UNC SCHOOL OF GOVERNMENT

2012 New Juvenile Defender Training

March 7 - Greensboro, NC

March 8-9 - 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

2012 New Juvenile Defender Training

March 7-9, 2012
Regional Juvenile Detention Center, Greensboro & UNC School of Government, Chapel Hill

Cosponsored by the UNC-Chapel Hill School of Government, the Office of Indigent Defense Services, and the National and Southern Juvenile Defender Centers

Wednesday, March 7

12:00 – 1:00	Check-in Regional Juvenile Detention Center, Greensboro, NC
1:00 – 1:15	Welcoming Remarks *Whitney Fairbanks, Civil Defender Educator* *UNC School of Government, Chapel Hill, NC*
1:15 – 1:45	**What's Different About Juvenile Court?** (30 min.) *Eric Zogry, Juvenile Defender, Office of the Juvenile Defender, Raleigh, NC* Objective: Foster a better understanding of the importance of juvenile delinquency proceedings and highlight differences between juvenile and criminal proceedings, including differences in purpose and procedure
1:45 – 2:45	**Kids Are Different (Adolescent Brain Development)** (60 min.) *Antoinette Kavanaugh, Forensic Clinical Psychologist, Chicago, IL* Objective: Demystify the effect of brain development on teenage behavior with a discussion on adolescent brain development and how teenagers develop cognitive skills, moral frameworks, and social relations
2:45 – 3:30	**Detention Advocacy** (45 min.) *Barb Fedders, Clinical Assistant Professor of Law* *UNC School of Law, Chapel Hill, NC* Objective: Provide defenders with advocacy tools for use during detention hearings, including how to present studies to the court, dispute flight risk, and advocate alternatives to detention
3:30 – 3:45	Break *(light snack provided)*
3:45 – 5:30	**Visit with Kids in Regional Juvenile Detention Center & Tour Facility** (105 min.)

Thursday, March 8

9:00 – 10:00	**Overview of Juvenile Delinquency Proceedings** (60 min.) *Janet Mason, Professor of Public Law and Government* *UNC School of Government, Chapel Hill, NC* Objective: Increase understanding of juvenile delinquency proceedings by providing a brief history of the juvenile justice system in North Carolina and an overview of these proceedings from start to finish
10:00 – 10:15	Break
10:15 - 11:00	**Developing a Pre-Adjudication Investigation and Discovery Plan** (45 min.) *Tobie Smith, Staff Attorney* *Legal Aid Society of Birmingham, Birmingham, AL* Objective: Provide a framework for use during the pre-adjudication phase of a delinquency proceeding and discuss the types of information often available as well as methods—e.g., court order, subpoena, release of information, etc.— to obtain each
11:00 – 12:00	**WORKSHOP: Developing a Pre-Adjudication Investigation and Discovery Plan** (60 min.) Objective: Reinforce objectives and skills discussed during "Developing a Pre-Adjudication Investigation and Discovery Plan" through small group exercises in which groups will use a fact pattern to brainstorm what else they want to know, how they will get it, and how they intend use it
12:00 – 1:00	Lunch *(provided in building)**
1:00 -1:30	**WORKSHOP: Developing a Pre-Adjudication Investigation and Discovery Plan** (30 min.)

*IDS employees may not claim reimbursement for lunch

Thursday, March 8 (continued)

1:30 – 2:00	**Calculating Your Client's Prior Delinquency History Level** (30 min.) *Whitney Fairbanks* Objective: Reinforce skills introduced in "Determining Dispositional Options"—part three of the Delinquency Disposition online series—with the use hypothetical problems
2:00 – 2:45	**Disposition Options and Advocacy** (45 min.) *C. Renee Jarrett, Lead Defense Attorney* *Council for Children's Rights, Charlotte, NC* Objective: Provide defenders with advocacy tools for use during the initial disposition in a delinquency proceeding, including the use of your theory of defense during disposition, and Juvenile Disposition Reports
2:45 – 3:00	Break *(light snack provided)*
3:00 – 4:00	**Suppression Issues: Search and Seizure and Interrogation in Schools** (60 min.) *Randee Waldman, Director, Barton Juvenile Defender Clinic* *Emory University School of Law, Atlanta, GA* Objective: Reinforce the importance of making motions to suppress in delinquency proceedings and contextualize the adolescent brain development discussion by highlighting its role in suppression issues that arise in juvenile delinquency proceedings
4:00 – 5:00	**Evidence Blocking** (60 min.) *John Rubin, Professor of Public Law and Government* *UNC School of Government, Chapel Hill, NC* Objective: Equip defenders with tools to improve outcomes in contested adjudications through case theory development and basic evidence blocking techniques (e.g., identifying evidence you want to keep out and brainstorming how to keep it out)

Friday, March 9

9:00 – 10:30	**WORKSHOP: Motions to Suppress and Evidence Blocking** (90 min.) Objective: Reinforce concepts discussed during "Suppression Issues: Search and Seizure and Interrogation in Schools" and "Evidence Blocking" sessions through small group exercises in which groups practice evidence blocking and reverse blocking
10:30 – 11:15	**Post Disposition and Probation Violations** (45 min.) *Mary Wilson, Assistant Public Defender* *Office of the Public Defender, Raleigh, NC* Objective: Provide defenders with advocacy tools for use during post-disposition proceedings with a focus on probation violations, extension of commitment, and other reviews
11:15 – 11:30	Break
11:30 – 12:30	**Ethics and the Role of Counsel in Delinquency Proceedings** (Ethics) (60 min.) *Whitney Fairbanks* Objective: Discuss defenders'ethical obligation to advocate at all points in the process for the expressed interest of their child clients
12:30	Closing Remarks; Certificates

	CLE Hours:
Wednesday:	4.00
Thursday:	6.5
Friday:	3.25
Web Module:*	.50
Total hours:	**14.25**

(*includes 1.0 hour of ethics*)

**"Delinquency Dispositions Module 3: Determining Dispositional Options" (.5 hour).*
All students will receive a link to this online presentation for viewing before the training.

WHAT'S DIFFERENT ABOUT JUVENILE COURT?

Overview of Juvenile Court

New Defenders School
UNC School of Government
March 8, 2012

1. How Are Juvenile and Criminal Court Alike?

   a. Mostly the same conduct

      "*Delinquent juvenile. – Any juvenile who, while less than 16 years of age but at least 6 years of age, commits a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws, or who commits indirect contempt by a juvenile as defined in G.S. 5A-31.*"

   b. Rules of Evidence apply at adjudication

   c. Standard of proof at adjudication = beyond a reasonable doubt

   d. Most of the same rights as adults
      (1) written notice of facts alleged in the petition
      (2) counsel (no indigence determination required)
      (3) confront and cross-examine witnesses
      (4) privilege against self-incrimination
      (5) discovery
      (6) other rights afforded adult offenders unless Code provides otherwise

2. How Are Juvenile and Criminal Court Different?

   a. Juveniles do not have a right to
      (1) bail, unless case is transferred to superior court
      (2) self representation – juvenile cannot waive right to counsel
      (3) a grand jury
      (4) a jury trial

   b. Jurisdiction
      (1) based on age at time of offense
      (2) court has jurisdiction over parent, guardian, and custodian

   c. Purposes

   d. Terminology

   e. Procedures
      (1) law enforcement
      (2) court counselors
      (3) court

   f. Outcomes

3. Initial Jurisdiction –

   a. A case can be initiated only in juvenile court
      (1) if the juvenile was 6 but not yet 16 at the time of the offense,
      (2) unless the juvenile was married, emancipated, in the armed services, or had a conviction in superior court at the time of the offense.

   b. The case can be initiated any time, regardless of the juvenile's age (i.e., even if the "juvenile" is an adult), if
      (1) the offense was a felony, and
      (2) the juvenile was 13, 14, or 15 at the time of the offense.

      If the juvenile is 18 or older when the case is initiated or becomes 18 before the case is completed, juvenile court jurisdiction exists only for purposes of probable cause and transfer hearings. If not transferred, the case must be dismissed.

   c. A case cannot be initiated in any court if the juvenile is 18 or older and
      (1) the juvenile was 13, 14, or 15 at the time of an offense that was not a felony, or
      (2) the juvenile was younger than 13 at the time of the offense, regardless of what the offense was.

4. Dispositional or Continuing Jurisdiction –

   a. After adjudication, the court continues to have jurisdiction for dispositional and review purposes until:
      (1) age 21, if adjudication was for first-degree murder, first-degree rape, or first-degree sex offense, and the juvenile was committed to a youth development center;
      (2) age 19, if adjudication was for some other Class A through E felony, and the juvenile was committed to a youth development center;
      (3) age 18, in all other cases; or
      (4) earlier, if the court terminates jurisdiction, which the court may do at any time.

   b. Jurisdiction is not determined by the length of a term of probation or commitment.

5. Subchapter II of G.S. Chapter 7B – The Juvenile Code

   a. Pre-court: temporary custody, petition, nontestimonial identification, secure custody
   b. First appearance
   c. Hearing on continued custody
   d. Probable cause
   e. Transfer
   f. Adjudication
   g. Disposition
   h. Probation violation
   i. Post-release supervision violation
   j. Other review
   k. Extended commitment

6. Early Stages

   a. Custody without a court order – Physical custody and provision of personal care and supervision until a court order can be obtained.
      (1) by a law enforcement officer if grounds would exist for the arrest of an adult without a warrant
      (2) by a law enforcement officer or a juvenile court counselor, if there are reasonable grounds to believe the juvenile is an undisciplined juvenile
      (3) by a law enforcement officer, a juvenile court counselor, or personnel of the Department of Juvenile Justice and Delinquency Prevention, if there are reasonable grounds to believe the juvenile has absconded from a residential facility operated by the department or from a detention facility

   b. Nontestimonial identification procedure
      (1) always requires court order (except when statute specifically requires fingerprints/ photograph)
      (2) includes fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, lineups, or similar identification procedures that require the juvenile's presence
      (3) prosecutor may request, before or after juvenile is taken into custody, by presenting required affidavit
      (4) juvenile may request if charged with a felony
      (5) procedures in G.S. 15A-274 through -280, and 15A-282 apply

   c. Petition
      (1) must be approved for filing by court counselor
      (2) if court counselor does not approve, complainant can seek review by prosecutor
      (3) test for sufficiency = same as for indictment
      (4) must be verified
      (5) must be served with summons on juvenile and parent, but service can be waived
      (6) may be amended with court's permission if the amendment does not change the nature of the offense alleged

   d. Secure custody order – only if court finds
      (1) petition has been filed
      (2) reasonable factual basis
      (3) statutory ground
         - felony charged and demonstrated danger to property or persons
         - demonstrated danger to persons and the offense
            - included assault on a person; or
            - involved use, threatened use, or display of deadly weapon; or
            - was driving while impaired or after consuming alcohol or drugs
         - willfully failed to appear
         - reasonable cause to believe juvenile won't appear

7. First Appearance

   a. All felony cases, regardless of juvenile's age

   b. Prosecutor should be present

   c. Parent should be present

   d. Combined with first hearing on need for continued custody if juvenile is in custody

   e. See G.S. 7B-2402.1: Restraint of juveniles in courtroom:
      At any hearing authorized or required by this Subchapter, the judge may subject a juvenile to physical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom. Whenever practical, the judge shall provide the juvenile and the juvenile's attorney an opportunity to be heard to contest the use of restraints before the judge orders the use of restraints. If restraints are ordered, the judge shall make findings of fact in support of the order.

   f. Court must
      (1) inform the juvenile of the allegations in the petition
      (2) ensure that the juvenile has counsel
      (3) if applicable, inform the juvenile of the date of the probable cause hearing
      (4) inform parents that they are required to attend all hearings and may be held in contempt for failure to attend a scheduled hearing

8. Hearing on Need for Continued Custody

   a. First hearing
      (1) must be held within 5 calendar days (earlier if order entered by delegee),
      (2) cannot be waived or continued

   b. Subsequent hearings must be held at least every 10 days (unless waived)

   c. Burden is on the state to show by clear and convincing evidence that
      (1) a statutory ground for secure custody exists,
      (2) restraints on the juvenile's liberty are necessary, and
      (3) no less intrusive alternative will suffice.

   d. The court is not bound by the usual rules of evidence.

   e. The court can release the juvenile with conditions.

9. Probable Cause Hearing

   a. Required in all felony cases in which the juvenile was 13, 14, or 15 at the time of the offense.

   b. Must be held within 15 days of first appearance, unless continued for good cause.

   c. The juvenile's attorney can waive the hearing and stipulate to probable cause in writing.

   d. State must show by nonhearsay evidence (or evidence that satisfies a hearsay exception), except as provided in e., below, that there is probable cause to believe
      (1) that the alleged offense was committed, and
      (2) that the juvenile committed it.

   e. The follow are admissible:
      (1) a report or copy of a report made by a physicist, chemist, firearms identification expert, fingerprint technician, or expert or technician in some other scientific, professional, or medical field, concerning results of an examination, comparison, or test performed in connection with the case, when stated in a report by that person; and
      (2) if not seriously contested, reliable hearsay to prove value or ownership of property, possession of property in someone other than the juvenile, lack of consent by an owner, possessor, or custodian of property to the breaking or entering of the premises, chain of custody, and authenticity of signatures.

   f. If the court does not find probable cause for a felony, the court either
      (1) dismisses the proceeding, or
      (2) if the court finds probable cause to believe the juvenile committed a lesser included misdemeanor, either proceeds to an adjudicatory hearing or sets a date for an adjudicatory hearing.

   g. If the court finds probable cause for first degree murder, transfer to superior court is mandatory.

10. Transfer Hearing

   a. If the court finds probable cause for any felony other than first degree murder, the court must conduct a transfer hearing on motion of the state, the juvenile, or the court itself.

   b. Issue: Will transfer serve the protection of the public and the needs of the juvenile?

   c. The court must consider these statutory factors:
      (1) age,
      (2) maturity,
      (3) intellectual functioning,
      (4) prior record,

(5) prior attempts to rehabilitate,
(6) facilities or programs available before the court's jurisdiction ends, and likelihood that the juvenile would benefit from treatment or rehabilitative efforts,
(7) whether the offense was committed in an aggressive, violent, premeditated, or willful manner, and
(8) seriousness of the offense and whether protection of the public requires that the juvenile be prosecuted as an adult.

d. If the court transfers the case to superior court,
(1) the order must state the reason for transfer.
(2) the court must set bond.
(3) the juvenile can appeal immediately to superior court.
(4) the juvenile must be fingerprinted.
(5) if not released on bond, the juvenile may be held on in a juvenile facility.
(6) the transfer includes the felony, any offense based on the same act or transaction or a series of acts or transactions connected together or constituting parts of a single scheme or plan of the felony, and any greater or lesser included offense of the felony.

e. If the court does not transfer the case to superior court, the court either
(1) proceeds to an adjudicatory hearing or
(2) sets a date for an adjudicatory hearing.

11. Adjudication

a. Requires proof beyond a reasonable doubt

b. Jeopardy attaches when the court begins to hear evidence.

c. If there is an issue as to the juvenile's capacity to proceed, the provisions of G.S. 15A-1001, -1002, and -1003 apply.

d. The juvenile either "admits" or "denies" the allegations in the petition If the juvenile is admitting the offense, the judge must address the juvenile personally and
(1) inform juvenile of right to remain silent and that any statement he makes may be used against him;
(2) determine that the juvenile understands the charge;
(3) inform the juvenile that he has a right to deny the allegations;
(4) inform the juvenile that by admitting, he waives his right to be confronted by witnesses against him;
(5) determine that the juvenile is satisfied with his representation; and
(6) inform the juvenile of the most restrictive possible disposition.

e. Before accepting an admission, the court must make inquiries to determine
(1) whether there have been prior discussions about admissions;

(2) whether the parties have entered into any arrangement with respect to the admission, the terms of any arrangement, and whether any improper pressure was exerted; and
(3) whether the admission is a product of informed choice.

f. The court may accept an admission only after determining that there is a factual basis, based on
(1) a statement of the facts by the prosecutor;
(2) a written statement of the juvenile;
(3) sworn testimony, which may include reliable hearsay; or
(4) a statement of facts by the juvenile's attorney.

g. If objecting to evidence of the juvenile's out-of-court statement, consider:
(1) was the juvenile "in custody"?
(2) was the juvenile interrogated?
(3) was the juvenile (if under 18) given the usual Miranda warning and told that he/she had a right to have a parent, guardian, or custodian present?
(4) if the juvenile was under 14, was a parent, guardian, or custodian present?
(5) did the juvenile himself waive his right to remain silent and, if 14 or older, the right to have a parent, guardian, or custodian present if one was not present?

Before admitting a statement resulting from in-custody interrogation, the court must find that the juvenile **knowingly, willingly, and understandingly** waived his rights.

h. An adjudication order must
(1) state that the allegations have been proved beyond a reasonable doubt,
(2) include the date and classification of the offense, and the date of adjudication,
(3) be signed by the judge and filed with the clerk.

i. An adjudication is not a "conviction."

12. Disposition

a. A disposition is a plan for an individual juvenile, designed to
(1) hold the juvenile and parents accountable,
(2) protect the public, and
(3) address the juvenile's rehabilitative and treatment needs.

b. Dispositions available in every case
(1) dismissal
(2) continuance for up to 6 months to allow family to meet the juvenile's needs
(3) evaluation and treatment
(4) Level 1 dispositions

c. Availability of Level 2 and Level 3 dispositions depends on
(1) whether offense that is subject of the disposition is violent, serious, or minor;
(2) the juvenile's prior adjudications; and
(3) the juvenile's probation status when the offense was committed.

Determining Which Dispositions Are Available

A. **Offense Classification.** Offenses are classified as:
- Violent: Class A through E felonies
- Serious: Class F through I felonies and Class A1 misdemeanors
- Minor: Class 1, 2, and 3 misdemeanors

A critical first step at every disposition is to determine the one offense that is the basis for the disposition. Multiple adjudications in the same session of court must be consolidated for disposition and be considered on the basis of the most serious offense.

First Determination: The disposition being entered is for a _____ (Violent, Serious, or Minor) offense.

B. **Delinquency History Level.** A juvenile has a low, medium, or high delinquency history level, based on any prior delinquency adjudications and the juvenile's probation status when the current offense was committed. (In this context, "prior" means before the date of the disposition hearing.) These are assigned points as follows:

• each prior adjudication of a Violent offense (Class A through E felony):	4 points
• each prior adjudication of a Serious offense (Class F through I felony or Class A1 misdemeanor):	2 points
• each prior adjudication of a Minor offense (Class 1, 2, or 3 misdemeanor):	1 point
• juvenile's status of being on probation when s/he committed the offense for which a disposition is being ordered:	2 points

If the juvenile was 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. This rule applies even if the adjudications are for unrelated offenses that occurred on different dates. The key is whether they were adjudicated on the same date.

Points are never assigned for the offense for which a disposition is being ordered. Two points are added, however, if the offense for which disposition is being ordered was committed while the juvenile was on probation. (The juvenile's probation status when s/he committed any prior offenses is not relevant and does not result in the assignment of additional points.)

The juvenile's delinquency history level is classified as follows:

Low:	0 – 1 point
Medium:	2 – 3 points
High:	4 or more points

Second Determination: The juvenile has _____ points and therefore has a _____ (Low, Medium, or High) delinquency history level.

Dispositional Chart for Delinquency Cases

Apply the offense classification and the juvenile's delinquency history level to the chart:

Offense	Delinquency History Level		
	Low (0-1 point)	**Medium (2-3 points)**	**High (4 or more points)**
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

Third Determination: According to the Chart, the court must order a disposition from
___ Level 1 ___ Level 1 or 2 ___ Level 2 ___ Level 2 or 3 ___ Level 3.

Dispositional Chart Exceptions

- **Previous commitment.** [G.S. 7B-2508(d)]
  When the Chart authorizes or requires a Level 2 disposition but not a Level 3 disposition, the court nevertheless may order a Level 3 disposition if the juvenile has been committed before.

- **History of chronic offending.** [G.S. 7B-2508(g)]
  The Chart suggests that a Level 3 disposition is never an option when the court is ordering disposition for a minor offense, and that is almost always the case. The court may order a Level 3 disposition for a minor offense, however, if the juvenile has been adjudicated delinquent for four or more prior offenses. "Prior," in this context, has a different meaning from the one used to determine a juvenile's delinquency history level? Here, a prior offense is one that was committed and adjudicated before commission of the next offense. Each of the four or more successive offenses must be one that was committed after adjudication of the preceding offense.

- **Extraordinary needs.** [G.S. 7B-2508(e)]
  When the Chart indicates that only a Level 3 disposition may be ordered, the court nevertheless may order a Level 2 disposition instead, if the court makes written findings substantiating that the juvenile has extraordinary needs. The appellate courts have not had occasion to interpret "extraordinary needs." The court of appeals, however, has expressed broad deference to trial courts' discretion in ordering dispositions in delinquency cases.

Fourth Determination: Despite the level(s) indicated on the Chart, an exception authorizes the court to enter a disposition from ___ Level 2 ___ Level 3 ___ not applicable

13. Probation

a. Conditions. When the court places a delinquent juvenile on probation, the court may impose conditions that are related to the juvenile's needs and reasonably necessary to ensure that the juvenile will lead a law-abiding life. The code lists a number of permissible conditions, including "any other conditions that the court determines to be appropriate."

b. Delegated conditions. In addition, the court may order the juvenile to comply, if directed to do so by the chief court counselor, with one or more of the following conditions:
   (1) perform up to twenty hours of community service
   (2) submit to substance abuse monitoring and treatment
   (3) participate in a life skills or educational skills program administered by the DJJDP
   (4) cooperate with electronic monitoring (but only if juvenile is subject to Level 2
   (5) cooperate with intensive supervision (but only if juvenile is subject to Level 2 disposition)

c. Violations. After notice and a hearing, if the court finds by the greater weight of the evidence that the juvenile has violated the conditions of probation, the court may
   (1) continue the original conditions of probation,
   (2) modify the conditions,
   (3) order a new disposition at the next higher level on the disposition chart,
   (4) include in a new disposition an order of confinement in a detention facility for up to twice the term that otherwise would be authorized.

   However, the court may not order a Level 3 disposition for a probation violation by a juvenile who was adjudicated delinquent for a minor offense.

d. Term. A term of probation may not exceed one year, unless the court extends it for up to one additional year. Upon finding that the juvenile no longer needs supervision, the court may terminate probation by entering an order either
   (1) in chambers, without the juvenile present, based on a report from the court counselor, or
   (2) with the juvenile present, after notice and a hearing.

   The order should specify whether the court retains or terminates jurisdiction.

14. Youth Development Center Commitments [G.S. 7B-2513 through 7B-2516]

a. Every commitment of a juvenile to the DJJDP must be for a period of at least 6 months.

b. Ordinarily, the length of the term beyond the 6-month minimum is indefinite; however, a definite commitment of no more than two years is an option if the juvenile
   (1) is at least fourteen,
   (2) has been adjudicated delinquent previously for two or more felony offenses, and
   (3) has been committed to a youth development center previously.

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c. DJJDP may file a motion seeking approval to physically place a committed juvenile in a program located somewhere other than a youth development center or detention facility. The motion must be served on the prosecutor.

d. A juvenile's commitment may never exceed
   (1) the juvenile's 21st birthday, if the juvenile is committed for first-degree murder, first-degree rape, or first-degree sexual offense;
   (2) the juvenile's 19th birthday, if the juvenile is committed for a Class B1, B2, C, D, or E felony other than one of the offenses listed above; or
   (3) the juvenile's 18th birthday, if the juvenile is committed for any other offense.

   When the maximum commitment is the juvenile's 19th or 21st birthday, the juvenile cannot remain committed past his 18th birthday without notice and an opportunity to request a hearing

e. Except for the 6-month minimum, a juvenile cannot remain committed longer than an adult could be incarcerated for the same offense, unless the juvenile first is given notice and an opportunity to request a hearing.

f. At the time of the initial commitment, the court must notify the juvenile of both
   (1) the absolute maximum period of possible commitment (i.e., age 18, 19, or 21), and
   (2) the maximum period of time the juvenile may remain committed before the DJJDP must make a determination about whether to extend the commitment beyond age 18 or beyond the adult maximum and give the juvenile notice.

g. After release, every juvenile must be subject to post-release supervision for at least 90 days but not more than one year.
   (1) On motion of the juvenile or the court counselor, or the court's own motion, the court may conduct a hearing to review the progress of a juvenile on post-release supervision.
   (2) If the court, after notice and a hearing, finds that the juvenile has violated terms of post-release supervision, the court may revoke the post-release supervision or make any disposition authorized by the code.
   (3) If the court revokes post-release supervision, the juvenile must return to DJJDP for an indefinite term of at least 90 days, subject to the absolute maximum commitment periods.

15. Authority over Parent, Guardian, or Custodian [G.S. 7B-1805; 7B-2700 to 7B-2707]

a. The court has jurisdiction over a juvenile's parent, guardian, or custodian if that person has been served with a summons in the case. The Code requires the parent, guardian, or custodian to attend all hearings of which that person has notice, unless the court has excused the person's appearance at a particular hearing or all hearings.

b. After adjudication that a juvenile is delinquent, the court may order the juvenile's parent, guardian, or custodian to
   (1) cooperate with and assist the juvenile in complying with the terms and conditions of probation or other court orders;

(2) attend parental responsibility classes;
(3) provide transportation, to the extent the person is able to do so, for the juvenile to keep appointments with a court counselor or to comply with other court orders;
(4) pay a reasonable amount of child support;
(5) pay a fee for probation supervision or residential facility costs;
(6) assign private insurance coverage to cover medical costs while the juvenile is in detention, a youth development center, or other out-of-home placement;
(7) pay court-appointed attorney fees;
(8) cooperate with treatment the juvenile needs, undergo treatment that the parent needs, and pay for various evaluation and treatment the court orders.

c. To assist parents in complying with the these requirements, the Code prohibits any employer from discharging, demoting, or denying a promotion or other benefit of employment to any employee because of that person's compliance with any obligations the Code places on a juvenile's parent, guardian, or custodian.[1]

16. Registration of Juvenile Sex Offender [G.S. 7B-2509; 14-208.26 to 14–208.32]

a. As part of a disposition, the court may order a juvenile to register with the sheriff if all of the following conditions are met:
(1) The juvenile was adjudicated delinquent for one of the following offenses:
- first or second degree rape,
- first or second degree sexual offense,
- attempted rape or sexual offense,
- aiding and abetting rape or sexual offense, or
- conspiracy or solicitation of another to commit rape or sexual offense.

(2) The juvenile was at least eleven years old when the offense was committed.
(3) The court finds that the juvenile is a danger to the community.

b. The court is never required to order a juvenile to register. If an adjudication of delinquency is based on one of the specified offenses, committed when the juvenile was at least eleven, the court is required to consider whether the juvenile is a danger to the community and if the court finds that the juvenile is, to consider whether the juvenile should be required to register.

c. When a juvenile is required to register as part of a delinquency disposition, the information about the registered juvenile is available only to law enforcement agencies. The sheriff must maintain it separately, may not include it in county or statewide registries, and may not make it available to the public via the internet or otherwise. The information is included in the Police Information Network. The registration requirement terminates automatically on the juvenile's 18th birthday or when the juvenile court's jurisdiction ends, whichever occurs earlier.

[1] The Code charges the Commissioner of Labor with enforcing the prohibition pursuant to Article 21 of G.S. Chapter 95. In that chapter, G.S. 95-241(a) prohibits any person from discriminating or taking retaliatory action against an employee because the employee in good faith complies or threatens to comply with obligations under the Juvenile Code.

17. Modification and Termination of Disposition Orders [G.S. 7B-2600, 7B-2601]

a. The juvenile may make a motion for review at any time. After a hearing the court should determine whether the dispositional order is in the juvenile's best interest and may modify or vacate it based on changed circumstances or the needs of the juvenile.

b. DJJDP, through the court counselor, may initiate review hearings for alleged violations of probation or post-release supervision, or for any other reason. In the case of a juvenile who is committed to the Department for placement in a youth development center, DJJDP may seek a review and a modification of the disposition if it finds that the juvenile is not suitable for youth development center programs

c. The court's jurisdiction over a juvenile does not end automatically just because the juvenile's probation, post-release supervision, commitment, treatment, or other specific dispositional requirement ends. Unless the court enters an order terminating jurisdiction earlier, the court's authority to enter or modify orders affecting the juvenile continues until
   (1) the juvenile's 18th birthday, or
   (2) the juvenile's 19th birthday if the juvenile was committed to a youth development center for an offense that would be a Class B1, B2, C, D, or E felony if committed by an adult, or
   (3) the juvenile's 21st birthday if the juvenile was committed to a youth development center for first-degree murder, first-degree rape, or first-degree sexual offense.

8 Tips for Trying Cases in Delinquency Court

by Eric J. Zogry

Eric J. Zogry was born and raised in Raleigh, North Carolina. He received a Bachelor of Arts degree with honors in Religious Studies from the University of North Carolina in Chapel Hill in 1992. He received his Juris Doctor degree from the Louisiana State University Paul M. Hebert Law Center in 1996, and was admitted to the North Caroline State Bar in 1997. After working for the North Carolina Sentencing and Policy Advisory Commission and the Research Division of the Administrative Office of the Courts, Mr. Zogry joined the staff of the Public Defender's Office in Greensboro in February 1999. As an assistant public defender, Mr. Zogry practiced exclusively in juvenile delinquency court and involuntary commitment court. Mr. Zogry was appointed Juvenile Defender by the Indigent Defense Services Commission in November 2004 and began work January 2005. He lives in Raleigh with his wife Becky and two daughters Rachel and Camille.

Juvenile delinquency court, for all of its reputation as a "kiddie court," can be a very scary place, especially for attorneys who are trying a case in delinquency court for the first time. What law applies? Do I need to file written motions? Does my client have the right to remain silent? Trying cases, or having "adjudicatory hearings," in delinquency court can at least be partially demystified if counsel considers the following eight "things you need to know" before trying a case in delinquency court. This article hopes to give some tips on practice, procedure and strategy to those uninitiated in the ways of delinquency court.

Know the Judge

The first rule of adjudicatory hearings is that the judge is the trier of fact and law in delinquency court. Although *In re Gault*[1] bestowed many of the same rights to juveniles that adults receive in criminal court, the right to trial by jury was not extended.[2] Specifically, North Carolina law has restricted this option.[3] Therefore the burden on defense counsel is very great. Not only does counsel need to manage the facts in favor of the juvenile, counsel becomes the gatekeeper of the appropriate law to be applied (see the Know Your Client's Rights section below). Because the juvenile is being judged by an adult, there is the concern that a juvenile may be "found guilty of being delinquent" in au effort to provide services, rather than to scrutinize the facts. Defense counsel may want to consider frequently, but politely, reminding the court that the burden at the adjudicatory stage is "beyond a reasonable doubt," no different than in adult criminal court.[4]

Another problem that may arise is the court's familiarity of the facts, or the juvenile himself/herself, which may inadvertently affect the court's decision making. In some jurisdictions, only one or two judges preside in delinquency court. In other jurisdictions, courts utilize a "family court" model in which one judge remains with the juvenile until jurisdiction is terminated. Prior to the adjudicatory hearing, there may be one or more hearings where the court has heard factual information. If the juvenile has been detained, the court must hold a secure custody hearing to determine whether or not the juvenile should remain detained. At these hearings, the court must have a reasonable factnal basis in which to detain the juvenile, or to maintain a juvenile in secure custody.[5] Specifically at a hearing to determine whether secure custody should be continued, testimony is allowed by the juvenile and the parent/guardian, and there is an opportunity to offer evidence and to examine witnesses. Similarly, the court can hold a probable cause hearing if the juvenile is 13 or older at the time of the offense and the juvenile is accused of committing a felony. The court would consider at least some of the facts of the case at this hearing. Finally, defense counsel may consider holding a pre-adjudicatory hearing on a particular issue, such as suppression or capacity, which may present facts to the court.

If counsel feels that a particular judge has gained too much information to be objective at an adjudicatory hearing, the attorney may want to consider moving for recusal. Another option for counsel is to request the court to change venue so as to prevent any potential bias.

File Motions

Currently, motions practice is in its nascent stage in delinquency court. Why? For starters, many attorneys treat juvenile court, well, like district criminal court, where motions practice is also not a priority. The difference, however, between juvenile court and adult criminal district court is that felonies are heard in juvenile court, so the stakes, including potential transfer to adult court, and use of felony adjudications against adult offenders, can be very high.

Any number of motions can be filed in juvenile delinquency court. The "big three" which can really change the course of the adjudicatory hearing are discovery motions, capacity to proceed motions, and suppression motions. Discov-

ery motions are standard practice in superior (and sometimes district) court, and should also be an automatic response in any delinquency proceeding. There is an abundance of helpful information, but specifically getting copies of statements is paramount. Capacity to proceed motions are also a necessity, especially when the client is very young, or couusel wants to challenge the juvenile's culpability, based on their developing adolescent brain (see more on this below). Suppression motions are a key tool because juvenile's statements are most frequently the evidence that is brought against them. Other motions counsel may file include ex parte motions to hire experts, motions in limine to exclude certain evidence, and motions to modify or vacate dispositional rulings.

These are just some examples of motions to be filed in every delinquency matter, not only to protect the client's rights, but to protect the record on appeal.

Inform the Juvenile and Parent/ Guardian of the Plan

Building trust is an important piece of any attorney-client relationship. With juvenile clients, trust becomes crucial. Take a step in the client's shoes for a minute. Juveniles are constantly being assessed, judged and supervised by adults. Most of those adults make decisions about the juvenile without any consideration of the juvenile's position or desires. As a juvenile defender, you may be the first person who has empowered your client not only in the court process, but in any setting which involves mostly adults. Take advantage of your relationship and get to know the case from the juvenile's viewpoint. You will be surprised how often a fact or perspective from your client can turn the case to her favor. Continue to inform your client about what is happening in the process, especially prior to, and during the course of, the adjudicatory hearing. The more prepared your client is, the less likely she will make a statement that will harm the case, or otherwise behave in an inappropriate manner during the hearing which will grab the judge's attention.

One of the most difficult aud frustratiug parts of delinquency representation is attorney----parent relations. Clearly, as juvenile defenders, we do not represent the parents. But it is just as clear that yonr contact, and therefore influence, on your client ends when they leave your sight. When your client goes home to her parent or guardian, you want to try to make sure that everyone is on the same page. Letting the parent or guardian know your general strategy before the adjudicatory hearing may go a long way in having the juvenile be honest with you, knowing that the parent or guardian approves and enconrages the jnvenile's participation.

Know Your Client's Rights

Adjudicatory hearings and adult criminal trials do not run exactly alike. Consider N.C. G.S. 7B-2405, which states that:

> the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law: (1) The right to written notice of the facts alleged in the petition; (2) The right to counsel; (3) The right to confront and cross-examine witnesses; (4) The privilege against self-incrimination; (5) The right of discovery; and (6) All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.

Most of these rights derive from *In re Gault*. What is interesting is the Trying the Adolescent Brain section, which appears to leave an open door for "all rights afforded adult offenders." The protection agaiust double jeopardy has been held to be one of these rights.[6] Note also that the rules of evidence in crimiual proceedings apply to the adjudicatory hearing.[7] Though the right to a speedy trial is not specifically mentioued in the above statute, there are many time frames in the Juvenile Code which a defender should consider enforcing, especially the filing of petitions under N.C.G.S. 7B-1703.[8]

Another right afforded juvenile offenders but not to adult offenders is the extension of the *Miranda* protections. N.C. G.S. 7B-2101 provides that when a juvenile under 14 is in custody, no admission or confession can be admitted unless a parent, guardian or attorney is present. If the juvenile is 14 or older, she must be told she has a right to have any attorney present before any statement may be used against her in an adjudicatory hearing. This protection is especially important in school settings, where police officers assigned to schools, or "SROs" (school resource officers), frequently interrogate juveniles about suspected criminal behavior. Defenders should also be aware that any statement made by a juvenile to the jnvenile court counselor during the intake process can be admissible prior to the dispositional hearing.[9] Note, however that although an adjudication of delinquency can not be used in adult prosecutions except under certain circumstances, the adjudication can be used to impeach the testimony of a juvenile in a subsequent juvenile proceeding or of a juvenile witness in a delinquency proceeding, regardless of whether the juvenile's record has been expunged.[10]

Open or Closed Hearings?

In 1999 the law pertaining to open hearings in delinquency court changed. Under prior law, the court was closed unless requested to be open. The current law states that the hearings are open to the public unless closed by the court upon a motion of a party.[11] The court must consider five factors to determine whether to close the court room, including the nature of the allegations, the age and maturity of the juvenile, benefit to the juvenile of confidentiality, the benefit to the public of an open hearing, and the possibility of whether or not the confidentiality of the juvenile's file will be compromised.

Currently, different jurisdictions employ different practices. In some jurisdictions, the court only hears one case at a time, sometimes because of the size of the court room. Other jurisdictions prefer bringing all parties into the court room. Some court rooms automatically close the court room for certain kinds of cases, such as sex offenses. In some smaller jurisdictions, delinquency cases are only one of several kinds of cases being heard during the same session of court. Abuse, neglect and dependency proceedings, domestic violence cases, even adult criminal first appearances are heard in the same room as delinquency cases.

Whether or not to close the court room

is something counsel should discuss with their clients. As stated above, many court rooms automatically close when the allegations involve sexual offenses. If court does not close automatically under these circumstances, attorneys should consider moving for a closed session as the allegations are not only embarrassing, leaked information could have long-ranging negative consequences for your client in the community, such as notice to local organizations or places the juvenile may frequent. High-profile media cases also should be considered to be closed, in that unwanted attention has the tendency to produce unwanted results in the court room.

Trying the Adolescent Brain

As discussed above, capacity motions are among the most frequently filed in delinquency court. While many are filed either for reasons of infancy, or because your client has a mental or emotional disability, you may consider contesting your client's capacity due to immaturity.

Roper v. Simmons[12] was a landmark decision, not only because it struck down the death penalty for youth under 18, but because the reasoning employed could be applied to other issues involving juveniles' ability to comprehend their actions or the results of their actions. Specifically, the Supreme Court considered three elements that diminish culpability in adolescents: the inability to see the consequences of their actions, their susceptibility to outside influence, and their ability to mature and develop their personality into young adulthood. Three examples of applying this analysis to specific defenses include suppressing a juvenile's statement due to the juvenile's inability to waive self-incrimination protections, the defense of specific intent offenses, and the argument that culpability should be reduced or negated.

Even if a motion that the juvenile was incapable of proceeding due to lack of development fails at the suppression stage, the court may consider the argument during the adjudicatory hearing. As explained above, the juvenile's statement is usually the linchpin, and sometimes the only evidence, in the State's case. Counsel could put on evidence that the juvenile was unable to understand her self-incrimination rights due to her inability to both foresee the consequence of waiver, and to make a reasoned decision due to the pressure of the authority figure presiding over the interrogation.

Many crimes include a specific intent element, indicating that the offender committed the offense for a specific goal or purpose. Using the *Roper* logic, counsel could argue that the juvenile could not have foreseen or planned the results of her actions. For example, the crime of indecent liberties between children requires that the State prove that the sexual act occurred for the purpose of gratifying sexual desire.[13] The State must not only show there was a touching but that there was some underlying understanding that the act was "sexual" in nature. Counsel should not let the court assume that the juvenile has developed to a point of understanding what is and is not a "sexual act," especially as it relates to younger clients.

