)

- Dispositional alternatives (1)–(13) and (16) under G.S. 7B-2506 are available to the court.
- In choosing among the alternatives, the court must consider the juvenile's needs as outlined in the risk and needs assessment section of the predisposition report, the appropriate community resources available to meet those needs, and the protection of the public. G.S. 7B-2508(c).

Level 2 (Intermediate)

- Dispositional alternatives (1)–(23) under G.S. 7B-2506 are available to the court with the proviso that at least one disposition listed in (13)–(23) must be ordered. The court may order a Level 3 disposition if the juvenile has received a Level 3 disposition in a prior proceeding.
- The standard for determination of the appropriate disposition is the same as for a Level 1 disposition. G.S. 7B-2508(d).

Level 3 (Commitment)

- Only alternative (24), commitment to the Department of Juvenile Justice and Delinquency Prevention, is allowed as a disposition under Level 3. *See infra* Chapter 15 (Commitment of Juvenile to Department of Juvenile Justice).
- The court has discretion, however, to impose a Level 2 disposition if it makes written findings establishing the "extraordinary needs" of the juvenile.

G.S. 7B-2508(e). It may also order a Level 3 disposition if the juvenile has four or more separate adjudications of delinquency. G.S. 7B-2508(g); *In re D.A.S.*, 183 N.C. App. 107 (2007) (court did not abuse its discretion by ordering a Level 3 disposition for a Class A1 misdemeanor, when offense was "serious" and juvenile had "high" prior delinquency level).

See supra § 13.6B (Statutory Categories); s*ee also* "Determining Dispositional Options for Delinquent Juveniles," by Janet Mason, 2007 New Juvenile Defender Program, at www.ncids.org (Training and Reference Materials).

Court's discretion. The court has wide discretion in ordering a disposition within this statutory scheme. For example, it can order dismissal or a continuance of disposition in any case. G.S. 7B-2501(d); *see supra* § 13.5A (Conduct of Hearing: Dismissal; Continuance of disposition). Level 1 dispositional alternatives may be ordered in every case. Level 2 dispositional alternatives are permissible for Level 3 cases on the court's finding of extraordinary needs of the juvenile. For Level 2 cases, the court must order at least one intermediate dispositional alternative in G.S. 7B-2506(13)–(23).

In some cases, the court also has discretion to determine the disposition level. *See infra* Appendix 13-3 (Disposition Chart); *In re Robinson*, 151 N.C. App. 733 (2002) (court had discretion to impose either Level 2 or Level 3 disposition as juvenile committed offense classified as "violent" and had "low" delinquency history level; no abuse of discretion in ordering commitment, a Level 3 disposition, because court based its order on juvenile's high risk of reoffending and needs of juvenile); *In re N.B.*, 167 N.C. App. 305 (2004) (court had discretion to impose either Level 2 or Level 3 disposition because juvenile committed offense classified as "violent" and had "low" delinquency history level; no abuse of discretion in ordering Level 3 disposition based on juvenile's continued excessive absences from school).

Counsel should emphasize this statutory discretion to the court in arguing for an appropriate disposition at the lowest dispositional level. This is particularly important because after a juvenile is placed on Level 2, even for a low-level felony or Class A1 misdemeanor, the court may order commitment upon adjudication of a probation violation. *See infra* § 14.8 (Violation of Probation).

13.9
Registration of Juvenile as Sex Offender

Current law. A juvenile who is at least 11 years old may be ordered to register as a sex offender if found to be a danger to the community and adjudicated for violation of one of the following criminal statutes: G.S. 14-27.2 (first-degree rape), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first-degree sexual offense), G.S. 14-27.5 (second degree sexual offense). G.S. 7B-2509. The registration statute also refers to G.S. 14-27.6, but that statute has been repealed. Also included are an attempt, conspiracy, or solicitation of another to commit any of the offenses, or aiding or abetting any of the offenses. G.S. 14-208.26(a1); *see also* G.S. 14-208.26 through -208.32 (registration provisions for certain juveniles adjudicated delinquent

for committing certain offenses). The court must specifically find that the juvenile is a danger to the community before registration as a sex offender can be ordered.

Registration information is placed on file with the sheriff of the county of the juvenile's residence. G.S. 14-208.26(b). The sheriff must forward the information to the Division of Criminal Statistics, which in turn must include the information in the Police Information Network. G.S. 14-208.26(b); 14-208.31. A separate file for juveniles registered as sex offenders must be maintained by the sheriff. Information in this file may be released only to law enforcement agencies. This information is not a public record and is not open to public inspection. G.S. 14-208.29(a), (b).

If the juvenile is ordered to register under G.S. 7B-2509, the registration requirement automatically terminates on the juvenile's eighteenth birthday or when the jurisdiction of the juvenile court ends, whichever first occurs. G.S. 14-208.30.

Impact of potential federal requirements. If North Carolina adopts the new federal sex offender registration requirements (contained in the Adam Walsh Child Protection and Safety Act of 2006), certain juveniles would be subject to full registration requirements rather than the more limited registration program that North Carolina currently has in place, described above. Under these new federal requirements, registration may be retroactive for delinquency adjudications entered before implementation of the requirements. It is therefore important for counsel to be familiar with the offenses that potentially could trigger these broader registration requirements. Federal law directs states to adopt the requirements by July 27, 2009, but up to two one-year extensions may be obtained. *See* John Rubin, *Determining the Defendant's Registration Obligations under the Revised Sex Offender Laws* at 27–29 (March 2008), at www.sog.unc.edu/programs/crimlaw/200710Sex%20offender.pdf.