Counsel may also want to explore other facts or circumstance around the case to determine whether or not the juvenile was influenced to the point where she was not making an independent, rational decision. Many times juveniles are with other juveniles, or other adults. If counsel believes the juvenile would not have participated in the offense but for the influence of those around her, counsel should use that strategy in the theory of defense.

"Argue" Disposition at Adjudication

The procedure that most distinguishes delinquency court from adult criminal court is disposition. Dispositions, which are similar to sentences, are tailored plans for the individual juvenile to both meet the juvenile's needs and protect the public. Dispositional options range from community service and mediation to out-of-home placement and commitment to a youth development center, or long-term locked facility.[14] It is a common strategy that, knowing the juvenile will probably be found responsible for the allegations, attorneys will be "arguing disposition" at the adjudication stage. Why would this tactic be employed? Sometimes counsel want to give the judge a "heads up" on other issues in the case that counsel wants the court to consider at disposition. While counsel may believe that the juvenile may ultimately be found responsible based on the facts, counsel may want to give the judge a preview of what is to come to influence her decision at disposition.

There are several examples of this strategy. One example is school-based offenses. In some cases, the juvenile's actions have been determined, in another setting, to be a product of the juvenile's mental or emotional limitations. Though providing this information at adjudication may not sway the judge, it may succeed in the ultimate argument, that the juvenile's actions were a manifestation of her disability, and the judge should consider this when entering disposition. Another scenario may involve an allegation of a sex offense. Counsel may want to argue the facts of a case not only when the evidence is not strong, but also to build a case for the juvenile not to be registered as a juvenile sex offender, or for the court to provide a less restrictive environment for treatment.

I would recommend utilizing this strategy only when there is a legitimate claim that the juvenile is not responsible for the allegations, or when the juvenile requests an adjudicatory hearing. If counsel tries a case where the evidence clearly indicates the juvenile's responsibility, the judge may see through the strategy and the arguments may be ineffective at disposition.

Preserve the Record and Appeal

Juveniles only have one shot at the trial level, so it is incredibly important to preserve the record on appeal. Counsel should object at the proper junctures and make offers of proof, make motions to dismiss after the State's evidence and after *all* of the evidence is presented at an adjudicatory hearing, and timely file the notice of appeal.

As stated earlier, the rules of evidence in adult criminal cases also apply in juvenile cases, so counsel should make sure during an adjudicatory hearing the proper objections are made and preserved. It is not uncommon, sometimes because of the informality of the hearing, that the court will not rule on an objection. Counsel must receive a ruling from the court prior to any answer made, and make an offer of proof, to make sure the issue is preserved.[15]

One of the most common mistakes made in adjudicatory hearings is making the motion to dismiss at the end of the State's evidence, but then failing to renew the motion at the end of all the evidence. This phenomenon is usually caused, again, by the informality of the proceedings, especially when the juvenile does not put on any evidence. Unfortunately, several cases on appeal have been thrown out because the attorney failed to renew the motion to dismiss.[16] Another common error specific to delinquency court is appealing both the adjudication and disposition orders. If defense counsel fails to appeal either one, the Court of Appeals will refuse to hear any issue associated with that order.[17]

Delinquency court also has specific rules as to when to file notice of appeal. Notice may be made in open court at the time of the hearing, or in writing within 10 days after the order is entered.[18] A "final order" is generally an order of disposition after adjudication. However, it often happens that disposition is continued, or in some instances, never entered. In those circumstances, notice must be made in writing after 60 days of the entry of the order, but before 70 days have elapsed.

Conclusion

There are certainly more than eight tips that will adequately prepare defenders for adjudicatory hearings in delinquency court. While I hope these suggestions will point defenders in a productive path I would also encourage further exploration in the world of juvenile delinquency. Defenders should consult with the attorneys in their jurisdiction, seek out training and other resources, and most importantly, observe some adjudicatory hearings. ◆

1. 387 U.S. 1 (1967)
2. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971)
3. N.C.G.S. 7B-2405(6)
4. N.C.G.S. 7B-2409
5. N.C. G.S. 7B-1903 and 7B-1906
6. *In re Drakeford*, 32 N.C. App. 113, 230 S.E.2d 779 (1977)
7. N.C. G.S. 7B-2408
8. See also *In Re: M.C.*, 643 S.E.2d 678 (2007), *In the Matter of: J.B.*, 650 S.E.2d 457 (2007), and *In the Matter of K.W.*, 664 S.E.2d 66 (2008)
9. N.C. G.S. 7B-2408
10. N.C. G.S. 7B-3201
11. N.C. G.S. 7B-2402
12. 543 U.S. 551 (2005)
13. N.C. G.S. 14-202.2
14. See N.C. G.S. 7B-2506 for a complete list of dispositional alternatives
15. See *In the Matter of: H.D.*, 2007 N.C. App. LEXIS 1267 (**unpublished opinion**)
16. See *In re Rikard*, 161 N.C. App. 150 (2003) and *In re Hodge*, 153 N.C. App. 102 (2002)
17. See *In the Matter of A.L.*, 166 N.C. App. 276, 601 S.E.2d 538 (2004)
18. N.C. G.S. 7B-2602

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KIDS ARE DIFFERENT

A DEVELOPMENTAL FRAMEWORK FOR JUVENILE CASES

ROPER	DEVELOPMENT	STATEMENT	TRIAL	DISPOSITION
	IMMATURITY			Must be tailored to each youth's unique needs, but could
•*Behavioral immaturity mirrors anatomical immaturity of brain*	• *Immature thinking*			include services (in a facility or the community) such as:
	-Unable to anticipate	Can't look ahead to statement in court	Did not plan: "it happened;" impulsive	Instruction in anticipating consequences
	-Unable to see choices	Only way to go home=say what they want	Carried weapon with no plan to use	Instruction in how to see choices & pros & cons
•*Rely on amygdala, primitive emotion center of brain when adults would process similar information through frontal cortex*	-Minimizes risk	Can always take back what I said	Believed it was "just talk" (fantasy)	Instruction in decision-making: think before acting
	• *Immature identity*			Instruction in planning & following a plan
	-Not successful	Self-conscious about being "slow"	Sensitive to being picked on	Being successful at something & opportunities to show it
	-Unstable self-definition	Unsure of self; hurt if called a liar	Does not ask for adult help	Guided process for defining self; becoming a leader
	-Wants acceptance	Compliant; does what is asked	Wants to belong even with negative peers	Instruction in how to think without being influenced
•*Frontal lobe --responsible for impulse control, decision-making, judgment--develops slowly until early 20's*	-Can't function independently	Naively trusts police; taught to tell truth	Easily influenced by older co-defendants	Improved social skills to be acceptable to positive peers
	• *Moral development*			Preparation for work & deciding to live on modest income
	-Fairness fanatic	Can't believe police would manpulate, lie	Can't walk away, especially when high,	Developing job skills; support on the job for good decisions
		Snitching=morally wrong	even though knows right from wrong	Learning positive ways to deal with unfairness
•*Prone to risk-taking; it is statistically aberrant to refrain from risk-taking in adolescence*	-Fragile moral reasoning	Does not understand rights	May have been righting a wrong	Practicing good moral reasoning under stress
	-Empathy	In shock about offense; shame	Did not realize there would be a victim	Victim empathy training
				Specialized instruction to:
				• Improve reading by learning how to decode words
• *More susceptible to stress, which further distorts already poor cost-benefit analysis*	DISABILITIES			• Improve reading by digesting more of the meaning
	• *Processing problems*	Doesn't comprehend meaning of Miranda	Can't comprehend others' intentions	• Improve sequencing: seeing cause & effect
	(digesting information)	Can't follow questions-doesn't ask	Things happened too fast	• Practicing comprehending instructions
		Can't read well		• Improve organization; learn how to prioritize
•*More vulnerable to peer pressure Importance of approval makes already risk-prone impulsive teen even more so*	• *Limited executive functions*	Focuses on getting it over with	Poor planner	• Learn how to concentrate & manage distractibility
	• *Impaired sequencing*	Thinking compromised by lack of sleep,	Couldn't envision what would happen next	• Learn how to manage stress
	• *Difficulty concentrating*	cold, hunger, other conditions	Became agitated under stress	Trauma treatment to:
				• Talk about traumatic events
•*Normal adolescents cannot be expected to operate with maturity, judgment, risk aversion or impulse control of an adult; teen who has suffered brain trauma, dysfunctional family, violence, or abuse cannot be presumed to operate even at standard levels for adolescents*	TRAUMA (causes delayed development)			• Hear about others' trauma
				• Separate past maltreatment from present provocations
	• *Over-reacts to threat*	Scared of police, especially 2-on-1	If victim aggressive, responds as if a repeat	• Learn not to blame self and stop self-destructive acts
			of past maltreatment (primitive reflex)	• Not assume others are hostile; not act like a victim
	• *Depressed*	Tearful, exhausted, poor eye contact;	Feels worthless, anxious, powerless; life	Learning to anticipate loss of control & how to manage
		slow thinking; gives in easily	is out-of-control; self-destructive	Learning to soothe self when agitated without substances
	• *Numbs feelings with substances*	High, coming down during questioning	Lowered inhibitions, poor judgment if	Positive, realistic view of self in future
			high during offense	Help with family where there is active substance abuse

DETENTION ADVOCACY

New Juvenile Defender Training
March 2012
Detention Advocacy
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Selected Organizations

Campaign for the Fair Sentencing of Youth, http://www.endjlwop.org

Campaign for Youth Justice, http://www.campaignforyouthjustice.org

Equal Justice Initiative, http://www.eji.org/eji

Families and Friends of Louisiana's Incarcerated Children, http://www.fflic.org

The W. Haywood Burns Institute for Juvenile Justice Fairness and Equity, http://www.burnsinstitute.org

Justice Policy Institute, http://www.justicepolicy.org/index.html

National Juvenile Defender Center, http://www.njdc.info

National Juvenile Justice Network, http://www.njjn.org

Prison Policy Initiative, http://www.prisonpolicy.org

Ten Principles for Providing Effective Defense Advocacy at Juvenile Detention Hearings

Prepared by NJDC for the Annie E. Casey Foundation's
Juvenile Detention Alternatives Initiative

Preamble

A. Goal of These Principles

These principles are developed as a resource to help defenders and other juvenile court professionals understand the elements of effective detention advocacy on behalf of indigent juvenile clients.[1] Defenders can be at a distinct disadvantage at the detention determination, whether it is at the beginning of the case, when indigent defense counsel often has the least information about the child and the charge compared to every other person in the courtroom,[2] or at the end of the case, when the child is post-disposition, and an unspoken but unmistakable presumption to detain creeps into the case discourse.[3] Juvenile indigent defense counsel have a duty "to explore promptly the least restrictive form of release, the alternatives to detention, and the opportunities for detention review, at every stage of the proceedings where such an inquiry would be relevant."[4] Therefore, it is critically important for juvenile defenders to be as well-prepared as possible when they walk into detention hearings, where counsel's often seemingly impossible goal is to present a history of the client leading up to the present day, along with an individualized release plan that is responsive to the client's expressed interests[5] and that bears in mind the needs of the court.

In fall 2004, the National Juvenile Defender Center, with support from the Annie E. Casey Foundation, published *Legal Strategies to Reduce the Unnecessary Detention of Children*, an advocacy and training guide aimed at ensuring that juvenile defenders provide zealous and comprehensive legal advocacy at detention and related hearings. These Principles build on that work. The National Juvenile Defender Center works to ensure excellence in juvenile defense and promote justice for all children.

B. Detention advocacy is crucial to every aspect of the case, including the development of the attorney/client relationship.

There are several reasons defenders must advocate aggressively at detention hearings. First, the detention decision is critical to the client's ability to prepare for trial. A detained client cannot assist as well in preparing for trial, and does not make as good an impression on the court, as a client who has been released.[6] In addition, detention halls are often crowded, dangerous, and unhygienic.[7]

Studies show that time spent in detention increases the likelihood that a child will recidivate,[8] in part because the child is likely to make negative peer connections, [9] and because positive, community-based relationships (in particular, with the child's family) are interrupted. In fact, detention, as a predictor of future criminality, is more reliable than gang affiliation, weapons possession, or family dysfunction.[10] Indeed, detention is a demonstrated gateway into the juvenile delinquency system.

Defenders must advocate aggressively for release in service to the attorney-client relationship. In many detention hearings, the defender's relationship with the client is new. There is no better way to realize the attorney/client relationship than by taking the time to understand and fight for the client's expressed legitimate interest.

C. Indigent defense delivery systems must pay particular attention to the disproportionate detention of the most vulnerable and over-represented groups of children in the delinquency system.

Nationally, children of color are severely over-represented at every stage of the juvenile justice process, and the detention stage is no exception.[11] As of the fall of 2005, over two-thirds of the youth in detention are children of color, largely African-American and Latino youth.[12] Not only are children from ethnic and racial minority groups disproportionately confined at detention hearings, but they suffer the effects of detention more acutely than other children.[13]

Ten Principles

1 At the detention hearing, as at all other stages of a case, defenders fulfill their ethical obligation to advocate for the expressed interests of each client.

A. The *IJA/ABA Juvenile Justice Standards* are clear that defenders have an ethical obligation to zealously advocate for the expressed interests of each juvenile client, even when the client's expressed legitimate interest conflicts with the defender's sound legal advice or with the defender's own personal judgment about what might be in the client's best interests.[14] These standards apply regardless of the client's age, education level, and perceived or measured intelligence level, so long as the client is "capable of considered judgment on his or her own behalf."[15]

B. In every case where there is conflict between a juvenile client accused of an offense and his or her parents, and, in particular, in cases where there is a possible conflict of interest between the client and his or her parents, as in cases in which either the parent or one of the client's siblings is a complainant, counsel should inform all parties involved that counsel represents the expressed legitimate interests of the client, and that, in the event of a disagreement between the client and his parents, counsel must advocate for the client's expressed interests alone.[16]

2 Defenders consult with the client as early as possible, and in all cases prior to the detention hearing.

A. As far in advance as possible before the detention hearing, defense counsel should consult with the client to find out the client's expressed interests regarding detention and detention alternatives, including placement with family members or in a community-based program, as well as any specific reasons that mitigate against detention of the client, including age, special needs, special strengths and talents, health concerns, and mental health issues.

B. The initial meeting with the client should also include discussion of: attorney-client confidentiality; the attorney's ethical duty to zealously advocate for the child's expressed interests; the client's right to remain silent; and the client's objectives for the case. Consultation with the client also includes explaining the roles of each of the courtroom players, the purpose of each part of the initial hearing, and preparing the child for the accusatory character of the hearing. If the child is detained counsel should inquire whether there is any evidence that the child has been harassed or mistreated by either staff or other inmates.

C. Although defenders cannot give the client's parent or guardian legal advice, as part of their ethical duty to zealously represent their juvenile clients, defenders should be sure to prepare the client's parent or guardian for the interview with the intake probation officer.[17] Defenders should relate to the parent the purpose of the interview, warn the parent that everything the parent says will likely be recited in open court, inform the parent that the judge might solicit the parent's opinion about the client's behavior and appropriate placement options in open court, and tell the parent the importance of supporting release when speaking with the probation officer. Defenders should also cover the specific areas likely to be discussed at the hearing, including school attendance, extracurricular activities and hobbies, parental control, dangerousness, and risk of flight.

3 Defense counsel prepares for the hearing with creative and thorough investigation.

A. Defense counsel should conduct a complete investigation of the client's history in preparation for the detention hearing. Counsel should make every effort to obtain the client's school and medical records, and talk with the client's parent or guardian, teachers, and any other adults to whom the client is close. The social history from the client should cover information about the client's strengths and skills, and the client's prior involvement in the system, as well as the client's special health needs, mental health needs, and family history.

B. Defense counsel should also investigate the allegations against the client for the probable cause hearing. Counsel should request from the government, receive and review any existing prior delinquency, truancy, and dependency record, as well as the police reports in the case. Counsel should also talk with the client about potential exculpatory information that might be useful at the probable cause hearing.

C. Defense counsel should advocate with the probation officer and the prosecutor before the hearing. Counsel should request from the probation officer, receive and review any risk assessment instrument (RAI) the probation officer intends to rely on in the detention hearing. Talking with the probation officer before the hearing also gives counsel an opportunity to negotiate on the client's behalf.

4 Defenders use all available arguments and information to oppose a finding of probable cause.

A. The probable cause standard, which is a very low evidentiary standard, is defined as 1) whether there is probable cause to believe that a crime was committed and 2) whether there is probable cause to believe that the child was involved.[18]

B. Where the state statute does not specify the burden or the standard of proof required, counsel should argue, pursuant to IJA/ABA standards, that the government bears the burden to prove probable cause by clear and convincing evidence.[19]

C. In jurisdictions where probable cause is determined in an evidentiary hearing, counsel should carefully consider whether to waive a probable cause hearing. Even if there is no chance of winning the hearing, counsel can use the hearing as an opportunity for discovery, and for sworn statements to use at trial.

D. Counsel should always make a probable cause argument. In most cases, an argument can be made concerning a deficient attestation, a lack of evidence concerning one or more of the elements of the charged offense, or an insufficient nexus between your client and the offense.

E. Particularly if the client is detained, where counsel receives exculpatory information after the probable cause hearing, counsel should immediately file a motion to reopen the hearing.

5 Defenders argue for judges to abide by statutory criteria for ordering detention, such as risk of flight and dangerousness.

A. Defenders should go into detention hearings knowing the purpose clause of the state's juvenile justice act, the detention statute, and, specifically, the statutory criteria necessary to imposing detention. Defenders should make an abbreviated and portable reference packet that includes the statute and court rules, the statute's legislative history, and synopses of recent and relevant case law.

B. Defenders should argue from the position that detention is the last resort. Most statutes, as they are constructed, support this position, and typically, judges have a great deal of discretion. The discretion lies in the determination of two specific factors: a client's potential dangerousness to the community and risk of flight.[20] In addition, most jurisdictions have statutory language stating that juveniles should be held in the least restrictive conditions necessary to ensure the safety of the community and the return of the juvenile to court.

6 In consultation with the client, defenders investigate and argue for alternatives to detention.

A. An alternative to detention is whatever creative plan a defender and community partners can devise that is responsive to the needs of the client and addresses the concerns of the court. To craft individualized detention plans using community-based resources, defenders must become familiar with the available detention alternatives. Defenders should compile a list of each community-based program, with contact names and phone numbers, addresses, target populations, and develop a plan to keep the list updated.

B. Defenders should visit community programs and aim to develop relationships with staff members.

C. Defenders should challenge any decision to detain based on a lack of community resources. The failure of the community to provide suitable, evidence-based programs responsive to the client's needs does not mean that the client should be detained.

7 Defenders are aware of current research on the harmful effects of detention and, when appropriate, use this research to argue against detention.

A. Defenders must be familiar with their local detention facilities to be able to argue convincingly concerning the harmful effects of detention. To that end, defenders should arrange tours of their local secure and non-secure detention facilities. They should request copies of each facility's standard operating procedures, and rules regarding how staff should treat residents. They should file Freedom of Information Act requests about criminal allegations, staff training guides, discipline guidelines, and statistics on the use of discipline. Finally, juvenile defenders should talk with their clients about their experiences with different staff members at different facilities.

B. Defenders should be aware of and argue the detention facilities' deficiencies, if they exist, including the limited or nonexistent access to special education, mental health treatment, and adequate medical care, increased chances of recidivism, and consequences of overcrowding and harsh treatment.[21]

C. Defenders should also be aware of and argue the advantages of staying on release, including continued involvement in family, school, and positive peer relationships.[22]

8 Defenders request that the judge make written findings and an order regarding detention.

A. Counsel should ensure that, in as timely a manner as possible, counsel receives a clear, concise written order documenting the court's findings with respect to the need for detention of the client. If counsel believes any conditions are excessively punitive or unnecessary, counsel should state that position on the record. If the order is ambiguous, counsel should seek clarification.

B. Defenders should work to ensure that detention orders specify any special conditions or needs of the client.

C. Both defense counsel and the client should receive copies of the order in a timely manner, and counsel should review the order with the client as soon as is practicable.

D. Defense counsel should advocate for juvenile detention hearings to be recorded and transcribed.[23]

9 Defenders ensure that each client who is released understands the conditions of his or her release and is prepared to fulfill these conditions.

A. Counsel should adequately explain the conditions of release to the client, and provide the client with the name and telephone number of the court worker assigned to monitor the client's case. Counsel should also contact the worker, provide counsel's name, address, and phone number, and let the worker know that the worker should consider counsel another resource as the client's case progresses.

B. If a client is released, counsel should ensure that the client's need for safety is met and that agencies are held responsible for the provision of any needed services.

10 Defenders appeal detention decisions immediately, if warranted and in consultation with the client.

A. If the client is detained, defense counsel should create and seek out opportunities to win release. In particular, defense counsel should file motions to reconsider, review or modify the detention decision based on evidence showing, inter alia: that time in detention has changed the circumstances of the case such that the child can be released into the community; that new evidence discovered after the probable cause hearing casts doubt on the correctness of the probable cause determination; or that defense counsel has, since the detention decision, been able to create a release plan that addresses the specific reasons the court cited in support of detention.

B. If the client is detained, defense counsel should immediately inform the client of his or her right to appeal, the timeline of an appeal, the likely outcome, and the affect than an appeal of the detention decision might have on the client's case.

C. If the client is detained, and counsel has exhausted the standard procedures available to obtain the client's release, defense counsel also considers filing a writ of habeas corpus, mandamus, or prohibition.

D. If counsel is not prepared to handle the client's appeal, counsel should transfer the case to another attorney who is.

For more information, please contact the National Juvenile Defender Center at 202.452.0010 or at inquiries@njdc.info.

Endnotes

1 For the purposes of these *Principles*, detention means confinement in a secure detention facility during the interim period between arrest and adjudication.

2 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 4 (2004), available on the web at http://www.njdc.info/pdf/detention_guide.pdf.

3 See generally, *Maine: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003); *Florida: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings* (2006). All of NJDC's state assessments are available at on the web at http://www.njdc.info/assessments.php.

4 Institute for Judicial Administration/American Bar Association (IJA/ABA), *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 8.2 Standards for the Defense Attorney.

5 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties,* Standard 3.1 The Lawyer-Client Relationship (stating, "[h]owever engaged, the lawyer's principal duty is the representation of the client's legitimate interests. Considerations of personal and professional advantage or convenience should not influence counsel's advice or performance").

6 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 5 (2004).

7 National Juvenile Detention Association and Youth Law Center, *Crowding in Juvenile Detention Centers: a Problem Solving Manual* (Dec 1998) 5-10, on the web at www.njda.com/learn-materials-pub-r0711.html.

8 Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* 4 (2006).

9 *Id*. at 5.

10 Bart Lubow, 11 Juvenile Justice Update 1, 2, *Reducing Inappropriate Detention: A Focus on the Role of Defense Attorneys* (Aug/Sep 2005).

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

12 Bart Lubow, 11 Juvenile Justice Update, *Reducing Inappropriate Detention: A Focus on the Role of Defense Attorneys* 1, 2 (Aug/Sep 2005); *see also* Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* 12 (2006)(stating that "[e]ven in states with tiny ethnic and racial minority populations, (like Minnesota, where the general population is 90% white, and Pennsylvania, where the general population is 85% white) more than half of the detention population are youth of color").

13 *Id*. at 2, 14 (stating, "Indeed, detained youth are generally among the most disadvantaged and disconnected people in our country. . . These youth have some of the worst odds of making a successful transition to adulthood in our country, and detention lowers those odds still further.")

14 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties,* Standard 3.1 The Lawyer-Client Relationship.

15 *Id*.

16 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition,* Standard 8.1 Conflicts of Interest.

17 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 14 (2004).

18 *Gerstein v. Pugh*, 420 U.S. 103 (1975).

19 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Interim Status: The Release, Control and Detention of Accused Juvenile Offenders Between Arrest and Disposition*, Standard 4.2 Burden of Proof.

20 Elizabeth Calvin, *Legal Strategies to Reduce the Unnecessary Detention of Children* 17-20 (2004) (listing potential detention hearing arguments concerning dangerousness and risk of flight).

21 *Id*. at 21.

22 *Id*. at 22.

23 IJA/ABA, *Juvenile Justice Standards, Standards Relating to Appeals and Collateral Review*, recognizes the importance of having hearings transcribed. According to Standard 3.2, The Right to Counsel and Records, "Any party entitled to an appeal under Standard 2.2, or his or her counsel, is entitled to a copy of the verbatim transcript of the adjudication and dispositional hearings and any matter appearing in the court file."

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Ten Principles for Providing Effective Defense Advocacy at Juvenile Detention Hearings, prepared by the National Juvenile Defender Center for the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative and reprinted with the permission of the National Juvenile Defender Center. *For more information, please contact the National Juvenile Defender Center at 202.452.0010 or at inquiries@njdc.info.*

Achieving Excellence in Detention Advocacy:
Guidelines for Juvenile Defenders to Provide Zealous Advocacy at Initial Detention Hearings

Prepared by NJDC for the Annie E. Casey Foundation's
Juvenile Detention Alternatives Initiative

These guidelines are designed to assist defenders in assessing their advocacy at the traditional, three-part initial hearings held in most jurisdictions: arraignment, the probable cause determination, and the detention hearing. In some jurisdictions, these are all collapsed into a single hearing. Because many jurisdictions still allow children to waive their right to counsel and/or plead at the initial hearing, some questions allude to these practices.

This tool is divided into two main sections. The first presents a series of questions about juvenile defense practice. The second section reviews policy and system procedures that may be impacting practice. Taken together, these two sections should provide defenders with the information necessary to identify practice gaps. Please contact NJDC with questions, suggestions, and technical assistance needs to move ahead. We look forward to working with defenders to enhance detention practice.

Consider the three most recent cases in which you represented a child at an initial detention hearing. For each of these cases, consider the following questions. Use these questions to think about which elements of detention advocacy you regularly provide to your child clients. The more of the above elements you can provide in each case, the more effective your advocacy will be. Please circle the response that best reflects how much you agree or disagree with each statement.

I. Practice Issues

Meeting My Client

Establishing the Attorney-Client Relationship

1. I had an opportunity to meet with my client prior to the detention hearing.	Yes	No
Comments:		
• We were able to meet in a private location where our conversations could not be overheard.	Yes	No
Comments:		
• I spoke with my client without parents, guardians or any other people or parties present.	Yes	No
Comments:		

2. I ascertained my client's expressed interests with respect to detention.	Yes	No
Comments:		
• I advocated zealously for my client's expressed interests both in the pre-hearing team meeting and in court before the judge.	Yes	No
Comments:		
3. I had a full initial interview with my client using age-appropriate language.	Yes	No
Comments:		
• I discussed attorney-client confidentiality rules with my client.	Yes	No
Comments:		
• I discussed my ethical duty to zealously advocate for my client's expressed interests, even when my client's expressed interest conflicts with my sound legal advice or with my own personal judgment.	Yes	No
Comments:		
• If my client was detained, I asked how my client was doing in detention.	Yes	No
Comments:		
• If my client was detained, I asked whether there was any evidence of harassment or mistreatment of my client in detention.	Yes	No
Comments:		
• I explained my client's right to remain silent.	Yes	No
Comments:		
• I explained what information is relevant to the detention decision under my state's law.	Yes	No
Comments:		
• I asked my client about his or her prior record.	Yes	No
Comments:		
• I asked my client about his or her school attendance and performance.	Yes	No
Comments:		
• I asked about my client's home life.	Yes	No
Comments:		

• If my jurisdiction requires drug tests, I asked my client the results of his or her drug test.	Yes	No
Comments:		
• We discussed the possible levels of detention (i.e., secure versus non-secure), and my client's opinion on possible alternatives to detention.	Yes	No
Comments:		
• I explored specific reasons that argue against detention, including vulnerability, age, special needs, health concerns, suicidal tendencies, etc.	Yes	No
Comments:		
• I ascertained my client's objectives for my legal representation.	Yes	No
Comments:		
• I told my client what to expect at the upcoming hearing, including an explanation of the purpose of the hearing and of the roles of the judge, the prosecutor, and the probation officer.	Yes	No
Comments:		
• I ascertained my client's choice about whether to admit or deny the charges.	Yes	No
Comments:		
• I asked about my client's version of events to prepare for the probable cause hearing, to get names, contact information, descriptions, or hang-out locations of potential witnesses, and/or to begin investigation planning.	Yes	No
Comments:		
• I discussed attorney-client confidentiality rules with my client.	Yes	No
Comments:		
4. I gave the client my contact information and explained how s/he can reach me.	Yes	No
Comments:		

5. I brought and got my client's signature on the appropriate release forms to allow me to subpoena my client's educational, medical, mental health, and other records.	Yes	No
Comments:		
6. Since I am not appointed with enough time to meet with each client individually, I have enlisted the aid of a social worker, law student, or legal intern to interview clients for me I am appearing in court.	Yes	No
Comments:		

Preparing for the Hearing

Knowledge of Applicable Detention Law and Alternatives

1. I am aware of the current case law, statutes, and court rules that explain when a child can be detained in my jurisdiction.	Yes	No
Comments:		
2. I am aware of current research on the harmful effects of detention, both generally, and specifically with respect to the places where my client is likely to be held.	Yes	No
Comments:		
3. I am aware of the current community-based alternatives to detention.	Yes	No
Comments:		

Taking a Comprehensive Client History

1. I have investigated my client's school history.	Yes	No
Comments:		
2. I have investigated my client's extracurricular activities, hobbies, and other strengths.	Yes	No
Comments:		

3. I have asked about my client's special needs, mental health and health issues, including the names and doses of any prescribed medications.	Yes	No
Comments:		
4. I have considered, in consultation with my client, family members to whom my client could be released.	Yes	No
Comments:		
5. I have considered, in consultation with my client, other community-based programs, besides family members, to whom my client could be released.	Yes	No
Comments:		
6. I have considered, in consultation with my client, community-based services that my client believes could help my client stay in the community.	Yes	No
Comments:		
7. I am aware of other family and community contacts willing to participate in the child's release plan in ways besides allowing my client to be released into their custody.	Yes	No
Comments:		
8. I contacted these people and/or programs before the hearing.	Yes	No
Comments:		

Preparing My Client's Family

1. I explained the purpose of the hearing to my client's family.	Yes	No
Comments:		
2. I explained my role as the child's counsel to my client's family.	Yes	No
Comments:		
3. I spoke with my client's family before the hearing to ascertain whether they were willing to have my client released to them.	Yes	No
Comments:		

• If the parent/guardian initially would not allow my client to return home, I explored with the parent/guardian realistic conditions under which the parent/guardian might allow the child back in the home.	Yes	No
Comments:		
• If the parent/guardian would not allow my client to return home, I explored with the parent/guardian other people to whom my client could be released.	Yes	No
Comments:		
• If the parent/guardian would not allow my client to return home, I explained to the parent/guardian the potential effects and consequences of detention.	Yes	No
Comments:		
4. If the parent/guardian did not come to the hearing, I tried to contact the parent/guardian to ascertain why the parent/guardian did not attend the hearing, and whether the parent/guardian would allow my client to return home.	Yes	No
Comments:		
5. If the parent/guardian could not come to the hearing, I explored having the parent/guardian appear by phone.	Yes	No
Comments:		
6. I prepared the parent/guardian for the possibility that the judge would solicit the views of the parent/guardian in open court concerning my client's school behavior, home behavior, and overall social functioning.	Yes	No
Comments:		

Obtaining Discovery

1. I requested, received and reviewed the risk assessment instrument (RAI).	Yes	No
Comments:		
• I discussed the RAI score with the intake probation officer prior to the hearing.	Yes	No
Comments:		
2. I requested, received and reviewed the police report(s) in my client's case.	Yes	No
Comments:		

3. I requested, received and reviewed a copy of any existing prior delinquency, truancy, and/or dependency history of my client.	Yes	No
Comments:		

Representation At The Hearing

Defender Arguments at the Hearing

1. If the detention hearing was not scheduled within the time required by my jurisdiction's statute or rules, I filed a motion to have my client released.	Yes	No
Comments:		
2. If I was not able to speak with my client before the detention hearing, due to untimely appointment to the case or any other reason, I requested that the case be continued for a few hours to allow me to consult with my client.	Yes	No
Comments:		
3. If I did not receive the RAI before the hearing, I raised this point at the hearing.	Yes	No
Comments:		
• If no one except the intake probation officer had access to the RAI before the hearing, I raised this point at the hearing.	Yes	No
Comments:		
4. If I did not receive or was not afforded an opportunity to review my client's prior record before the hearing, I raised this point at the hearing.	Yes	No
Comments:		
5. If I did not receive or was not afforded an opportunity to review the police report(s) in my client's case, I raised this point at the hearing.	Yes	No
Comments:		

Probable Cause Hearing

1. If the government sought to detain my client, I marshaled all available evidence to argue against a finding of probable cause.	Yes	No
Comments:		

• If the jurisdiction has probable cause hearings where testimony is taken, I cross examined the government's witnesses, and used the witnesses' testimony to argue against probable cause.	Yes	No
Comments:		
• If the jurisdiction has probable cause hearings where testimony is taken, and I calculated that there was little to no chance of winning the probable cause hearing, I used the probable cause hearing as a discovery tool.	Yes	No
Comments:		
• If the jurisdiction has probable cause hearings in which the court determines probable cause based on an officer's affidavit, I tried to argue against probable cause based on, *inter alia*, a deficient attestation, a lack of evidence concerning one or more of the elements of the charged offense, or an insufficient nexus between my client and the offense.	Yes	No
Comments:		
• I argued to hold the prosecution to the required burden and standard of proof.	Yes	No
Comments:		

Detention Hearing

1. I argued that detention cannot be imposed unless the relevant statutory criteria, as explicated by current case law, were met.	Yes	No
Comments:		
2. I argued that my client should be placed in the least restrictive environment possible.	Yes	No
Comments:		
3. I argued research on the risks and harmful effects of detention for children.	Yes	No
Comments:		
4. I presented and argued for a detention alternative, tailored and responsive to the judge's concerns about the individual client, complete with specific names and contact information of people willing to be involved in the youth's release conditions, and detailed representations concerning how my client will be monitored.	Yes	No
Comments:		

5. If the jurisdiction allows the presentation of evidence to support arguments in aid of the detention decision, I called witnesses or introduced other evidence to support my arguments against secure detention or in favor of alternatives.	Yes	No
Comments:		
6. I advocated for my client's expressed interests, even when the child's expressed interests conflicted with my reasoned legal advice or with my own personal judgment about what might be in the child's best interests.	Yes	No
Comments:		

Making a Record

1. At the end of the hearing, I requested that the judge prepare and issue written findings and an order.	Yes	No
Comments:		

For jurisdictions in which juveniles can waive counsel or plead guilty at the initial hearing

2. I asked to be assigned to represent the child, at least to put on the record that the child's waiver of counsel and plea were entered without the benefit of counsel.	Yes	No
Comments:		
3. I asked the court to inform the child that, should the child change his or her mind, I or my office would be available to represent him or her.	Yes	No
Comments:		
4. I stated for the record that I had not had a chance to investigate the matter or subpoena relevant documents before my client pled.	Yes	No
Comments:		

After The Hearing

Keeping the Client and the Client's Family Informed

1.	If my client was released, I clearly explained the conditions of release to my client and my client's parent/guardian and provided information about how to satisfy the conditions.	Yes	No
	Comments:		
2.	If my client was released, I got contact information for my client, including my client's name, address, phone number, and similar information for my client's relatives and friends.	Yes	No
	Comments:		
3.	If my client was detained, I made sure that my client's family knew where and how to visit my client.	Yes	No
	Comments:		
4.	If my client was detained, I visited my client within 48 hours of the detention decision.	Yes	No
	Comments:		
5.	If the detention center is so far away that I could not travel there within 48 hours, I contacted my client by phone within 48 hours.	Yes	No
	Comments:		
6.	I scheduled my next in-person meeting with my client.	Yes	No
	Comments:		
7.	I discussed with my client, in detail and using age-appropriate language, what happened at the hearing, and answered any questions my client had.	Yes	No
	Comments:		
8.	I explained to my client, in detail and using age-appropriate language, the next steps in the case.	Yes	No
	Comments:		

Challenging the Decision to Detain

1.	If my client was detained, I filed a motion to reopen the probable cause hearing in cases where I subsequently received exculpatory information.	Yes	No
	Comments:		
2.	If my client was detained, I filed a motion to reconsider the detention decision in cases where I subsequently discovered favorable information (e.g., the charge is reduced, or a new placement option emerges).	Yes	No
	Comments:		
3.	If the judge's detention decision was influenced by a lack of community resources, I challenged this as an unlawful basis for the decision.	Yes	No
	Comments:		
4.	If the judge's detention decision appeared to be influenced by the parent's unwillingness to allow the child to return home, I challenged this ground for the decision, and considered, in careful consultation with my client, filing a dependency petition.	Yes	No
	Comments:		
5.	I informed my client of the right to appeal the detention decision.	Yes	No
	Comments:		
6.	If my client wished to appeal, I followed the procedural steps needed to secure the right to an appeal.	Yes	No
	Comments:		
7.	I handled the appeal or transitioned the case to another attorney.	Yes	No
	Comments:		
8.	I considered petitioning for an extraordinary writ (habeas corpus, mandamus, or prohibition) to obtain the release of a client who was wrongfully detained.	Yes	No
	Comments:		

We look forward to hearing from you about how this tool has helped inform or change detention practice in your site. We would also like your suggestions about other areas of detention advocacy, both inside and outside the courtroom, that should be included in this tool, as well as ways to make these *Guidelines* more useful to juvenile defenders.

II. Policy Considerations

This section of the *Guidelines* reviews policy and systemic issues that may impact your detention practice. Think about which elements of detention advocacy you did not or could not provide to your juvenile clients.

1. If you could not provide a service, what were the barriers to your representation?

2. How would you characterize those barriers?

3. Are they systemic (e.g., excessive caseloads, insufficient supervision, insufficient non-legal resources like support staff, inadequate compensation, social workers, and experts), or technical (e.g., lack of training opportunities in juvenile-specific practice), or do they result from tradition (e.g., no one files motions to reconsider because no one ever has)?

4. What are the sources of those barriers – your office, state laws or rules, local habits, your court system, or something else?

Drawing Strength from the Defender Community

5. If you could have provided a service, but did not, what were the reasons?

6. What barriers do you need to overcome, and how will you do so?

7. What resources can help you to serve your clients better?

8. Consider the following avenues. Can you, as defenders:

• Keep and share a regularly-updated list of the current community-based alternatives to detention, with contacts at each facility and phone numbers?	Yes	No
• Regularly update and share model motions to reopen, or to reconsider, or motions arguing the conditions of the local detention center?	Yes	No

• Convene regular case review meetings with defenders in other jurisdictions?	Yes	No

Juvenile Court Policies and Procedures

Are there ways for you, as a defender charged with protecting your clients' due process rights, to improve juvenile court policies and procedures for your clients?

Could you, as a defender:

• In jurisdictions where children are allowed to plead after waiving counsel, coordinate with your colleagues to make sure a defense attorney is present and ready to counsel a child who wishes to plead after waiving counsel before the child pleads?	Yes	No
• In jurisdictions where children are allowed to plead at the initial hearing, begin a practice of stating on the record you have not had a chance to investigate the matter or subpoena relevant documents before the client pled?	Yes	No
• If you were in the courtroom when a child waived the right to counsel, could you, before the waiver colloquy, ask the court for a brief pass to allow you or one of your colleagues to advise the child about the advantages and disadvantages of waiving counsel outside of the presence of the court and of the child's parents?	Yes	No

Detention Process Issues

As a defender, are you meaningfully engaged in the detention hearing?