13.10 Dispositional Order

A dispositional order must be in writing and must contain appropriate findings of fact and conclusions of law. G.S. 7B-2512; *see In re Ferrell*, 162 N.C. App. 175 (2004) (findings of fact in dispositional order did not support order transferring custody of juvenile from mother to father). The court must state with particularity, both orally and in the written order, the precise dispositional terms, including the kind and duration, as well as the person who is responsible for implementation of the disposition and the person or agency granted custody if there is an order changing custody. G.S. 7B-2512.

13.11 Modification of Dispositional Order

A. Jurisdiction

The court has jurisdiction pursuant to G.S. 7B-2600(c) to modify a dispositional order during the following periods:

- during the minority of the juvenile;
- until the juvenile reaches the age of 19 years if the juvenile has been committed to the Department for the offenses specified;
- until the juvenile reaches the age of 21 years if the juvenile has been committed to the Department for first-degree murder, first-degree rape, or first-degree sexual offense; or
- until terminated by order of the court.

B. Motion and Notice Required

A hearing to review a dispositional order may be held on motion or petition after due notice. G.S. 7B-2600(a).

The Department may make a motion if a juvenile committed to its care is not suitable for its program. An alternative disposition under G.S. 7B-2508 may be entered at the hearing on motion of the Department. G.S. 7B-2601.

C. Standard for Review

The court may conduct a review hearing to determine whether the order is in the best interests of the juvenile, and may moderate or vacate the order "in light of changes of circumstances or the needs of the juvenile." G.S. 7B-2600(a).

D. Dispositional Alternatives at Review Hearing

If the court finds that the original disposition was illegally imposed or was unduly severe in reference to the seriousness of the offense, the culpability of the juvenile, or the disposition given to juveniles convicted of similar offenses, the court may reduce the nature or duration of the disposition. G.S. 7B-2600(b).

Appendix 13-1

Authorization to Prepare Pre-Disposition Reports

DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION
CONSENT FOR RELEASE/EXCHANGE OF CLIENT INFORMATION
Authorization to Prepare Pre-Disposition Reports

Juvenile's Full Name _____

Parent, Guardian, or Custodian Name _____ County _____

As parent, guardian, or custodian of the juvenile named above, I hereby give consent for the Department of Juvenile Justice and Delinquency Prevention to prepare for the court a pre-disposition Juvenile-Family Datasheet and risk and needs assessments prior to adjudication, and to release/exchange information and records regarding my child.

This consent includes, but is not limited to: the release of school's academic, attendance, special education, disciplinary records, and immunization record; the Department of Social Services records; the Mental Health records, including psychological/psychiatric records and alcohol and substance abuse treatment; or any part of the juvenile's medical history/record. I also agree to release the following specific information:

_____

_____

_____ .

This information can also be used for the development of a service plan if my child enters into:

- *A diversion plan and/or contract,*
- *Any type of court ordered supervision*.

I understand that information given for preparation of a pre-disposition Juvenile-Family Datasheet and risk and needs assessments prior to adjudication, may be used by the juvenile's attorney. I consent to this information exchange. The information may be used by the District Attorney for disposition purposes only and the presiding judge after adjudication. I consent to this information exchange.

I understand that I can revoke this authorization at any time, with the exception of information that has already been released. Unless revoked sooner, the authorization expires at the time the court's jurisdiction terminates. This information will only be shared on an as needed basis among child serving agencies.

I understand that my consent for release/exchange of client information and authorization to prepare disposition reports expires when jurisdiction ends; but that records entered into the North Carolina Juvenile Online Information Network (NC-JOIN) may be maintained indefinitely.

Signatures

Juvenile: _____

Parent, Guardian, or Custodian: _____

Parent, Guardian, or Custodian: _____

Witness: _____

Attorney (Optional): _____

Date: _____

The Court Counselor shall print and file this completed form in the Court Counselor file.

Appendix 13-2

Scoring Prior Record

Name	File No.	DOB

SCORING PRIOR RECORD			
NUMBER	TYPE	FACTORS	POINTS
	Prior Felony Class A through E Adjudication	X4	
	Prior Felony Class F through I or Misdemeanor Class A1 Adjudication	X2	
	Prior Misdemeanor Class 1 through 3 Adjudication	X1	
		SUBTOTAL	
		If the offense was committed while on probation + 2	
		TOTAL	

CLASSIFYING PRIOR RECORD LEVEL		
POINTS	LEVEL	PRIOR RECORD LEVEL
0-1	I	
2-3	II	
4+	III	

PRIOR RECORD			
OFFENSE	DATE OF ADJ.	DISPOSITION	CLASS

Appendix 13-3

Disposition Chart

DISPOSITION CHART			
OFFENSE	DELIQUENCY HISTORY		
	LOW	MEDIUM	HIGH
VIOLENT	Level 2 or 3	Level 3	Level 3
SERIOUS	Level 1 or 2	Level 2	Level 2 or 3
MINOR	Level 1	Level 1 or 2	Level 2

OFFENSE CLASSIFICATION:

1. Violent: adjudication of a Class A through E felony
2. Serious: adjudication of a Class F through I felony or Class A1 misdemeanor
3. Minor: adjudication of a Class 1 through 3 misdemeanor

POINT ASSIGNMENT:

1. Prior adjudication of a Class A through E felony – 4 points
2. Prior adjudication of a Class F through I felony or Class A1 misdemeanor – 2 points
3. Prior adjudication of a Class 1 through 3 misdemeanor – 1 point
4. If the juvenile was on probation at the time of the offense – 2 points

DELIQUENCY HISTORY LEVELS:

1. Low: no more than 1 point
2. Medium: at least 2 but not more than 3 points
3. High: 4 or more points

*A juvenile who has been adjudicated for a minor offense may be committed to a Level 3 disposition if the juvenile has been adjudicated for 4 or more separate prior offenses.

*If the juvenile was adjudicated for more than one offense in a single session of district court, only the adjudication for the offense with the highest point total is used.

*If a juvenile is adjudicated for more than one offense during a session of juvenile court, the court must consolidate the offenses for disposition and impose a single disposition for the class of offense and delinquency history level of the most serious offense.

Appendix 13-4

Juvenile Disposition Options

LEVEL 1: COMMUNITY	LEVEL 2: INTERMEDIATE	LEVEL 3: COMMITMENT
1. custody of juvenile to home/ custodian/DSS	Any Level 1 *disposition may be imposed but at least one of the following must be imposed:*	1. training school not less than 6 months
2. alternative schooling	1. wilderness program	*court may impose a Level 2 disposition if it submits written findings of extraordinary needs of the juvenile
3. community based/substance abuse/residential or nonresidential treatment up to 12 months	2. placement in resident treatment/intensive nonresidential treatment/intensive substance abuse or non-State group home	
4. restitution up to $500	3. intensive probation	
5. fine	4. supervised day program	
6. community service up to 100 hours	5. regimented training program	
7. victim-offender reconciliation program	6. house arrest	
8. probation	7. suspend disposition with conditions	
9. driver's license not issued	8. detention up to 14 24-hour periods	
10. curfew	9. residential placement in a State multipurpose group home	
11. not associate with persons/places	10. restitution more than $500	
12. intermittent detention up to 5 24-hour periods	11. community service up to 200 hours	
13. wilderness program	*court may impose a Level 3 disposition if the juvenile has previously received a Level 3 disposition in a prior juvenile action	

Appendix 13-5

Application of the Disposition Chart

For offenses committed on or after 7/1/99

Offense Classification
[*G.S. 7B-2508(a)(1);-(2);-(3)*]

- **Violent:** Adjudication of a Class A through E felony
- **Serious:** Adjudication of a Class F through I felony or a Class A1 misdemeanor
- **Minor:** Adjudication of a Class 1, 2, or 3 misdemeanor

Delinquent History Points
[*G.S. 7B-2507(b)(1);-(2);-(3);-(4)*]

- Each prior adjudication of a Class A through E felony = **4 points**
- Each prior adjudication of a Class F through I felony or Class A1 misdemeanor = **2 points**
- Each prior adjudication of a Class 1, 2, or 3 misdemeanor = **1 point**
- If the juvenile was on probation at the time of offense = **2 points**

Multiple Prior Adjudications
[*G.S. 7B-2507(d)*]

- For purposes of determining the delinquent history level, if a juvenile is adjudicated delinquent for more than one offense in a single session of district court, only the adjudication for the offense with the highest point total is used.

Special Dispositional Circumstances

- If the disposition chart prescribes a **Level 2** disposition, the court may impose a **Level 3** (commitment) disposition if the juvenile was previously committed to a youth development center in a prior juvenile action. [*G.S. 7B-2508(d)*]
- The court may impose a **Level 2** disposition rather than a **Level 3** (commitment) disposition if the court submits written findings on the record that substantiate *extraordinary needs* on the part of the offending juvenile. [*G.S. 7B-2508(e)*]
- A juvenile who has been adjudicated for a minor offense may be committed to a **Level 3** (commitment) disposition if the juvenile has been adjudicated of four or more prior offenses. For purposes of determining the number of prior offenses, each successive offense is one that was committed after adjudication of the preceding offense. [*G.S. 7B-2508(g)*]

Violation of Probation

- The court shall not order a **Level 3** (commitment) disposition for violation of the conditions of probation by a juvenile adjudicated delinquent for a minor offense. [*G.S. 7B-2509(f)*]

- If the court finds that the juvenile has violated the conditions of probation, the court may continue the original conditions of probation, modify the conditions of probation, or order a new disposition at the next higher level on the disposition chart (except that a juvenile adjudicated delinquent for a "minor" offense may not go to **Level 3** for violation of probation). Part of the new disposition may include an order of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508. [*G.S. 7B-2509(e)*]

3/25/04

Appendix 13-6

Request for Release of Department of Juvenile Justice File

TO: _____, Chief Court Counselor

FROM: _____, Attorney for the Juvenile

RE: _____, Juvenile

CASE: ____ J ____

Pursuant to North Carolina General Statutes §7B-3001(c), please make available the above-referenced juvenile's file maintained by your office so that the undersigned attorney may review and/or copy the file in order to provide legal representation for the juvenile. The file should include the following documents and information:

- Family background information;
- Any report made by any individual or group involving the juvenile or the juvenile's family's social, medical, psychological, psychiatric, or education status;
- Any interviews made by the court counselor;
- Any information regarding the juvenile's prior record in any and all districts in the State of North Carolina, including but not limited to a print out of the juvenile's NCJOIN file;
- Any other information gathered regarding the juvenile

Please let me know when the file will be made available. Thank you for your cooperation in this matter.