Could you, as a defender:

• Organize training on the RAI in each of the jurisdictions in which you practice?	Yes	No
• Adopt, with the permission of your division supervisor, a system to review detention cases more rigorously and more frequently than release cases?	Yes	No
• Make sure that defenders are on the RAI subcommittee?	Yes	No

Please adapt this diagnostic tool to the practices of your jurisdiction:

Does your jurisdiction's statute hold that criminal procedure does not apply at detention hearings? If it does, what does that mean for you to advocate zealously at detention hearings?

Does your jurisdiction's statute forbid the introduction of evidence at detention hearings by defenders? If it does, brainstorm how you can get information that is favorable to your client before the court.

NJDC is available to work with defenders to ensure that these guidelines lead to juvenile defenders' being engaged in meaningful reform of detention practice. Please do not hesitate to contact us.

Thank you.

For more information, please contact the National Juvenile Defender Center at 202.452.0010 or at inquiries@njdc.info.

National Juvenile Defender Center

1350 Connecticut Avenue NW, Suite 304
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www.njdc.info

Achieving Excellence in Detention Advocacy: Guidelines for Juvenile Defenders to Provide Zealous Advocacy at Initial Detention Hearings, prepared by the National Juvenile Defender Center for the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative and reprinted with the permission of the National Juvenile Defender Center. *For more information, please contact the National Juvenile Defender Center at 202.452.0010 or at inquiries@njdc.info.*

INVESTIGATION AND DISCOVERY

Chapter 10:

Discovery

10.1 Overview

Generally. The parties to a juvenile proceeding have rights to obtain evidence and information from each other through the process of discovery. A juvenile has the right to discovery in all cases, regardless of whether the underlying offense alleged is a misdemeanor or felony. This chapter discusses grounds and procedures for obtaining discovery, including statutory rights to discovery of each party under the Juvenile Code and constitutional rights of the juvenile to obtain information from the State. Discovery is essential to development of a strong defense for the juvenile and evaluation of the State's case.

Statutory rights. The parties' statutory rights to discovery are set forth in Article 23 of the Juvenile Code. G.S. 7B-2300 to -2303. There is no "open file" discovery statute comparable to that found in the Criminal Procedure Act. *See* G.S. 15A-903. Counsel must file a motion and obtain an order for disclosure of specific information or materials.

The State's statutory right to discovery is largely dependent on the juvenile's exercise of rights under G.S. 7B-2300, and is limited to evidence that the juvenile intends to introduce at hearing. G.S. 7B-2301.

Constitutional rights. Disclosure by the State of exculpatory evidence that is material to the defense, commonly known as *Brady* material, has been recognized by the U.S. Supreme Court as essential under the Due Process Clause of the Fourteenth Amendment to ensuring fairness in a criminal case. The constitutional requirements of due process under the 14th Amendment are applicable to juvenile cases under *Gault*. *See infra* § 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

Local rules governing discovery. Some districts have adopted local rules of discovery that may include deadlines for filing discovery motions and for producing discovery.

Other bases for disclosure. There are several other means of obtaining information in juvenile proceedings. Voluntary disclosure by the State is specifically allowed by statute. The North Carolina Rules of Professional Conduct require disclosure by the prosecutor of certain information in criminal cases and may be applicable to juvenile proceedings. Finally, counsel may use a subpoena to require a witness to appear and produce documents or move for production of documents from a non-party witness. *See* 1 North Carolina Defender Manual §§ 4.7A (Evidence in Possession of Third Parties), 4.8 (Subpoenas) (May 1998), at www.ncids.org.

10.2 Terminology Used in This Chapter

Brady material is evidence or information that is favorable to the defense and material to the outcome of either the guilt-innocence or sentencing phase of a trial. This evidence must be disclosed by the State in a criminal case under the Due Process Clause of the 14th

Amendment pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *See infra* § 10.5A (*Brady* Material).

Petitioner is "the individual who initiates court action by the filing of a petition or a motion for review alleging the matter for adjudication." G.S. 7B-1501(20). The term "petitioner" as used in the discovery statute is used to refer to agents of the State acting on behalf of the petitioner, including the prosecutor, law enforcement officers, and juvenile court counselors.

10.3
Procedures for Obtaining Discovery

A. Discoverable Information Pursuant to Statute

The categories of information that each party is statutorily entitled to obtain are set forth in G.S. 7B-2300. *See infra* §§ 10.4 (Juvenile's Statutory Right to Discovery) and 10.8 (State's Statutory Right to Discovery). There is no statutory "open file" discovery as provided in criminal cases pursuant to G.S. 15A-903.

B. Motion and Order Required

Each statutory section providing for discovery requires that a motion be filed and an order obtained. G.S. 7B-2300. It is common practice to file a single motion identifying all the categories of information sought. *See infra* Appendix 10-1 (Motion for Discovery and Exculpatory Material). Counsel should ask that discovery be produced by a specific date and request a hearing on the motion, if necessary.

In some districts the prosecutor has an open file policy or the juvenile court counselor routinely provides discovery materials to the juvenile's counsel. Even if discovery materials are voluntarily provided, counsel should file a discovery motion to protect the juvenile's rights to discoverable information that might not have been provided by the State. In criminal cases in which the defendant has failed to make a formal request for discovery from the State pursuant to the statutory requirements, the courts have held that the defendant has no remedy if the State fails to produce the information voluntarily. *See State v. Abbott*, 320 N.C. 475 (1987) (prosecutor not barred from using defendant's statement at trial even though it was discoverable under statute and was not produced before trial; open-file discovery policy was no substitute for formal request and motion).

Counsel should file a motion for discovery and secure an order compelling discovery to protect the juvenile's rights in all cases. There is not a specific statutory provision in the Juvenile Code comparable to G.S. 15A-902(b) under the Criminal Procedure Act, assuring the juvenile's rights to discovery through the making of a formal request and securing of the prosecutor's agreement to comply. This further underscores the need for counsel to prepare and file a written, comprehensive motion for discovery in juvenile cases.

C. When to File Motion

The Juvenile Code does not specify a deadline for moving for discovery. A motion for discovery should be filed early in the proceeding, however, so that counsel will have as much time as possible to review the information and evidence produced, investigate the evidence, and make additional motions if necessary. Discovery material may also be important for a probable cause hearing. Because adjudicatory hearings are usually set for hearing soon after the filing of the petition, discovery must proceed in a timely manner so that counsel will be prepared for the hearing. This is particularly important if the juvenile is in secure custody pending adjudication, making it especially important to avoid unnecessary continuances of the hearing.

D. Contents of Motion

A discovery motion should be broad enough to include all evidence and information covered by statute. Although cases subsequent to *Brady* have held that a specific request is not required, the motion should also ask for all exculpatory information to put the State on notice of the information it should produce and to strengthen the record in the event of an appeal. *See infra* §§ 10.4 (Juvenile's Statutory Right to Discovery) and 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

The motion for discovery should also include a request for any other information believed to be helpful to the juvenile's case regardless of whether the information is specified by statute. The duty to advocate zealously for the juvenile requires that counsel seek all evidence necessary to mount an effective defense.

Although the Juvenile Code does not set a deadline for production of discovery, counsel should request that the court specify a deadline in its order. Local rules in some districts provide deadlines for production of discovery. Counsel should be familiar with these rules to protect the juvenile's rights.

E. Hearing on Motion for Discovery

The discovery statute does not specify that a hearing is required, as the wording is mandatory that "upon motion" the court "shall order" disclosure of the information. G.S. 7B-2300(a)–(d). It may be necessary to schedule a hearing and give notice, however, if required by the court, local rules or custom, or if the State objects to entry of an order for discovery. Also, a hearing may be beneficial to obtain an order setting a deadline for production of discovery or if the State has not produced requested information in a timely manner.

At the hearing counsel should be prepared to cite the statutory bases for disclosure of the material, as well as the constitutional bases for exculpatory material requested under *Brady*. *See infra* § 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

F. Continuing Duty to Disclose

Each party who has been ordered to disclose information or evidence is under a continuing duty to disclose newly-discovered evidence that is subject to discovery. The other party

must be given prompt notice of the new or additional evidence. G.S. 7B-2303. The State has an additional continuing duty under *Brady* and related cases to disclose evidence that is favorable to the juvenile and is material to the outcome of the case. *See infra* § 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

G. Continuances and Sanctions

Counsel may need additional time to review evidence that has just been disclosed by the State. In some instances, the failure of the State to disclose evidence under a discovery order in a timely manner may justify a motion to dismiss, or a request for one of the sanctions available in criminal cases under G.S. 15A-910, for violation of the juvenile's statutory or constitutional rights.

Counsel should promptly turn over information that the juvenile is required by law or ordered to disclose to avoid a request for a continuance by the State or sanctions.

10.4
Juvenile's Statutory Right to Discovery

A. Statement of the Juvenile and Co-Respondents

The State must provide information regarding both written and oral statements made by the juvenile or by any co-respondents. G.S. 7B-2300(a). Specifically, on motion and order, the State must:

- allow the juvenile to inspect *and* copy any relevant written or recorded statements within the possession, custody, or control of the petitioner made by the juvenile or any other party charged in the same action; and
- divulge, in written or recorded form, the substance of any oral statement made by the juvenile or any other party charged in the same action.

G.S. 7B-2300(a)(1), (2).

A copy of a waiver form read to or signed by the juvenile during any questioning should also be requested in the discovery motion. Counsel should review the particular waiver form to determine whether the juvenile's constitutional or statutory rights were violated. If an adult waiver form was used it is likely that the juvenile did not receive adequate information regarding statutory rights, such as the right to have a parent or guardian present during questioning. *See infra* § 11.4H (Knowing, Willing, and Understanding Waiver of Rights).

B. "Within the possession, custody, or control"

Under the first provision of the statute, the prosecutor is required to produce certain written or recorded statements "within the possession, custody, or control of the petitioner." G.S. 7B-2300(a). Thus, any information subject to discovery received by the prosecutor must be produced, whether generated by the prosecutor's office or other entities. These materials could include Department of Social Services reports, psychological evaluations, or reports of school resource officers. *See, e.g.,* G.S. 7B-307(a) (social services department must report

to the district attorney evidence of child abuse, and law enforcement must coordinate its investigation with the protective services investigation). Further, the phrase "possession, custody, or control" has been construed to mean "within the possession, custody, or control of the prosecutor *or those working in conjunction with him and his office*." *State v. Pigott*, 320 N.C. 96, 102 (1987) (emphasis in original). The prosecutor is therefore obligated to produce materials and information connected with the case, such as information in the possession of law enforcement, whether or not contained in the prosecutor's files.

C. Names of Witnesses

The State must provide, on motion and order, the names of all persons to be called as witnesses. Counsel should include in the motion a request for the records of any witnesses under the age of 16, which must be provided "if accessible to the petitioner." G.S. 7B-2300(b). The requirement that the State provide the records of juvenile witnesses implies that they may be used to impeach the credibility of a juvenile witness. *See also infra* § 12.5C (prior adjudication of delinquency may be used to impeach juvenile or juvenile witness). Impeachment by a juvenile record may be particularly important if a co-respondent is testifying against the juvenile.

D. Documents and Tangible Objects

The State must allow the juvenile, on motion and order, to inspect *and* copy books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, and tangible objects. G.S. 7B-2300(c). These materials must meet two conditions:

- First, the information must be within the possession, custody, or control of the petitioner, prosecutor, or an investigating law enforcement officer. This language reinforces the obligation of the prosecutor to turn over discoverable information even if it is not in the immediate possession of the prosecutor. *See supra* § 10.4B ("Within the possession, custody, or control"); and
- Second, the information must be material to the preparation of the defense, *or* intended for use by the State as evidence, *or* obtained from or belonging to the juvenile.

G.S. 7B-2300(c)(1), (2).

Counsel should include in the motion a request for any documents or tangible objects obtained from the scene of the offense or from the alleged victim. The motion may include a request for such items as videotapes of the alleged victim or the scene of the offense, which may have to be copied from a computer hard drive, as well as any audio recordings describing the scene of the offense, of a call to 911, or of the alleged victim's statement. In some instances it may be easier for counsel to obtain information directly from the source, such as a recording of a call to 911. It may be necessary to file a motion to preserve evidence that law enforcement may routinely destroy after a certain amount of time has elapsed. *See infra* Appendix 10-2 (Motion and Order to Preserve the Rough Notes of Investigators).

E. Reports and Examinations

Tests. The State must allow the juvenile, on motion and order, to inspect and copy the results of tests and examinations within its possession, custody, or control. Results of physical or mental examinations, and tests, measurements, or experiments made in connection with the case, as well as underlying data, must be disclosed. G.S. 7B-2300(d)*; see State v. Cunningham*, 108 N.C. App. 185 (1992) (defendant entitled to data underlying lab report on controlled substance). Counsel should request copies of any physical or mental examinations of the alleged victim, the juvenile, or witnesses. Further, the data underlying tests, experiments, and measurements made should be specifically requested in the motion, particularly regarding evidence obtained from the alleged victim or scene of the offense.

Physical evidence. Physical evidence that the State intends to offer at the adjudication is discoverable by the juvenile. On motion of the juvenile, the court must order the State to allow the juvenile access to the physical evidence, or a sample of it, for the juvenile to inspect, examine, and test under appropriate safeguards. G.S. 7B-2300(d).

F. "Work Product" Exception

The Juvenile Code provides that the State is not required to produce "reports, memoranda, or other internal documents made by the petitioner, law enforcement officers, or other persons acting on behalf of the petitioner" in the investigation or prosecution of the case unless required pursuant to G.S. 7B-2300(a)–(d). G.S. 7B-2300(e). Additionally, there is no statutory requirement that the State produce statements made by witnesses, the petitioner, or anyone acting on behalf of the petitioner unless otherwise required by the statute. *Id.* This type of information is commonly referred to as "work product." The definition of "work product" may vary, however, based on the type of proceeding and applicable statutory provisions. *Compare* G.S. 15A-904 (adult criminal "work product" provision).

Information that falls within the discovery statute, or that must be disclosed pursuant to constitutional mandates, must be produced. Statutory and constitutional disclosure requirements override any work product exception. *See infra* § 10.5 (Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence).

G. Consequences of Juvenile Obtaining a Discovery Order

Except for the names of the juvenile's witnesses, the State's statutory right to discovery is dependent on the juvenile's exercise of statutory rights under G.S. 7B-2300, and is limited to evidence that the juvenile intends to introduce at the hearing. G.S. 7B-2301. If the juvenile obtains an order for *any* discovery under the statute, the State may obtain information from the juvenile as allowed by statute. G.S. 7B-2301(b), (c); *see infra* § 10.8 (State's Statutory Right to Discovery).

In most cases, the State has more information than the juvenile, so the benefits of obtaining information from the State outweigh the risks of disclosing evidence. It is therefore generally best to file a broad request for discovery as early as possible in the proceeding.

H. Local Discovery Rules

Some districts have adopted local rules governing discovery. These rules may expand the information available to the juvenile or may set deadlines for requesting and producing discovery. It is vital for counsel to be familiar with any local rules to ensure that all discoverable information is requested and obtained in a timely manner.

10.5
Juvenile's Constitutional Right to Disclosure of Exculpatory Evidence

A. *Brady* Material

The U.S. Supreme Court recognized the constitutional right of a criminal defendant under the Due Process Clause of the 14th Amendment to disclosure by the State of evidence that is:

- favorable to the defense, *and*
- material to the outcome of either the guilt-innocence or the sentencing phase of the trial.

Brady v. Maryland, 373 U.S. 83, 87 (1963). Subsequent cases have clarified that the right to disclosure is not dependent on a request by the defendant for the exculpatory information. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *United States v. Bagley*, 473 U.S. 667 (1985).

The North Carolina Court of Appeals has stated in a juvenile appeal of an adjudication of delinquency that "it is true that suppression of evidence favorable to an accused upon request violates due process where the evidence is material to guilt," citing *Brady*. *In re Coleman*, 55 N.C. App. 673, 674 (1982) (although *Brady* applies, Court unable to determine matter on appeal because neither document in question nor its contents included in record).

Although not required by *Kyles* and *Bagley, supra,* it is good practice to file a motion requesting that the State produce exculpatory evidence and specifying to the extent known the evidence that counsel wants the State to produce. This will put the State on notice and will strengthen the record in the event of an appeal.

B. Evidence Required to be Disclosed under *Brady*

Defender Manual. The North Carolina Defender Manual contains a more complete discussion of information required to be disclosed under *Brady* and related cases. *See* 1 North Carolina Defender Manual § 4.6 (*Brady* Material) (May 1998), at www.ncids.org.

Favorable to the defense. Categories of evidence that must be disclosed as favorable to the defense are discussed, with case citations, in § 4.6B of the North Carolina Defender Manual, *supra*. Favorable evidence includes evidence that tends to negate guilt, mitigate an offense

or sentence, or impeach the truthfulness of a witness or reliability of evidence. Examples of favorable evidence include:

- impeachment evidence, such as**:**
  - false statements of a witness
  - prior inconsistent statements
  - bias of a witness
  - witness's capacity to observe, perceive, or recollect
  - psychiatric evaluations of a witness
  - prior convictions and other misconduct
- evidence discrediting police investigation and credibility
- other favorable evidence, such as:
  - evidence undermining identification of defendant
  - evidence tending to show guilt of another
  - physical evidence
  - "negative" exculpatory evidence (i.e., defendant not mentioned in statement regarding crime)
  - identity of favorable witnesses

Material to outcome. Under *Brady,* evidence must be material to the outcome of either the guilt-innocence or the sentencing phase of the case, in addition to being favorable to the defense. *Brady v. Maryland,* 373 U.S. 83, 87 (1963). The U.S. Supreme Court, in *Kyles v. Whitley*, 514 U.S. 419 (1995), provided further guidance regarding when evidence is material to the outcome of the case and must be disclosed. In *Kyles*, the Court stated four aspects of materiality under *Brady*:

- The standard of review for constitutional error for failure to disclose by the State is a "reasonable probability" that the outcome of the trial would have been different.
- The test is not the sufficiency of the evidence presented, but rather whether the favorable evidence might have cast a different light on the evidence presented, thereby undermining confidence in the verdict.
- If constitutional error is found the defendant is entitled to a new trial; the harmless error standard is not applicable.
- Materiality is determined by the cumulative effect of all undisclosed evidence, not on an item-by-item basis.

Kyles v. Whitley, 514 U.S. 419, 434–37 (1995).

10.6
North Carolina Rules of Professional Conduct

Rule 3.8(d) of the Rules of Professional Conduct requires that the prosecutor in a criminal case disclose evidence that "tends to negate the guilt of the accused or mitigates the offense" and information that might mitigate at sentencing. Although this rule does not specifically apply to juvenile cases, the reasons underlying the duty to disclose are equally applicable. The rule requires the State to make "reasonably diligent inquiry" and to disclose non-privileged evidence as required by law, rules of procedure, or court opinions unless a protective order is entered.

10.7
Voluntary Disclosure by State

The Juvenile Code specifically provides that the State is not prohibited from making voluntary disclosure of evidence "in the interest of justice." G.S. 7B-2300(f). It is important, however, for counsel to file a broad motion for discovery even when the State voluntarily discloses evidence. The right to discovery under the statute requires that a motion be filed and an order for discovery be entered. *See supra* § 10.3B (Motion and Order Required). Although *Brady* and the Rules of Professional Conduct do not necessarily require that a motion be filed to invoke the State's duty to disclose, counsel should file a written motion to highlight the information being sought and to strengthen the record in the event of appeal. If the prosecutor fails to disclose information after receiving a specific request, the juvenile may be in a stronger position to argue for sanctions.

10.8
State's Statutory Right to Discovery

A. Names of Witnesses

The juvenile must provide, on motion and order, the names of all persons to be called as witnesses. G.S. 7B-2301(a).

B. Right Based on Juvenile's Order for Discovery Following State's Motion and Order for Discovery

If a juvenile has obtained an order for discovery of *any* information under G.S. 7B-2300, the State has the right to discover the evidence or information listed below. G.S. 7B-2301(b), (c). The juvenile has no obligation to disclose evidence or information unless the State has filed a discovery motion and obtained an order compelling disclosure.

Documents and tangible objects. On motion of the State, the court must order the juvenile to allow the State to inspect and copy books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, and tangible objects. These materials must be:

- within the possession, custody, or control of the juvenile; *and*
- intended to be introduced as evidence by the juvenile.

G.S. 7B-2301(b).

Reports of examinations and tests. On motion of the State, the court must order the juvenile to allow the State to inspect and copy the results of certain tests and examinations. Results of physical or mental examinations, tests, measurements, or experiments made in connection with the case must be disclosed. The information must be:

- within the possession and control of the juvenile; *and*
- intended to be introduced as evidence or prepared by a witness whom the juvenile intends to call to testify about the result of the examination or test.

G.S. 7B-2301(c).

Physical evidence. On motion of the State, the court must order the juvenile to allow the State to inspect, examine, and test, subject to appropriate safeguards, physical evidence or a sample of it if the juvenile intends to offer the evidence or tests or experiments in connection with the evidence in the case. G.S. 7B-2301(c).

10.9 Protective Order

Either party is allowed to file a motion requesting an order that discovery be denied, restricted, or deferred. G.S. 7B-2302(a).

In the court's discretion, a party moving to restrict discovery may submit supporting affidavits or statements for *in camera* inspection. If the motion for relief is granted, the material inspected *in camera* by the court must be preserved for review by the Court of Appeals on appeal. G.S. 7B-2302(b).

Appendix 10-1

Motion for Discovery and Exculpatory Material

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 FOR DISCOVERY AND EXCULPATORY MATERIAL

NOW COMES the Juvenile, by and through his attorney, and requests this Honorable Court, pursuant to N.C. Gen. Stat. §§ 7B-2300-2303, to require the District Attorney for Judicial District 35 to produce, divulge and permit counsel for the Juvenile to inspect, copy or photograph the following:

1. Any written or recorded statements made by the Juvenile within the possession, custody or control of the State or any of its law enforcement officials and any form reflecting the waiver of the Juvenile's rights.
2. The substance of any oral statement relevant to the subject matter of the case made by the Juvenile, regardless of to whom the statement was made, within the possession, custody or control of the State, indicating to whom each such statement was made and the date each such statement was made.
3. All prior criminal records of the Juvenile, from any source as are available to the Office of the District Attorney.
4. The names of persons to be called as witnesses, including but not limited to a copy of the record of witnesses under the age of 16, if accessible to the State.
5. All books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State which are intended for use by the State as evidence of any kind at the trial of the Juvenile, which may be material to the preparation to the Juvenile's defense, or which were obtained from or belong to the Juvenile.
6. All results or reports of physical or mental examinations or of tests, measurements, or experiments, made in connection with the case, or copies thereof, within the

possession, custody, or control of the State, and any physical evidence, which may be offered as an exhibit or evidence in the case, including, but not limited to, any fingerprint or handwriting analysis made in connection with this case.

7. The Juvenile, through counsel, further requests that the District Attorney or his agents, pursuant to *United States v. Agurs* and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), disclose to, and permit counsel for the Juvenile to inspect, copy or photograph all evidence, of whatever kind within the possession or control of the State of North Carolina, or any of its law enforcement officials, which is favorable to, may be favorable to, or tends to be favorable to the Juvenile in this cause, or which may be material and relevant to the Juvenile's defense. This request for voluntary discovery of evidence favorable or tending to be favorable to the Juvenile includes, but is not necessarily limited to, the following items:

   a. A copy of any prior criminal record available to the State or any of its law enforcement agencies of witnesses whom the State intends to or will offer as a witness on behalf of the State of the trial of the Juvenile.

   b. A disclosure of all criminal charges known to the State of North Carolina or any of its law enforcement agencies pending against any person whom the State intends to or will offer as a witness on behalf of the State at the trial of the Juvenile.

   c. All written, recorded, or oral statements made by any person who is a witness or an alleged witness to any of the transactions involving the offenses with which the Juvenile is charged, which statements written, recorded, or oral -- are inconsistent with the Juvenile's guilt of any of the charges against him, or which are or may tend to be favorable to the Juvenile on the issue of mitigation or punishment. This request for disclosure concerns witnesses or alleged witnesses to any of the transactions described in the petition(s) filed against the Juvenile, whether the State intends to call such person or persons as witnesses or not.

WHEREFORE, the Juvenile requests the Court to issue an Order compelling the State to provide the foregoing items of discovery pursuant to N.C. Gen. Stat. §§ 7B-2300-2303.

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 [ ], [ ].

_____

[ATTORNEY]

Appendix 10-2

Motion to Preserve the Rough Notes of Investigators

STATE OF NORTH CAROLINA

[ ] COUNTY	IN THE GENEAL COURT OF JUSTICE DISTRICT COURT DIVISION FILE NO. [ ]
IN THE MATTER OF [JS, A JUVENILE]	))) MOTION TO PRESERVE) THE ROUGH NOTES OF) INVESTIGATORS

NOW COMES, the Juvenile, through undersigned counsel, and respectfully moves this Court, pursuant to U.S. v. Agurs, 427 U.S. 97 (1976) and Brady v. Maryland, 373 U.S. 83 (1963), to order the prosecutor to preserve and turn over to the defense counsel any materials in the possession of the prosecutor and law enforcement agents which are favorable to the Juvenile, including the rough notes of all persons investigating this case with the [POLICE DEPARTMENT], including other sources employed or working with the [POLICE DEPARTMENT].

In order for the Juvenile to have access to these materials prior to the probable cause hearing, pre-adjudication or upon cross-examination at the adjudication hearing, it is absolutely necessary that the court enter an order requiring the state to investigate and preserve all of said rough notes and other related paper work.

WHEREFORE, the Juvenile respectfully requests that the prosecutor be ordered to respond to this request, in writing or in open court, to inquire of all investigating officers concerning the existence of this material, and if any such evidence or material exists, to require its preservation during the pendency of 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 [ ], [ ].

_____

[ATTORNEY]

Chapter 5: Experts and Other Assistance

(Forms list on other side)

Chapter 5: Forms

Chapter 5: Experts and Other Assistance

This chapter focuses on motions for funds for the assistance of an expert (including the assistance of an investigator). Such motions are most appropriate in felony cases. Other forms of state-funded assistance (such as interpreters) are discussed briefly at the end of this chapter.

5.1 Right to Expert

A. Basis of Right

Due Process. An indigent defendant's right to expert assistance rests primarily on the due process guarantee of fundamental fairness. The leading case is *Ake v. Oklahoma,* 470 U.S. 68, 76, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), in which the Supreme Court held that the failure to provide an expert to an indigent defendant deprived him of a fair opportunity to present his defense and violated due process. North Carolina cases, both before and after *Ake,* recognize that fundamental fairness requires the appointment of an expert at state expense upon a proper showing of need. *See, e.g., State v. Tatum,* 291 N.C. 73, 229 S.E.2d 562 (1976).

Other Constitutional Grounds. Other constitutional rights also may support appointment of an expert for an indigent defendant, including equal protection and the Sixth Amendment right to effective assistance of counsel. *See Ake,* 470 U.S. at 87 n.13 (because its ruling was based on due process, court declined to consider applicability of equal protection clause and Sixth Amendment); *State v. Ballard,* 333 N.C. 515, 428 S.E.2d 178 (1993) (Sixth Amendment right to assistance of counsel entitles defendant to apply *ex parte* for appointment of expert).

State constitutional provisions, such as Art. I, § 19 (law of the land) and Art. I, § 23 (rights of accused), also may support appointment of an expert. *See generally State v. Tolley,* 290 N.C. 349, 364, 226 S.E.2d 353, 365 (1976) (law of land clause requires that administration of justice "be consistent with the fundamental principles of liberty and justice"); *State v. Hill,* 277 N.C. 547, 178 S.E.2d 462 (1971) (under Art. 1, § 23, "accused has the right to have counsel for his defense and to obtain witnesses in his behalf").

Statutory Grounds. G.S. 7A-450(b) provides that an indigent defendant is entitled to the assistance of counsel and other "necessary expenses of representation." Necessary expenses include expert assistance. *See State v. Tatum,* 291 N.C. 73, 229 S.E.2d 562 (1976); G.S. 7A-454 (authorizing trial court to approve fees for expert witness).

B. Breadth of Right

The North Carolina courts have recognized that a defendant's right to expert assistance extends well beyond the specific circumstances presented in *Ake,* a capital case in which the defendant requested the assistance of a psychiatrist for the purpose of raising an insanity defense and contesting aggravating factors at sentencing.

Type of Case. Upon a proper showing of need, an indigent defendant is entitled to expert assistance in both capital and noncapital cases. *See State v. Ballard,* 333 N.C. 515, 428 S.E.2d 178 (1993) (right to expert in noncapital murder case); *State v. Parks,* 331 N.C. 649, 417 S.E.2d 467 (1992) (right to expert in non-murder case).

Type of Expert. An indigent defendant is entitled to any form of expert assistance necessary to his or her defense, not just the assistance of a psychiatrist. *See Ballard,* 333 N.C. 515, 428 S.E.2d 178 (listing some of experts considered by North Carolina courts); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988) (defendant entitled to appointment of psychiatrist and fingerprint expert in same case).

Stage of Case. A defendant has the right to the services of an expert on pretrial issues, such as suppression of a confession, as well as on issues that may arise in the guilt-innocence and sentencing phases of a trial or in post-conviction proceedings. *See State v. Taylor,* 327 N.C. 147, 393 S.E.2d 801 (1990) (recognizing right to expert assistance in post-conviction proceedings); *Moore,* 321 N.C. 327, 364 S.E.2d 648 (right to psychiatrist for purpose of assisting in preparation and presentation of motion to suppress confession); *State v. Gambrell,* 318 N.C. 249, 347 S.E.2d 390 (1986) (right to psychiatrist for both guilt and sentencing phases); *United States v. Cropp,* 127 F.3d 354 (4th Cir. 1997) (indigent defendant has right to gather psychiatric evidence relevant to sentencing, and trial judge may authorize psychiatric evaluation for this purpose).

C. Right to Own Expert

Under *Ake* and North Carolina case law, a defendant has the right to an expert *for the defense,* not merely an independent expert employed by the court. *See Ake,* 470 U.S. at 83 (defendant has right to psychiatrist to "assist in evaluation, preparation, and presentation of the defense"); *Gambrell,* 318 N.C. 249, 347 S.E.2d 390 (recognizing requirements of majority opinion in *Ake*); *Smith v. McCormick,* 914 F.2d 1153, 1157 (9th Cir. 1990) ("right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather, it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate"). Thus, the defense determines the work to be performed by the expert (although not, of course, his or her conclusions).

The courts have stopped short of holding that a defendant has a constitutional right to choose the individual who will serve as his or her expert. *See Ake,* 470 U.S. at 83 (defendant does not have constitutional right to choose particular psychiatrist or to receive funds to hire his or her own expert); *State v. Campbell,* 340 N.C. 612, 460 S.E.2d 144 (1995) (on defendant's motion for psychiatric assistance, trial court appointed state

psychiatrist who had performed earlier competency examination); *see also Marshall v. United States,* 423 F.2d 1315 (10th Cir. 1970) (error to appoint FBI as investigator for defendant, as FBI had inescapable conflict of interest). Upon a proper showing, however, most trial judges will allow the defendant funds to hire an expert of his or her choosing.

5.2 Required Showing for Expert

To obtain the services of an expert at state expense, a defendant must be (1) indigent and (2) in need of an expert's assistance.

A. Indigency

To qualify for a state-funded expert, the defendant must be indigent or at least partially indigent. Defendants represented by a public defender or other appointed counsel easily meet this requirement, as the court already has determined their indigency. A defendant able to retain counsel also may be considered indigent for the purpose of obtaining an expert if he or she cannot afford an expert's services. *See State v. Boyd,* 332 N.C. 101, 418 S.E.2d 471 (1992) (trial court erred in refusing to consider providing expert to defendant who was able to retain counsel); *see also State v. Hoffman,* 281 N.C. 727, 738, 190 S.E.2d 842, 850 (1972) (an indigent person is "one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense").

B. Preliminary but Particularized Showing of Need

An indigent defendant must make a "threshold showing of specific necessity" to obtain the services of an expert. A defendant meets this standard by showing either that:

- he or she will be deprived of a fair trial without the expert's assistance; or
- there is a reasonable likelihood that the expert will materially assist the defendant in the preparation of his or her case. *See State v. Parks,* 331 N.C. 649, 417 S.E.2d 467 (1992) (finding that formulation satisfies requirements of *Ake*); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988) (defendant must show either of above two factors).

The cases emphasize both the preliminary *and* particularized nature of this showing. Thus, a defendant need not make a "prima facie" showing of what he or she intends to prove at trial; nor must the defendant's evidence be uncontradicted. *See, e.g., Parks,* 331 N.C. 649, 417 S.E.2d 467 (defendant need not make prima facie showing of insanity to obtain expert's assistance; defendant need only show that insanity likely will be a significant factor at trial); *State v. Gambrell,* 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986) (court should not base denial of psychiatric assistance on opinion of one psychiatrist "if there are other facts and circumstances casting doubt on that opinion"); *Moore,* 321 N.C. 327, 345, 364 S.E.2d 648, 657 (defendant need not "discredit the state's expert witness before gaining access to his own").

A defendant must do more, however, than offer "undeveloped assertions that the requested assistance would be helpful." *Caldwell v. Mississippi,* 472 U.S. 320, 323, n.1, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985); *see also State v. Mills,* 332 N.C. 392, 400, 420 S.E.2d 114, 117 (1992) ("mere hope or suspicion that favorable evidence is available" is insufficient to support motion). In short, defense counsel may need to make a fairly detailed, although not conclusive, showing of need.

5.3 Components of Showing of Need

This section discusses the potential ingredients of a motion for funds for an expert. Some defense attorneys make a detailed showing in the motion itself. Others make a relatively general showing in the motion and present the supporting reasons and evidence (documents, affidavits, counsel's own observations, etc.) when presenting the motion to the judge. In either event, counsel should be prepared to give the judge all of the evidence supporting the motion, both to make the motion as persuasive as possible and to preserve the record for appeal.

Because of the detail that counsel must provide the court, counsel always should ask to be heard *ex parte*. *See infra* § 5.4, p. 8. The exact showing will vary, of course, with the type of expert sought. *See infra* § 5.5, p. 11 for a discussion of specific types of experts. Sample motions for experts appear at the end of this chapter.

A. Area of Expertise

Defense counsel should specify the particular kind of expert needed (e.g., psychiatrist, pathologist, fingerprint expert, etc.). A general description of a vague area of expertise may not be sufficient. *See, e.g., State v. Johnson,* 317 N.C. 193, 344 S.E.2d 775 (1986) (trial court did not err in denying general request for "medical expert" to review medical records, autopsy reports, and scientific data). Although a defendant may obtain more than one type of expert upon a proper showing, a blunderbuss request for several experts is unlikely to succeed. *See, e.g., State v. Mills,* 332 N.C. 392, 420 S.E.2d 114 (1992) (characterizing motion as fanciful "wish list," court denied in entirety motion for experts in psychiatry, forensic serology, DNA identification testing, forensic chemistry, statistics, genetics, metallurgy, pathology, private investigation, and canine tracking).

B. Name of Expert

When possible, counsel should determine the expert he or she wants to use before applying to the court. Counsel should interview the prospective expert, both to determine his or her suitability for the case and to obtain information in support of the motion.

Whether counsel must advise the court of the expert's name in moving for funds depends on local practice. Some judges require counsel to identify the proposed expert and one or two alternatives. Even if not required, identifying the expert and describing his or her qualifications may help substantiate the need for expert assistance and reduce the chance

that the court may appoint an expert not to defense counsel's liking. A curriculum vitae can be included with the motion.

Several sources may be helpful in locating suitable experts. Often the best sources of referrals are other criminal lawyers. In addition to public defender offices and private criminal lawyers, it may be useful to contact the Center for Death Penalty Litigation (in Durham); Prisoners Legal Services (in Raleigh); and organizations of criminal lawyers (such as the National Association of Criminal Defense Lawyers and National Legal Aid & Defender Association, both in Washington, D.C.). Counsel also can look at university faculty directories, membership lists of professional associations, and professional journals for the names of potential experts.

C. Amount of Funds

The actual relief requested in a motion for expert assistance is authorization to expend state funds to retain an expert. Counsel should advise the court of the estimated amount of money needed (based on the expert's hourly rate, number of hours required to do the work, costs of testing or other procedures, travel expenses, etc.) and should be prepared to explain the reasonableness of the amount in light of prevailing rates. Counsel may reapply for additional funds as needed.

D. What Expert Will Do

Counsel should specifically describe the work to be performed by the expert—review of records, examination of defendant, interview of particular witnesses, testifying at trial, etc. Failure to explain what the expert will do may hurt the motion. *Compare, e.g., State v. Parks,* 331 N.C. 649, 417 S.E.2d 467 (1992) (trial court erred in denying motion for psychiatric assistance where defendant intended to raise insanity defense and needed psychiatrist to evaluate his condition, testify at trial, and counter opinion of state's expert) *with State v. Wilson,* 322 N.C. 117, 367 S.E.2d 589 (1988) (motion denied where defendant indicated only that assistance of psychologist might be helpful to him in preparing his defense).

E. Why Expert's Work Is Necessary

This part is the most fluid—and by far the most critical—part of a showing of need. *See generally State v. Jones,* 344 N.C. 722, 726, 477 S.E.2d 147, 149 (1996) ("court should consider all the facts and circumstances known to it at the time the motion" is made). Although there are no rigid rules on what to present, consider doing the following:

- Identify the issues that you intend to pursue and that you need expert assistance to develop. To the extent then available, provide specific facts supporting your position on those issues. For example, if you are considering a mental health defense, describe the evidence supporting the defense. *See, e.g., Parks,* 331 N.C. 649, 417 S.E.2d 467 (court found persuasive the nine circumstances provided in support of request,

including previous diagnosis of defendant and counsel's own observations of and conversations with defendant).

- Emphasize the significance of the issues: the more central the issue, the more persuasive the assertion of need may be. *See, e.g., State v. Jones,* 344 N.C. 722, 477 S.E.2d 147 (1996) (defendant entitled to psychiatric expert because only possible defense to charges was mental health defense); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988) (defendant entitled to fingerprint expert where contested palm print was only physical evidence connecting defendant to crime scene).
- Deal with contrary findings by the state's experts. For example, if the state already has conducted an analysis of blood or other physical evidence, explain what a defense expert may be able to add. Although the cases state that the defendant need not show that the state's expert is wrong (*see Moore,* 321 N.C. 327, 364 S.E.2d 648), you can strengthen your motion by pointing out areas of weakness in the state's analysis or at least areas where reasonable people might differ. If the expert is a state employee and not a neutral expert, advise the court of that as well. *See id.* (one of circumstances supporting motion). Before making the motion, try to interview the state's expert and obtain any reports, test results, or other information that may support the motion. If the state's expert is uncooperative, that fact may bolster your showing.
- Explain why you cannot perform the tasks with existing resources and why you require special expertise or assistance. In some instances, the point is self-evident. *See, e.g., Moore,* 321 N.C. 327, 364 S.E.2d 648 (defense could not challenge fingerprint evidence without fingerprint expert). In other instances, you may need to convince the court that the expert would bring unique abilities to the case. *See, e.g., State v. Kilpatrick,* 343 N.C. 466, 471 S.E.2d 624 (1996) (defense failed to present any specific evidence or argument on why counsel needed assistance of jury selection expert in conducting voir dire).