_____, Assistant Public Defender

Defender District _____

COMPASSION FATIGUE

North Carolina Lawyer Assistance Program

"Lawyer Impairment & How to Get Help"

NCLAP
NORTH CAROLINA
LAWYER ASSISTANCE PROGRAM

Cathy Killian, Western Coordinator
Lawyer Assistance Program
2237 Park Road
Charlotte, NC 28203
Phone: 704.910.2310
Cathy.D.Killian@gmail.com

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Confidential Help for the Lawyers of North Carolina

What Is Chemical Dependency?

Chemical dependency is a leading health problem and cause of death in this country. The National Institute on Alcohol and Alcohol Abuse estimates that 10% of the population of the United States are alcoholics or otherwise chemically dependent. Chemical dependency within the legal profession may be as high as 20% of the population. Don't let yourself or someone you know fall into these statistics without the chance for assistance. Confidential help is available through the North Carolina State Bar Lawyer Assistance Program.

Facts About The Problem

Chemical dependency is not the result of a moral defect or deficiency of character, but is a chronic, progressive, and irreversible disease. If excessive drinking or drug use continues, it is fatal. Death may actually come through suicide (25% of all suicides are alcohol-related) or in the form of heart failure, liver disease, bleeding ulcers, cirrhosis, gastrointestinal disorders, or any one of a number of other ailments, but death will be a direct consequence of the excessive and prolonged intake of alcohol. Not only is substance abuse a physical health problem, it also alters perception and thinking. Such changes produce certain predictable behavior patterns such as failing to keep appointments, failing to return client calls, missing deadlines and other manifestations of poor judgment that undermine a lawyer's ability to fulfill the heart of a lawyers ethical obligations to his or her clients and the public.

How Does It Work?

Fortunately, chemical dependencies are treatable. Alcoholism, for example, may readily be arrested and its ill effects completely alleviated thorough total abstinence from mood altering substances. If you or someone you know has a substance addiction, the North Carolina State Bar Lawyer Assistance Program can help. The Committee was formed in 1979 to help chemically dependent lawyers in the state of North Carolina. The Committee is authorized to receive in confidence information form any source concerning a lawyer thought to have a substance abuse problem. If, following a discreet and confidential investigation, a careful evaluation of the facts reveals that the lawyer is impaired, the Committee may make a recommendation to the lawyer concerning sources of help. The Committee assists individual lawyers in need of guidance and support in dealing with a potentially fatal condition so that they may return to happy and productive lives.

Confidential Help for the Lawyers of North Carolina

Who Works For LAP?

LAP has a full-time professional director, an assistant director and two clinicians on staff, all of whom are trained in chemical addictions and mental health issues and a full-time professional assistant director who is trained in chemical addictions and mental health. The Director is also a lawyer who practiced for years. Much of the work of the LAP program is performed by lawyer volunteers who are recovering alcoholics and other people who have a deep and abiding concern about alcoholism as a result of personal or professional experience. In order to participate in LAP, these volunteers receive training in protecting confidentiality and in the most effective ways to assist the chemically dependent lawyer. In addition, the LAP program has a ready range of confidential resources to which it can refer lawyers in need.

Who Will LAP Help?

Of course, LAP will help any North Carolina lawyer who believes he or she may be suffering from chemical dependency. While LAP does not provide any direct assistance to family members, LAP is ready to provide information on where to go for help to the spouse or children of a chemically dependent lawyer as well as the lawyer's partners or associates. Assistance to family members is often critical because alcoholism and chemical dependence are family problems. For the chemically dependent person, the craving for alcohol or drug subverts the normal human pattern of interpersonal relationships. This causes chronic disruption and distress to the healthy functioning of the family. LAP can help family members find the resources they need for themselves. A return to health for the impaired lawyer is greatly enhanced by a family that has recovered it own balance.

Confidentiality

If you call to seek help for yourself, your inquiry is confidential. If you call as the spouse, child, or friend of a lawyer whom you suspect may have an alcohol or drug problem, and needs your help, your communication is also treated confidentially and never related to the lawyer for whom you are seeking help without your permission. All inquiries, questions and conferences are privileged and held in the strictest confidence. Under Rule 1.6 of the Rules of Professional Conduct of the North Carolina State Bar, the attorney/client privilege is applied to communications between a lawyer seeking assistance and LAP. In order to assure this high degree of trust and confidence, LAP is, by rule of the State Bar which has been approved by order of the North Carolina Supreme Court, entirely separate from any ethics or disciplinary committee of the State Bar.

SIGNS OF LAWYER IMPAIRMENT

The following outline includes those symptoms that predictably suggest lawyer impairment. Note, though, that the symptoms may vary in nature according to the type of problem, and in severity, according to the stage of problem development.

A. **Attendance**:

- Returns late from lunch or fails to return.
- Leaves early on a routine basis or amasses a string of unpredictable absences.
- Fails to keep scheduled appointments.
- Takes frequent days off without good reason.
- Fails to appear at depositions or court hearings.

B. General Behavior:

- Persistent complaints of not feeling well.
- Deterioration of personal appearance or hygiene.
- Withdrawal.
- Overreacts to real/imagined criticism.
- Becomes grandiose, aggressive, belligerent.
- Large weight gain or loss.
- Insomnia or sleeps all the time.
- Unable to retain (or fires) secretary, bookkeeper or associate lawyers.
- Drinks or uses drugs regularly at noon.
- Drinks or uses drugs during office hours.
- Appears under the influence of or being in an impaired condition during court appearance or deposition.
- "Needs a drink or to use drugs" when something good or bad has happened.
- Loses control at social gatherings when professional decorum is called for.

C. Job Performance:

- Neglects to process mail promptly (and does not return phone calls).
- Performs poorly in the afternoons.
- Fellow workers complain.
- Misses deadlines for performance, such as allowing the statue of limitations to expire.

ARE YOU AN ALCOHOLIC?

To Answer this question ask your self the following questions and answer them as HONESTLY as you can.

	Yes	No
Do you lose time from work due to drinking?	_____	_____
Is drinking making your home life unhappy?	_____	_____
Do you drink because you are shy with other people?	_____	_____
Is drinking affecting your reputation?	_____	_____
Have you ever felt remorse after drinking?	_____	_____
Have you gotten into financial difficulties as a result of drinking?	_____	_____
Do you turn to lower companions and an inferior environment when drinking?	_____	_____
Does your drinking make you careless of your family's welfare?	_____	_____
Has your ambition decreased since drinking?	_____	_____
Do you crave a drink at a definite time daily?	_____	_____
Do you want a drink the next morning?	_____	_____
Does drinking cause you to have difficulty sleeping?	_____	_____
Has your efficiency decreased since drinking?	_____	_____
Is drinking jeopardizing your job or business?	_____	_____
Do you drink to escape from worries or trouble?	_____	_____
Do you drink alone?	_____	_____
Have you every had a loss of memory (blackout) as a result of drinking?	_____	_____
Has your physician ever treated you for drinking?	_____	_____
Do you drink to build up your self-confidence?	_____	_____
Have you ever been to a hospital or institution on account of drinking?	_____	_____

If you have answered YES to any one of the questions, there is a definite warning that YOU MAY BE AN ALCOHOLIC.

If you have answered YES to any two or more of the questions, the chances are that you ARE AN ALCOHOLIC.

THE PREVALENCE OF IMPAIRMENT

- 18% of lawyers suffer from substance abuse *(Washington Survey)*
- 33% of lawyers suffer from significant mental health issues *(Washington Study)*
- 19 - 37% of lawyers suffer from depression. Of these, 25% suffer *physical* symptoms of depression or anxiety *(Washington and North Carolina Studies)*
- Of 28 occupations surveyed, lawyers are most likely to suffer depression and 3.6 times more likely to suffer depression than the average person (*1991 Johns Hopkins University study*).

THE RELATIONSHIP BETWEEN LAWYER IMPAIRMENT AND ERRORS IN JUDGMENT

- 40 - 75% of discipline cases involve a chemically dependent or mentally ill practitioner *(Illinois Survey)*
- 80% of Client Protection Fund cases involve chemical dependency or a gambling component *(Louisiana Study)*

OREGON BAR SURVEY

- An Oregon Bar Survey of Incidents of Malpractice comparing those who had successfully used the LAP versus the Bar at large. Those using the LAP were less likely to commit malpractice.

North Carolina State Bar's Model Law Firm
Alcohol and Drug Policy

The firm regards alcoholism and drug addiction as illnesses and desires to assist employees suffering from such illness to obtain effective treatment.

The firm regards the unauthorized possession and distribution of controlled substances as crimes and will discipline any employee proved to be involved in such a crime whether or not such employee is addicted to drugs.

The impairment of any employee's performance due to drug or alcohol addiction is deemed to be the firm's business, not a reserved aspect of one's private life. It is the firm's policy to encourage and offer qualified medical assistance to any employee who appears to the firm management to suffer from such illness.

No employees will be disciplined solely for impairment due to any illness so long as the employee cooperates with a qualified treatment program agreed to by the firm and the employees. The employee's choice of treatment will be accepted only if approved by a specialist retained by the firm after consultation with the employee's personal physician. Any treatment undertaken in accordance with this policy shall be entirely confidential and no disclosure by an employee to any treatment personnel will be reported to the firm nor will any such disclosure be available to any legal authority whatever except in accordance with the requirements of applicable law.

The firm will name a supervisory employee as administrator of this policy and as the firm's representative in all matters pertaining to its execution. This person shall be a firm liaison with the LAP Committee, no other person within the firm shall be informed of any consultation or referral under this policy without the consent of the affected employee except as necessary to complete the ongoing work of the employee.

North Carolina Model Law Firm Alcohol and Drug Policy
Explanatory Statement

A law firm desiring to provide appropriate assistance to employees suffering from substance abuse or addiction should consider doing three things: (1) adopt a policy, (2) implement the policy, and (3) educate the members and employees of the firm.

The North Carolina State Bar has recommended to its membership a law firm policy which recognizes that alcoholism and other forms of drug addiction are treatable illnesses; however, the policy condones neither impaired job performance nor illegal conduct.