F. Documentation

Counsel should provide documentary support for the motion—affidavits of counsel and prospective experts, information obtained through discovery, scientific articles, etc. How to present this evidence to minimize the risk of disclosure to the prosecution is discussed further in the next section.

5.4 Obtaining an Expert *Ex Parte*

A. Importance of *Ex Parte* Hearing

Grounds to Obtain. Regardless of the type of expert sought, defense counsel should always ask that the motion be heard *ex parte*—that is, without notice to the prosecutor and without the prosecutor present.

Support for this procedure can be found in *State v. Ballard,* 333 N.C. 515, 428 S.E.2d 178 (1993), and *State v. Bates,* 333 N.C. 523, 428 S.E.2d 693 (1993), which held that an indigent defendant is entitled as a matter of right to an *ex parte* hearing when moving for the assistance of a mental health expert. The court found that a hearing open to the prosecution would jeopardize a defendant's right to effective assistance of counsel under the Sixth Amendment because it would expose defense strategy to the prosecution and inhibit defense counsel from putting forward his or her best evidence. An open hearing also could expose privileged communications between lawyer and client (an essential part of the Sixth Amendment right to counsel, according to the court) and force the defendant to reveal incriminating information (in violation of the Fifth Amendment privilege against self-incrimination). *See also State v. Greene,* 335 N.C. 548, 438 S.E.2d 743 (1994) (error to deny *ex parte* hearing on motion for mental health expert).

Although *Ballard* and *Bates* involved mental health experts, the reasoning of those cases supports *ex parte* hearings for all types of experts. On request, many judges will proceed *ex parte* as a matter of course. If counsel must argue the point, he or she should emphasize the factors identified in *Ballard* and *Bates*—namely, that an open hearing could expose defense strategy and confidential attorney-client communications and impinge on the privilege against self-incrimination. *See State v. Phipps,* 331 N.C. 427, 418 S.E.2d 178 (1992) (stating that there are "strong reasons" to hold all hearings for expert assistance *ex parte*); *see also State v. White,* 340 N.C. 264, 457 S.E.2d 841 (1995) (to obtain *ex parte* hearing, defendant is not required to make showing of need for expert; however, on facts presented, trial court did not abuse discretion in refusing to hear motion for investigator *ex parte*); *United States v. Sutton,* 464 F.2d 552 (5th Cir. 1972) (trial court erred by failing to hold hearing *ex parte* on motion for investigator); *Marshall v. United States,* 423 F.2d 1315 (10th Cir. 1970) (use of adversarial rather than *ex parte* hearing to explore defendant's need for investigator was error).

If Request Denied. If counsel cannot obtain an *ex parte* hearing, he or she must decide whether to make the motion for expert assistance in open court (and expose potentially damaging information to the prosecution) or forego the motion altogether (and give up the chance of obtaining funds for an expert). Some of the implications for appeal are as follows:

- If the defendant makes the motion in open court and the trial judge refuses to fund an expert, the defendant has not waived the right to challenge the judge's refusal to hold an *ex parte* hearing. The theory on appeal would be that the defendant could have made a stronger showing if allowed to do so *ex parte. See Bates,* 333 N.C. 523, 428 S.E.2d 693 (court finds it impossible to determine what evidence defendant might have offered had he been allowed to do so out of prosecutor's presence).
- If the defendant decides not to pursue the motion in open court, *Ballard* indicates that the defendant need not make an offer of proof to preserve for appellate review the trial judge's refusal to hold an *ex parte* hearing; however, if counsel has strong evidence of the need for expert assistance, he or she may want to ask the trial court for leave to submit the evidence under seal.

Regardless of which way you proceed, make a record of the trial court's decision not to hear the motion *ex parte*.

B. Who Hears the Motion

After Transfer of Case to Superior Court. An *ex parte* motion for expert assistance ordinarily may be heard by any superior court judge of the judicial district in which the case is pending. *But cf.* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 25 (for capital motions for appropriate relief, rule states that requests for experts, *ex parte* matters, and similar matters arising prior to filing of MAR "should" be ruled on by senior resident judge or designee). Thus, any superior court judge assigned to hold court in the district ordinarily has authority to hear the motion, whether or not actually holding court at the time. *See* G.S. 7A-47 (in-chambers jurisdiction extends until adjournment or expiration of session to which judge is assigned). Any resident superior court judge also has authority to hear the motion, whether or not currently assigned to hold court in the district. *See* G.S. 7A-47.1 (resident superior court judge has concurrent jurisdiction with judges holding court in district to hear and pass upon matters not requiring jury).

Before Transfer of Case to Superior Court. In some felony cases, a defendant may need an expert before the case is transferred to superior court. For example, in a case involving a mental health defense such as diminished capacity or insanity, which turns on the defendant's state of mind at the time of the offense, counsel often will want to retain a mental health expert as soon after the offense as possible. Counsel may be able to obtain authorization from a district court judge to retain an expert.

C. Filing, Hearing, and Disposition of Motion

In moving *ex parte* for funds for an expert, counsel should keep in mind maintaining the confidentiality of the proceedings and preserving the record for appeal.

The motion papers and any other materials should be presented directly to the judge who will hear the matter (not to the clerk of court). Ordinarily, a separate written motion requesting to be heard *ex parte* (in addition to the motion for funds for an expert) is unnecessary. In the event one is needed, a sample motion to be heard *ex parte* appears at the end of this chapter. (The motion was written before *Ballard* and *Bates,* discussed *supra* § 5.4A, p. 8; if used, it should be updated to include those decisions.)

If the judge hears the motion *ex parte* but denies funds for an expert, counsel may (and often should) renew the motion upon obtaining additional supporting evidence. *See generally State v. Jones,* 344 N.C. 722, 477 S.E.2d 147 (1996) (after court initially denied motion for psychiatrist, counsel renewed motion and attached own affidavit that related his conversations with defendant and included medical notes of defendant's previous doctor; court erred in denying motion). If the motion ultimately is denied, obtain a court reporter and ask the judge to hear and rule on the motion on the record (but still in chambers). For purposes of appeal, it is imperative to present on the record all of the

evidence and arguments supporting the motion. You should ask the judge to order that the motion and supporting materials be sealed and that the court reporter not transcribe or disclose the proceedings except on the defendant's request.

If the motion is granted, counsel likewise should ask that the order and motion papers be sealed and preserved for appellate review. Some defense attorneys prefer instead to retain the order and motion papers and file them upon conclusion of the case at the trial level. To avoid any question about the propriety of this practice, counsel should consider including in the order for an expert a provision authorizing counsel to retain the materials until the case concludes at the trial level. Regardless of which way you proceed, make sure that the order and motion papers are provided to the court to ensure a complete record in the event of appeal.

D. Other Procedural Issues

There is no time limit on a motion for expert assistance. *But cf. State v. Jones,* 342 N.C. 523, 467 S.E.2d 12 (1996) (defendant requested expert day before trial; belated nature of request and other factors demonstrated lack of need).

The defendant ordinarily does not need to be present at the hearing on the motion. *See State v. Seaberry,* 97 N.C. App. 203, 388 S.E.2d 184 (1990) (finding on facts that motion hearing was not critical stage of proceedings and that defendant did not have right to be present; court finds in alternative that noncapital defendants may waive right to be present and that this defendant waived right by not requesting to be present).

5.5 Specific Types of Experts

The legal standard for obtaining an expert is the same in all cases—that is, the defendant must make a preliminary showing of specific need—but the courts' application of the standard may vary with the type of expert sought. For example, in some cases the courts have found that the defendant did not make a sufficient showing of need for a jury consultant; however, these cases may have little bearing on the required showing for other types of assistance.

A. Mental Health Experts

Case Law. North Carolina case law is relatively favorable on motions for mental health experts, perhaps because defense counsel is in a better position to obtain supporting information. On several occasions, the supreme court has reversed convictions for failure to grant the defense a mental health expert. *See State v. Jones,* 344 N.C. 722, 477 S.E.2d 147 (1996); *State v. Parks,* 331 N.C. 649, 417 S.E.2d 467 (1992); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988); *State v. Gambrell,* 318 N.C. 249, 347 S.E.2d 390 (1986). These cases illustrate the kinds of information that counsel can and should marshal (e.g., counsel's observations of and conversations with the client; treatment, social services, school, and other records bearing on client's mental health; etc.). *See also*

Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Psychiatrist or Psychologist,* 85 A.L.R.4th 19 (1991).

Impact of Competency Examination. Cases involving mental health issues also may involve issues about the client's competency to stand trial. In such cases, counsel should consider moving for a mental health expert before deciding whether to question competency. The motion would seek funds for an expert on all applicable mental health issues (defenses, mitigating factors, etc.), including competency. *See supra* § 2.4, p. 9 (discussing reasons for obtaining evaluation by own expert before questioning competency). Once the expert has evaluated the client, counsel will be in a better position to determine whether there are grounds for questioning competency.

Once counsel questions a client's competency, the court may order a competency examination at a state facility (Dorothea Dix hospital) or at a local mental health facility. *See supra* § 2.5, p 10 (competency examination by state or local examiner). The impact of such an examination on a motion for a mental health expert may be difficult to predict.

- A state-conducted competency examination may have no impact on a later motion for expert assistance. The courts have held that a competency examination does not satisfy the state's obligation to provide the defendant with a mental health expert to assist with preparation of a defense. *See Moore,* 321 N.C. 327, 364 S.E.2d 648 (examination to determine competency not substitute for mental health expert's assistance in preparing for trial); *see also Ake v. Oklahoma,* 470 U.S. 68, 76, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) (psychiatry is "not an exact science, and psychiatrists disagree widely and frequently").
- A competency examination may lend support to a motion for a mental health expert, as it could show that the defendant, even if competent to proceed, suffers from some mental health problems.
- A competency examination may undermine a later motion for a mental health expert as well as presentation of the defense in general. *See State v. Pierce,* 346 N.C. 471, 488 S.E.2d 576 (1997) (in finding that defendant had not made sufficient showing of need, court relied in part on findings from earlier competency examination); *State v. Campbell,* 340 N.C. 612, 460 S.E.2d 144 (1995) (on motion for assistance of mental health expert, trial court appointed same psychiatrist who had earlier found defendant competent to stand trial); *see also supra* § 2.9, p. 22 (evidence from competency examination may be admissible to rebut mental health defense).

B. Experts on Physical Evidence

Some favorable case law exists on obtaining experts on physical evidence. *See, e.g., State v. Bridges,* 325 N.C. 529, 385 S.E.2d 337 (1989); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988). In both cases, the only direct evidence connecting the defendant to the crime scene was physical evidence (fingerprints), and the only expert testimony was from witnesses for the state, not independent experts. In those circumstances, the defendants were entitled to their own fingerprint expert without any further showing of need.

When physical evidence is not as vital to the state's case, counsel may need to make an additional showing of need for an expert. *See, e.g., State v. Seaberry,* 97 N.C. App. 203, 388 S.E.2d 184 (1990) (ballistics evidence was important to state's case but was not only evidence connecting defendant to crime; defendant made insufficient showing for own ballistics expert). *See also* Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Chemist, Toxicologist, Technician, Narcotics Expert, or Similar Nonmedical Specialist in Substance Analysis,* 74 A.L.R.4th 388 (1990); Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Fingerprint Expert,* 72 A.L.R.4th 874 (1990); Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Ballistics Expert,* 71 A.L.R.4th 638 (1990).

C. Investigators

Case Law. The courts have adhered to the general legal standard for appointment of an expert when ruling on a motion for an investigator—that is, the defendant must make a preliminary showing of specific need. But, defendants sometimes have had difficulty meeting the standard because, until they get an investigator, they may not know what evidence is available or helpful. *See, e.g., State v. McCullers,* 341 N.C. 19, 460 S.E.2d 163 (1995) (motion for investigator denied where defense presented no specific evidence indicating how witnesses may have been necessary to his defense or in what manner their testimony could assist defendant); *State v. Tatum,* 291 N.C. 73, 229 S.E.2d 562 (1976) (court states that defendants almost always would benefit from services of investigator; court therefore concludes that defendant must make clear showing that specific evidence is reasonably available and necessary for a proper defense). *See also State v. Potts,* 334 N.C. 575, 433 S.E.2d 736 (1993) (defendant entitled to funds for investigator on proper showing); Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Investigator,* 81 A.L.R.4th 259 (1991).

Points of Emphasis. To the extent possible, counsel should forecast for the court the information that an investigator may be able to obtain. Thus, counsel should identify the witnesses to be interviewed, the information that the witnesses may have, and why the information is important to the defense. If the witness's name or location is unknown and the witness must be tracked down, indicate that problem. Identify any other tasks that an investigator would perform (obtaining documents, photographing locations, etc.).

Counsel also should indicate why he or she cannot do the investigative work. General assertions that counsel is too busy or lacks the necessary skills may not suffice. *See, e.g., State v. Phipps,* 331 N.C. 427, 418 S.E.2d 178 (1992). Identify the obligations (case load, trial schedule, etc.) that prevent you from doing the investigative work. If the investigation requires special skills (such as the ability to speak Spanish), indicate that as well. *See generally State v. Zuniga,* 320 N.C. 233, 357 S.E.2d 898 (1987) (defendant did not demonstrate language barrier requiring appointment of investigator). Remind the court that counsel ordinarily should not testify at trial to impeach a witness who has changed his or her story. *See* N.C. REVISED RULES OF PROFESSIONAL CONDUCT Rule 3.7 (disapproving of lawyer acting as witness except in certain circumstances). Private

counsel appointed to represent an indigent defendant also can point out that an investigator would cost the state less than if appointed counsel did the investigative work.

D. Other Experts

Selected appellate opinions on other types of expert assistance are cited below, but these opinions may not reflect the actual practice of trial courts, which may be more favorable to the defense. In addition to those listed below, trial courts have authorized funds for mitigation specialists, social workers, eyewitness identification experts, polygraph experts, DNA experts, handwriting experts, legal experts, and others.

Medical Experts. *See, e.g., State v. Rose,* 339 N.C. 172, 451 S.E.2d 211 (1994) (funds for neuropsychologist denied where defendant already had been examined by two psychiatrists); *State v. Penley,* 318 N.C. 30, 347 S.E.2d 783 (1986) (defendant "arguably made threshold showing" for medical expert, but for other reasons court finds no error in denial of funds).

Pathologists. *See, e.g., Penley,* 318 N.C. 30, 347 S.E.2d 783 (defendant "arguably made threshold showing" for pathologist); *Williams v. Martin,* 618 F.2d 1021 (4th Cir. 1980) (error to deny pathologist).

Jury Consultants. *See, e.g., State v. Zuniga,* 320 N.C. 233, 357 S.E.2d 898 (1987) (jury selection expert denied; requested expert lacked skills for stated purpose); *State v. Watson,* 310 N.C. 384, 312 S.E.2d 448 (1984) (denial of expert to evaluate effect of pretrial publicity for purposes of moving to change venue and selecting jury; insufficient showing of need). *See also* Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Expert in Social Attitudes,* 74 A.L.R.4th 330 (1990).

Statisticians. *See, e.g., State v. Moore,* 100 N.C. App. 217, 395 S.E.2d 434 (1990) (initial motion for statistical expert to analyze race discrimination in grand and petit juries granted; motion for funds for additional study denied), *rev'd on other grounds,* 329 N.C. 245, 404 S.E.2d 845 (1991).

5.6 Confidentiality of Expert's Work

If the court grants a motion for expert assistance, counsel will need to meet with the expert, explain the defense theory, and provide the expert with information on those aspects of the case with which the expert will be involved. In short, counsel will need to incorporate the expert into the defense team.

What protections exist for these communications and the expert's resulting work?

- If the defense does not call the expert as a witness, the prosecution generally does not have a right to discover the expert's work. *See supra* § 4.9C, p. 46 (discussing

restrictions on discovery of expert's work and circumstances when work may be discoverable).

- If the defense intends to call the expert as a witness, the prosecution may be entitled to pretrial discovery. *See supra* § 4.9C, p. 46. In granting motions for expert assistance, some judges have required experts to prepare a written report and provide it to the prosecution. Such an order is permissible only to the extent it complies with the discovery statutes. *See id.*
- Once on the stand, an expert may be required to disclose the basis of his or her opinion, including materials he or she reviewed, examinations of and communications with the defendant, etc. *See generally* N.C. R. EVID. 705 (disclosure of basis of opinion); 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE 669-76 (Michie Co., 4th ed. 1993) (discussing application of rule).

To reaffirm the confidential nature of the relationship, counsel may want to have the expert enter into a nondisclosure agreement. A sample appears at the end of this chapter. *See also* N.C. REVISED RULES OF PROFESSIONAL CONDUCT Rule 3.4(f) (lawyer may request person other than client to refrain from voluntarily giving relevant information to another party if person is agent of client); *Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41 (1990) (court holds in civil case that lawyer for defendant could not interview plaintiff's physician without plaintiff's consent; defendant's lawyer could obtain information from physician only through statutorily recognized methods of discovery).

5.7 Right to Other Assistance

A. Interpreters

For Deaf Clients. Under G.S. Ch. 8B, a deaf person is entitled to a qualified interpreter for any interrogation, arraignment, bail hearing, preliminary proceeding, or trial. *See also* G.S. 8B-2(d) (no statement by a deaf person without a qualified interpreter present is admissible for any purpose); G.S. 8B-5 (if a communication made by a deaf person through an interpreter is privileged, the privilege extends to the interpreter).

Obtaining an interpreter is a routine matter, not subject to the requirements on appointment of experts discussed above. An AOC form for appointment of an interpreter (AOC-G-107) appears at the end of this chapter. The superior court clerk should have a list of qualified interpreters. *See* G.S. 8B-6.

For Non-English Speaking Clients. The courts also have the authority to appoint a language interpreter for a person who does not speak English. *See State v. Torres,* 322 N.C. 440, 368 S.E.2d 609 (1988) (court has inherent authority to appoint language interpreter); G.S. 7A-314(f) (authorizing payment in criminal case for language interpreter for indigent defendant, witness for indigent defendant, or witness for state). Obtaining a language interpreter is likewise a routine matter, covered by the form request for an interpreter at the end of this chapter.

For Others. An interpreter may be appointed whenever the defendant's normal communication is unintelligible. *See State v. McLellan,* 56 N.C. App. 101, 286 S.E.2d 873 (1982) (defendant had speech impediment).

B. Other Expenses

Under G.S. 7A-450(b), the state has the responsibility to provide an indigent defendant with counsel and "other necessary expenses of representation." This general authorization may provide the basis for payment of various expenses incident to representation, such as suitable clothing for the defendant.

SUPPRESSION ISSUES

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SELECTED STATE LAW CASES RELATING TO INTERROGATIONS IN THE SCHOOL SETTING[1]

State	Cases	Holding
United States Supreme Court	**In re J.D.B.** 131 S.Ct. 2394 (2011)	A child's age properly informs the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer. Facts: A 7th grade special ed student, was questioned in school conference room about some recent break-ins. Asst Principal, investigator, SRO, and intern were in room. Δ was not provided with Miranda warnings, but was told he was free to leave. After Δ denied guilt, he was told to "do the right thing." Δ was also confronted with evidence of his guilt at this time. Δ then asked if admitting guilt would help, and officer responded that it would be helpful but that he was still referring the case to court. Δ's parent/guardian wasn't contacted. Interview lasted 30-45 minutes, during which Δ admitted taking part in the burglaries. Δ was allowed to take the bus home. Additional investigation took place later that day. Analysis: North Carolina court held that based on the objective nature of the analysis for interrogations, the state court did not take into consideration Δ's age or status as a special education student. HOWEVER, the US Supreme Court reversed North Carolina and held that

[1] This chart highlights selected state law cases relating to the interrogation of students on school grounds. While we hope that this chart is thorough, it does not list every single case relating to this topic. Additionally, the summaries are just that – they are not an in-depth analysis of each case. Finally, the chart does not yet include federal decisions on this topic. We hope, however, that it is a useful starting point for your individual research in challenging the admissibility of statements provided while at school.

		considering a child's age does not jeopardize the objective nature of the inquiry. The Court reversed and remanded the case for the state courts to consider the child's age when determining whether it was a custodial interrogation.
Alabama	**Jefferson v. State,** 449 So. 2d 1280 (Ala. Crim. App. 1984)	Motion to suppress denied. Δ made incriminating statements about stabbing a boy in a fight to a "campus supervisor" in the assistant principal's office. Δ moved to suppress statements b/c they were made during a custodial interrogation w/o constitutional guarantees. The court found that the statements were not the result of a "custodial interrogation" because Δ voluntarily went to the assistant principal's office, Δ was not in custody, campus supervisor didn't arrest Δ, & Δ's statements were voluntary.
Alaska	**Kalmakoff v. State** __ P.3d __, 2010 WL 2206659 (June 1, 2010)	Remanded to trial court to determine if Δ was in custody during his initial interview with police. Reiterating the Court of Appeals assessment that other states are "virtually unanimous in recognizing that a directive or 'request' for a secondary school student to leave class for the purpose of being questioned by a police officer can result in a custodial interrogation for Miranda purposes" (*Kalmakoff v. State*, 199 P.3d 1188 (Alaska App. 2009)), the Court concluded that there was not enough factual information to make a determination in this case. This information is necessary to determine if third interview was sufficiently attenuated from first two interviews so as to make third and fourth interviews admissible. The court of appeals decision (*Kalmakoff v. State*, 199 P.3d 1188 (Alaska App. 2009)) provides a comprehensive review of other state court decisions relating to the question of custody on school grounds.
	Watkinson v. State 980 P.2d 469 (1999)	Motion to suppress denied. 16-yr-old Δ shot his father and stepmother then wandered around all night before going to school. The police contacted him at school, where he confessed to the killings. Held: Δ knowingly and voluntarily waived his Miranda rights.
Arizona	**In re Andre M.** 88 P.3d 552 (Ariz. 2004)	Motion to suppress granted. 16-year-old Δ was questioned about a fight & firearms on school grounds by police officers (who came to the school) in the principal's office. The officers excluded Δ's mother from interrogation, which created a coercive & frightening environment. The court found the Δ's confessions shouldn't be admitted b/c there was no evidence Δ's statements were given voluntary, there was an unjustified exclusion of Δ's mother, there's no proof about whether Δ received age-appropriate Miranda warnings, and there's no acknowledgement to indicate that Andre received & understood his Miranda rights.
	In re Jorge D. 43 P.3d 605 (Ariz. Ct. App. 2002)	Remanded to trial court to determine if Δ in custody. School bus driver was hit in the head w/ a bottle when driving bus after school. She took bus back to school & made suspected Δs get off bus and meet w/ the principal & police officer The next morning, students were called to principal's office and questioned by police officer (with principal in the room). Δ confessed and the lower court held Miranda wasn't necessary because there was nothing to indicate

		involuntariness. The appellate court said the issue was whether the juvenile was in custody when being questioned and found an objective test for determining "custody" for purposes of Miranda (from Berkemer v. McCarty, 468 U.S. 420 (1984)). That test: custody for Miranda purposes is the same for adults & juveniles, but additional elements that bear upon the child's perceptions and vulnerability, including the child's age, maturity and experience with law enf. & the presence of a parent or other supportive adult. This test couldn't be applied in this case b/c the record contains insufficient facts to apply the test since the trial court rather summarily denied the motion to suppress. The case was remanded so the court could find if the Δ was in custody & if the confession was voluntary.
	Matter of Navajo County Juvenile Action No. JV91000058 901 P.2d 1247 (Ariz. Ct. App. 1995)	Motion to suppress denied. Confessions by Δ, a juvenile, to his junior high school principal about setting a locker on fire were admissible b/c they were made voluntarily & Miranda warnings weren't necessary. Principals are not law enforcement agents, but they may be bound by *Miranda* when acting "as an instrument of the police [or] as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile." Here, the principal had an independent responsibility to investigate a student infraction committed during school hours on school grounds because the principal is responsible for safety, administration, and discipline in his school. He did not act at the behest or direction of the police; he initiated and conducted the investigation on his own.
Arkansas	**K.L. v. State** --S.W.3d-- (Ark.App. 2010)	Affirmed trial court's denial of motion to suppress.. Δ, a fifth grader, was accused of rape. Based on a referral from a teacher, the principal interviewed the Δ in her office. The principal told the Δ that he had to tell the principal the truth, or with the allegations, the principal would have to call the resource officer. The principal stated that the Δ could have left, but the principal never told Δ that he did not have to talk to her. Δ sought to suppress the statements he made to the principal, arguing it was a custodial interrogation. Relying upon cases from other jurisdictions, the court held that absent more a school official is not acting as law enforcement and does not need to provide *Miranda* warnings. The court reasoned that the principal had a duty to discern what happened by interviewing the parties. Although the court found that the Δ was not actually free to leave, this restriction was because of his status as a student, rather than as a suspect. The fact that Δ couldn't leave was not determinative of whether the questioning was a custodial interrogation. Overall, the court focused on the role of the principal and the flexibility in school disciplinary procedures (citing *New Jersey v. T.L.O.*). Because the principal was acting in her capacity as a principal, the interview was not custodial.
California	**In re Corey L.** 250 Cal.Rptr. 359 (Cal. Ct. App. 1988)	Motion to suppress denied. Miranda warnings not required prior to questioning of a student (about cocaine) by a principal. Warnings only required with respect to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his

		freedom of action in any significant way."
	In re Paul P. 216 Cal. Rptr. 51 (Cal. Ct. App. 1985)	Motion to suppress denied. Miranda warnings were not required before juvenile was questioned by caseworker/therapist employed by private school facility b/c the caseworker was not acting in a law enforcement capacity when questioning Δ. Caseworker was private employee & was acting on his own initiative in investigating injury to student. Fact that therapist knew Sherriff was on his way did not alter the fact that the therapist was acting on his own initiative. Miranda is applicable only to questioning by law enforcement officials, their agents and agents of the court while the suspect is in official custody. A private citizen is not required to advise another individual of his rights before questioning him.
	In re Victor F. 169 Cal.Rptr. 455 (Cal. Ct. App. 1980)	Motion to suppress denied. Δ was caught by a teacher attempting to steal a bicycle from a school. Once he was detained by a security guard, teacher, and vice principal he made statements admitting his intention to steal a bike. Then a policeman arrived, Δ was Mirandized and he again confessed. Δ argued his initial confession was tainted because the teacher, principal and security guard were acting as agents of the law. The court held that "[i]t does not matter that a particular employee's duties may be confined to the protection of persons and property on his employer's premises or that his employer may be the state, a political subdivision thereof or a local entity. What does matter is whether he is employed by an agency of government, federal, state or local, whose primary mission is to enforce the law. Clearly, neither the security guard, the school principal, or teachers' primary mission was to enforce the law in our instant case." As a result, Miranda warnings did not need to be administered and Δ's confession was deemed admissible.
	In re Irvin S. 2010 WL 4108464 (Cal. Ct. App. 2010) **UNPUBLISHED OPINION**	Motion to suppress denied. Police officer had information that Δ had committed several acts of graffiti. Officer contacted the school resource officer (SRO) in advance. When the officer arrived at the school, the SRO put the officer and Δ in a conference room. The officer told Δ that he was not under arrest; he was free to leave; and this was just a conversation. The interview lasted about 45 minutes. In response to Δ's concern about going to juvenile hall, the officer assured the Δ that he would likely get a ticket, but not have to go to juvenile hall. The court considered the objective test of whether a reasonable person in Δ's position would have felt he or she was in custody, and deferred to the trial court's factual findings. The court looked at the totality of the circumstances and found that Δ was not in custody because the interview was on school grounds; Δ was told he could leave; and the tone of the questioning was informal. The juvenile court found that the officer made no threats and did not use coercion or pressure. Therefore, *Miranda* rights did not have to be administered, and Δ's incriminating statements during the interview were admissible.
Colorado	**People in Interest of P.E.A.** 754 P.2d 382 (Colo. 1988)	Motion to suppress denied. The principal and security officer didn't act as agents of the police when they questioned, investigated and searched students after received an anonymous drug tip. A police officer received the tip, and told the principal about it. The officer did not participate

		in the questioning or searching. The officer giving principal information & his presence on school grounds during the investigation don't establish that the principal and security officer acted as police agents. As a result, Miranda warnings were not required and parents were not required to be contacted.
Connecticut	**Doe v. Cortright** 2008 WL 1823089 (Conn.Super.,2008) **UNPUBLISHED OPINION**	Motion to suppress denied. Δ was arrested for PWID (MJ). The next day, Δ reported to school. Δ was told to go to the assistant principal's office where he made various admissions when asked. The SRO joined the meeting b/c the student had questions about the legal implications of his actions. The SRO answered the student's questions, but did not otherwise participate in any questioning. The decision was then made to suspend Δ for 10 days. The court held that Miranda rights were not required b/c Δ was no longer in custody (he had been arrested and released the previous day) and he was not subjected to a custodial interrogation initiated by law enforcement officers. Furthermore, Miranda rights apply to criminal prosecutions, not school suspension proceedings.
	Doe v. Hughes 2009 WL 659209 (Conn.Super. Feb. 19, 2009) **UNPUBLISHED OPINION**	Doe sought injunction prohibiting school board from hearing incriminating statements provided without being provided with Miranda warnings. Court finds that standard for injunctive relief has not been met. In particular, there was little likelihood that Doe would be successful in proving that he was in custody for Miranda purposes. Moreover, "Miranda rights pertain to criminal prosecutions, not school suspension hearings."
Delaware	None found	
Florida	**State v. J.T.D.** 851 So. 2d 793 (Fla. Dist. Ct. App. 2003)	Motion to suppress denied. Δ was interviewed by assistant principal and principal in the principal's office. A St. Petersburg Police Officer, the school's SRO, was present during the questioning. After the student confessed, the school officials turned the questioning over to the SRO, who began reading Δ his Miranda rights. The reading was interrupted & the SRO had to leave b/c of another situation. The court held that the questioning did not amount to a custodial interrogation – Δ was summoned by assistant principal for a student disciplinary problem, the clear purpose of the interview was to determine whether Δ had breached the student code of conduct, the interview was in the principal's office, only the principal & assistant principal participated in questioning) & the assistant principal is not an agent of the police. The officer's mere presence didn't transform the school official's interview into a custodial interrogation.
	State v. J.H. 898 So. 2d 240 (Fla. Dist. Ct. App. 2005)	Trial court granted motion to suppress statement b/c officer failed to read Miranda warnings prior to questioning. Trial court then suppressed evidence found as result of subsequent search. Appellate court does not reach issue of whether statement should have been suppressed; search was proper under reasonable suspicion standard even absent information obtained from the confession.
	M.H. v. State 851 So. 2d 233 (Fla. Dist. Ct. App.	Δ had an altercation w/ another student. A school official questioned (w/o Miranda) Δ in the presence of an SRO. The school official asked all but one of the questions. The court

	2003)	suppressed only the response to the SRO's question b/c the mere presence of a law enforcement officer does not amount to custodial interrogation requiring Miranda warnings.
	J.A.R. v. State 689 So. 2d 1242 (Fla. Dist. Ct. App. 1997)	Motion to suppress denied. Δ was reported for having a gun. Assistant principal called deputy sheriff (SRO) & the two of them walked to Δ's classroom. One called the Δ outside. The SRO asked Δ if he had a gun. Δ admitted he did. SRO conducted a pat down, found the gun, arrested Δ. Δ argued that SRO should've Mirandized him since he was "in custody" once he was asked to come outside the classroom. The court held that since the SRO would have been able to discover the gun without the Δ's admission (b/c assistant principal had reasonable suspicion to search him), the admission was harmless.
	In Interest of J.C. 591 So. 2d 315 (Fla. Dist. Ct. App. 1991), *rehearing denied* (1992)	Motion to suppress denied. Δ was sent to the principal's office b/c he had allegedly been smoking MJ on school grounds. The assistant principal questioned student (w/o Miranda) in front of Sheriff's Deputy (SRO). The SRO "could have asked a question or two." The court found that the deputy's contribution was de minimis, and therefore the trial court did not abuse its discretion in failing to suppress the statements. The court further stressed that this opinion was limited to the facts of this particular case, and that "where a student is detained (as the trial judge found this student was) and a law enforcement officer participates in the interrogation, Miranda warnings should be given if the confession is to be admissible."
	State v. V.C. 600 So. 2d 1280 (Fla. Dist. Ct. App. 1992)	Motion to suppress denied. The assistant principal questioned Δs (one in the hallway and one in an office) about an alleged robbery & told them police could get involved. The Δs provided written confessions to the assistant principal, which the assistant principal gave to police. The trial court suppressed the statements b/c they weren't "freely & voluntarily given." The appellate court reversed b/c the statements weren't coerced, the assistant principal's actions weren't unreasonable, the students weren't in custody when they were questioned, & there is no evidentiary support for finding that assistant acted as an agent for the police. Δs had abandoned their assertion that Miranda warnings should have been provided prior to this appeal.
	W. B. v. State 356 So. 2d 884 (Fla. Dist. Ct. App. 1978)	Motion to suppress denied. Δ admitted to assistant principal that he stole money from the concession. Miranda warnings weren't necessary b/c assistant principal was acting as a school official, not as a police officer or as a police agent. Therefore, Δ's statements were admissible.
	B.M.B. v. State 927 So. 2d 219 (Fla. Dist. Ct. App. 2006)	Delinquency adjudication reversed. A middle school teacher left 6 students unsupervised briefly, and when she returned she suspected her lemonade had been contaminated with a cleaning solution. A Tampa detective set up an office in the school to interview the 6 possible suspects individually. No parents were notified; his badge and gun were visible. Based upon his suspicions of Δ, the detective brought Δ back in for a 2nd interview. Detective told Δ (falsely) that witnesses saw her contaminate the drink, but she denied involvement. The tape was turned off, and Detective said this is when he read Miranda warning. She then confessed to the incident. Court ruled that the 2nd interview was a custodial interrogation, and that Δ did not knowingly and voluntarily waive her rights; b/c tape recorder off, there was no evidence re:

		sufficiency of warnings or re: understanding of warnings, Δ's parents hadn't been contacted, and Δ's age/experience didn't allow her to fully appreciate the gravity of the situation.
	C.W. v. State 779 So. 2d 462 (Fla. Dist. Ct. App. 2000)	Hearing impaired Δ was suspected of attempting to break into a car. Detective came to school to question him. A school coach was brought in to translate sign language. After communicating Miranda warnings and obtaining a confession, Δ was adjudicated delinquent at trial. The interpreter (coach) did not testify. B/c the state did not establish that the coach accurately signed the Miranda warning to Δ or that Δ communicated his full understanding and made a voluntary waiver thereafter, it was error to admit C.W.'s statements at trial.
Georgia	**In re T.A.G.** 663 S.E.2d 392 (Ga. Ct. App. 2008)	Motion to suppress granted. Δ implicated in robbery of students in boys' bathroom during a school basketball game. He gave some incriminating statements to an assistant principal during an initial interview (these were admitted and not the subject of the appeal). A second interview was then conducted by 2 asst. principals. A school resource officer (SRO) was present for this second interview. The SRO wore a shirt identifying him as a police officer, and also wore a gun and police utility belt. The officer did not question Δ during the interview and "was present for safety purposes." At one point, in response to a question from the asst. principal, the SRO indicated that robbery would be an appropriate charge. Although the SRO did not actively question Δ, the court found that the officer participated in the interview process and "was more than merely present." The court also found that the asst. principal was acting as an agent of the police during the second interview. The testimony indicated that the administrator consulted with the SRO throughout the investigation, and that she did the questioning because of the different rules implicated when an officer got involved. Finally, the court found that Δ was in custody and should have been provided with his *Miranda* warnings.
	Dillard v. State 612 S.E.2d 804 (Ga. Ct. App. 2005)	Motion to suppress denied. Δ was photographed on atm camera attempting to use a credit card that was stolen at gunpoint. Δ was identified in photograph. Police officers went to Δ's school, told the principal, & the principal summoned the Δ. Δ went to the principal's office. Police showed Δ the picture & she admitted it was her. Officers then Mirandized her & asked her to come to the station. Δ argues that she was restrained to the degree associated w/ formal arrest and, therefore, Miranda was necessary for her statement to be admissible. Court held that statement could be admitted b/c she was not "formally arrested." She was not in handcuffs, she hadn't been told she wasn't free to go, she wasn't threatened or promised anything, & she didn't ask to end the meeting or questioning. Trial court's decision to admit the statements was not clearly erroneous.
Hawaii	None found	
Idaho	**In interest of Doe** 948 P.2d 166 (Idaho Ct. App. 1997)	Motion to suppress was granted. Δ, 5th grader, was questioned by SRO about touching a girl. He was called into a faculty room to talk to the SRO (not in uniform, but with badge showing) & not Mirandized. He confessed and the SRO let him return to class. The statements were suppressed b/c the Δ was in custody for purposes of Miranda – Δ received a mandatory

		directive to report to the faculty room; was not informed that he was free to leave, that he did not have to answer the officer's questions, or that he could terminate questioning; knew person interviewing him was a police officer. Unlikely that any 10-year-old would feel free to leave
Illinois	**People v. Pankhurst** 848 N.E.2d 628 (Ill. App. Ct. 2006)	Motion to suppress was denied. Questioning by a principal and dean (which led to a confession) was admissible without Miranda being given. Principal was told by a student that Δ was in possession MJ. Principal summoned Δ out of class, asked Δ to empty his pockets (MJ was an item he emptied from his pocket), and questioned him. When police arrived, the principal let the officer into the office w/ Δ. Officer briefly spoke with Δ, and then the principal came back in & asked officer to leave the office. The principal questioned Δ more, and Δ confessed. Principal then left the office & told the officer of the confession. The principal did not act as an agent of police b/c by the time the officers arrived, the principal had already begun his investigation & the principal didn't seek any advice from officers about conducting the investigation. School officials must have leeway to question students regarding activities that violate the law or school rules. Officials aren't trained or equipped to conduct police investigations. When an official hasn't been given police powers, then Miranda is inapplicable.
	In re E.M. 634 N.E.2d 395 (Ill. App. Ct. 1994)	Motion to suppress was denied. As dean of students opened the locker, removed Δ from class, and questioned Δ w/o an officer present, he was acting in loco parentis & acting independently of police liaison officer when questioning Δ. Therefore, Miranda warnings not required. A student told the dean that he had seen Δ place a brown jacket into his (the Δ's) locker. The dean went to the locker w/ the police liaison officer assigned to the school & the dean opened the locker. The stolen jacket was inside. The dean summoned the Δ to his office and questioned Δ. The officer was not in the office during questioning. Δ confessed & dean told Δ that he'd be contacting the police. The dean then took Δ to the officer (who's office was across the hall). The officer Mirandized Δ. The Δ refused to talk and the officer let him go back to class. Officer didn't know about confession until 8 months later.
	People v. Shipp 239 N.E.2d 296 (Ill. App. Ct. 1968)	Motion to suppress was denied. Δ was suspected of actuating a fire alarm. Δ was called into the principal's office and questioned w/o Miranda. Statements made to the principal were admissible b/c "the calling of a student to the principal's office for questioning is not an 'arrest' & he is not in custody of police or other law enforcement officials. This situation does not fall w/in the scope of the Miranda decision as the Supreme Court has limited it."
	In re J.W. 654 N.E.2d 517 (Ill. App. Ct. 1995)	Delinquency adjudication reversed. 14-year-old was called into the principal's office and when he arrived, there were three officers and the assistant principal waiting for him. They told him that they wanted to speak to him about a homicide and notified his grandmother. He was placed in the back of the police car and transported to the police station, where Δ made incriminating statements. Those statements were admitted at trial despite defense counsel's motion to quash his arrest and suppress evidence. Based on the defendant's age, the number of officers present, the method of questioning, the place of questioning, and the lack of any communication that he was free to leave, the appellate