The model policy provides for the establishment of an understanding and supportive atmosphere within which lawyers and employees may seek personal help or express concern about a colleague or other employee.

The two major obstacles to reaching out for help for oneself or another are based on the fear of being punished and the fear of causing harm to one's reputation.

These can be overcome by express recognition of the medical model of addiction and the establishment of appropriate safeguards as to confidentiality.

The firm's partners should fully understand the model policy before adopting it. Representatives from the **LAP** Committee are available to assist them in its understanding.

It is very important for the partners to understand that the firm should not ignore impaired job performance. Work related problems are a major indicator that "something" may be wrong. If that "something" is alcohol or drug related, then trying to protect the employee from the consequences of his/her own action is harmful, not helpful to the employee. This is called "enabling" and it is the direct result of not understanding the disease process.

Existing policies or Employee Assistance Programs (EAP) should be reviewed and any real or potential conflicts should be identified and resolved.

The partners need to agree on who will handle these matters and establish appropriate safeguards for confidentiality.

They may wish to retain an independent provider of EAP services. Law firm sponsored medical insurance needs to be reviewed to verify what is covered by the insurance before a need arises.

Once a policy is adopted, the firm should announce it and visibly post it. **LAP** is available to conduct educational programs, at no charge, for the benefit of the firm's lawyers and employees.

These programs discuss the prevalence and impact of the problem in the workplace, explain the progressive and the harmful nature of the disease of addiction, teach how to identify job related symptoms, explore how supervisors and co-workers enable sick colleagues, and explain how to appropriately respond to a possible problem using the firm's policy.

Always keep in mind that **LAP** is a ready and willing resource to help your firm, using recovering lawyer volunteers and referral to treatment professionals. **LAP** exists to serve and save lives.

Before and After

The following personal story of a North Carolina lawyer is presented anonymously in the spirit of Alcoholics Anonymous, which seeks to avoid pride in recovery.

I didn't consider alcohol as a remedy for my unhappiness and depression in high school. I was introverted, although active in school activities, but I never felt like I belonged in social situations. While my classmates were having fun outside the classroom, I was at home reading a book.

I discovered alcohol when I was eighteen and a sophomore at UNC Chapel Hill. Looking back, I think it saved my life and I can recall regretting that I had not discovered it sooner. I could not imagine any ill effects from this elixir. Even then I drank alone a great deal, and when I was at parties, I would become quiet and withdrawn the more I drank. After graduation, I was inducted into the Army and my alcoholism began to blossom. Liquor was cheap and everybody drank. I knew then that I was controlled by alcohol before I actually knew the technical definition for alcoholism, but I did not want to do anything about it because I didn't think I could live without it and could not imagine life without alcohol.

During the three years of law school, I declared a moratorium on my drinking because I was afraid that I could not drink and complete the academic program. I can remember that on the rare occasions when I did drink, I got very drunk and was very hung over.

The day I received the good news on the Bar results is when the daily drinking began. At first it was about four to six beers, and then I switched to bourbon, about a half-pint per day. This consumption did not affect my work or tennis or bridge. The first time I thought the pattern was changing was when I drove to Myrtle Beach and drank six beers on the way instead of three as I had in the past, arriving intoxicated instead of mellow. About this time, I started icing down beer to take with me to the tennis court and I sought a group of bridge players who drank while they were playing. The daily hangovers began and became a part of my regimen. I made excuses for a while telling myself that they were caused by cigarettes. Notwithstanding the drinking and the hangovers, my law practice continued to grow and no one knew how sick and unhappy I was becoming. My home life was miserable. My then wife and I rarely spoke civilly to each other, but we showed the world happy faces. No one ever mentioned to me that I had a drinking problem and of course, I overlooked my true feelings. She finally insisted that I enter treatment, and I can remember telling my psychiatrist, who was also treating me for a bi-polar disorder (manic depression), that my practice would be ruined if I went away for twenty-eight days and he told me that most people would not notice that I was gone and that those who did, would not care. Well, this came as quite a shock to someone who truly thought he was the center of the universe.

I went through the twenty-eight days never relating to anything and not accepting my alcoholism as a disease, which needed to be treated. I got drunk on the plane coming home and continued to drink alcoholically for another ten years, during which time I was divorced

and remarried. Finally, I hit that cross roads in my life where I had to make a decision. Denial was no longer an option. This time I was in a second marriage which was also disintegrating, and my two teenage sons were using drugs, drinking, and generally running wild in the streets. They had inherited my disease. For me, it was either stop drinking or die, and on hopefully my last day of using alcohol, I had been on a ten-day drinking marathon. Monday morning I had to make a court appearance. I had not shaved or taken a shower in over a week. To stop the shaking, I fortified myself with two big hits of vodka (Smirnoff, of course), did my business and came home, drinking straight vodka all the way.

At the time, I was living on a lake. It was early March, snowing and sleeting, the wind was blowing and it was cold. I decided to jump in the lake with a suit and overcoat on and swim until I drowned. This was the first time I really seriously considered getting sober. I had always thought that if I did quit drinking I would revert to my high school days when I was severely depressed. I looked at alcohol as my savior, but realizing how cold the lake water would be, I rationalized that sobriety couldn't be as dreadful as I thought it would be and I had never really given it a chance. I called two friends who had been sober for a few years and they came over and fed me coffee and soup and talked with me (not to me) about recovery. I went to an AA meeting that night and not only have I not had a drink since that time, I haven't wanted a drink and that was thirteen and a half years ago.