		court held that a reasonable person in the boy's situation would not have felt free to leave and therefore that he was in custody and should have been read his Miranda warnings. The *J.W.* court also noted that "[h]aving been driven to the station, J.W. was in effect stranded there, buttressing the conclusion that a reasonable person in his situation would not have felt free to leave."
Indiana	**G.J. v. State** 716 N.E.2d 475 (Ind. Ct. App. 1999)	Motion to suppress was denied. School dean is not required to Mirandize student before questioning that took place in a school building (or a non-coercive atmosphere) b/c dean is a school official, and not a police officer & Δ wasn't in police custody. Accordingly, not a custodial interrogation. Crime Stoppers received a tip that Δ had MJ at school. They contacted police. Police contacted the school dean. Δ was brought to the dean's office, dean questioned him about MJ, and Δ pulled a vial of MJ out of his pocket. This was admissible.
	S.A. v. State 654 N.E.2d 791 (Ind. Ct. App. 1995)	Motion to suppress denied. A student gave an officer from the Public School Police Department the names of students he suspected of stealing the student's locker combination book. The student returned the next day & said Δ had the book in his backpack. An officer removed Δ from class & escorted Δ to the vice-principal's office. Δ was told to leave the office & his bag was searched. When he reentered the office, Δ was confronted about the book. Δ admitted to having the book, but said that he found it. The vice-principal called the Δ's father. The father came to the school and continued questioning Δ. Δ's statements were admissible b/c the questioning took place in the school building by the vice-principal, & a major portion of it in the presence of the student's father. Δ wasn't in police custody nor was he questioned by a police officer. Therefore, the questioning did not amount to custodial police interrogation and the Miranda safeguards did not apply.
	State v. C.D. --N.E.2d—(Ind. Ct. App. 2011), 2011 WL 1640164 (Ind. Ct. App. May 2, 2011)	Motion to suppress denied. A teacher reported that Δ appeared to be under the influence of some substance. Δ was brought to the assistant principal's office. After the assistant principal noted that his speech and mannerisms were "slower than normal," the assistant principal requested the presence of the school's security officer (who was also employed by the city police department and was wearing his police officer uniform that day). The security officer was considered a "drug recognition evaluator" and examined Δ. The court reasoned that the questioning was not coercive and was performed at school with an educational purpose. The school questioned Δ in order to keep possibly intoxicated students out of the classroom. As a result of the examination, Δ was suspended from school, which further shows Δ was detained for educational purposes, as opposed to a criminal investigation. The court explains that in this instance, it doesn't matter that the security officer, as opposed to a dean, performed the examination because he was also acting to fulfill an educational purpose.
Iowa	**State v. Bogan** 774 N.W.2d 676 (Iowa 2009)	Motion to suppress granted. Court finds that motion to suppress should have been granted b/c Δ in custody at time of questioning. 2 detectives went to 14-yr-old Δ's school. Δ had already been pulled out of his class by another detective, a school liaison officer and the principal, and was sitting in the principal's office. He was then taken by the 2 detectives to the nurse's office,

		where he was joined by his father. The court applied a 4-factor test: (i) language used to summon individual, (ii) purpose, place and manner of interrogation, (iii) extent to which Δ is confronted with evidence of his guilt and (iv) whether Δ is free to leave the place of questioning. In weighing these factors, the court found that Δ was in custody. Important to the analysis were the following: Δ was summoned from his class and escorted by a detective and liaison officer. Additionally, although Δ was allowed to roam freely in the nurse's office, and was permitted to keep his cell phone, he was not permitted to leave the office to use the restroom, but was instead sent to a restroom within the office and not normally available to students. Finally, armed police officers remained at the only exit of the office.
Kansas	**In re L.A.** 21 P.3d 952 (Kan. 2001)	Motion to suppress denied. The school security officer noticed Δ slumped over in his car so he went over to check on Δ. When he approached the car, he saw Δ packaging a white powdery substance. Δ admitted that MJ and Valium found in his possession belonged to him. Questioning occurred in the principal's office where the security officer had brought Δ from his classroom, it was conducted by the security officer, & the search was carried out at the direction of the vice-principal. The statements were admissible. The role of school security officer is to protect school district property & the students, teachers, & other employees on the premises of the school district. The school security officer isn't employed by an entity whose primary responsibility is law enforcement. Thus, during an investigation of a violation of school policy, the school security officer isn't required to give Miranda warnings.
Kentucky	**C.W.C.S. v Com.** 282 S.W.3d 818 (Ky. Ct. App. 2009)	Motion to suppress denied. Δ was 14 yr old boy whose younger brothers accused him of sexually abusing them. Detective and Family Services agent went to Δ's middle school to talk to him. Detective Gibbs and Ms. Brand went to the office and a school official went to get Δ from class. Δ was taken to the school counselor's office where Detective Gibbs and Ms. Brand were waiting. Detective Gibbs identified himself as a police officer, and although he was not in uniform he was wearing a gun and badge. Before any questions were asked, Detective Gibbs told Δ that he did not have to speak with him or answer any questions and was free to return to class. Detective Gibbs explained that if Δ refused to speak with them, he and Ms. Brand would leave the school premises. Δ said he was willing to speak with them. Detective Gibbs did not read Δ his Miranda rights at any time. Δ incriminated himself. Court denied suppression motion b/c Δ was told he was free to leave and not required to discuss the sexual misconduct allegations. As a result, Δ was not in custody for Miranda purposes.
Louisiana	**State v. Barrett** 683 So.2d 331 (La. Ct. App. 1996)	Motion to suppress denied. The questions that the principal and the deputy sheriff (who was acting as a member of the school board's drug detection team that does random drug searches w/ drug dogs) asked the Δ: why he had $400, how he got to school, and where his car was located, did not require Δ to be Mirandized. The drug team came in periodically to search random classrooms in the school. The dog alerted to Δ's wallet. Δ was sent to principal's office. Principal asked why he had $400. Officer asked how he got to school & where his car

		was located. When questioned by the principal, Δ was not being questioned by a law enforcement officer, and had not been taken into custody, detained, or deprived of his freedom, other than as appropriate considering his status as a student. He also was not in custody or detained when questioned by the officer. Thus, Miranda did not apply.
Maine	None Found	
Maryland	None Found	
Massachusetts	**Com. v. Ira I.** 791 N.E.2d 894 (Mass. 2003)	Motion to suppress denied. Assistant principal was contacted by victim's mother b/c 4 Δs assaulted the v on his way home from school. The assistant principal called each Δ down individually, questioned each one for 15-20 minutes (w/o Miranda), & had 3 of 4 Δs (who admitted to assault) write statements. The assistant principal then contacted all parents to make them aware of the situation, & told the v's mother that she could further this through the court system if she wished. The trial court's granting of the motion to suppress was reversed b/c the assistant principal was acting in the scope of his employment, rather than as an instrument of police, the police didn't control/initiate/or influence the investigation, the Δs weren't subject to custodial interrogation (even though questioned individually and may not have felt free to leave). The mere fact that officials are in a position of authority over students doesn't transform each interview into a custodial interrogation, nor does it transform officials into officers. Because not custodial, no need for Miranda warnings. Court also found that the statements were voluntary.
	Com v. Snyder 597 N.E.2d 1363 (Mass. 1992)	Motion to suppress denied. The principal was told by a faculty member that a student had approached the faculty member b/c Δ offered to sell that student MJ. Principal and assistant principal searched the Δ's locker, found the MJ, called the Δ out of class, & questioned Δ. Δ confessed to trying to sell it. Police were called. When they arrived, the principal told police about confession. Police gave Δ his Miranda & asked if it was true. Δ answered affirmatively. Δ's statements weren't suppressed b/c the school administrators weren't acting as law enforcement. Even if Δ was "in custody" by being kept in the principal's office, the administrators aren't law enforcement officials or agents of such officials so Miranda isn't necessary. Additionally, just b/c school administrators intend to turn the MJ into police doesn't make them agents in police questioning.
Michigan	**People v. Garrett** 2002 WL 226907 (Mich.App.,2002) **People v. Toney** 2002 WL 226872 (Mich.App.,2002) (Co-defendants; Identical opinions) **UNPUBLISHED OPINIONS**	Motion to suppress was denied. Statements made to a high school counselor weren't suppressed b/c counselor wasn't acting as an agent of police. The counselor didn't perform typical law enforcement duties; his duties were limited to enforcing discipline at school so his communication w/ Δ weren't "police-initiated interrogation." The Δ wasn't manipulated, detained, or reluctant to speak w/ counselor. Miranda warnings were not required b/c the school counselor was not acting as an agent of the police. Moreover, statements were voluntary and not coerced.

	People v. Vang 2005 WL 3416156 (Mich.App.,2005) **UNPUBLISHED OPINION**	Motion to suppress was denied. A police officer questioned the Δ for about an hour in a school room. The Δ was not "in custody," so Miranda warnings not required. The Δ was not in custody b/c the officer was unarmed and not in uniform, the boy sat freely in his chair next to an unlocked door, Δ wasn't told by school personnel that he had to meet w/ the officer, and the officer never told Δ he was under arrest.
	People v. Mayes 508 N.W.2d 161 (Mich. Ct. App. 1993)	Δ was called to the principal's office. When he arrived, he was greeted by a police officer who frisked him for weapons and questioned Δ (without Miranda warnings). The Δ admitted the gun was his. The Δ appealed on the grounds that his counsel "was ineffective" for not arguing that his statements should be suppressed. The court isn't sure whether the Δ would've prevailed on this issue, so they decline to hold that counsel was ineffective. Some things the court looked at were that: this was a comparatively non-threatening detention; Δ was free to leave; he was never told he was under arrest, and the questioning was brief and it occurred in the principal's office, not a police-dominated setting.
	In re Kuhl Not reported in N.W.2d 2004 WL 2412695 (Mich.App., 2004) **UNPUBLISHED OPINION**	Suppression of statement overturned on appeal. 16 yr old Δ questioned by police re: bomb threat in a school office with his parents present. Cops told him he was free to end the interview at any time. No Miranda warnings given. The fact that an individual is the focus of an investigation does not, in and of itself, mean that the questioning is custodial. Also, no indicia of a coercive environment were present. As a result, Miranda warnings were not required.
Minnesota	**In re Welfare of G.S.P.** 610 N.W.2d 651 (Minn. Ct. App. 2000)	Motion to suppress granted. Custodian found a bag w/ a bb gun in it after school hours. He took it to the assistant principal's office & left a note on it. The assistant principal called a school liaison officer. The officer and assistant principal went to get Δ out of class & took him to the office. The assistant principal told the student he needed to answer the questions and explained he'd ask some questions, then turn the interrogation over to the officer. Δ, who had never been in trouble before, thought he was in custody. Additionally, the assistant principal and officer were working together rather than making two inquires. A peace officer interrogating a student in custody must administer Miranda warnings to the student.
	In re M.A.K. 667 N.W.2d 467 (Minn. Ct. App. 2003)	Finding that trial court should have granted motions to suppress. 14-yr-old Δ questioned 2x in school police liaison office by police officer regarding stolen car and burglary, respectively. Miranda warnings not provided during either questioning, although during the first interview Δ was told that he was not under arrest and that his step-father consented to the interview. Court of Appeals found that Δ was in custody and that his statements were involuntary. Factors in custody determination included: no previous experience with police, removed from class and escorted to police liaison office, not told that free to leave or that could refuse to answer questions, not told he could speak with parents, and given hall pass to go back to class only after police satisfied with statements. With respect to voluntariness, given the circumstances described during custody analysis, the Court found that "M.A.K.'s will was almost certainly

		overcome." This was true even though the police "were not forceful of purposefully intimidating toward M.A.K."
	In re D.R.M.S. 2006 WL 3361948 (Minn. Ct. App. 2006) **UNPUBLISHED OPINION**	Motion to suppress was granted. A police officer went to Δ's school to question Δ about damage done to the county pool gauges. Δ was called out of class & escorted to the principal's office by school staff. Once there, a police officer took him into a small room (used for detention), closed the door, and told Δ that he wasn't under arrest & he didn't have to speak to the officer if he didn't want to. He didn't advise Δ of Miranda rights or tell Δ he was free to leave. After questioning, the officer told Δ he could go back to class after making a taped statement. The statements were suppressed b/c Δ made the statements to a uniformed police officer w/ a sidearm, officer didn't ask if Δ wanted to contact his parents, officer didn't tell Δ he was free to leave, & questions were designed to elicit criminally incriminating responses. A reasonable person in similar circumstances would believe he was under arrest. Therefore, Δ was subject to custodial interrogation & Miranda warnings were necessary.
	Welfare of R.L.N. 1998 WL 405026 (Minn. Ct. App. 1998) **UNPUBLISHED OPINION**	Motion to suppress was denied. Police Chief discovered distinct footprints near the broken windows of the school. In the locker room, the Police Chief saw Δ putting on shoes that matched the prints near the window. Δ was called to the school office & the door was closed behind him. During 15 minute interrogation by the officer, Δ admitted to breaking into the school, and he was allowed to return to class. Δ wasn't in police custody so no custodial interrogation took place and Miranda warnings were not required. There was no physical force used, Δ confessed voluntarily, & the questioning was done at school.
	In re Welfare of D.J.B. 2003 WL 175546 (Minn. Ct. App. 2003) **UNPUBLISHED OPINION**	Motion to suppress was granted. Detective who taught Δ's D.A.R.E. class and who was a resource officer at the Δ's school interviewed Δ about allegations of criminal sexual conduct w/ a 5-year-old girl who attended Δ's Mom's daycare. A teacher removed Δ from class & walked w/ him to the school conference room (in an area of school not frequented by students). The detective shut the door & told the Δ he didn't have to answer questions and he was free to leave. The detective sat b/w the Δ and the door. Δ wasn't informed of right to have attorney or parents present. The interview was tape-recorded The detective's civilian clothes weren't relevant b/c the Δ knew the detective as a law enforcement officer. A reasonable person would have felt as if they were in custody and the "soft Miranda" the police gave wasn't proper.
Mississippi	None found	
Missouri	None found	
Montana	None found	
Nebraska	**In re interest of Tyler F.** 755 N.W.2d 360 (Neb. 2008)	Motion to suppress denied. Δ was questioned at school by 2 police detectives regarding allegations of criminal / delinquent activity outside of school. With the assistance of school officer, Detectives pulled Δ out of class and took him into an admin room at the school, where he was questioned for ~20 minutes. No Miranda rights were read, no parents were present. Police told Δ that he was not under arrest. After confrontation with evidence, Δ confessed and

		was then allowed to go straight back to class. Court ruled that Δ was not in custody (thus no Miranda warning was req'd), and the confession was voluntary and not coerced.
	In re C.H. 763 N.W.2d 708 (Neb. 2009)	Motion to suppress granted. Δ's half-sister complained to her parents that Δ, 14 yr old, had been touching her inappropriately at night in the room they shared with 2 other brothers. Δ's father alerted authorities and agreed to let them interview Δ at his high school. Δ was brought into the principal's office, not read Miranda rights, not told he was free to leave. Although Δ had unrestrained freedom of movement during the questioning, cop did not advise Δ that he was not under arrest, that he was free to leave, or that he did not have to talk to detectives or answer any questions. Court held that Δ's incriminating statements were erroneously admitted at trial level because he was in custody at the time of question and was never Mirandized.
	In re Kenneth S. NOT REPORTED in N.W.2d 2002 WL 337760 (Neb.App.,2002) **UNPUBLISHED OPINION**	Motion to suppress denied. Δ was implicated in off-campus setting of several fires. Officers went to Δ's school and asked principal to get Δ. Principal told them Δ was in special ed classes and had ADHD. Δ was brought into principal's office for questioning. Officers first began with small talk, and then read Δ his Miranda rights. Δ signed the rights waiver form without asking questions or asking for a lawyer. After 90 minutes of questioning, Δ made inculpatory statements but couldn't pinpoint locations of fires he helped start. Officers asked Δ to ride around and show them. Δ's parents were not informed he was in custody or trouble at all until later that afternoon. Court ruled that ADHD was not enough to render his understanding of rights impossible. Court also found no police coercion or promises of leniency.
Nevada	None found	
New Hampshire	**State v. Heirtzler** 789 A.2d 634 (N.H. 2002)	Motion to suppress statements was granted when school officials and police had an "agency" relationship under the agency rule. The agency rule is meant to prevent the government from circumventing the rights of a Δ by securing private parties to do what it cannot. Here, a teacher witnessed Δ pass a piece of tin foil to another student, who took something out, and returned it to Δ during class. The teacher told the SRO,a police officer who was assigned to the school to investigate criminal matters and who was under the direct control of the police department. The SRO passed the information to the assistant principals. There was an understanding that information would be brought to the SRO and he would delegate responsibility (for the less serious offenses) to the school. The school would then investigate those less serious offenses. There was also a "silent understanding" that the SRO would pass along information to school officials when the SRO could not act due to constitutional restraints. The school was acting as agents of police when they questioned and searched the Δ b/c the SRO "induced" them to take such actions. Enforcing the law or investigating criminal matters is outside the scope of a school official's administrative authority.
	State v. Tinkham 719 A.2d 580 (N.H. 1998)	Motion to suppress statements was denied when school principal and assistant principal questioned Δ in her office. The principal was informed by two student's that a student had MJ. The student was called to the principal's office questioned, and searched. That student stated

		that she bought the MJ from Δ. The MJ obtained from the search was taken to the police station. The principal told police that she'd be questioning Δ. The principal & assistant principal searched & questioned Δ in principal's office. Δ admitted to selling the MJ. While the principal must regularly conduct inquiries regarding violations of the law, the principal is not a law enforcement agent within the definition of Miranda. Further, the principal wasn't acting as an agent of police. The police didn't direct the principal in her course of action
New Jersey	**State In Interest of E.D.** 2006 WL 2074875 (N.J.Super.A.D.,2006) **UNPUBLISHED OPINION**	Motion to suppress was denied when a student was questioned by the principal in the vice principal's office in the presence of the assistant principal and a police officer b/c the principal wasn't acting on behalf of law enforcement. Although the principal and a uniformed officer not assigned to the school had reviewed surveillance videos together prior to questioning, there is no proof that the Officer prepared the principal's interrogation or told the principal what to ask. Nor did the Officer participate in the questioning which led to the incriminatory response. Accordingly, "the principal did not appear to be acting on behalf of law enforcement, but was endeavoring to ensure safety and discipline on school grounds, as opposed to furthering a police investigation for purposes of prosecution."
New Mexico	**Doe v. State** 540 P.2d 827 (N.M. Ct. App. 1975), *cert. denied*, 540 P.2d. 248 (N.M. 1975) (dissent can be found at 540 P.2d 834)	Motions to suppress were denied when a teacher (who saw the act) and principal questioned a student in a vacant classroom about him smoking a pipe (containing MJ) on school property. Miranda-type warnings re not necessary in cases involving in-school disciplinary matters. Moreover, confessions was voluntary and not improperly induced.
New York	**In re Daquan M.** 64 A.D.3d 713, 881 N.Y.S.2d 906) (N.Y. App. Div., 2nd Dept. 2009)	Motion to suppress denied. Δ was questioned solely by school personnel. Therefore, he was not being questioned by law enforcement officials and was not in custody for Miranda purposes.
	In re Daniel M. 67 A.D.3d 527, 888 N.Y.S.2d 496 (N.Y. App. Div., 1st Dept. 2009)	Oral statement as school properly suppressed b/c of failure to provide Miranda warnings. However, written statement at police station, after warnings, sufficiently attenuate from earlier statement. Initial questioning very brief (only one direct question about the incident), change in location, about 1 hour break, and able to confer with mother at station.
	In re Angel S. 758 N.Y.S.2d 606 (N.Y. App. Div. 2003)	Motion to suppress denied. Principal questioned Δ in the presence of fire marshals (who constitute police officers). The questioning was part of the school's own investigation, was conducted pursuant to school protocol, and wasn't done w/ police instigation, instruction or input. Accordingly, Miranda warnings not required. Moreover, even if done in conjunction with law enforcement, the interrogation wasn't custodial. A reasonable teenager in Δ's position would not have thought he was in custody while being asked questions by the principal in the principal's office.
	People v. Butler 725 N.Y.S.2d 534 (N.Y. Sup. Ct.	Statements made to dean admissible, but statements made to police officer not admissible. After the school cafeteria was cleared out, school safety officers saw Δ standing in cafeteria

	2001)	wearing a bandana, which was against school rules. Safety officers asked Δ for identification. When he couldn't produce i.d., they took Δ to the dean's office. On the way there, another person (wearing the same attire as Δ) approached safety officers. The safety officers asked him for id. He handed them i.d., and fled when they asked him to escort them to the dean's office. In a cubicle at the dean's office, Δ was questioned by the dean. Δ produced a card that was identical to the card produced by that other person in the hall. Δ didn't know the information on the card & claimed he had no other i.d. The dean asked the safety officers to search the Δ. The search revealed a handgun, & Δ was handcuffed. The dean, in the presence of school safety officers asked "is it loaded," to which the student responded "Yes." Later, a regular duty officer arrived at the school and asked where he obtained the weapon. The safety officer asked how he got into the school. The initial questioning by the school safety officer with regards to questioning was appropriate. Moreover, the dean was not required to provide Miranda warnings before questioning b/c the dean is a private individual and it wasn't a custodial interrogation; the dean's questions weren't asked in cooperation w/ or under the direction of police officers. The questions by the police officer, however, were aimed at obtaining evidence to be used in criminal investigation & required Miranda.
	In re Brendan H 82 Misc. 2d 1077 (N.Y. Fam. Ct. 1975)	Statements made by Δ to high school dean were not suppressed. Δ was charged w/ criminal mischief for rolling over the dean's car. Dean questioned Δ at school, & Δ was permitted to leave after questioning. The school official had no power of arrest, so Δ couldn't have reasonably believed he was in custody, and no custodial interrogation occurred. Moreover, specific facts of this case aside, the court held that "school officials interrogating students concerning misconduct occurring within the precincts of the school are not subject to Miranda, at least not when acting in concert with or as agents of the police."
North Carolina	**In re W.R.** 675 S.E.2d 342 (N.C. 2009)	Upholds trial court decision to admit statements. In this decision, the N.C. supreme court reverses the appellate court's decision to grant a motion to suppress statements. The appellate court, 634 S.E.2d 923 (N.C. Ct. App. 2006), held that a reasonable person in the juvenile's place would have believed he was restrained to the degree associated w/ formal arrest. Principal received a call from a student's parent about Δ bringing a weapon to school. Principal & assistant principal took Δ out of class, took him to the assistant principal's office, and began questioning him. The school resource officer joined in the questioning, which occurred for 30 minutes. The officer searched Δ, found nothing. After further questioning, Δ admitted that he had a knife at school the day before. Given totality of circumstances, including the presence of the resource officer, this was a custodial interrogation and Miranda warnings should have been provided. In reversing the appellate court, this court held that Δ did not make a motion to suppress or otherwise object when the admissions came into evidence, thereby failing to preserve the issue. B/c of the lack of findings relating to the role of the SRO and the nature of the interrogation, the Court was not in a position to find error in the trial court's admission of

		the statements.
	In re C.G. 673 S.E.2d 167 (N.C. Ct. App. 2009) **UNPUBLISHED OPINION**	Motion to suppress denied. Δ was questioned at school by police investigator. Only Δ and officer present. Officer told Δ he wasn't under arrest, was free to leave, and didn't have to talk to officer if he didn't want to. Δ sat closest to the door, no evidence of coercion. Officer never touched Δ, and Δ was allowed to go back to class at end of interview. As a result, this was not a custodial interrogation and Miranda warnings did not need to be provided.
	In re J.T.S. 698 S.E.2d 768 (N.C. Ct. App. 2010) **UNPUBLISHED OPINION**	Affirmed denial of motion to suppress. Related case to *J.D.R* below. . Δ allegedly started a fire in a high school's bathroom by lighting a paper towel and putting it in a pipe chase. After calling in a County Arson Task Force Investigator, the assistant principal examined surveillance videos and identified Δ as a suspect. Same facts as below, except Δ here was questioned by the assistant principal. Δ initially denied his involvement, but after seeing surveillance video that put Δ near the fire, Δ admitted his involvement. After Δ admitted his involvement, the assistant principal notified the Arson Investigator of Δ's statements, and then the Arson Investigator questioned Δ as well. The Investigator read Δ his *Miranda* rights before he began questioning Δ. The court held that the questioning performed by the assistant principal was not a custodial interrogation. The assistant principal was acting in his capacity as a school official for the purpose of ascertaining whether any school policies were violated. Although an SRO had been present during a substantial portion of the assistant principal's interview of Δ, the SRO's presence was inadequate to transform the questioning into a custodial interrogation. The court also relied on the inherent limitations on student freedom of movement in a school environment. Therefore, any statements made to the assistant principal were admissible.
	In re J.D.R. 699 S.E.2d 139 (N.C. Ct. App. 2010) **UNPUBLISHED OPINION**	Affirmed denial of motion to suppress. Related case to *J.T.S.* above. Same facts as above, except Δ here was questioned by the principal. The principal escorted Δ to his office and questioned Δ. Initially, Δ denied involvement, but then admitted to his involvement. The principal asked Δ to prepare a written statement. After the statement was prepared, the Arson Investigator came into the principal's office and read Δ his Constitutional Rights Warning/Waiver certificate and also explained the document to Δ's father upon his arrival at the school. The questioning by the principal was not custodial and therefore, the statements were admissible. The Arson Investigator was not present when Δ drafted his written statement, nor was the school resource officer (SRO). The principal explained it is the school's routine policy when investigating incidents to speak with the student and then have them write out a statement. Further, the principal was acting in his capacity as a principal and not as law enforcement while questioning Δ in order to ensure safety in the school.
	In re K.D.L. 700 S.E.2d 766 (N.C. Ct. App. 2010)	Reversed trial court's denial of motion to suppress. Δ should have been afforded his *Miranda* warnings and should have been afforded his right to have a parent present during interrogation pursuant to N.C. Gen.Stat. §7B-2101(2009). The court did not consider Δ's age, citing *JD.B.*, but rather just focused on the totality of the circumstances and whether it was objectively

		reasonable for Δ to believe he was functionally under arrest, regardless of age. Facts supporting that Δ was in custody: Δ knew he was suspected of a crime and was interrogated for 6 hours, generally in the presence of an armed SRO; Δ was frisked by the SRO and was transported in the SRO's vehicle to the principal's office in another building for questioning; and at no point was there any indication Δ was free to leave; the SRO remained close by for most of the day. Although the SRO did not question the Δ, but rather was present while the principal questioned Δ, the SRO's presence and "active-listening" increased the likelihood that the principal's questions would produce an incriminating response. The court also noted that unlike in *J.D.B.*, Δ was never given the *option* to answer the questions. Therefore, the court found that Δ was in custody during the interview. Since the SRO did not afford Δ his *Miranda* rights and did not afford Δ his right to have a parent present, the court held that the trial court violated Δ's constitutional and statutory rights by denying Δ's motion to suppress.
	Matter of Phillips 497 S.E.2d 292 (N.C. Ct. App. 1998)	Motion to suppress was denied. Assistant principal saw school money bag under the counter in the school administration office. Later, he saw Δ enter the school administration office. The secretary's back was turned. When she turned back to the desk, the Δ exited the office & the money bag was gone. While looking for the money, the assistant principal saw Δ exiting the bathroom. Assistant principal went into the bathroom & discovered the empty money bag. He found Δ, questioned her about the money, & she went into the bathroom and retrieved it for him. Miranda warnings not required before questioning by the assistant principal. Assistant principal is not a law enforcement officer, he didn't act as an agent of law enforcement, he has no arrest power, & he was questioning Δ for disciplinary purposes rather than criminal proceedings. The court further held that delinquency adjudication following a school suspension does not constitute double jeopardy; the primary purpose of suspension is the protection of other students, not the punishment of the offender.
North Dakota	None found	
Ohio	**In re G.J.D.** 2010 WL 2349608 (Ohio App. 11 Dist., June 11, 2010) **UNPUBLISHED OPINION**	Motion to suppress denied. 16-year-old Δ questioned by principal about "hit list." Court held that the principal was not acting as an agent of the police, as the principal did not discuss the matter with the police at any time prior to taking Δ's statement, and the police were not present during the questioning. Further, the use of a blank police statement form and sharing the statement with the police did not make the principal an agent of the police. Finally, because the principal was not acting as an agent of the police, the interrogation could not have been custodial, because Miranda does not apply to questioning by private citizens.
	In re A.A. 2009 WL 2488010 (Ohio App. 9 Dist. Aug. 17, 2009) **UNPUBLISHED OPINION**	Motion to suppress granted. Detective came to school seeking to question Δ about crime that occurred in community. An aide delivered Δ a hall pass, and Δ walked himself to an assistant principal's office, where 2 APs and the detective were waiting. The detective then asked Δ some questions about the incident. The court found that Δ was in custody: "A.A. was pulled out of his classroom and summoned to the office, where he was asked to sit in a small, closed

		room with three authority figures. . . He was not advised that he could call his parents or that he was free to leave. While the door of the office was not locked, a person in [Δ]'s situation would have known that, if he left before the assistant principals were finished with him, he could face adverse consequences, such as a detention, for walking the halls without a pass." As a result, the detective should have provided Miranda warnings.
	In re Haubeil 2002 WL 1823001 (Ohio App. 4 Dist., 2002) **UNPUBLISHED OPINION**	Motion to suppress statements denied. Principal contacted police w/ a report that a student may have a gun in school. When police arrived, Δ was already in principal's office. Police officer's conducted a pat down and interviewed Δ. Miranda warnings not required because Δ wasn't subject to custodial interrogation; there was no formal arrest & a reasonable person in Δ's position would have felt free to leave. "Ohio courts have generally found that the act of law enforcement officers questioning minors while they are at school does not amount to custodial interrogation where there is no evidence that the student was under arrest or told he was not free to leave."
	Matter of Gruesbeck 1998 WL 404516 (Ohio Ct. App. 1998) **UNPUBLISHED OPINION**	Motion to suppress denied. A private security guard at the high school interviewed Δ in his office b/c the guard was told by other student's that Δ was at the locker that caught fire. The guard questioned Δ in the presence of the assistant principal. Δ admitted to lighting a paper sack in the locker. Miranda warnings not required b/c questioning wasn't done under the direction of a police officer and questioning was brief. Moreover, Δ's statements were voluntarily given.
	In re McDonald 2007 WL 563089 (Ohio Ct. App. 2007) **UNPUBLISHED OPINION**	Motion to suppress denied. A black resident found a KKK note on a McDonald's box in her driveway. Police suspected Δ, who worked at McDonalds and lived nearby. Δ was questioned first at school, where he gave an inculpatory statement. Δ was read his Miranda warnings and indicated his understanding. Court held that the statement was voluntary. Although the room was windowless and he was alone with investigator, the court found that there was no evidence of coercion, deprivation of physical comfort, or any improper inducements. While Δ may have felt intimidated by the situation, there was no evidence to suggest that the circumstances were calculated to coerce a confession. Moreover, the absence of his parents, while a factor to consider, is not dispositive.
Oklahoma	**State v. M.A.L.** 765 P.2d 787 (Okla. Crim. App. 1988)	Motion to suppress statements granted b/c of failure to follow Oklahoma Statute which states that no information gained by questioning a child is admissible unless the questioning by a law enforcement officer or investigative agency is done in the presence of the parents or legal custodian of the child, and the child and parent has been fully advised of the child's legal rights. The assistant principal began an investigation after several burglaries occurred. He questioned several students, including Δ. Some students gave the assistant principal information about the Δ, so Δ was called into the office again. At that time, Δ confessed. Assistant principal called the police department. A police officer sat in the assistant principal's office while the assistant principal questioned Δ again. The officer then talked to the Δ, received a confession, and took

		the Δ into custody. Both confessions inadmissible pursuant to the Okla. statute; the confession made to the school principal also inadmissible pursuant to the statute b/c the principal was acting in an "investigatory capacity." According to the court, "[t]he purpose of the statute is defeated if officials are allowed to admit confessions into evidence merely because the juvenile was not in police custody."
Oregon	**State ex rel. Juv. Dept. v Killitz** 651 P.2d 1382 (Or. Ct. App. 1982)	Judgment reversed b/c motion to suppress statements should have been granted, and factual basis for jurisdiction derived entirely from statements. Δ was called into the principal's office. In the principal's presence, a uniformed/armed police officer questioned him about a burglary. The Δ made incriminating statements about the burglary, and was sent back to class. The following day, Δ was again questioned by the same officer. The statements were elicited in response to police questioning, so "interrogation" did occur. The interrogation was "custodial" within the meaning of *Miranda,* b/c the Δ wasn't free to leave (Δ was in school during regular hours being controlled to a great extent by school personnel), Δ was being questioned as a suspect rather than as a witness by an armed police officer, Δ didn't voluntarily go to the place of questioning.
	State ex rel. Juv. Dept. v Gage 624 P.2d 1076 (Or. Ct. App. 1980)	Motion to suppress denied. School principal discovered 1000 missing school lunch tickets. He was directed by students to Δ. Δ was called to the principal's office & interrogated by principal. Even assuming that the principal was a public official and that in-custody interrogation required the reading of Miranda warnings, this was not a custodial situation; principal investigating the absence of certain tickets for lunches at school, "I have serious doubts this would constitute a criminal interrogation."
	State ex rel. Juv. Dept. v Loredo 865 P.2d 1312 (Or. Ct. App. 1993)	Motion to suppress denied. 13-yr-old Δ was called into principal's office over school intercom. Δ went and was placed in principal's office, where he met only with a police officer. Officer's gun was hidden from view, but he showed his badge. Officer told Δ he was free to leave, he didn't have to answer any questions, and that he wasn't under arrest. Δ was also permitted to call his Children's Services Division counselor, for whom he left a message. Ct held that this didn't rise to level of "in custody" even though Δ had never been questioned by police before. Δ was in familiar surroundings in the principal's office, and was not subject to punishment for refusing to answer the officer's questions. The interview setting was thus "not compelling" and Miranda rights weren't necessary.
	State ex rel. Juvenile Dept. of Washington County v. Thai/Schmolling 908 P.2d 844 (Or. Ct. App. 1995)	Statement made during custodial interrogation should not have been admitted. However, ct ruled that it was harmless error in this case. Δ's younger sister complained of inappropriate sexual conduct by Δ. Δ's mom, suspecting that Δ may be questioned at school, called school and told Δ not to answer any questions. Officer came to school and interviewed Δ in a room by himself. After receiving Miranda warnings, Δ stated that he did not want to answer questions. He was then arrested. Δ asked why and officer told Δ about his sister's allegations. Δ then denied it and said it was his brother who did the touching. Officer did not re-Mirandize Δ and

		continued questioning him, ultimately eliciting inculpatory statements. Ct held that once Δ invoked his rights, the officer was required to re-issue Miranda warnings before continuing questioning.
Pennsylvania	**In re R.H.** 791 A.2d 331 (Pa. 2002)	Motion to suppress granted. School police officers found that someone had vandalized a high school classroom. The police suspected the Δ. They escorted appellant to the main building of the school, asked for his shoe to compare w/ the footprint left in the fire extinguisher residue in the classroom, found it was a match, & questioned Δ for 25 minutes. The Δ confessed and the police and his mother were called. Miranda warnings required. For purposes of Miranda, even though school police officers are employees of the school district, they are constitutionally indistinguishable from municipal police b/c they are permitted to exercise the same powers as municipal police while on school property & b/c they wear uniforms and badges. Moreover, Δ was subjected to custodial interrogation.
	In re Tracy 14 Pa. D. & C.3d 310 (Pa.Com.Pl. 1980)	Motion to suppress denied. A teacher/coach discovered a new warm-up jacket missing from his office. He alerted the faculty. Δ was spotted wearing a jacket that fit the description. The assistant principal questioned the Δ, and the police were notified. The statements made by Δ were not suppressed b/c the assistant principal is not a law enforcement officer and there was no police involvement prior to the meeting b/w the Δ and the assistant principal. As a private citizen, the assistant principal was not required to give Miranda warnings.
	In re D.E.M. 727 A.2d 570 (Pa.Super. Ct. 1999)	Motion to suppress denied. Police officers informed school officials about an anonymous tip saying Δ had a gun at school. Police then left, although the principal promised to contact the police if they discovered any information.. Δ was removed from class, brought to the principal's office, searched, & questioned. Δ admitted to having a gun in his jacket pocket. The police department was then contacted. School officials do not act as agents of the police then they conduct an independent investigation based upon information they receive from the police; the police did not coerce, dominate or direct the actions of the school officials. Moreover, school officials are not required to provide Miranda warnings before questioning about violations of the law and/or school rules.
Rhode Island	**In re Harold S.** 731 A.2d 265 (R.I. 1999)	Motion to suppress denied. Police officer informed school principal about an assault on school grounds conducted by Δ. The officer then left & the principal went to his office. After speaking to the victim, the principal contacted Δ's parents. After his father came to the school, Δ was summoned to the office and questioned, during which time Δ confessed. The principal was not acting as an agent during the questioning; the officer had left the school grounds, and did not ask the principal to speak with Δ. Because the principal was not acting as an agent of the police, and Δ was not subjected to questioning by law enforcement, it was unnecessary to provide Δ with Miranda warnings.
South Carolina	**In re Drolshagen** 310 S.E.2d 927 (S.C. 1984)	Motion to suppress denied. Δ was called into the principal's office at the request of investigating police officers. In the presence of officers, school officials questioned Δ about

		vandalism that occurred the weekend prior. Δ confessed. Police didn't ask any questions. The court denied motion to suppress b/c the fact that the questioning took place in the presence of police officers is not enough to render it a custodial interrogation.
South Dakota	None found	
Tennessee	**R.D.S. v. State** 245 S.W.3d 356 (Tenn. 2008)	Motion to suppress incriminating statements denied. Δ questioned by SRO, a "sworn law enforcement officer," on his way to his truck in the parking lot and again in the parking lot when marijuana found in his car. Miranda warnings not required b/c Δ was not in custody when he made the incriminating statement. SRO asked (but did not require) the student to walk out to his truck while school officials searched it, the student was questioned in the parking lot and while walking between the school and the parking lot, and the student was not confined to the principal's office or some other room in the school for questioning. Moreover, statement was voluntary, even under broader state constitutional provisions.
Texas	**In re V.P.** 55 S.W.3d 25 (Tex. Crim. App. 2001)	Motion to suppress denied. School District Police Officer (who was wearing a police uniform) assigned to the school was told by a student that Δ had brought a gun to school. The officer & hall monitor excused Δ from class & brought him to speak w/ the assistant principal. On the way there they said they had heard he had something illegal, which he denied. Once in the office, the officer left and the assistant principal questioned him. According to Δ, he immediately asked to speak to his mother and his lawyer. After further questioning, Δ confessed. Because the officer had left the office during questioning, Δ was not in custody during the questioning; the assistant principal was conducting a school investigation, not a criminal investigation. The fact that the tip came from the police officer did not transform the questioning into custodial interrogation. Because he was not in custody, Δ did not have the legal right to remain silent or to speak to his lawyer.
	In re D.A.R. 73 S.W.3d 505 (Tex. Crim. App. 2002)	Motion to suppress granted. After reports that he had a gun on school grounds, Δ was called the assistant principal's office. Δ was searched & questioned, he denied having a gun, & he returned to class. After additional reports came in, the SRO summoned Δ from class. A security guard brought Δ to SRO's office & Δ was questioned, in a closed office, by the SRO. Δ confessed. Miranda warnings were required b/c a reasonable 13-year-old in his position would have believed he was in custody; Δ would have known there was probable cause to arrest him, he was escorted to the office by a uniformed security guard, the office door was closed, only Δ and the SRO (a uniformed officer) were in the room, and Δ defendant was confronted with allegations by numerous students.
Utah	**State v. Largo** 473 P.2d 895 (Utah 1970)	Statements admissible. Counselors at the school conducted an investigation about an attack that occurred in a girls' dormitory, during which they questioned many students. Δ admitted to involvement. Miranda warnings not required b/c Δ was not in custody, the interrogation by the school authorities was not accusatory, and there was no focus on a particular suspect during the inquiry.

Vermont	None found	
Virginia	**J.D. v. Com.** 591 S.E.2d 721 (Va.Ct. App. 2004)	Motion to suppress denied. Δ was called into an associate principal's office to be questioned about thefts in the school. The principal came in & out during the questioning. The SRO was there during questioning, but remained silent. Miranda warnings not required b/c the SRO didn't direct questioning, the associate principal is not a law enforcement officer and was not acting as an agent of law enforcement, and the Δ was not in custody when questioned. Moreover, the statements were voluntary.
Washington	**State v. C.G.** 101 Wash.App. 1053, 2000 WL 1009028 (Wash. Ct. App. 2000) **UNPUBLISHED OPINION**	Motion to suppress denied. After receiving information that Δ gave marijuana to another student, vice principal performed a search and questioned Δ in the office. Δ confessed and the vice principal called the police to arrest Δ. "The vice principal's responsibility to maintain order and discipline in the schools does not translate into an allegiance with law enforcement sufficient to trigger Miranda."
	State v. D.J. 132 Wash.App. 1055, 2006 WL 1217215 (Wash. Ct. App. 2006) **UNPUBLISHED OPINION**	Motion to suppress denied. After incident on bus, Δ and other students taken to principal's office. While waiting outside office, SRO briefly spoke with Δ about the incident. Δ was then questioned by 2 school officials. Miranda warnings not required b/c Δ not in police custody to a degree associated with formal arrest. SRO's questions were open-ended and asked in a non-accusatory manner while in an open waiting room; assistant principal questioned outside the presence of the SRO.
	State v. D.R. 930 P.2d 350 (Wash. Ct. App. 1997)	Motion to suppress granted. Δ questioned by police detective in the assistant principal's office about an incident that occurred outside of school. While the detective informed Δ that he did not have to answer his questions, he did not provide Miranda warnings. Warnings required b/c Δ was in custody; not informed that he was free to leave, youth (14), naturally coercive nature of principal's office, and obviously accusatory nature of interrogation all factors pointing to custody.
	State v. R.B 92 Wash.App. 1054, 1998 WL 729678 (Wash. Ct. App. 1998) **UNPUBLISHED OPINION**	Motion to suppress denied. Δ questioned by plain-clothed police detective in office at Δ's school. Looking at totality of circumstances, this was not a custodial interrogation, and therefore Miranda warnings not required. Although not told her was free to leave, other factors outweigh this one factor; 17 years old, SRO (a familiar face) accompanied Δ to the office, questioned as a witness not a suspect in open-ended and non-accusatory manner, interview lasted only 6 or 7 minutes.
	State v. Lemon 100 Wash.App. 1014, 2000 WL 349765 (Wash. Ct. App. 2000) **UNPUBLISHED OPINION**	Motion to suppress oral statement to vice principal denied; motion to suppress written statement, in presence of police chief, granted (this part of the decision not challenged or discussed on appeal). Δ called into vice-principal's office in conjunction with school investigation into marijuana use. After questioning was under way, Chief of Police arrived and joined questioning. Miranda not required prior to Δ's oral statement as it was not in response to police questioning; school-district employees not required to give Miranda warnings prior to questioning a suspect.

	State v. J.S. 2008 WL 5377852 (Wash. Ct. App. 2008) **UNPUBLISHED OPINION**	Motion to suppress denied. Δ questioned by detective in counselor's office, with counselor and CPS investigator present. Detective wasn't in uniform, his gun wasn't visible, and Δ was seated next to the door. Detective told Δ he wasn't under arrest, wasn't req'd to answer any questions, was free to leave at any time, he couldn't get in trouble for refusing to talk or walking out, and that he would be allowed to return to his classroom afterward. Although Δ initially denied any misconduct, after he refused a lie detector test the officer responded by saying "I know you're lying, you know it, everyone here knows it." Court held that that since Δ was advised he was free to leave/not under arrest/didn't have to answer questions, and interview took place in counselor's office (not principal's) it leans toward not being a custodial interrogation. Because it was not custodial, Miranda warnings did not need to be provided. As to the coercion prong, court held that ample evidence supported trial court's conclusion of non coercion, including short time of interview, no physical injury to Δ, Δ wasn't mentally impaired, interview in counselor's office, detective told Δ he was free to leave, detective wasn't in uniform, didn't show his badge and gun/handcuffs were concealed.
West Virginia	None found	
Wisconsin	**State v. Schloegel** 769 N.W.2d 130, 319 Wis.2d 741 (Wis. Ct. App. 2009)	Motion to suppress denied. Δ suspected of possessing drugs. After no drugs found on person or in locker, principal, school liaison officer and police officer escort him to his car to conduct search. After items are found in his car, Δ makes incriminating statements. Court finds that Δ is not in custody for purpose of Miranda. Investigation was conducted primarily by the principal, not the officers. According to the court, "if in custody at all, [Δ] was in custody of the school and was not being detained by the police at that time." Accordingly, there was no Miranda violation.
	In Interest of Thomas J.W. 570 N.W.2d 586 (Wis. Ct. App. 1997)	Statements made by 8-year-old student questioned by an officer about a fire at school admissible when child was found to be a child in need of protection or services (CHIPS). A CHIPS proceeding is significantly different than a criminal proceeding, and, therefore, statements are admissible in court even though Miranda warnings not provided. As compared to delinquency or criminal proceeding, a CHIPS proceeding is focused on providing protection and services, not punishment.
	In re Clifford L.H. 597 N.W.2d 775; 1999 WL 308797 (Wis. Ct. App. 1999) **UNPUBLISHED OPINION**	Motion to suppress granted. The high school principal summoned Δ to his office at the request of a police officer. Upon arriving, Δ was met by the principal and a police officer in full uniform. When Δ entered the office, the principal left and shut the office door. Left alone with the officer, Δ was questioned about several fires. Officer did not inform Δ that he was not under arrest, that he could leave if he wanted, or that he did not have to answer any questions. After Δ denied his involvement, the officer confronted Δ with witness statements implicating Δ in one of the fires. Only after Δ admitted to setting the fire did the officer inform him that he could leave.

		In holding that this was a custodial interrogation, the court stated: "This court further notes the particularly restrictive environment of a school setting. In the general course of school discipline, a student summoned to a principal's office for questioning on a disciplinary matter would not feel free to leave and would in fact be subject to disciplinary measures if he did not come to the office. This restraint becomes more compelling when the interrogation is conducted alone by a fully uniformed police officer who questions a student about an alleged criminal matter. The record is devoid of any circumstances which would have indicated to [Δ] that he was free to leave the principal's office and refuse to answer [officer]'s questions. In light of the restrictive school setting, [Δ]'s youth, the isolated location of the interrogation, the officer's imposing appearance in full uniform and sole adult presence in the room, and the officer's failure to inform [Δ] he was free to leave, this court is persuaded that a reasonable person in [Δ]'s position would have considered himself to be in custody. Because this court concludes [Δ] was in custody and because [Δ] was not informed of his *Miranda* rights before being interrogated, the trial court's order suppressing [Δ]'s statements is affirmed.
	In re Jason W.T. 652 N.W.2d 133, 2002 WL 1767211 (Wis. Ct. App. 2002) **UNPUBLISHED OPINION**	Motion to suppress granted on appeal. Burglary occurred, and local officer knew Δ lived nearby. Officer, wearing uniform and visible firearm, went to Δ's school, found Δ in the hallway, and asked Δ to come to principal's office. Officer, who knew Δ was a special education student, had interviewed Δ once before in the presence of Δ's mom. Officer told Δ he was not under arrest and that he did not have to speak to officer. Officer also testified that he told Δ that he was free to go, but this statement, unlike the others, was not in his police report. After Δ denied involvement, officer referenced that previous interview took 2 – 2 ½ hours and that he did not want to be there that long again. Officer also "told him that we wanted to clear this matter up. And if he would be truthful with me, the sooner he would be truthful with me, the sooner he could go back to class." Δ then admitted to entering the house. Δ was never provided with Miranda warnings. Applying an objective test, but finding that age was relevant to such a test, the Court held that initially this started as non-custodial questioning. However, once the officer referenced the previous interview, and stated that he did not wish to do that again this time, the situation changed. This statement would make any reasonable 12 yr old think they were not free to leave until he told officer he had been involved in the burglary. Therefore, Miranda rights should have been administered at that time.
Wyoming	**CSC v. State** 118 P.3d 970 (Wyo. 2005)	Motion to suppress denied. Investigating an incident that tool place off school grounds 3 days earlier, police officers went to Δ's school and requested that he be removed from class. Δ was placed in a conference room with 2 investigators from the sheriff's office, a police detective, an SRO, and a school administrator. One investigator conducted almost all of the questioning. The court held that Miranda warnings were not required b/c Δ not in custody; Δ wasn't restrained, no promises or threats were made, the investigator's demeanor was calm, and the investigator repeatedly informed Δ that he did not have to answer questions, that he was free to leave and that he would not be arrested that day (he was arrested 4 days later). Moreover, the court held that the custody analysis is an objective one. While refusing to rule out the

		possibility that a suspect may be so young that age must be considered, that is not the case here, where the Δ is 16 years old.

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SELECTED STATE LAW CASES RELATING TO SEARCHES AND SEIZURES IN THE SCHOOL SETTING[1]

State	Key Case	Holding
U.S. Supreme Court	Safford Unified School District # 1 v. Redding, 129 U.S. 2633 (2009). 2009 U.S. LEXIS 4735 (U.S. June 25, 2009).	Applying the two part reasonableness test from *New Jersey v. T.L.O*. the Court finds that a school vice principal had reasonable suspicion to search a 13 year girl for common pain killers but that the subsequent strip search was neither justified nor permissible in scope and thus unconstitutionally violated her 4th Amendment protections. However, the Court ordered qualified immunity for the school officials citing a prior lack of clarity in the law.
	Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002)	An Oklahoma school implemented a drug testing policy for all students who enroll in extra-curricular activities. Expanding upon the analysis in *Vernonia School Dist. 47J v. Action*, 515 U.S. 646 (1995), the Court held that individualized suspicion is not always required to conduct a search on school grounds, as "special needs" exist in the public school context. The Court concluded that the random drug testing in question

[1] This chart highlights selected state law cases relating to search and seizure of students on school grounds. While we hope that this chart is thorough, it does not list every single case relating to this topic. Additionally, the summaries are just that – they are not an in-depth analysis of each case. Finally, the chart does not yet include federal decisions on this topic. We hope, however, that it is a useful starting point for your individual research in challenging school-based searches and seizures.

		was a reasonable way to fulfill the school's interest in preventing and deterring drug use among students, and that it did not constitute an illegal search and seizure.
	Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995)	An Oregon school district's policy authorizing random drug testing of students who participate in its athletic programs is upheld as constitutional under the 4th and 14th Amendments. Children in the temporary custody of the State, which is acting *in loco parentis*, have a decreased expectation of privacy. This is especially true with regards to student athletes who must conform to a number of additional school regulations and who share common locker rooms. The urinalysis tests required under the school district's policy are relatively unobtrusive because they are handled in a carefully regulated manner, do not distinguish between students, and only expose students as much as they would be exposed in any public restroom. Moreover, the interests of the State in deterring drug use in schools and in protecting student athletes from the consequences of drug use are compelling. In analyzing the constitutionality of the policy, the court looks to (a) the nature of the privacy interests; (b) the character of intrusion; (c) the nature and immediacy of concern and efficacy of solution.
	New Jersey v. T.L.O, 469 U.S. 325 (1985)	4th Amendment protections against unreasonable searches and seizures apply to public school searches. In searches conducted by school officials, neither a warrant nor probable cause is required. Instead, the school official must have reasonable suspicion to believe that the student is violating the law or a school rule. The Court set out a two part reasonableness test: the search must be justified at its inception and permissible in scope. However, the Court expressly reserved judgment on the appropriate legal standard for searches conducted by school officials in conjunction with or at the behest of law enforcement officials.
Alabama	Wynn By and Through Wynn v. Bd of Educ. Of Vestavia Hills, 508 So. 2d 1170 (Ala. 1987)	The teacher had reasonable grounds for suspecting the defendant of stealing money, and thus for performing the search. The search was not excessively intrusive and was reasonably related to the objective of the search.
Alaska	Shamburg v. State, 762 P.2d 488 (Alaska Ct. App. 1988)	School officials had reasonable grounds for the search of student's car, based on his activity and slurred speech. Reasonableness of the search was based on totality of the circumstances.
Arizona	State v. Serna, 860 P.2d 1320 (Ariz. Ct.	Public high school security guard employed by the school is an agent

	App. 1993)	of the high school principal. Although a state actor and subject to the requirements of the 4th amendment, standard for conducting a search is "reasonableness under all of the surrounding circumstances." Held that this search was reasonable.
	In re Appeal in Pima County Juvenile Action No. 80484-1, 733 P.2d 316 (Ariz. Ct. App. 1987)	High school principal had no personal knowledge that student was engaging in drug use or possession. Student was summoned from outdoor area where students go for a variety of reasons. Thus the principal's search of the minor's pockets was unreasonable at inception and the motion to suppress cocaine found in his pockets was granted.
Arkansas	State v. C.W., 374 Ark. 116 (2008)	When a fellow student reported that defendant had sold him marijuana, defendant was brought into school conference room where two police officers were waiting for him. They asked him to take off his shoes; a bag of marijuana was found in one shoe. They took him next door, arrested him, read him his Miranda rights and took him to a detention center. Circuit Court granted motion to dismiss b/c police officers had plenty of time and cause to get an arrest warrant prior to the search. After the motion was granted, the state decided to *nolle prosequi* the case, and then filed an interlocutory appeal. State's attempted interlocutory appeal is here dismissed because prior *nolle prosequi* order was final decision from which no interlocutory appeal is appropriate.
California	In re Randy G., 28 P.3d 239 (Cal. 2001)	"We do not decide whether the record supports that finding of reasonable suspicion because we conclude instead that the broad authority of school administrators over student behavior, school safety, and the learning environment requires that school officials have the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious, or harassing manner." Further, school security officer, who is not a member of law enforcement, is no different than a school official for purposes of this analysis and may also briefly detain and question a student without reasonable suspicion. Held that items found during a consensual search after a 10-minute "seizure" did not need to be suppressed because the seizure was not arbitrary and capricious.
	In re William G., 709 P.2d 1287 (Cal. 1985)	Supreme Court of California articulates reasonable suspicion standard for public school officials to search students. Assistant principal noticed

		student with calculator case that appeared to have an "odd looking bulge." After repeated efforts to get student to hand over calculator, assistant principal took it, forced it open, and found four baggies of marijuana, a small gram weight scale, and some zigzag cigarette papers inside. The court granted Δ's motion to suppress evidence because assistant principal had no reasonable suspicion to suspect that Δ was engaged in a proscribed activity justifying the search. Suspicion that Δ was tardy or truant did not justify a search of any kind.
	In re K.S., 183 Cal.App.4th 72, 108 Cal.Rptr.3d 32 (Cal.Ct.App. 2010) **Certified for Partial Publication**	When a school official independently decides to search a student and then conducts that search, the reasonable suspicion (TLO) standard applies, even if the police provide the information justifying the search and are present when it occurs. The extent of the police role in a student search will govern whether the TLO standard applied, with the determination being made by examining the totality of circumstances. In the unpublished portion of the decision, the court finds reasonable suspicion existed where the police received information from a reliable confidential informant that defendant possessed ecstasy pills hidden in a slit in his pants. The police, through the SRO, then passed this information along to school officials. Because the student was in PE class and not wearing his street clothes, the official searched defendant's PE locker, where he found pills in a slit in defendant's pants.
	In re Jose Y., 141 Cal. App. 4th 748 (Cal. Ct. App. 2006)	Pat-down search of defendants were proper. "Minor students may be detained without any particularized suspicion, as long as the detentions are 'not arbitrary, capricious, or for the purposes of harassment.' Searches of students on campus do not require probable cause to believe the student violated the law, but rather reasonable suspicion the student is violating or has violated a law, school rule, or regulation. Completely random searches of students who enter school grounds are authorized for the purpose of determining whether a weapon is being brought on campus." Additionally, the court found that since defendant was NOT a student of the school where he was found, he had a lesser privacy right than someone who would properly be on the grounds. The mere fact that he had no legitimate business on campus created a reasonable need to determine whether or not he posed a danger.
	In re Lisa G., 23 Cal. Rptr. 3d 163 (Cal.	Student accused of disrupting class, left to use the bathroom, returned

	Ct. App. 2004)	but was locked outside the classroom. Teacher was aware that the student was standing outside the door unable to reenter. She opened student's purse to find her student identification number so she could write a referral for the disruptive behavior, found a knife in the purse and called security. The motion to suppress the evidence was granted because teacher had no reason to suspect the student had a weapon on her or was otherwise engaged in a proscribed activity and thus the search was unjustified at its inception. Mere disruptive behavior does not authorize a school official to rummage through a student's belongings.
	In re William V., 4 Cal. Rptr. 3d 695 (Cal. Ct. App. 2003)	SRO assigned to school only needed reasonable suspicion to conduct the search of the student.
	In re Alexander B, 270 Cal. Rptr. 342 (Cal. Ct. App. 1990) **Overruled, in part, by In re Randy G., 28 P.3d 239 (Cal. 2001).**	Police officer who searched student at the request of the dean of students held to reasonable suspicion standard. Reasonable suspicion found where allegation by another student that someone in defendant's group had a gun. To the extent this case is inconsistent with respect to the detention of students, it is expressly disapproved in: *In re Randy G*., 28 P.3d 239 (Cal. 2001).
Colorado	Trinidad Sch. Dist. No. 1 v. Lopez By and Through Lopez, 963 P.2d 1095 (Colo. 1998)	Student suspended from high school marching band for refusal to submit to suspicion-less drug test sued school district and various district employees for injunctive and declaratory relief on ground that testing policy violated Fourth Amendment. This court applied the 3-factor test put forth in *Veronia*: (1st) "The nature of the privacy interest upon which the search here at issue intrudes"; (2nd) "The character of the intrusion that is complained of"; (3rd) "the nature and immediacy of the governmental concern at issue here, and the efficacy of the means for meeting it." Because this testing policy was not for a completely voluntary program (the kids signed up for a four credit music class), the students subjected had a higher privacy interest than the students in *Veronia*. Here, unlike *Veronia*, the intrusion here was negligible. The court further recognized extracurricular activities as a necessary component for furthering academic experience (getting into college), and thus, "being subjected to this type of search as part and parcel to that experience should give us pause before we accept wholesale the notion that drug abuse in the general student population requires such testing." The court found the searches unreasonable, in violation of the

		U.S. Constitution. NOTE: THIS CASE WAS DECIDED PRIOR TO THE USSC DECISION IN *EARLS*.
	People in Interest of PEA, 754 P.2d 382 (Colo. 1988)	Even though police officer was present, he did not take part in the investigation, and thus the test should concern the reasonableness of the search undertaken by the principal. Given the circumstances, the search and seizure of the marijuana was held to be reasonable, and did not violate student's Fourth Amendment rights.
Connecticut	Burbank v. Canton Bd. Of Ed., 2009 Conm. Super. LEXIS 2524 (Conn. Superior Ct. Sept. 14, 2009)	Parents sought to enjoin school board from using drug-sniffing dogs to conduct warrantless, suspicion-less, sweeps of school property. The parents further requested 48 hours notice of such sweeps in the future. Finding that the parents could not prevail on their claim, the court denied injunctive relief. Specifically, the court found that the overwhelming weight of authority does not support the position that these sweeps constitute a search, as a student does not have a reasonable expectation of privacy in the smells emanating from his locker or car.
Delaware	State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971)	High school principal was a state actor, but his search was reasonable under the circumstances, and thus the motion to suppress was denied. The principal had reasonable suspicion to search the student's jacket.
District of Colombia	NONE FOUND	
Florida	C.A. v. State, 977 So. 2d 684 (Fla. Dist. Ct. App. 2008)	A student who was taken to assistant principal's office, questioned, and told to empty his pockets and open his wallet and who complied with the order was "searched" for 4th Amendment purposes. A teacher's "hunch" or "intuition" is insufficient grounds for reasonable suspicion as a matter of law. Moreover, suspicion by association or transference is not reasonable suspicion.
	I.R.C. v. State**,** 968 So. 2d 583 (Fla. Dist. Ct. App. 2007)	Record supported finding that juvenile's consent to search of his bag by officer was voluntarily given, and not a mere acquiescence to police authority. ∆ was pulled out of classroom by deputy sheriff b/c he had received info that ∆ had cannabis on him. Officer told ∆ this, and asked ∆ for consent to search his bag and person. ∆ asserted that he felt that he had no choice but to consent and believed that if he had declined to consent he "would have been pinned to the ground and [his] bag would have been searched anyways." Additionally, the officer did not inform him that he was free to withhold his consent to the search. Although the "vulnerable subjective state of the person who

		consents," is undoubtedly relevant to the determination of voluntariness, Δ has pointed to no factors-such as his age, education, intelligence, or mental condition-that evidence such a vulnerable state. Nor has Δ pointed to any coercive circumstance or to any conduct by the deputy-such as a show of force, other threatening conduct, a prolonged detention, verbal threats, inveigling, or importuning-that provides an objective grounding for Δ's professed inability to decline the deputy's request to search. Search was therefore valid because consent was obtained.
	C.G. v. State, 941 So. 2d 503 (Fla. Dist. Ct. App. 2006)	Student passed out in bathroom and informed assistant principal of same after regained consciousness. Noticing that he appeared quiet and subdued and looked pale, the AP directed Δ to empty his pockets, which contained marijuana. Ct. suppressed the marijuana, finding that the AP had no reasonable grounds to believe Δ violated the law or school rules; Δ's appearance was entirely consistence with non-criminal behavior, such as illness.
	C.N.H. v. State, 927 So. 2d 1 (Fla. Dist. Ct. App. 2006)	Students at a "high risk" alternative school held to have waived a portion of their privacy rights in exchange, or in lieu of, confinement. Thus they enjoyed greater reduction in privacy rights than students at regular public schools. The searches are characterized as administrative searches, rather than searches for criminal activity implicated by the 4th amendment. In this context, a school policy of conducting daily suspicion-less but even-handed pat-down searches of students and searches of student purses was held to be constitutional. The school had a compelling governmental interest in conducting the searches and was not required to utilize the least intrusive means to accomplish its goal.
	A.H. v. State, 846 So. 2d 1215 (Fla. Dist. Ct. App. 2003)	School teacher could not understand Δ's speech when Δ was asked to provide his name. As a result, he felt that Δ could be on something. He reported his suspicion to the AP, who, along with a school resource officer, conducted s search. Search not justified at inception because it was based on "gut feeling" of one school official who had difficulty understanding the student; neither of the other adults had trouble understanding Δ. Moreover, Δ's consent not voluntary because he was a freshman in his second week at the school and did not feel he could refuse given the presence of the assistant principal and resource officer.

	State v. N.G.B., 806 So. 2d 567 (Fla. Dist. Ct. App. 2002)	Search by school resource officer requires only reasonable suspicion standard, not probable cause standard, when the investigation is initiated by the assistant principal who enlisted the school resource officer's assistance. The court notes that this case presents a conflict with decisions in the 1st District, which have referenced the probable cause standard.
	State v. Whorley, 720 So. 2d 282 (Fla. Dist. Ct. App. 1998)	Reasonable suspicion standard applied where school official conducted search in the presence of SRO. Reasonable suspicion found where fellow student informed school official that defendant was in possession of ecstasy.
	J.A.R. v. State, 689 So. 2d 1242 (Fla. Dist. Ct. App. 1997)	Handgun found during pat-down search by deputy sheriff, serving as an SRO, in the presence of school official. Court held that if a school official has a reasonable suspicion that a student is carrying a dangerous weapon, "that official may request *any* police officer to perform the pat-down search for weapons without dear that the involvement of the police will somehow violate the student's Fourth Amendment rights or require probable cause for such a search." Reasonable suspicion found to exist where there was a tip from a student that defendant was carrying a gun.
	State v. D.S., 685 So. 2d 41 (Fla. Dist. Ct. App. 1996)	Search conducted by an assistant principal in the presence of a Dade County School Police Officer. Held that probable cause not required; school police officer is a school official who is employed by the district School Board. "[A] search conducted by a school police officer only required reasonable suspicion in order to legally support the search . . . . even if the school police officer had directed, participated or acquiesced in the search…." Overrules *M.J. v. State*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981).
	T.J. v. State, 538 So. 2d 1320 (Fla. Dist. Ct. 1989)	Although a search based on accusations that the student might be carrying a knife may have been justified at its inception, when the principal opened the purse, saw no weapon, and opened a zippered pocket although she saw no bulges, the scope of the search exceeded that reasonably related to the circumstances justifying the search.
	F.P. v. State, 528 So.2d 1253 (Fla. Dist. Ct. App. 1988)	SRO, a member of the sheriff department, whose salary was reimbursed by the school board, was asked to conduct a search by an investigator from the police department. Held that the "school official exception" to probable cause requirement does not apply if search is

		done at the behest of the police.
	W.J.S. v. State, 409 So. 2d 1209 (Fla. Dist. Ct. App. 1982)	Reasonable suspicion is not necessary to detain a student and take him "to be checked out" on school property.
Georgia	State v. Young, 216 S.E.2d 586 (Ga. 1975)	Search by assistant principal did not violate 4th amendment rights of student, nor did the exclusionary rule apply. Balancing test set out between interests of the school official and those of the student's right to privacy. Court divided into 3 groups who make searches: government actors, private persons, and government law enforcement officers. In this case, search by assistant principal did not violate 4th Amendment rights. Bright-line rule is that if police officer is involved in any manner, the search must have probable cause; otherwise, only need reasonable suspicion.
	Ortiz v. State, 703 S.E.2d 59 (Ga. Ct. App. 2010)	An officer's mere presence in the room, without more evidence of his involvement, does not indicate police participation thereby implicating the exclusionary rule. The officer came in during the search and was merely a security resource, not partaking in the search and not physically touching the defendant. Because the exclusionary rule does not apply to school officials absent additional orders from law enforcement, the district court did not err in denying Ortiz's motion to suppress. *See Young*,
	State v. K.L.M., 628 S.E.2d 651 (Ga. Ct. App. 2006)	When a certified law enforcement official participates in a search, even if under the direction of a school official, the officer must have probable cause to conduct the search.
	State v. Scott, 630 S.E.2d 563 (Ga. Ct. App. 2006)	City of Atlanta police officer, assigned to work at the school as an SRO should be treated as a police officer, not a school official, and thus is subject to probable cause standard for a search. In this case, probable cause did not exist.
	Patman v. State, 537 S.E.2d 118 (Ga. Ct. App. 2000)	Police officer working on special assignment in a school is held to the probable cause standard for searches of students. In this case, the officer had probable cause based on the circumstances of the case.
Hawaii	In Interest of Doe, 887 P.2d 645 (Haw. 1994)	Held that the school official had reasonable grounds for searching the student's purse, the search was not unreasonable or intrusive, and the search was based on individualized suspicion. Thus, the search did not violate the 4th Amendment.
Idaho	NONE FOUND	
Illinois	People v. Dilworth, 661 N.E.2d 310 (Ill. 1996)	Search conducted by school liaison officer, a police officer employed by the Joliet police department and assigned full-time to the school as

		a member of its staff. Officer held to reasonable suspicion standard when acting on own behalf, or at behest of school officials. Held that the search and seizure of the illegal drugs passed the reasonableness test, and the officer's search did not violate the 4th Amendment.
	People v. Kline, 824 N.E.2d 295 (Ill. App. Ct. 2005)	Removal from the classroom by the Dean, accompanied by a police officer, constituted a seizure for purposes of the 4th amendment. Role of the officer in this removal is unclear, and the court held that this was a seizure even if the dean was acting alone. The anonymous tip upon which the seizure was based did not constitute reasonable suspicion. In evaluating a tip for whether it constitutes reasonable suspicion, courts should consider the detail provided, whether the informant witnessed any criminal activity, and whether the tip accurately predicts future activity of the suspect.
	People v. Williams, 791 N.E.2d 608 (Ill. App. Ct. 2003)	SRO, an officer with the Hinsdale police department, held to reasonable suspicion standard when searching car on school premises, even where the search was related to a burglary investigation. The court noted, though, that the school was intimately involved with the investigation and the search, and that the search was conducted by an SRO who had been assigned to the school for 4 years, not an outside officer. Search found to be justified at inception and permissible in scope, and therefore reasonable.
	In re J. A., 406 N.E.2d 958 (Ill. App. Ct. 1980)	Dean of students who was also part-time juvenile officer was acting as a school officer when he was on the premises in that capacity and acting under the direction of school superiors and not the police. Thus the proper standard by which the search should be measured is reasonable suspicion, which was present.
Indiana	Myers v. State, 839 N.E.2d 1154 (Ind. 2005)	"[W]here a search is initiated and conducted by school officials alone, or where school officials initiate a search and police involvement is minimal, the reasonableness standard is applicable. And the ordinary warrant requirement will apply where 'outside' police officers initiate, or are predominantly involved in, a school search of a student or student property for police investigative purposes." Found that school officials initiated and conducted the searches (searches conducted after alert of cars from drug sniffing dogs) and that the police only assisted with the searches. Thus, the reasonableness test was applied. Found the search to be both reasonable at its inception and reasonable in scope.

	Linke v. Northwestern School Corp, 763 N.E.2d 972 (Ind. 2002)	Policy of random drug testing for athletes, participants in extracurricular activities, and students who drove themselves to school upheld.
	State v. C.D., --N.E.2d.--, 2011 WL 1640164 (Ind. Ct. App. May, 2 2011)	Court on appeal found trial court erred when it granted C.D.'s motion to suppress evidence. "Where a school official initiates a search of a student's personal property, the search must be reasonable under the circumstances". To determine the reasonableness under the Fourth Amendment, the court considers: (1) whether the action was justified at its inception; (2) whether the search conducted was reasonably related in scope to the circumstances that justified the interference in the first place. C.D. appeared impaired and a school security officer told the official that he thought C.D. was under the influence of marijuana. Thus, a search of C.D.'s backpack for controlled substances was justified, and the search was reasonably related in scope to the circumstances.
	D.M. v. State, 902 N.E.2d 276 (Ind. Ct. App. 2009)	A few days after drugs and weapons had been discovered on some students, a teacher overheard Δ tell other students that he "had a stack." While all of the students were out of the classroom, the teacher searched several students' jackets, including Δ's. In Δ's jacket, the teacher found 17 credit cards and a set of car keys. The search was held to be not justified at inception because the teacher could not articulate a reasonable ground for suspecting that the individual student possessed contraband. Δ's delinquency adjudication was vacated.
	T.S. v. State, 863 N.E.2d 362 (Ind. Ct. App. 2007)	Police officer employed by Indiana Public School Police acted in his capacity as a security officer, akin to an SRO, and held to reasonable suspicion standard. Even though the officer acted alone, he had the intent to involve the school dean, thereby demonstrating a concern with a possible violation of school rules and not just a criminal violation. Reasonable suspicion standard only applies when the SRO is acting "to further educationally related goals." While the request to leave class constituted a seizure, seizure based on anonymous tip held to be reasonable. "Our holding contemplates that a seizure in schools may be unreasonable without being arbitrary, capricious, or undertaken for the purpose of harassment". Id. at 375.
	D.L. v. State, 877 N.E.2d 500 (Ind. Ct. App. 2007)	School police officer was justified in patting down a student found in high school hallway during a non-passing period in order to find his identification card, even though student denied having ID card on him,

		because the rule the officer was trying to enforce, that the student present his ID upon request, was designed to protect the students. During the pat down, the officer saw the student put something down his pants. Under these circumstances, the search was reasonable at its inception and reasonably related in scope to the circumstances justifying it.
	D.B. v. State, 728 N.E.2d 179 (Ind. Ct. App. 2000)	Pat-down search by school police officer held to be reasonable because officer smelled smoke coming from bathroom stalls, observed student with another student in a single stall, and neither student responded to officer's inquiry as to what they were doing in the stall. The search was reasonably related to the objectives of the search as the pat-down was minimally intrusive and once officer found the marijuana the officer ceased her search.
Iowa	State v. Jones, 666 N.W.2d 142 (Iowa 2003)	Search conducted of student's high school locker found constitutional. Students have legitimate expectation of privacy in the contents of their locker. However, search as part of annual school-wide cleanout of lockers was permissible, even without individualized suspicion. Students right to privacy in the contents of their lockers must be balanced against the schools need to maintain safety and a secure environment. The search in this case was consistent with these objectives and therefore constitutional.
Kansas	In re L.A., 21 P.3d 952 (Kan. 2001)	School assistant vice principal and school security guard searched student based upon a tip from another student. Held to reasonable suspicion standard and found that the search was justified at its inception and reasonable in scope.
	State v. Burdette, 225 P.3d 736 (Kan. App. 2010)	Although two sheriffs deputies weer in the room during the search, they did not participate in the search in any way thus, the search was not a law enforcement search needing probable cause. Using the RSS, the court found that the search of defendant's pocket was justified at its inception (because the student appeared impaired) and reasonable in scope.
Kentucky	Lamb v. Holmes, 162 S.W.3d 902 (Ky. 2005)	Teachers and administrators entitled to qualified immunity relating to "strip searches" of middle school girls during gym class. While details of searches contradictory, law not clearly established at time of search, thereby entitling the teachers to qualified immunity regardless of whether constitutional.
	Rone v. Daviess County Board of	Strip search of student to locate illegal drugs performed by school

	Education, 655 S.W.2d 28 (Ky. App.1983)	officials without presence of law enforcement officers. Held that there were reasonable grounds for the school official to perform the search and the student's privacy was never severely interfered with, and thus the search was reasonable.
Louisiana	State v. Taylor, 50 So.3d 922 (La. App. 4 Cir. 2010)	Court applied a two-prong test from New Jersey v. T.L.O., 469 U.S. 325 (1985) where (1) The search must be justified ("there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school") AND (2) The scope of the search must be reasonable ("the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction"). The State has the burden of proving that the warrantless search was reasonable. Here, where the recovery school officer found defendant smoking cigarettes in the bathroom, there was not enough evidence to justify the personal search of defendant's shoes for contraband and thus the search was not reasonable. The court reasoned that shoes are not a likely place to hide cigarettes, and thus searching this part of the defendant was not within the reasonable scope of a search.
	State ex rel. K.M., 49 So.3d 460 (La. App. 4 Cir. 2010)	"We find that the motion to suppress was properly denied, as the police officer had reasonable suspicion that K.M. was trespassing on school property and had authority to seize the knife pursuant to the plain view doctrine and affirm." The plain view doctrine is an exception to the rule that a search and seizure conducted without a warrant is presumed unreasonable. Seizure of evidence under the plain view doctrine is permissible when: (1) there is prior justification for an intrusion into the protected area; and (2) it is immediately apparent without close inspection that the items are evidence or contraband. Court found that it was justified because K.M. was trespassing (defendant did not have mandatory school uniform on) and was reasonable under the plain view doctrine (defendant voluntarily opened her purse and officer saw the knife).
	State v. Barrett, 683 So.2d 331 (La. App. 1 Cir. 1996)	Officers, in the presence of the school principal, searched for drugs using drug detection dogs. During the search, defendant was asked to empty his pockets. Officer was a member of the school board's drug detection team as well as a deputy with the sheriff's office. When she conducted the search, she was acting in her capacity as a law

		enforcement officer, not a school security guard. Nonetheless, the court held that "[t]aking into account the decreased expectation of privacy defendant had as a student, the relative unobtrusiveness of the search, and the severity of the need met by the search, we conclude the type of search conducted in this case (wherein defendant was asked to empty his pockets and leave the room) is reasonable and hence constitutional."
Maine	NONE FOUND	
Maryland	In re Patrick Y., 746 A.2d 405 (Md. 2000)	Held that lockers are school property, so students have no reasonable expectation of privacy in their lockers. School principal & another school official searched middle school lockers after being informed by an SRO that there might be drugs "in the middle school area." They found a knife & beeper in defendant's book-bag, left in his locker. Held that school officials did not need probable cause or reasonable suspicion to search defendant's locker.
	In re Devon T., 584 A.2d 1287 (Md. Ct. Spec. App. 1991)	Search performed by school security guard, in the presence of school principal, was held to articulable suspicion test. A lower standard is used because the guard is not a trained police officer, and the school has a special interest in protecting its students.
	In re Dominic W., 426 A.2d 432 (Md. Ct. Spec. App. 1981)	Maryland legislature requires school officials to have probable cause before searching students. Here the assistant principle was not looking for contraband, nor had sufficient reason to suspect this student over a number of others, thus he did not have probable cause. Moreover, the exclusionary rule applies to searches conducted by school officials.
Massachusetts	Commonwealth v. Lawrence L., 792 N.E.2d 109 (Mass. 2003)	Held that the memorandum between the police and the school principal requiring the school officials to report criminal behavior did not make the principal an agent of the police, and thus school officials were not acting as agents of law enforcement in conducting a search. Under the 4th amendment, the school official must only demonstrate that the search was reasonable in all its circumstances. Because it found probable cause to exist, the court declines to decide whether the Mass. Constitution requires a more stringent standard.
	Commonwealth v. Damian D., 752 N.E.2d 679 (Mass. 2001)	School official conducted "administrative search" of student for violating school rules relating to truancy, and found marijuana. Because school officials had no evidence that the student was in possession of contraband, the search was not reasonable at its inception; there was no reason to believe that the search would uncover evidence that the

		student was violating the school rules.
	Commonwealth v. Snyder, 597 N.E.2d 1363 (Mass. 1992)	Based upon a tip from another student, school officials searched defendant's locker for marijuana. Relevant test under US constitution is whether the search of the locker is reasonable in all the circumstances. Court does not decide relevant standard under Mass. Constitution because probable cause existed.
	Commonwealth v. Carey, 554 N.E.2d 1199 (Mass. 1990)	School official searched defendant's locker after another teacher received a tip from two students in his class that defendant had shown them a gun. Held that school official had probable cause to conduct the search, and the search followed the reasonableness standard. Court declines to rule on whether students have an expectation of privacy in their lockers. Search of the locker was reasonable at its inception and in its scope. *Case contains a good overview of locker decisions in other jurisdictions.*
	Commonwealth v. Smith, 889 N.E.2d 439 (Mass. App. Ct. 2008)	Search of a student in which a .380 caliber handgun was justified at its inception because the student had evaded the front door metal detectors, was found in an unauthorized area, and failed to follow his usual practice of dropping his belongings in the school administrator's office. The scope of the search was reasonably related to its objective because the official took his jacket, noted that it was heavy, and found the handgun in the pocket of the jacket. In applying the Mass. Constitution, the court classified the search as administrative, noted the limited intrusiveness, and held that the search satisfied the reasonableness requirement of Article 14.
Michigan	People v. Ward, 233 N.W.2d 180 (Mich. Ct. App.1975)	Based upon information from a teacher that defendant had been seen selling pills, the court held that the principal in this case had reasonable suspicion that the defendant had drugs on his person, and thus was justified in having defendant empty his pockets.
Minnesota	In re Welfare of S.M.L, 2006 WL 2255834 (Minn.App.) UNPUBLISHED DECISION	Search conducted by school official comports with 4th amendment if there are reasonable grounds to believe the search will produce evidence of a violation of the law or a school rule. Search conducted based upon reasonable suspicion that student was in possession of tobacco products in violation of school rules. Weapon found during that search. Surrender of cigarettes did not dissipate suspicion. Search was both justified at its inception and permissible in scope.