The AA program for me, although simple, has not been easy, but I don't think it should be because if it were, maybe it wouldn't have the inestimable value, which it has. Recovery is my way of life and my goal after a few years of recovery became to try and give to others what has been so unselfishly given to me. I belong in AA. The people whom I have been fortunate enough to befriend are special and blessed people and they know it. I know I am a walking miracle. I could have died a thousand times and taken many people with me, but because I didn't, I have a duty and an obligation to reach out to others who are struggling with this insidious illness.

We are very much alike but we also are different. My bottom did not include jail (except a few hours in a holding cell in Mexico) or a DWI, or a suspension of my law license or bankruptcy, but I sank as low as I could go without death or insanity. I do not take my sobriety for granted. It is a daily blessing and I must work on it every day without exception.

Two years ago, I was diagnosed with prostate cancer which was discovered as a result of a routine physical. I had not had a physical examination in over ten years and although I had no health problems, from somewhere a clear message was being sent to me to have a physical. I had the radical surgery. At no time during the process have I had any fear, including when the cancer was discovered, during the surgery and the after care. Today I am cancer free. I must attribute my lack of fear to my faith in a Higher Power, which I discovered through Alcoholics Anonymous. If I had been drinking when the cancer was discovered, I would have been terrified. The program works if one will let it work.

Confidential Help for the Lawyers of North Carolina

What is Depression?

Depression is an illness that involves the whole person. It includes the person's body, mood, and thinking. It affects eating and sleeping habits feelings about self, and thoughts about everything. Fifteen percent of people who have a serious depression may eventually commit suicide. Don't let this happen to you or to someone you know. Confidential help is available through the North Carolina State Bar Lawyer Assistance Program.

Facts About the Problem

The inability to experience pleasure (anhedonia) presents as the primary symptom of depression. The illness is all consuming, completely enveloping a person's life. The condition causes one to feel hopeless, helpless, sad, or down during most of the day, almost every day. Depressed people experience feelings of guilt and unworthiness. Sleeping patterns are adversely affected as are eating habits, often resulting in excessive weight loss or gain. People feel hopeless and often believe that they and everyone else would be better off if they were dead. They may be suicidal. Depression is not the result of weakness, moral defect, or deficiency of character. Rather, it is a chronic disease, the nature of which can be organic, psychological, or interpersonal.

LAP also treats mental illness?

The good news is that depression is treatable. The LAP also provides assistance to lawyers suffering from depression and/or other mental health disorders. The LAP seeks to confidentially help a lawyer evaluate any problem he or she is encountering that may potentially adversely affect his or her ability to carry out his or her duties as a lawyer and to also address the problem. The goal of the program is to provide assistance to lawyers who may suffer from depression or other mental health disorders before such issues become debilitating and cause adverse consequences to the lawyer and his or her clients.

How does it work?

The LAP will assist a lawyer in need in obtaining good medical assistance from a trained professional who understands the problems that lawyers deal with on a day to day basis. This is usually a two stage process: first, a preliminary evaluation is conducted by the one of our clinical staff to try to understand the scope of the issues involved and then, utilizing this knowledge, connecting the lawyer with a counselor, psychiatrist, or other professional, best suited to provide assistance. The LAP does not itself provide treatment.

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Who will LAP help?

LAP offers assistance to any North Carolina lawyer who believes he or she may be suffering from depression or other mental health disorders. LAP may also help family members find resources as part of its assistance to a lawyer.

Confidentiality

Again, LAP is entirely separate from the Disciplinary Department of the State Bar. Information received by LAP concerning any lawyer seeking help or to whom assistance is offered is confidential. The confidentiality provided is that of the attorney-client privilege. See 27 NCAC 1D, Rule .0613 and Rule 1.6 of the Revised Rules of Professional Conduct. If you call as the spouse, child, or friend of a lawyer you suspect may have a mental health problem, or who may be experiencing depression, your communication is also treated as confidential.

Take the Test

If you or someone you care about answers yes to five or more of these questions (including questions # 1 or #2)… and if the symptoms described have been present nearly every day for two weeks or more, you should consider speaking to a health care professional about different treatment options for depression:

YES NO

1. Do you or they feel a deep sense of depression, sadness, or hopelessness most of the day?

2. Have you or they experienced diminished interest in most of all activities?

3. Have you or they experienced significant weight change when not dieting?

4. Have you or they experience a significant change in sleeping patterns?

5. Do you or they feel unusually restless….or unusually sluggish?

6. Do you or they feel unduly fatigued?

7. Do you or they experience persistent feelings of hopelessness and/or inappropriate feelings of guilt?

8. Have you or they experienced a diminished ability to think or concentrate?

9. Do you or they have recurrent thoughts of death or suicide?

Other explanations for these symptoms may need to be considered. Adapted from *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders.* Fourth Edition. Washington, DC. American Psychiatric Association: 1997

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Kitchen Table

By Don Carroll

Two lawyers who were very respected members of the Bar were both patients seeing the same counselor. Each had come because of loneliness, depression, and burnout. Neither was aware that the other was also seeking help. As the sessions progressed both men talked about their deep caring about many of their clients and their love of the law. Sometimes when they lost a case they would share their feelings about how such a loss felt. Like us all, their law school training of learning to look at the client's case objectively made them believe that taking the time to consider their feelings about their loss and their client's loss was unprofessional, even unmanly. They felt alone with their emotions and isolated from other lawyers because of them.

In the safety of their counselor's office they begin to wonder aloud about their feelings, about their work and its impact on the lives of their clients. They often shared stories with their counselor about their clients' cases with great animation. The two men had been professional partners for more than 20 years. They shared a receptionist, a staff of para-professionals, an office, but they didn't know each other. They shared a counselor too, who was ethically bound not to tell either about the other's visits or even that they were both patients. The counselor encourage each of them to talk to his partner about these things, but the counselor got the same response each time: "Him? Heavens, he would just laugh."

This story was originally told by Dr. Rachel Remen about physicians in her book, *Kitchen Table Wisdom.* I think lawyers are no different. Lawyers often feel isolated from others by the nature of their work experiences. The attorney-client privilege prevents us from talking with those outside our firms about client matters and within it is just as difficult to talk to each other about the feeling quality of our experiences as lawyers. To borrow a little more from Dr. Remen adapted to lawyers—

> People who are lawyers have been trained to believe that it is scientific objectivity that makes them most effective in their efforts to understand and resolve their client's problems and that a mental distance is necessary to protect them from becoming wounded by their work. Law school is demanding training. Yet objectivity makes us far more vulnerable emotionally than compassion or a simple humanity. Objectivity separates us from the life around us and within us. We are wounded by life just the same; it is only the healing that cannot reach us.

Objectivity is not whole. In the objective stance no one can draw on their own human strengths, no one can cry, or accept comfort, or find meaning, or pray. No one who is untouched by it can really understand the life around them either. Lawyers are trained fact finders. Despite the great wonder in the simple pleasures of life, it is possible for us to see only despair and experience only frustration in the practice of law.

The ability to be fully present, and not just objectively there with a client, is more a matter of cultivating a sense of perspective and meaning about life. It is more a spiritual quality than a mental one. One can start to cultivate presence by becoming more present to oneself and others. A first step is to take time to experience your own feelings and find someone you can express them to who will be a good listener without judgment. Many lawyers need some structure to be able to get the hang of what probably came natural as a child. A structure is provided by finding a good counselor you can talk to or going to a self-help group that addresses a major issue in your life. Normal depression (as opposed to clinical depression where the assistance of a psychiatrist is needed) can be the natural healing way the psyche has of pushing us inward to face an emotional rigidity that has taken the joy and enthusiasm out of life.

Dr. Remen believes that an impulse toward wholeness is natural and exists in everyone, though each of us heals in our own way. Some people heal because they have work to do. Others heal because they have been released from work and the pressures and expectations that others place on them. Some people need music, others need humor. But universally people need to be freed from their own emotional isolation to find healing and joy in their lives. We need to be able to share our experiences over the kitchen table. It is not the content of this sharing but the process of this sharing that brings wisdom. If you need help in finding a way to make your life more open to being fully experienced, or if you just know that something is wrong but you can't put your finger on it—there is help. Call the Lawyer Assistance Program.

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NCLAP
NORTH CAROLINA
LAWYER ASSISTANCE PROGRAM

Identifying Illness Based Impairment in Colleagues

Depression, Anxiety and Stress

Alcoholism and Substance Abuse

Every aspect of an addicted or depressed attorney's life is affected. When there are problems at work or home, with health or finances, or there is police involvement, chances are the attorney is suffering from a medically based illness which can be successfully treated. If you recognize the following warning signs in a colleague, call us. ***We can help.*** Visit NCLAP.org

Relationship Problems

- ❑ Complaints from clients
- ❑ Problems with supervisors
- ❑ Disagreements or inability to work with colleagues
- ❑ Avoidance of others
- ❑ Irritable, impatient
- ❑ Angry outbursts
- ❑ Inconsistencies or discrepancies in describing events
- ❑ Hostile attitude
- ❑ Overreacts to criticism
- ❑ Unpredictable, rapid mood swings
- ❑ Non-responsive communication

Performance Problems

- ❑ Missed deadlines
- ❑ Decreased efficiency
- ❑ Decreased performance after long lunches involving alcohol
- ❑ Inadequate follow through
- ❑ Lack of attention
- ❑ Poor judgment
- ❑ Inability to concentrate
- ❑ Difficulty remembering details or instructions
- ❑ General difficulty with recall
- ❑ Blaming or making excuses for poor performance
- ❑ Erratic work patterns

Personal Problems

- ❑ Legal separation or divorce
- ❑ Credit problems, judgments, tax liens, bankruptcy
- ❑ Decreased performance after lunches involving alcohol
- ❑ Frequent illnesses or accidents
- ❑ Arrests or warnings while under the influence of alcohol or drugs
- ❑ Isolating from friends, family and social activities

Attendance Problems

- ❑ Arrive late and/or leaving early
- ❑ Taking "long lunches"
- ❑ Not returning to work after lunch
- ❑ Missing appointments
- ❑ Unable to be located
- ❑ Ill with vague ailments
- ❑ Absent (especially Mondays/Fridays)
- ❑ Frequent rest room breaks
- ❑ Improbable excuses for absences
- ❑ Last minute cancellations