Mississippi	Covington County v. G.W., 767 So.2d 187 (Miss. 2000)	Held that school officials did not need a warrant before performing a search of vehicle on school grounds, if the search was reasonable at its inception and did not exceed the scope of reasonableness. It did not matter that the SRO was present with the school official when the search was conducted. In this case, there was reasonable suspicion to believe the student was drinking in the parking lot before class, and the search was related to this suspicion.
	S.C. v. State, 583 So.2d 188 (Miss. 1991)	Referred to both federal and state constitutional standards. Held that the school officials had reasonable suspicion to search student's locker for handguns, and that the search was reasonable and within the scope of their authority, where another student reported that defendant offered to sell him handguns.
Missouri	NONE FOUND	
Montana	NONE FOUND	
Nebraska	In re Michael R., 662 N.W.2d 632 (Neb. Ct. App.2003)	Case of first impression in Nebraska. School official hears student mention "big bags," which he testified is a common slang term for marijuana at the school. Student is asked to empty his pockets, nothing is found except his car keys. School officials proceed to search his car and find marijuana in the glove compartment. Search of car is upheld as constitutional; when search of person came up empty, it was reasonable to believe that Δ had contraband in his vehicle. Moreover, the school policy manual specifically informed students that their vehicles may be searched if there is a suspicion that the student is in possession of illegal drugs.
	In re Adrian B., 658 N.W.2d 722 (Neb. Ct. App. 2003)	Pat-down search of student would not be constitutional because student was not free to leave and police officer had no reason to suspect that the student was armed or dangerous. However, because the student was a runaway and the police officer was taking temporary custody of a juvenile the search incident to such custody was constitutional.
Nevada	NONE FOUND	
New Hampshire	In re Juvenile 2006-406, 931 A.2d 1229 (N.H. 2007)	Based on two reports that student had a "pot pipe" from a teacher overhearing student conversations, the principal searched the student's locker and found the pipe, vegetative matter believed to be marijuana, a lighter and some cash. The search is held to be justified at inception and reasonable in scope.
	State v. Heirtzler, 789 A.2d 634 (N.H.	When a teacher told the school resource officer that she had observed

	2001)	students passing something in science class, the officer determined he did not have enough information to investigate further but he told the assistant principal about the matter. When the assistant principal questioned and searched the student as a result of this information and in line with a prior agreement with the resource officer, the court found they were acting as agents of the police and suppressed the evidence.
	State v. Tinkham, 719 A.2d. 580 (N.H. 1998)	Standard for warrantless searches by school officials under both US and State constitution is whether search is reasonable under all the circumstances. It must be justified at its inception and reasonably related in scope to the circumstances giving rise to the search. Fellow student's statement that she had purchased drugs from defendant during the previous day gave rise to reasonable suspicion, and the school principal was justified in searching the student to prevent future drug use and drug sales in the school and to confiscate any drugs in defendant's possession. Search of bag and request to remove shoes and socks and empty pockets reasonable in scope.
	State v. Drake, 662 A.2d 265 (N.H. 1995)	Case of first impression for NH. School officials are not held to the same standard as law enforcement officers. Warrantless search of student by public school officials is constitutional if reasonable under all the circumstances. Held that interests of the school have to be balanced with the student's legitimate interest in privacy. In this case, the search was reasonable where principal received a tip that student would be carrying drugs, there were existing suspicions of the student's drug involvement. Scope was permissible when search started with a request to empty pockets and only expanded to a search of his knapsack when drugs were found in his pocket.
New Jersey	State v. Best, 987 A.2d 605 (N.J. 2010)	A public school administrator needs only to satisfy the lesser reasonable grounds standard, rather than the probable cause standard, to search a student's vehicle parked on school property. Another student who appeared to the school nurse to be on drugs admitted to buying pill from Δ. When search of Δ's person and locker did not yield the contraband, school officials searched the car. The court found reasonable suspicion existed and the search was narrowly focused on Δ's car, the only other place the pills could have been hidden.
	Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ., 826 A.2d 624 (N.J. 2003)	Random drug testing applied to all students participating in athletic and non-athletic extracurricular activities as well as those with school

		parking permits upheld under U.S. and N.J. Constitutions. Students have reduced privacy expectations within public schools, the way the urine testing was administered made it minimally intrusive, and the state has a strong interest in attempting to reduce the major drug problem in schools.
	State v. Biancamano, 666 A.2d 199 (N.J. Super. Ct. App. Div.1995) **Overruled, in part, by State v. Dalziel, 867 A.2d 1167 (N.J. 2005)**	Upheld a school official's search of defendant on reasonable suspicion grounds, when another student informed the official that defendant was distributing drugs.
	Desilets v. Clearview Regional Bd. Of Educ., 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993)	Policy of searching all students' hand luggage prior to boarding bus for field trip upheld under both US and NJ constitutions. No need for individualized suspicion. Search justified at its inception due to unique burdens placed on school personnel in context of field trip and reasonably related to school duty to provide discipline, supervision, and control.
	State v. Moore, 603 A.2d 513 (N.J. Super. Ct. App. Div. 1992)	Prior order to suppress evidence was reversed because there was report from specific student that defendant possessed a controlled dangerous substance (CDS), defendant had been disciplined for a CDS previously, and the principal did not search the book bag until after defendant denied that it was his. As a result, the search was both justified at its inception and reasonable in scope.
New Mexico	Kennedy v. Dexter Consol. Sch., 10 P.3d 115 (N.M. 2000)	Two students, one male, one female, were strip-searched in a vain attempt to recover a missing ring. Search was held to have violated their constitutional rights, and neither school district nor school officials were entitled to qualified immunity b/c the right not to be strip-searched in school without being individually suspected of wrongdoing was clearly established, as was the right to be free from searches that are not justified at their inception and are clearly excessive in scope.
	State v. Jonathon D., 2009 LEXIS 402 (N.M. Ct. App. Sept. 23, 2009) UNPUBLISHED OPINION	Search found reasonable when student was caught smoking outside of school and called into the principal's office. Student contends that he surrendered a package of cigarettes and a lighter, making any further suspicion of student having contraband unreasonable. Court disagreed, stating that the surrender or discovery of contraband material on a student creates more reasonable suspicion and supports further search to ensure that student does not have additional contraband. Further, requiring student to remove his shoes and raise his pants legs was minimally intrusive.

	State v. Pablo R., 137 P.3d 1198 (N.M. Ct. App. 2006)	Search of student and his jacket found to be unsupported by reasonable suspicion. Two campus aides saw him walking down the school hallway without a pass and thought he appeared fidgety and nervous when confronted. However, there was no reason to suspect that he was engaging in criminal behavior nor was there a logical connection between the search and the suspected violation of being out of class without a pass; the search would not likely have yielded any evidence of the suspected violation.
	State v. Crystal B., 130 N.M. 336 (N.M. Ct. App. 2000)	Assistant principal received information that the student was smoking in a school alleyway considered "off campus." When assistant principal arrived in the alley, he did not see cigarettes or smell smoke but took the student into his office and conducted a search anyway. Court held search was unreasonable when school official had no reasonable suspicion that student was breaking school rules.
	In re Josue T., 989 P.2d 431 (N.M. Ct. App. 1999)	SRO, when asked to conduct search at behest of school officials, held to reasonable suspicion standard. It was reasonable for school officials to seek assistance for SRO when they reasonably suspected the student to be in possession of a dangerous weapon. The search was justified at its inception, and permissible in scope and not excessively intrusive.
	In re Eli L., 947 P.2d 162 (N.M. Ct. App. 1997)	Search found unreasonable when police officers are called to disperse gang members who are yelling obscenities at school principal, group disperses, and the officers search one student who may or may not have been in the group because he was dressed like a gang member and gave gang whistle when police approached. Both officers testified that there was no criminal activity taking place. Court emphasized that the requirement of individualized particularized suspicion is crucial.
	State v. Tywayne H., 933 P.2d 251 (N.M. Ct. App. 1997)	Search conducted by police officers hired as security for an after-school dance. For searches performed solely by police officers, even at the direction of school officials, probable cause is required (not reasonable suspicion). Held that the search was not justified under any traditional exceptions, and the search should not have been allowed because no probable cause existed. As the search was performed solely at the discretion of police officers, it did not matter that the search took place at school. Search was not supported by exigent circumstances or justified pursuant to *Terry* exception.
	Doe v. State, 540 P.2d 827 (N.M. Ct.	Held that the search by school official was a reasonable search, and

	App.1975)	based on reasonable suspicions where the student had been seen smoking a pipe on school grounds in violation of school rules.
	State v. Michael G., 748 P.2d 17 (N.M. Ct. App. 1987)	Search of ∆'s locker was upheld based on report of unidentified fellow student that ∆ had tried to sell him marijuana. Statement from unidentified student was not mere rumor or belied, but specific eyewitness account.
New York	In re Gregory M., 627 N.E.2d 500 (N.Y. 1993)	For searches by school officials, reasonable suspicion standard applies under both US and NY State constitutions. However, investigative touching of outside of bag requires less suspicion, as the search is far less intrusive than that contemplated by TLO, there is only a minimal expectation of privacy in the outside of the bag, and the interest of the school in preventing weapons on school grounds is a governmental interest of the highest urgency. Hearing of metallic thud was enough to support the investigative touching, even though did not rise to the level of reasonable suspicion.
	People v. Scott D., 315 N.E.2d 466 (N.Y. 1974)	∆ had been under watch for 6 months for suspicion of dealing drugs based upon information from confidential sources. On the day of the search, a teacher observed ∆ enter bathroom with another student twice in same hour, and considered this behavior unusual. ∆ was brought to the office and searched by the security coordinator, who found drugs. Despite the lessened standard for searches in school, the observed behavior, even combined with the information from the confidential source and an additional observance of ∆ having lunch with another suspected student, was not enough to warrant the search.
	In re William P., 870 N.Y.S.2d 664 (N.Y. App. Div. 2008)	Court held that allegation that student was illegally searched by school principal, based on information from another student that juvenile had gun in his book bag, did not lay out a factual scenario which, if credited, would have warranted suppression. A suppression hearing was unnecessary inasmuch as respondent's "allegations on their face 'did not lay out a factual scenario which, if credited, would have warranted suppression." According to respondent, the principal confronted him based on information from another student that respondent was in possession of a gun in his book bag. "Under ordinary circumstances, a search of a student by a ... school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating ... the law". Here, respondent "did not present a

		legal basis upon which to challenge the [principal's] conduct"
	Matter of Derek G., 808 N.Y.S.2d 721 (N.Y. App. Div. 2006)	Pistol found in a bag located at Δ's feet in a classroom. Δ then taken to principal's office, where he is searched by an officer who finds ammunition in his pants pocket. Δ's motion to suppress the ammunition is denied; officer had probable cause to arrest Δ after finding the bag with the pistol, and the search of Δ's pants was incidental to Δ's arrest.
	In re Steven A., 764 N.Y.S.2d 99 (N.Y. App. Div. 2003)	School safety agent, a civilian employee of the police department assigned exclusively to school security held to reasonable suspicion standard. Reasonable suspicion existed in this case, where the safety agent received a call about intruders, and observed the student drop and retrieve an object that the agent reasonably believed to be a weapon.
	People v. Butler, 725 N.Y.S.2d 534 (N.Y. App. Div. 2001)	School Safety Officer acted appropriately in questioning defendant about his identification and bringing him to the dean's office when no such identification could be produced. Safety officer had at least reasonable suspicion that defendant either was not a student and was trespassing or was cutting class. Search was also appropriate under reasonable suspicion standard. Moreover, because the weapon was found during a frisk, the search would have been appropriate on even less than reasonable suspicion.
	In re Haseen N., 674 N.Y.S.2d 700 (N.Y. App. Div. 1998)	School officials, while conducting a pat-down of all students on the morning of Halloween, felt a hard object and identified the butt of a gun on Δ. A school safety officer then conducted a more thorough search and retrieved the gun. Given egg-throwing incidents each of the 3 previous Halloweens, the administrative pat-down search was reasonable. Moreover, once the gun was observed, the follow-up search was predicated on individualized suspicion.
	In re Ronnie H., 603 N.Y.S.2d 579 (N.Y. App. Div. 1993)	Δ was stopped in hallway by AP who suspected Δ was wearing a stolen jacket. Δ agreed to leave the jacket, but asked to retrieve his things from the pocket. AP reached into pocket and found drugs. Was not a search as AP was merely complying with request from Δ to return property. Even assuming it was a search, it was a reasonable one.
	In re Ana E., 2002 WL 264325 (N.Y. Fam. Ct. 2002)	School safety officials held to reasonable suspicion standard, not probable cause. In this case, it did not matter that the officials were employed by police department, under police department supervision, and considered themselves peace officers. School authorities initiated

		the investigation that led to the search. Moreover, "the distinction between school police under the control of the police department and school police under the control of the Board of Education is irrelevant for present purposes. In either case the school safety officers work at the school and are part of the school community." Reasonable suspicion was present in this case.
North Carolina	In re D.L.D., 694 S.E.2d 395, (N.C. Ct. App. 2010)	Reasonable suspicion standard applied. Sheriff department employee (Corporal Aleem) assigned to school, along with school official, observed live video surveillance of students in bathroom. Scene looked "fishy" and the two went to check on it. After arriving and observing additional behavior, the Corporal frisked defendant, and found 3 bags of marijuana. A subsequent search turned up money. According to the court, the Corporal was "working in conjunction with and at the direction of [school official] to maintain a safe and educational environment at [school], namely, keeping [school] drug-free. Therefore, the reasonableness standard under T.L.O. applies." The court finds both searches to be reasonable under the circumstances described, finding them to be justified at their inception and not unnecessarily intrusive.
	In re S.W., 614 S.E.2d 424 (N.C. Ct. App. 2005)	Reasonable suspicion as it applies to SRO. Court held the search of juvenile in weight room on school grounds by deputy who was acting in conjunction with school officials was reasonable. Deputy Carpenter was exclusively a school resource officer, who was present in the school hallways during school hours and was furthering the school's educational related goals when he stopped the juvenile. When the juvenile walked by Deputy Carpenter in the hall, Deputy Carpenter smelled a "strong odor" of marijuana. After having smelled marijuana on the juvenile, Deputy Carpenter had reasonable grounds to suspect a search would turn up evidence the juvenile violated or was violating the law and or school rules. The search was reasonably related to the objective and was not excessively intrusive in light of the age and gender of the juvenile and the nature of the suspicion.
	In re J.F.M., 607 S.E.2d 304 (N.C. Ct. App. 2005), *review denied*	SRO, a deputy sheriff, was working in conjunction with school officials in detaining student. The court held that since the SRO intended to bring the student immediately to the administrative office at the school, he was acting under the authority of the school officials, and so reasonable suspicion standard should apply. "[W]e hereby find

		applicable the *T.L.O.* standard to incidents where a resource officer, acting in conjunction with a school official, detains a student on school premises." The detention in question was based upon reasonable suspicion.
	In re D.D., 554 S.E.2d 346 (N.C. Ct. App. 2001), *appeal dismissed and disc. review denied*, 558 S.E.2d 867 (N.C. 2001)	Applied reasonable suspicion standard to principal's search and seizure of non-school juveniles on the school campus. 3 officers were present during the search, and actively participated in the search of some of the students. The reasonable suspicion standard should apply where officers act in conjunction with school officials. Moreover, the officers' involvement was minimal, and was done to further the principal's obligation to maintain a safe learning environment.
	In re Murray, 525 S.E.2d 496 (N.C. Ct. App. 2000)	Applied reasonable suspicion standards when an assistant principal asked a school resource officer to handcuff a student, enabling the official to search the student's bag. Because the search itself was conducted by a school official, probable cause did not apply.
North Dakota	NONE FOUND	
Ohio	In re K.K., "Slip Copy" 2011 WL 198379 (Ohio Ct. App. 2011)	Appellant argued the search by school officials was done at the specific request and direction of law enforcement and therefore it was an illegal warrantless search. An officer contacted the school to provide a tip that defendant may possess illegal drugs. The school AP then searched defendant and found illegal substances. According to the court, despite the origination of the tip the school made a decision to search the defendant independent of the police. As a result, the correct standard was reasonable suspicion and this search was reasonable.
	Mayeux v. Bd. of Educ., 2008-Ohio-1335 (Ohio Ct. App. 2008)	Student appealed suspension decision based upon evidence found during search. After receiving report that student was dealing drugs, officials sought to search him. Student consented to pat-down search, which revealed several hundred dollars in his wallet. Upon informing student that officials would search his car, student told them there was nothing to find except cigarettes. Both the questioning and the search were reasonable; the informant was trustworthy and the student himself admitted that he had cigarettes in the car. The suspension was upheld.
	In re Sumpter, 2004-Ohio-6513 (Ohio Ct. App. 2004)	Search held justified at inception and reasonable in scope when teacher heard "knocking" sound in hallway that he understood to mean that a student was letting others know he had something to sell. Δ

		subsequently asked to use the bathroom and left the classroom. Δ called to office and searched by a police officer at the instruction of the assistant principal. Applied reasonableness standard even though school police officer conducted the search, b/c officer was acting as agent or designee of the school official who directed the search.
	State v. Adams, 2002 WL 27739 (Ohio App. 5 Dist. 2002) UNPUBLISHED OPINION	Search by school officials held to be reasonable based on all of the circumstances of the case. The official had reasonable suspicion that he would find marijuana on the student.
	In re Dengg, 724 N.E.2d 1255 (Ohio Ct. App. 1999)	"[T]his court expressly refuses to apply the 'reasonableness' standard to justify a warrantless search performed by police." A canine sniff of the exterior of an object, however, does not constitute a search for purposes of the 4th amendment. Moreover, once the canine alerted to a particular car, the officers had probable cause to search that car.
	In re Adam, 697 N.E.2d 1100 (Ohio Ct. App. 1997)	In this case, the search conducted by the school official of the students locker was reasonable and within the scope of authority. However, the broad rule allowing search of any students' locker violated students' 4th Amendment rights. Searches conducted outside the reasonable suspicion standard were not justified.
Oklahoma	F.S.E. v. State, 1999 OK CR 51, 993 P.2d 771 (Okla. Crim. App. 1999)	Assistant principal's search of student's car was based upon reasonable suspicion where official smelled marijuana on student and student admitted there was marijuana in his car. Search was reasonable at its inception and search of trunk was justified in scope after student told story about flat tire.
Oregon	In re M.A.D., __ P.3d __, 2010 WL 2303256 (Or. June 10, 2010), reversing In re M.A.D., 202 P.3d 249 (Or. Ct. App. 2009)	Holding that, in accordance with the State Constitution, *under some circumstances* school officials may search a school student in accordance with the reasonable suspicion standard. "[W]hen school officials at a public high school have a reasonable suspicion, based on specific and articulable facts, that an individual student possesses illegal drugs on school grounds, they may respond to the immediate risk of harm created by the student's possession of the drugs by searching the student without first obtaining a warrant." The court does not adopt a per se reasonable suspicion standard. Instead, it limits the decision to the specific facts of the case before it: "this case involved a present threat to school safety and a search by a school official acting in his official capacity and in furtherance of his responsibility to protect students and staff; our holding is based on those circumstances. The permissibility of other kinds of searches by

		school officials is not before us." On the specific facts of the case, the Court found that the school official had reasonable suspicion to believe that the student possessed illegal drugs and sought to distribute those drugs to other students earlier that morning.
	In re Stephens, 27 P.3d 170 (Or. Ct. App. 2001)	Student enrolled in an alternative school had signed form agreeing to random searches of his person, his possessions and his locker. Search of a pager found within his locker upheld because it was within the scope of the student's consent and because there was no evidence that he was coerced into signing the form.
	Matter of Gallegos, 945 P.2d 656 (Or. Ct. App.1997)	Does not decide relevant standard for search by school officials under Oregon Constitution because found that school officials had probable cause to conduct the search. Probable cause was based upon named informant known to school officials and believed by them to be credible. Informant's poor attendance record and poor grades did not make him any less credible.
	Matter of Rohlffs, 938 P.2d 768 (Or. Ct. App.1997)	Where school officials removed a student from his class, searched his locker (consensual) and then took him to a classroom and asked him to empty his pockets, the removal goes beyond the restraints and investigation that the compulsory attendance laws would justify. Accordingly, the detention constituted a "stop" and required reasonable suspicion. Reasonable suspicion existed where two students independently told official that the defendant probably had drugs on him. Official also knew that student was in drug counseling. Final search of jacket, conducted by police officer who had been called in, was voluntary. State constitution does not appear to have been raised.
	In re Finch, 925 P.2d 913 (Or. Ct. App. 1996)	Search of Δ's jacket after he was involved in a fist-fight was found to be unreasonable. Following dissolution of the fight, which occurred across the street from the school, the assistant principal took Δ back to his office and noticed that his jacket seemed heavier than normal so he reached into the pockets of the jacket. The court held that Δ's participation in the fight and the additional weight in his jacket did not constitute a reasonable inference that he possessed a weapon which would allow the assistant principle to search his belongings.
	State ex. Rel Juvenile Dept. of Washington County v. Dubois, 821 P.2d	Case of first impression for Oregon; 4th Amend. requires reasonable suspicion for school official to conduct search of student. Does not

	1124 (Or. Ct. App.1991)	decide applicable standard under Oregon Constitution because found that "the collective knowledge of the school authorities gave them probable cause to believe that the child was in possession of a gun."
Pennsylvania	Com. v. Cass, 709 A.2d 350 (Pa.1998)	School district's decision to conduct a general search will be deemed reasonable "if the decision to search was motivated by an interest of the school district, the importance of which outweighed the intrusion into the privacy rights of the students suffered as a result of the search." Held that students maintain a limited expectation of privacy in their lockers. Canine sniff of lockers is not considered a search. Search of individual lockers was a minimally intrusive invasion of the students' privacy interest. Given the minimal intrusion and the heightened school interest, the school-wide search of lockers was reasonable under both US and state constitutions.
	In re J.N.Y., 931 A.2d 685 (Pa. Super. Ct. 2007)	Teacher reported to vice principal that she had been told that the student was in possession of marijuana pipes, but could not recall or name the informants. The vice principal stopped the student while she was waiting for her bus, brought her to her office and threatened to call the police if she did not allow him to search her purse. The subsequent search was found to have been unsupported by reasonable suspicion; effectively anonymous tips, without more, do not provide sufficient reasonable suspicion to conduct a search.
	In the Interest of A.D., 844 A.2d 20 (Pa. Super. Ct. 2004)	Two students reported money and other items were stolen from their purses during gym class. Search of group of students sitting in bleachers where the purses were left was upheld as reasonable because the assistant principal only searched limited group of students, searched them in private area, and had female hall monitor search the female students.
	In re D.E.M., 727 A.2d 570 (Pa. Super. Ct. 1999)	School officials did not act as agents of the police, even though they conducted their investigation based upon information obtained from the police; the agency inquiry must focus on whether the police coerce, dominate or direct the actions of school officials. Moreover, school officials are not required to have reasonable suspicion before "merely" detaining and questioning a student about an anonymous rumor that he had a gun at school.
	Com. v. J.B., 719 A.2d 1058 (Pa. Super. Ct. 1998)	Individualized searches of public school students by school officials, including school police officers (employees of the Philadelphia School District), are subject to reasonable suspicion standard under both

		federal and state constitutions. Search reasonable where officer observed student staggering, with his eyes closed, in the hallway between classes. When the officer asked if the student was OK, his eventual answer was provided with slurred speech.
	In Interest of F.B., 658 A.2d 1378 (Pa. Super. Ct. 1995)	Case involved police officers conducting metal detector screenings at school. Found that the school's interest in ensuring security far outweighs the juvenile's privacy interest. Since the officers followed a uniform procedure for each search, and did not arbitrarily choose the student, the search was held to be reasonable.
	In Interest of S.F., 607 A.2d 793 (Pa. Super. Ct. 1992)	Plainclothes police officer for the School District of Philadelphia held to reasonable suspicion standard. Search of pockets reasonable at inception and in scope when officer observed furtive conduct of student, including quickly hiding a clear plastic bag and wad of money in his pocket.
	In Interest of Dumas, 515 A.2d 984 (Pa. Super. Ct. 1986)	Held that a student had a reasonable expectation of privacy in his school locker and the school official did not have reasonable suspicion to search the student's locker. Once school official seized cigarettes from student, he had no reason to believe that a search of the student's locker would turn up additional cigarettes. Further, official could not articulate suspicion that may locate marijuana in the locker.
Rhode Island	NONE FOUND	
South Carolina	In Interest of Thomas B.D., 486 S.E.2d 498 (S.C. Ct. App.1997)	Reasonable suspicion test does not apply to searches by police officers on school property, where the police were not acting on behalf of or as agents of the school, and were not connected to the school. However, the search in this case was permissible under the plain view doctrine.
South Dakota	NONE FOUND	
Tennessee	R.D.S. v. State, 245 S.W.3d 356 (Tenn. 2008)	Case of first impression in TN. "[T]he reasonable suspicion standard is the appropriate standard to apply to searches conducted by a law enforcement officer assigned to a school on a regular basis and assigned duties at the school beyond those of an ordinary law enforcement officer such that he or she may be considered a school official as well as a law enforcement officer, whether labeled and 'SRO' of not. However, if a law enforcement officer not associated with the school system searches a student in a school setting, that officer should be held to the probable cause standard. The case was remanded to determine officer's role at the school. The facts indicated

		that the officer was a deputy sheriff, and that she was called an SRO. The record was not clear, though, about the officer's role in the school. Long list of factors for the trial court to consider in making this decision. *Good recap of the law in other states.*
	State v. R.D.S., 2009 LEXIS 440 (Tenn. App. June 16, 2009)	Probable cause required for search by SRO in this particular case. On remand from 245 S.W.3d 356, the trial court found that the SRO was a school official, thereby needing only "reasonable suspicion" to search a student's car. The appellate court here reversed. Finding that the SRO did not have any duties apart from those of a law enforcement officer, the court held that the SRO needed probable cause to search the vehicle. The court remanded to determine whether SRO had probable cause to search student's car.
Texas	Coronado v. State, 835 S.W.2d 636 (Tex. Crim. App. 1992)	Reasonable suspicion standard applied where sheriff's officer assigned to school, along with school official, conducted searches of student. Court found that post-pat-down searches of the student's car and locker were not reasonably related in scope to the circumstances which initially justified the search and were excessively intrusive in light of the infraction (skipping school).
	In the Matter of D.H., 306 S.W.3d 955 (Tex. App. 2010).	A canine search was conducted at a Texas high school where students were required to leave their belongings in the classroom and step out into the hallway while the search was conducted. The court held the defendant's 4th Amendment right against unlawful seizure was not violated when she was required to leave her backpack in the classroom. Assuming such a requirement constitutes a seizure under the 4th Amendment, it was constitutionally permissible given the student's relatively minor privacy interest implicated by leaving the bag behind, the low level of intrusion involved in the inspection, the limited amount of information gathered, the school's high interest in preventing drug use, and the school's custodial and tutelary responsibilities for its students.
	In re P.P., 2009 Tex. App. LEXIS 892 (Tex. App. 2009)	During a routine search of all students as they entered school, drugs were found on Δ. Court categorized this routine search as administrative and found it to be reasonable. Δ signed a consent to be searched daily prior to registering at the alternative school. Moreover, in light of students' diminished expectation of privacy in school, the search was relatively unobtrusive and met the needs of the school.
	In re. A.H.A., 2008 Tex. App. LEXIS	After approaching two freshmen in an area off-limits to freshmen, the

	9715 (Tex. App. 2008)	AP smelled marijuana on their hands. AP searched Δ and found bag of marijuana. During search, AP placed thumb in Δ's waistband, between pants and gym shorts. Δ did not contest that the search was justified at its inception, but claimed that it was excessive in scope. The court rejects Δ's contention that this was a near-strip search and finds that the scope of the search was reasonably related to the circumstances that justified the original inference.
	In re B.R.P., 2007 Tex. App. LEXIS 6805 (Tex. App. 2007)	AP received information that Δ was buying and selling drugs. Court found the search both justified at its inception and reasonable in scope. The tip in this case was from a student known by the AP, the tip contained "predictive information" that could be verified, and the tip was not the only basis for the search, which was also predicated on suspicious behavior observed by the AP. Given that the basis for the search was that Δ was suspected of carrying drugs, the scope of the search was reasonable.
	In re A.T.H., 106 S.W.3d 338 (Tex. App. 2003)	Austin Police Officer stationed at high school conducted a pat-down search of a student based upon an anonymous tip that students were smoking marijuana. Whether a school police officer conducts a search for contraband or conducts a part-down weapons frisk, the officer must have reasonable suspicion. In finding a lack of reasonable suspicion, the court states that an anonymous tip, standing alone, may justify the initiation of an investigation but rarely provides the reasonable suspicion necessary to justify an investigative detention or search; corroboration must be present.
	Russell v. State, 74 S.W.3d 887 (Tex. App. 2002)	Police officer assigned to the high school had reasonable suspicion to suspect that a search would turn up evidence that defendant had violated or would violate either the law or school rules. Moreover, pat-down search of pockets in baggy shorts reasonably related to objective of determining whether student had a weapon and not excessively intrusive. Court rejected the State's argument that a pat-down search on school grounds did not necessitate reasonable suspicion.
	Shoemaker v. State, 971 S.W. 2d 178 (Tex. App. 1998)	School official, also the victim of credit card theft by defendant, searched defendant's locker. Official found to be acting under state authority (not as private citizen) and held to reasonable suspicion standard under US and Texas constitutions. Search of locker valid at inception and reasonably related in scope. Moreover, based upon school locker policy, school officials regularly searched lockers either

		for purpose of random checks or in response to reports of contraband. After search, official did not remove items, but reported to police department. Police officer conducted subsequent search of the locker. Court found that this search was also justified from its inception and reasonably related in scope.
	Wilcher v. State, 876 S.W.2d 466 (Tex. App. 1994)	Police Officer for the Houston Independent School District held to reasonable suspicion standard. Search for weapon was reasonable from its inception and was reasonably related in scope to the circumstances which justified interference in the first instance.
	Coffman v. State, 782 S.W.2d 249 (Tex. App. 1989)	School official had reasonable suspicion for conducting the search, based on student's prior propensity to get into trouble, being in the hall without a pass and returning from an area where thefts had previously occurred.
Utah	State v. Hunter, 831 P.2d 1033 (Utah Ct. App. 1992)	Case of first impression for Utah, dealing with college campus search of dorm rooms. Held that the right to privacy in the dorm room did not protect student from search of the dorm by school officials who had reasonable suspicion. Room-to-room searches of dorm rooms in response to incidents of vandalism, etc, deemed reasonable exercise of university's authority to maintain the educational environment.
Vermont	NONE FOUND	
Virginia	Smith v. Norfolk City Sch. Bd., 46 Va. Cir. 238 (Va. Cir. Ct. 1998).	Facial challenge to school board policy allowing for random metal detector scans of students in order to search for weapons is denied. The policy is upheld as reasonable despite lack of individualized suspicion prior to the searches because the discretion of school officials is limited and the intrusion of the metal detectors is minimal. Court cites reduced privacy expectations of students in public schools and compelling state interest from *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).
Washington	York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995 (Wash. 2008)	Supreme Court of Washington acknowledged the decision in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), but held that random drug testing of student athletes violates Washington's State Constitution. The Court further declined to adopt a special needs exception to the warrant requirement.
	State v. McKinnon, 558 P.2d 781 (Wash. 1977)	Search by school official found to be reasonable, by looking at the interests involved and the evidence against defendants. School official held to reasonable suspicion standard, not probable cause. Even though the tip to the school official came from the chief of police, and

		the official called the police upon finding drugs, joint action was not present. The following factors are relevant in determining whether school officials had "reasonable grounds" for a search: "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." *State v. McKinnon*, 558 P.2d 781 (Wash. 1977).
	State v. C.Z.-J., 2007 Wash. App. LEXIS 2733 (Wash. Ct. App. 2007)	School official in private alternative school searched Δ after observing suspicious conversation and behavior. Court upheld search as reasonable, and specifically held that a "student's history is a specific factor that may establish reasonable grounds to support a school official's search of a student."
West Virginia	State ex. Rel Galford v. Mark Anthony B., 433 S.E.2d 41 (W.Va. 1993)	While school social worker had reasonable and articulable suspicion to justify a search of the student, a strip search of the student for missing money was unreasonable in scope, as it was excessively intrusive. While stealing money cannot be condoned, it does not begin to approach the threat to other students posed by the possession of drugs or weapons.
	State v. Joseph T, 175 W. Va. 598; 336 S.E.2d 728 (W. Va. 1985)	Search of student's locker for alcohol was justified at its inception when another student had alcohol on his breath and admitted to drinking beer at defendant's house on the way to school. The discovery of marijuana was "reasonably related" to the search for alcohol. Thus the search was supported by reasonable suspicion and did not constitute a violation of the student's constitutional right against unreasonable searches and seizures.
Wisconsin	In Interest of Angelia D.B., 564 N.W.2d 682 (Wis. 1997)	Search done by school liaison officer. Held to reasonable suspicion standard where officer became involved in the investigation at the request of school officials, and continued to act in conjunction with school officials, on school grounds. Search for weapons in this case found to be reasonable.
	In Interest of Isiah B., 500 N.W.2d 637 (Wis. 1993)	After a weekend in which two incidents involving gunfire occurred on school premises, the principal ordered random searches of student lockers, consistent with the school's written policy that lockers are school property and subject to inspection. After 75-100 other locker searches were conducted, the Δ's locker was searched and a weapon and some cocaine were found in his jacket. The search was upheld

		based on the ∆'s reduced privacy expectations regarding his school locker and the school's need to ensure student safety.
	State v. Schloegel, 2009 Wisc. App. LEXIS 357 (Wis. Ct. App. 2009)	Student with prior drug charge consented to search of his person and book bag based on anonymous tip, and no contraband was found. However, school officials then informed him it was school policy that they could search his car if they had reasonable suspicion and the student opened the vehicle at their request. The court held that searches on school grounds need to be supported only by reasonable suspicion and that school parking lots constitute school grounds. Applying the reasonable suspicion test, the court found that the search was justified at its inception and reasonably related in scope.
	In Interest of L.L., 280 N.W.2d 343 (Wis. Ct. App. 1979)	For search of a student by a teacher, lower standard of reasonable suspicion, not probable cause, should be used. Student's expectation of privacy balanced against school's interest in order and teacher's ability to educate. The court determined that the exclusionary rule applies to juvenile proceedings, that a teacher is a state agent because he was maintaining order and discipline in the school, and the search had to meet reasonable suspicion standard. Teacher was permitted to use previous incidents and behavior of student, along with observations of student, as part of reasonable basis to believe that an immediate search was necessary. Even though search was for weapons, marijuana did not affect the reasonableness of search.
Wyoming	NONE FOUND	

EVIDENCE BLOCKING

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 . . ." ▪

Evidence Blocking*

Jonathan Rapping**

* The term "evidence blocking" and the ideas set forth in this paper come from my colleague and mentor at the D.C. Public Defender Service, Jonathan Stern. Mr. Stern honed the practice of evidence blocking to an art. There is not a concept in this paper that I did not steal from Mr. Stern, including examples presented. He deserves full credit for this paper.

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I. Facts of the World v. Facts of the Case

If a tree falls in the woods and no one is there to hear it, does it make a sound? We may confidently answer, "yes." However, we cannot, with certainty, know what exactly it sounded like. Scientists might estimate what the sound would have been based on whatever factors scientists use, but that will be an approximation. They may disagree on the density of other vegetation in the area that would affect the sound, or the moisture in the soil that may be a factor. Perhaps the guess will be close to the actual sound. Perhaps not. We can never know for sure. A trial is the same way. It is a recreation, in a courtroom, of a series of events that previously took place. There are disagreements over factors that impact the picture that is created for the jury. The picture painted for the jury is affected by biases of the witnesses, the quality and quantity of evidence that is admitted, and the jury's own viewpoint. In the end, the picture the jury sees may be close to what actually occurred or may be vastly different.

Understanding that the picture that is painted for the jury is the one that matters is central to the trial lawyer's ability to be an effective advocate. It is helpful to think of facts in two categories: facts of the world and facts of the case. The first category, facts of the world, are the facts that actually occurred surrounding the event in question in our case. We will never know with certainty what the facts of the world are. The second category, facts of the case, are the facts that are presented at trial. It is from these facts that the fact-finder will attempt to approximate as closely as possible the facts of the world. The fact-finder will never be able to perfectly recreate a picture of what happened during the incident in question. How close the fact-finder can get will be a function of the reliability and completeness of the facts that are presented at trial.

II. The Difference Between Prosecutors and Defense Attorneys

By understanding that the outcome of the trial is a function of the facts of the case, we have a huge advantage over the prosecution. The prosecutor tends to believe he knows the "truth." He thinks the facts of the world are perfectly reflected by his view of the evidence known to him. When the facts of the case point to a conclusion that is different from the one he believes he knows to be true, the prosecutor is unable to adjust. He can't move from the picture he has concluded in his mind to be "true." Therefore, he renders himself unable to see the same picture that is painted before the jury at trial. The good defense attorney understands she is incapable of knowing the "truth." She focuses on the facts of the case. She remains flexible to adjust to facts that are presented, or excluded, that she did not anticipate. In that sense she is better equipped to see

the picture the jury sees and to effectively argue that picture as one of innocence, or that at least raises a reasonable doubt.

The ability to think outside the box is one of the main advantages defense attorneys have over prosecutors. It is a talent honed out of necessity. We necessarily have to reject the version of events that are sponsored by the prosecution. They are a version that points to our client's guilt. We must remain open to any alternative theory, and proceed with that open mind throughout our trial preparation.

Prosecutors generally develop a theory very early on in the investigation of the case. Before the investigation is complete they have usually settled on a suspect, a motive, and other critical details of the offense. In the prosecutor's mind, this version of events is synonymous with what actually happened. In other words, the prosecutor assumes he knows the "truth." The fundamental problem with this way of thinking is that all investigation from that point on is with an eye towards proving that theory. Instead of being open minded about evidence learned, there is a bias in the investigation. Evidence that points to another theory must be wrong. When it comes to a witness who supports the government's theory but, to an objective observer, has a great motive to lie, the prosecutor assumes the witness is truthful and that the motive to lie is the product of creative defense lawyering. This way of thinking infects the prosecution at every level: from the prosecutor in charge of the case to law enforcement personnel who are involved with the prosecution. Whether the prosecution theory ultimately is right or wrong, this mid-set taints the ability to critically think about the case.

Good defense attorneys don't do this!!! We understand that the "truth" is something we will almost certainly never know and that, more importantly, will not be accurately represented by the evidence that makes it into the trial. We understand that a trial is an attempt to recreate a picture of historical events through witnesses who have biases, mis-recollections, and perceptions that can be inaccurate. We know trials are replete with evidence that is subject to a number of interpretations and that the prism through which the jury views this evidence depends on the degree to which, and manner in which, it is presented. In short, as defense attorneys, we understand that a trial is not about what "really happened." Rather, it is about the conclusions to which the fact-finder is led by the facts that are presented at trial. This may closely resemble what actually occurred or be far from it. We will never know. As defense attorneys we deal with the facts that will be available to our fact-finder. To do otherwise would be to do a disservice to our client.

For example, imagine a case that hinges on one issue, whether the traffic light was red or green. The prosecutor has interviewed ten nuns, all of whom

claim to have witnessed the incident in question. Each of the ten nuns insists that the light was green. The defense has one lone witness. This witness says the light was red. At trial, not a single nun shows up to court. The only witness to testify to the color of the light is the lone defense witness, who says it was red. The prosecutor sees this case as a green light case in which one witness was wrong. The jury, on the other hand, sees only a red light case. It knows nothing of the nuns. The only evidence is that the light was red. As defense attorneys we must also see the case as a red light case. These are the only facts of the case. Even assuming the ten nuns were correct, that the light was green, those facts are irrelevant to this case and the jury that will decide it.

III. The Art of Evidence Blocking

The defense attorney's job is to shape the facts of the case in a manner most favorable to her client. She must be able to identify as many ways as possible to keep facts that hurt her client from becoming facts of the case. Likewise, she must be thoughtful about how to argue the admissibility of facts that are helpful to her client's case. This requires a keen understanding of the facts that are potentially part of the case and a mastery of the law that will determine which of these facts become facts of the case.

As a starting proposition, the defense attorney should consider every conceivable way to exclude every piece of evidence in the case. Under the American system of justice, the prosecution has the burden of building a case against the defendant. The prosecution must build that case beyond a reasonable doubt. The facts available to the prosecution are the bricks with which the prosecutor will attempt to build that case. At the extreme, if we can successfully exclude all of the facts, there will be no evidence for the jury. It follows that the more facts we can successfully keep out of the case, the less bricks available to the prosecution from which to build the case against our client.

A wise advocacy principle is to never underestimate your opponent. Along this line it would behoove you to assume that if the prosecutor wants a piece of evidence in a case, it is because it is helpful to his plan to win a conviction against your client. Assume he is competent. Assume he knows what he is doing. Assume that fact is good for his case, and therefore bad for your client. Therefore, you do not want that fact in the case. Resist the temptation to take a fact the prosecution will use, and make it a part of your defense before you have considered whether you can have that fact excluded from the trial and how the case will look without it. Far too often defense attorneys learn facts in a case and begin thinking of how those facts will fit into a defense theory without considering whether the fact can be excluded from the trial. This puts the cart

before the horse. We must train ourselves to view every fact critically. We must consider whether that fact is necessarily going to be a part of the case before we decide to embrace it[1].

The prosecutor obviously knows his case, and how he plans to build it, much better than you do. If you accept the premise prosecutors tend to do things for a reason, i.e. to help convict your client, then it follows that any fact the prosecution wishes to use to build its case against your client is one we should try to keep out of evidence. Even if you are unwilling to give the prosecutor that much credit, limiting the facts at his disposal to use against your client can only be beneficial. This defines a method of practice coined by Jonathan Stern as "evidence blocking." Put plainly, evidence blocking is the practice of working to keep assertions about facts of the world out of the case. This exercise is one that forces us to consider the many ways facts can be kept out of evidence, and therefore made to be irrelevant to the facts of the case, and the derivative benefits of litigating these issues.

It is helpful to think of evidence blocking in four stages: 1) suppression/discovery violations; 2) witness problems; 3) evidence problems; and presentation problems.

A. Suppression / Discovery and Other Statutory Violations

The first stage we must think about when seeking to block evidence includes violations by the prosecution team of the Constitution, statutory authority, or court rule. We must think creatively about how evidence gathered by the State may be the fruit of a Constitutional violation. Generally, in this regard, we consider violations of the Fourth, Fifth, and Sixth Amendments. We look to any physical evidence seized by the government, statements allegedly made by your client, and identifications that arguably resulted from a government-sponsored identification procedure. We consider theories under which this evidence was obtained illegally and we move to suppress that evidence. We also must look to any violations of a statute or rule that might arguably warrant exclusion of evidence as a sanction. A prime example of this is a motion to exclude evidence based on a violation of the law of discovery. How we litigate these issues will define how much of the evidence at issue is admitted

[1] Of course, after going through this exercise, there will be facts that you have concluded are going to be part of the "facts of the case." These are "facts beyond control." At that point it is wise to consider how your case theory might embrace these facts beyond control, thereby neutralizing their damaging impact. However, this paper is meant to serve as a caution to the defense attorney to not engage in the exercise of developing a case theory around seemingly bad facts until she has thoroughly considered whether she can exclude those facts from the case.

at trial and how it can be used. We must use our litigation strategy to define how these issues are discussed.

B. Witness Problems

A second stage of evidence blocking involves identifying problems with government witnesses. This includes considering the witness' basis of knowledge. A witness may not testify regarding facts about which she does not have personal knowledge. It also includes thinking about any privileges the witness may have. Be thoughtful about whether a witness has a Fifth Amendment privilege. Consider marital privilege, attorney/client privilege, and any other privilege that could present an obstacle to the government's ability to introduce testimony it desires in its case. Another example of a witness problem is incompetency. We should always be on the lookout for information that arguable renders a witness incompetent to testify and move to have that witness excluded from testifying at trial. These are some examples of witness problems.

C. Evidence Problems

While witness problems relate to problems with the witness herself, we must also consider a third stage of evidence blocking: problems with the evidence itself. Even with a witness who has no problems such as those described above, there may be problems with the evidence the government wishes for them wish to present. Perhaps the information the witness has is barred because it is hearsay. Consider whether the evidence is arguably irrelevant. Think about whether the evidence is substantially more prejudicial than probative. These are all examples of problems with the evidence.

D. Presentation Problems

A final stage of evidence blocking involves a problem with the method of presentation of the evidence. Maybe the government is unable to complete the necessary chain of custody. The prosecutor may be missing a witness who is critical to completing the chain of custody. Maybe the prosecutor has never been challenged with respect to chain of custody and is unaware of who he needs to get the evidence admitted. By being on your feet you may successfully exclude the evidence the prosecutor needs to make its case against your client. Another example of a presentation problem is where the prosecutor is unable to lay a proper foundation for admission of some evidence. A third example is a prosecutor who is unable to ask a proper question (for example, leading on

direct). These are all examples of problems the prosecutor could have in getting evidence before the jury if you are paying attention and making the appropriate objections.

IV. How Do You Raise An Issue

Once you have decided that there is evidence that should not be admitted at your trial you must consider the best method for bringing the issue to the Court's attention. You essentially have three options: 1) file a pretrial written Motion in Limine, 2) raise the issue orally as a preliminary matter, or 3) lodge a contemporaneous objection. There are pros and cons to each of these methods.

Some motions must be filed in writing prior to trial, such as motions to suppress. Each jurisdiction is different on the requirement regarding what must be filed pre-trial and the timing of the filing[2]. For any motions that must be filed pretrial, you should always file pretrial motions whenever possible, for reasons stated below. However, many evidentiary issues may be raised without filing a motion. Objections to evidence on grounds that it is hearsay, irrelevant, substantially more prejudicial than probative, or any number of evidentiary grounds, are routinely made contemporaneously during trial. Certainly, should you anticipate an evidentiary issue in advance of trial you may raise it with the court. This may be done orally as a preliminary matter or in writing as a motion in limine.

What are the pros and cons of the different methods of raising an objection? Let's first consider a written, pretrial motion in limine. There are several advantages to filing a pretrial motion in limine to exclude evidence on evidentiary grounds. One is that it gives you a chance to educate the judge on the issue. Judges, like all of us, often do not know all of the law governing a particular issue off the top of their heads. If forced to rule on an issue without giving it careful thought, most judges rely on instinct. It is the rare judge whose instinct it is to help the criminal defendant. If the judge is going to rely on one of the parties to guide her, it is more often than not the prosecutor[3]. Therefore, you are often better often having had the chance to educate the judge than to rely on her ruling in your favor on a contemporaneous objection when the answer is not obvious.

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[2] In Georgia, pursuant to O.C.G.A. 17-7-110, all pretrial motions, demurrers, and special pleas must be filed within ten days of the date of arraignment unless the trial court grants additional time pursuant to a motion.

[3] To the extent that you have previous experience with that judge and you have developed a reputation for being thorough, smart, and honest, you may be the person upon whom the judge relies. If that is the case with the judge before whom you will be in trial, that may factor into your decision about whether to object contemporaneously.

A second reason for filing a written motion pretrial is that you are entitled to a response from the prosecutor. This benefits you in several ways. First, every time you force the prosecution to commit something to writing, you learn a little more about their case. Filing motions are a great way to get additional discovery by receiving a response. Second, whenever the prosecutor commits something to writing, he is locking himself into some version of the facts. If he characterizes a witnesses testimony in a particular way and that witness ends up testifying differently, you have an issue to litigate. Presumably, the prosecutor accurately stated in his response to your motion what the witness told him or his agent. You now are entitled to call the prosecutor, or his agent, to impeach the witness. Maybe the response is an admission of the party opponent that can be introduced at trial. The bottom line is that there is now an issue where there would not have been one had you not forced the response to your motion[4].

A third reason for filing a written motion is that there is always the chance that the prosecutor will fail to respond, despite being required to by law or ordered to by the court. Whenever the prosecutor fails to respond to a written motion you are in a position to ask for sanctions. Sanctions may be for the court to treat your motion as conceded. They might be exclusion of some evidence. Perhaps you may get an instruction in some circumstances. Be creative in the sanctions you request.

A fourth reason is that when you file a motion, you get a hearing. Pretrial hearings are great things. They give us a further preview of the prosecutions case, commit the prosecution to the evidence presented at the hearing, and may result in sanctions.

A fifth reason for filing motions whenever you can is that it increases the size of your client's court file. A thick court file can be beneficial to your client in several ways. The shear size of a large court file is intimidating to judges and prosecutors. Judges like to move their dockets. Thick case files tend to be trials that take a long time to complete. Judges will be less likely to force you to trial in a case with a thick case jacket. Similarly, prosecutors often have to make choices about which cases to offer better pleas in or to dismiss outright. The more of a hassle it is to deal with a case, the greater the chance the prosecutor will offer a good plea to your client or dismiss the case outright.

A sixth reason is that by taking the time to research and write the motion, you are better preparing yourself to deal with the issue and to consider how it impacts your trial strategy.

[4] One of Jonathan Stern's cardinal rules that I have taken to heart is that you always want to be litigating something other than guilt or innocence.

A final reason for filing pretrial motions even when not required is that you appear to be honest and concerned with everyone getting the result right. By appearing to be on the up and up you can gain points with the court that will spill over to other aspects of the trial.

What are the downsides to filing a motion in advance of trial. One is certainly that you give the prosecution a heads up to an issue you seek to raise. To the extent that you identify a problem with the government's case, they may be able to fix it with advance notice. Certainly this is an important consideration that must be factored into your decision about whether to raise an evidentiary issue in writing, pretrial. A second issue, which concerns me much less, is that it allows the prosecutor to do the research he needs to do to address the legal issue you raise. Certainly by filing a pretrial motion you allow everyone to be more prepared. However, if the issue is an important one, and the judge's ruling depends on the prosecutor having a chance to do some research, most judges will give the prosecutor time to research the question before ruling whenever you raise it. To the extent this holds up the trial, there is always the risk the judge will fault you for not raising the issue earlier.

The third option, raising the issue orally as a preliminary matter, is a compromise between the other two alternatives. Obviously, it has some of the pros and cons of the other alternatives. How you handle any given issue must be the product of careful thought and analysis.

V. Conclusion

In conclusion, as defense attorneys we must take advantage of any tools at our disposal to alter the landscape of the trial in our client's favor. In order to do this we must understand and appreciate the difference between facts in the world and facts in the case. By undergoing a rigorous analysis of the facts that are potentially part of the case against our client, we may be able to keep some of those facts out of evidence. This exercise has the benefit of keeping from the prosecutor some of the blocks he hoped to use to build the case against you client. It alters the facts of the case in a way the prosecutor may be unable to deal with. And by litigating these issues we stand to derive residual benefits that will shape the outcome of the trial.

DISPOSITION ADVOCACY

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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INTERVIEW SHEET OF JUVENILE CLIENT

Next Court Date:_____ Date File Opened:_____
Judge Assigned:_____ Attorney Assigned:_____

Today's Date:_____
SS#:_____
Driver's License:_____

FULL
NAME:_____
Alias:_____
DOB:_____
Age:_____ Sex:_____ Race:_____ Place of birth:_____

CURRENT ADDRESS:_____
MAILING ADDRESS(if different):_____
PHONE
NUMBERS:_____
Who live with?_____

Physical and Mental Problems and
Medications:_____
_____
_____

Attend School?_____ Where?_____
Grades?_____
Suspensions or Discipline
Reports:_____
_____
Employment/ Future Plans?_____

FAMILY INFORMATION:
Father's Name and Contact Information(home and
work)_____
_____
Mother's Name and Contact Information(home and
work)_____
_____
Other
Family/Friends:_____-

SocialWorker:_____
Court Counselor:_____
Therapist:_____
Any other community services:_____

Date arrested/served:_____
Who served?_____
Did give an oral statement?_____
Sign a rights form?_____
Did sign any statements?_____
Was anyone else charged with you?_____
What are you charged with?_____
_____
Does any other attorney represent you?_____

Do you have any other charges?_____
Are you now on probation?_____

Have you ever been in court before for any reason?_____
For
what?_____
_____
_____
_____
_____

FACTUAL DETAILS OF CURRENT
CHARGES:_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
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_____

OTHER INFO. OR
ISSUES:_____
_____
_____
Interviewer:_____ Date:_____

POST-DISPOSITION ADVOCACY

Chapter 14:

Probation

14.1 Overview

Probation is a dispositional alternative that may be ordered by the court pursuant to either a Level 1 or Level 2 disposition. A juvenile who is on probation is placed under the supervision of a juvenile court counselor and may be subject to a number of statutory conditions.

Violation of a condition of probation may subject a juvenile to extension of probation, modification of the terms of probation, or in some cases entry of disposition at the next higher level. A juvenile who is moved from a Level 2 to Level 3 disposition as a result of a probation violation will usually receive a commitment to the Department for confinement in a locked facility.

14.2
Terminology Used in This Chapter

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

Intensive probation is a dispositional alternative under G.S. 7B-2506(15), although the term is not defined by either statute or policy. Under Department policy it is treated as a category under intensive supervision.

Intensive supervision is court-ordered supervision by a juvenile court counselor. G.S. 7B-2510(b)(5). The intensive supervision counselor maintains a small caseload and makes frequent contacts with the juvenile, the juvenile's parent, guardian, or custodian, and others involved with the juvenile. *See infra* § 14.4C (Intensive supervision).

Motion for review hearing is a hearing pursuant to G.S. 7B-2510(d) to review the progress of a juvenile on probation at any time during probation or at the end of probation. *See infra* § 14.8A (Motion and Notice Required). Although a motion for review may contain an allegation of a violation of probation, a review hearing should not be a probation violation hearing unless proper notice has been given.

Probation is a dispositional alternative in which the juvenile is ordered to comply with specified conditions under the supervision of a juvenile court counselor. A juvenile may be returned to court for violation of those conditions during the probationary period. G.S. 7B-1501(22).

Probation violation hearing is a hearing to review a juvenile's probation on motion and notice pursuant to G.S. 7B-2510(d), alleging a specific violation of probation. *See infra* § 14.8 (Violation of Probation).

14.3
When Probation May Be Ordered

Probation is a dispositional alternative after an adjudication of delinquency if the juvenile is eligible for a Level 1 or Level 2 disposition. *See supra* § 13.8 (Dispositional Limits for Each Class of Offense and History Level). Under Level 1 (community disposition), regular probation may be ordered. G.S. 7B-2506(8), -2508(c). Under Level 2 (intermediate disposition), the juvenile may be placed on either regular or intensive probation. G.S. 7B-2506(8), (15); 7B-2508(d).

Although probation is not a required dispositional alternative, it is often routinely ordered. Counsel should argue against an order of probation when not warranted by the facts to avoid exposing the juvenile to a possible allegation of violation of probation in the future.

14.4
Conditions of Probation

A. Generally

A juvenile court counselor has the authority to visit a juvenile's residence if the juvenile is on probation. In addition, the court may order a juvenile to comply with conditions that are "related to the needs of the juvenile and that are reasonably necessary to ensure that the juvenile will lead a law-abiding life. . . ." G.S. 7B-2510(a). The statute lists 14 conditions that are specifically authorized. The court may order that a juvenile:

- remain on good behavior;
- not violate any laws;
- not violate any reasonable and lawful rules of a parent, guardian, or custodian;
- attend school regularly;
- maintain passing grades in up to four courses and cooperate with planning for such;
- not associate with specified persons or be in specified places;
- refrain from use or possession of any controlled substance, refrain from use or possession of any alcoholic beverage, *and* submit to random drug testing;
- abide by a prescribed curfew;
- submit to a warrantless search at reasonable times;
- possess no firearm, explosive device, or other deadly weapon;
- report to a juvenile court counselor as required by the counselor;
- make specified financial restitution;
- be employed regularly if not attending school;
- satisfy any other conditions determined appropriate by the court.

See infra § 14.5 (Conditions of Probation: Case Law).

Although certain conditions of probation are routinely ordered in every case in some districts, counsel should argue that the conditions of probation should be related to the adjudicated offense and the needs of the juvenile as contemplated by G.S. 7B-2501(c). *See In re McDonald*, 133 N.C. App. 433 (1999) (amount of restitution must be related to amount of monetary damage as finding of fact; special condition of probation restricting television upheld when court found juvenile's actions influenced by television show).

B. As Directed by Chief Court Counselor: Generally

The juvenile may also be ordered to comply with other conditions "if directed to comply by the chief court counselor." G.S. 7B-2510(b). Under G.S. 7B-2510 (b)(1)–(3), the juvenile may be required by the chief juvenile court counselor to:

- perform up to 20 hours of community service,

- submit to substance abuse monitoring and treatment, and
- participate in a life skills or educational skills program administered by the Department.

C. As Directed by Chief Court Counselor: Level 2

Under G.S. 7B-2510(b)(4)–(5), a juvenile who is eligible for a Level 2 disposition may be ordered to comply with the following conditions at the direction of the chief court counselor:

- cooperate with electronic monitoring, and
- cooperate with intensive supervision.

Electronic monitoring. Electronic monitoring is defined by the Department as "recording of a juvenile's schedule with telecommunication equipment located in the juvenile's residence. Two levels of monitoring are offered: 1) Electronic House Arrest; and 2) Electronic Monitoring." House arrest requires the juvenile to be in the juvenile's residence unless at a designated place, such as at school or work. Electronic monitoring requires the juvenile to abide by a specified schedule, which usually includes a nighttime or other curfew. *See* Court Services Terms Defined, at www.ncdjjdp.org/resources/policies/ip/DEFINITIONS.pdf; *see also* Number CS 13.1, "Electronic Monitoring," Department of Juvenile Justice and Delinquency Prevention (Oct. 17, 2006), at www.ncdjjdp.org/resources/policies/ip/CS%2013.1.pdf. Electronic monitoring is not the same as a dispositional order for house arrest under G.S. 7B-2506(18).

Intensive supervision. The requirements for intensive supervision are outlined by Department policy but are not defined by statute. *See* Number CS 3.1, "Supervision," Department of Juvenile Justice and Delinquency Prevention (Oct. 17, 2006), at www.ncdjjdp.org/resources/policies/ip/CS%203.1.pdf. Under Department policy, a juvenile court counselor may supervise a maximum of 12 juveniles on intensive supervision. The counselor must contact the juvenile and the juvenile's parent, guardian, or custodian immediately after the juvenile is assigned to intensive supervision. Face-to-face contact must be made by the counselor with the juvenile at least three times every seven days, with at least one contact to be on the weekend or outside of regular school hours. In addition, contact with the parent must be made in person at least once every seven days, with a visit to the juvenile's residence at least every seven days. Finally, the counselor is required to make one contact per week with someone at the juvenile's school, the juvenile's work, or others involved significantly with the juvenile.

Contacts may gradually become less frequent with the approval of the chief court counselor. At a minimum, the counselor must have contact with the juvenile at least once every seven days, with the parent, guardian, or custodian every 14 days, and with school personnel and others at least once every 21 calendar days. Counsel will generally have to ask the juvenile court counselor or review the juvenile court counselor's file to learn if less frequent contacts have been approved.

14.5
Conditions of Probation: Case Law

The North Carolina appellate courts have considered dispositional orders that impose one of the specified statutory conditions, as well as orders that impose "any other conditions determined appropriate by the court." G.S. 7B-2510. This section contains a brief review of some of these cases. Opinions of the North Carolina Supreme Court from 1997 to the present and of the North Carolina Court of Appeals from 1996 to the present are available online at www.aoc.state.nc.us/www/public/html/opinions.htm. Professor Janet Mason of the School of Government periodically sends out e-mail summaries of recent case law and legislation affecting juvenile proceedings. To receive these e-mails, go to www.sog.unc.edu/listservs.html, scroll to sogjuvenile, and click on the subscribe link. Additionally, the Office of the Juvenile Defender website has a section on case law, updated quarterly, online at www.ncids.org/Juvenile%20Defender/JuvDef%20HomePage.htm.

A. Restitution

Ability to pay. Although the court may order restitution as a condition of probation pursuant to G.S. 7B-2510(a)(12), the record must show that the juvenile has the ability to pay. *In re Schrimpsher*, 143 N.C. App. 461, 464 (2001). In *Schrimpsher,* the Court held that although the lower court does not have absolute discretion to order restitution, the burden is on the juvenile under G.S. 7A-649(2) [now G.S. 7B-2506(4), (22)] to show that "the juvenile does not have, and could not reasonably acquire, the means to make restitution." 143 N.C. App. at 464. Because the juvenile was 16 years old, was ordered to obtain a full-time job until school started, and presented no evidence of inability to pay, the Court found there were appropriate findings to support the ability to pay restitution. *Id.* at 464–65; *see also In re Heil*, 145 N.C. App. 24, 31–33 (2001) (court must consider whether paying restitution is in juvenile's best interest and whether the juvenile has the ability to pay restitution, and must restrict payment schedule to 12 months under G.S. 7A-646, now 7B-2500, and 7A-649(2) (now 7B-2506(4))).

In a recent unpublished decision, the Court of Appeals reaffirmed earlier cases holding that victim compensation should not be the only or paramount concern of restitution. Further, the record must support that payment of restitution as a condition of probation is "fair and reasonable, related to the needs of the child, and calculated to promote the best interest of the juvenile. . . ." *In re B.K.C.*, 650 S.E.2d 676 (2007) (unpublished), *quoting Schrimpsher, supra.* The lower court must make findings as to whether restitution is in the juvenile's best interest and whether the juvenile has the ability to pay restitution. *B.K.C.*, *citing In re Heil*, 145 N.C. App. 24, 32 (2001).

Jointly and severally liable. In *Schrimpsher*, the Court held that if more than one person is responsible for damages, all should be held jointly and severally liable for payment of restitution. 143 N.C. App. 461, 465–66 (2001). As there was evidence that more than one person participated in the break-in but no findings in the record indicating the amount of harm caused by the juvenile or whether others should be held jointly and severally liable, the case was remanded for further findings on these issues.

Amount of restitution. The court must make findings of fact that justify the amount of restitution ordered. *In re McDonald*, 133 N.C. App. 433, 436 (1999). In *McDonald*, the order for restitution was reversed because it contained no findings of fact regarding the cost of the damage caused by the juvenile, and the only evidence in the record was pictures showing the damage.

B. Submission to Urinalysis, Blood, or Breathalyzer Testing

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 as a condition of probation that the juvenile submit to testing on request of court counselor). Under the statute (now G.S. 7B-1500(4)), juveniles are entitled to fair and equitable procedures and protection of their constitutional rights. *Id.* at 466.

C. Other Conditions

Requiring others to consent to warrantless searches. Pursuant to G.S. 7B-2510(a)(6), the court may order that the juvenile "not associate with specified persons or be in specified places." That authority does not extend, however, to ordering that those with whom the juvenile resides or rides consent to warrantless searches. *In re Schrimpsher*, 143 N.C. App. 461, 468–69 (2001). The Court found that it was "unfair and unreasonable" to require those not under the court's jurisdiction to consent to warrantless searches. Additionally, such a requirement would give persons other than the juvenile control over the success or failure of the probation.

Wearing sign. The court may not order a juvenile to wear a sign in public that identifies the juvenile as delinquent. *In re MEB*, 153 N.C. App. 278 (2002). In *MEB*, the juvenile was ordered to wear a large sign in public stating "I am a juvenile criminal." This requirement was held to violate the juvenile's right to confidentiality pursuant to G.S. 7B-3001(b), and to subject the juvenile to a choice between public ridicule and *de facto* house arrest in violation of the Juvenile Code and public policy.

Wearing necklace with victim's picture and visiting gravesite on anniversaries of victim's birth and death. The court distinguished the condition in *MEB* from requirements that a juvenile wear a necklace containing the victim's picture and place flowers on the victim's grave on the anniversaries of the victim's birth and death. *In re J.B.*, 172 N.C. App. 747, 751–53 (2005). In *J.B.*, the Court found that the special conditions of probation, unlike those in *MEB*, did not expose the juvenile's record of delinquency to the public and did not amount to *de facto* house arrest. The juvenile could wear the victim's picture enclosed in a locket, which could be worn under clothing; visiting the gravesite was not addressed. Additionally, the Court found that there was no requirement that the lower court solicit or consider a therapist's opinion regarding the potential for either benefit or damage to the juvenile from these conditions.

Restricting participation in activities. A prohibition on watching television for one year has been upheld as a condition of probation. *In re McDonald*, 133 N.C. App. 433 (1999). In *McDonald*, the juvenile stated in court that she spray-painted the words "Charles Manson Rules" on someone else's property because she had recently watched a television documentary about him. Because the condition was related to the juvenile's misconduct, the injury to property, and her need to be free of negative influences, the Court found that the special condition was proper.

A restriction on participating in school activities, such as football or dances, was held to be proper where the court had evidence that the juvenile had difficulty with age-appropriate complex social interactions. *In re J.B.*, 172 N.C. App. 747, 753 (2005). The Court noted that the juvenile could continue to interact with his peers in more structured settings, such as during regular school hours and at church, and was restricted only from those activities that posed the greatest danger for inappropriate or delinquent conduct.

Requiring admission of sex offense. The decision of the U.S. Supreme Court in *Minnesota v. Murphy*, 465 U.S. 420 (1984), that the constitutional right against self-incrimination prohibits making a waiver of the right a condition of probation, has been held applicable to juvenile cases. *In re T.R.B.*, 157 N.C. App. 609, 620 (2003). In *T.R.B.*, the Court of Appeals held that under *Murphy* a condition of probation ordering that the juvenile complete a sex offender evaluation and treatment program, which required attendance at all meetings and admission of responsibility for the offense, was impermissible. The Court noted that there may be an exception if the juvenile is granted immunity from use of the statements in subsequent prosecutions. *Id.* at 621–22, *quoting Murphy*.

14.6
Intensive Probation

Although the court may order intensive probation as a disposition pursuant to G.S. 7B-2506(15), the term is not defined by statute. The policies of the Department do not address the requirements for intensive probation but appear to categorize it under court-ordered supervision as the same as intensive supervision. *See supra* § 14.4C (As Directed by Chief Court Counselor: Level 2: Intensive supervision); *see also* Number CS 3.1, "Supervision," Department of Juvenile Justice and Delinquency Prevention (Oct. 17, 2006), at www.ncdjjdp.org/resources/policies/ip/CS%203.1.pdf.

14.7
Term of Probation

A term of probation is limited to one year subject to an extension of up to an additional year. An extension of probation is allowed only if, after a hearing on the matter, the court finds an extension of probation is necessary "to protect the community or to safeguard the welfare of the juvenile." G.S. 7B-2510(c). The court should be asked to specify in the dispositional order either a date certain for the end of probation or a time for a review hearing.

The term of probation may be extended even after expiration of the original term after timely notice and a hearing. *In re T.J.*, 146 N.C. App. 605, 607–08 (2001). In *T.J.*, the juvenile court counselor filed a motion for review prior to the expiration of the probationary period alleging that the juvenile had not completed the community service hours ordered as a condition of probation. Citing G.S. 7B-2510(d), which provides that the court may review the juvenile's progress "at any time during the period of probation or at the end of probation," the Court held that the court had limited discretion to modify probation within a reasonable time after its expiration. *Id.* at 607.

The North Carolina appellate courts have not specifically considered the issue of the timeliness of a motion alleging a juvenile court probation violation filed after the probationary period has expired. Counsel should argue that a motion filed after probation has ended is untimely, as distinguished from the facts in *In re T.J.,* where the motion was filed during the probationary period. Analogous provisions from criminal court may be relevant, such as G.S. 15A-1344(f) (court does not have jurisdiction to revoke probation after probationary period has ended unless State filed a motion alleging probation violation during probationary period and shows reasonable efforts to conduct hearing before probation ended).

14.8 Violation of Probation

A. Motion and Notice Required

The progress of the juvenile on probation may be reviewed on motion of the juvenile court counselor, the juvenile, or the court. Conditions or the duration of probation may be modified only after notice and a hearing as provided by statute. G.S. 7B-2510(d). Counsel should object at the review hearing if the State attempts to introduce evidence relating to a violation of probation that was not alleged in the motion for review. Objections should also be made if there is an attempt to impose additional conditions of probation without a motion and notice. *See* G.S. 7B-1807, -2600.

The juvenile and the juvenile's parent, guardian, or custodian are entitled to five days written notice prior to a hearing on an alleged violation of probation. G.S. 7B-1807. Counsel may have grounds to move to dismiss the State's motion alleging violation of probation if less than five days notice is given prior to expiration of the term of probation; the basis would be insufficient statutory notice. To ensure protection of the juvenile's rights in the proceeding, counsel should request formal presentation of evidence supporting allegations of violation of probation.

B. Secure Custody Pending Hearing

Where the juvenile is alleged to have violated probation, the court may order secure custody pending the probation violation hearing if the juvenile is alleged to have damaged property or injured persons. G.S. 7B-1903(d).

C. Burden of Proof

An order for probation may be amended for a violation of probation only if the court, after a hearing, finds by the greater weight of the evidence that the juvenile violated conditions of probation. G.S. 7B-2510(e).

Counsel should argue that the court must find a "willful violation," analogizing to the requirements in criminal case law. *See State v. Young*, 21 N.C. App. 316 (1974). In criminal cases the burden is on the defense to present competent evidence of inability to comply. *See State v. Crouch*, 74 N.C. App. 565, 567 (1985). Counsel should be prepared to offer evidence that the juvenile was not able to comply with conditions.

Juvenile probation revocation proceedings are considered "dispositional." *In re D.J.M.*, 181 N.C. App. 126 (2007); *In re O'Neal,* 160 N.C. App. 409 (2003). As a result, the probation violation hearing may be less formal than an adjudicatory hearing, and the court may be able to consider any evidence, including hearsay evidence, that the court finds to be relevant, reliable, and necessary to its determination. G.S. 7B-2501.

D. Preparation for Hearing

Preparation for a hearing on a motion alleging a violation of probation is generally the same as for a hearing on a petition. Counsel should meet with the juvenile and prepare the juvenile to testify when helpful to the case, talk with the juvenile court counselor and review the counselor's records, and make other contacts as required to investigate and respond to the alleged violation. Witnesses and records should be subpoenaed as necessary. If appropriate, counsel should explore negotiating an agreement with the juvenile court counselor or prosecutor.

Counsel should check the following items during hearing preparation to determine whether:

- the motion alleging violation of probation was filed within the probationary period;
- the juvenile was given adequate written notice of the alleged violation and hearing;
- the juvenile court counselor has correctly calculated the period of probation;
- the original order of probation was for a period of probation within the statutory provisions of G.S. 7B-2510(c); and
- the condition of probation that is alleged to have been violated was set forth in the dispositional order and was a condition of probation allowed under G.S. 7B-2510(a).

E. Advocacy at Probation Violation Hearing

The State must prove an alleged violation of probation by the greater weight of the evidence if the juvenile denies the allegation.

Objections should be made to evidence that is not related to the alleged probation violation. Counsel should also object to hearsay and other evidence that has not been established to be reliable. *See In re J.P.M.,* 645 S.E.2d 902 (2007) (juvenile probation hearings are considered "dispositional"); G.S. 7B-2501 (dispositional hearings may be

informal and the court may consider any evidence, including hearsay evidence that the court finds to be relevant, reliable, and necessary to its determination).

Counsel should argue against an allegation that the juvenile has violated probation by virtue of having been alleged to be delinquent or charged with a new offense. Under G.S. 7B-2510(a)(2), the court may order the juvenile not to violate any laws. The juvenile is not in violation, however, by merely being accused of violating a law.

F. Alternatives on Finding of a Violation

If a violation is found, the court may keep in place the original terms of probation, modify the terms of probation or, with one exception, order a new disposition at the next higher level from the original disposition. G.S. 7B-2510(e). The exception is that a Level 3 disposition may not be ordered for a violation of probation if the original adjudication was for an offense classified as minor under G.S. 7B-2508. G.S. 7B-2510(f). If a new disposition is ordered, the court may order a period of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508, which sets forth dispositional limits for each class of offense and delinquency history level. G.S. 7B-2510(e). If detention is ordered, counsel should request that the juvenile be given credit for any time already served.

If a violation is found, the court should enter a new disposition immediately rather than holding the juvenile in detention and continuing the matter; there is not a statutory provision authorizing the new disposition to be continued.

G. Admission of Probation Violation Does Not Bar Subsequent Adjudication on Same Allegation

A finding by the court of a violation of probation for a specified act does not bar the filing of a petition and an adjudication of delinquency based on the same act. *In re O'Neal*, 160 N.C. App. 409 (2003). In *O'Neal*, the juvenile admitted violating probation by, among other acts, being physically aggressive with another juvenile. As a result, he was placed on a new Level 2 probation for one year. He was subsequently adjudicated delinquent based on the same act of aggression that was the basis of the probation violation. The Court held that double jeopardy does not apply to probation violations because there is a different burden of proof and any new disposition imposed results from the original adjudication of delinquency and not from the act that violates probation.

14.9 Termination of Probation

The court may enter a written order terminating probation on finding that there is no further need for supervision, either at the end of the probationary term originally ordered or at any time during probation. At the election of the court, an order may be entered in chambers based on a report of the juvenile court counselor or may be entered after notice and a hearing with the juvenile's attendance. G.S. 7B-2511. Termination of probation does not terminate the court's jurisdiction unless ordered by the court, or when statutory conditions ending jurisdiction are met. G.S. 7B-1601(b); *see supra* § 3.3 (Jurisdiction). Counsel should

therefore request that the court terminate jurisdiction as well as probation, which may be done by checking a box on the order terminating probation. *See* Form AOC-J-465 (Order to Terminate Supervision (Undisciplined/Delinquent)) (April 2000), at www.nccourts.org/Forms/Documents/537.pdf.

PRESERVING THE RECORD

PRESERVING ERROR FOR APPEAL: A CHECKLIST

Staples Hughes, Appellate Defender
New Felony Defender Training, School of Government, Chapel Hill, February 10, 2012

THE BIG PICTURE

PRESERVING THE RECORD FOR APPEAL IS PART OF YOUR JOB AS TRIAL COUNSEL. IT IS PART OF THE DUTY OF LOYALTY AND COMPETENCE YOU OWE YOUR CLIENT.

1. Common misapprehensions.

A. "We'll save that for appeal." NO. WRONG.
B. "They can raise that in an MAR." NO, NOT IF YOU KNOW ABOUT "THAT."
C. "They can raise that in federal court." HELL NO.

☐

2. Why do trial counsel fail to fully preserve issues?

A. Trying cases is stressful and complex and exhausting.
B. Trial counsel may not aware of the importance of the mechanics of **fully** preserving issues. That's what this checklist is for.

☐

3. BE PARANOID. NEVER assume that an issue is preserved as a matter of law. It almost certainly isn't.

☐

4. Preservation is MORE important in tough cases. The appellate courts are not going to cut your client a break because the stakes are high.

☐

5. ABLE TO WRITE DOWN YOUR THEORY OF THE CASE IN ONE PAGE? NO? THEN YOU AREN'T READY FOR TRIAL. Too basic or even silly? You will discover the strengths and expose the weaknesses in your case (and will be better prepared to preserve error).

☐

FUNDAMENTAL PRINCIPLES FOR PRESERVING EVIDENTIARY ISSUES

I. You have to object or make a request.

A. An objection or request must be timely.

B. Specific grounds must be articulated in some fashion. Just "Objection" won't do. Just "Because it's admissible" won't do. More below.

C. If the answer to the objectionable question is inadmissible for additional reasons, you have to object on the additional grounds (see below re: motion to strike).

D. You must comply with procedural requirements (like "written," in the case of jury instructions).

E. You must reassert the objection or request consistently when the same or a similar issue comes up. **THIS IS A COMMON PROBLEM.** You cannot give up on the objection, or we lose it on appeal. Even if the judge says you don't have to, you have to.

F. You must renew before the jury an objection to a ruling on pre-trial motion or issue. This includes rulings on motions in limine and suppression motions. You should renew, outside the jury's presence, all requests to admit evidence previously excluded by rulings on the prosecution's motions in limine.

G. Forget Evidence Rule 103(a) [last paragraph]. *State v. Tutt*, 615 S.E.2d 688 (2005) (rule violates N.C. Constitution).

H. No objection at trial = plain error or *ex mero motu* or, if we are lucky, some equivalent impossible standard of review on appeal = client loses. DOA (dead on appeal).

II. Why stating the grounds REALLY MATTERS.

A. A general objection to the prosecution's evidence, overruled, is no good unless the evidence wasn't admissible for any reason.

B. A specific objection, overruled, is no good if you miss another objection for admission of the evidence.

C. If you do not articulate a specific ground for admissibility of defense evidence that is excluded, we lose that ground on appeal.

III. If the state's objection is sustained, you have to make an offer of proof to show what you wanted to do.

A. Don't rely on the context to make the record.
B. Don't rely on your own summary unless you have to, that is, unless the judge makes you summarize (object to that restriction), or unless there is some other good reason to summarize (like the witness was taken to the hospital with a suspected heart attack when the judge wouldn't let him testify).
C. Best: get the witness to testify out of the jury's presence.
D. If the court shuts you down: "Your Honor, we want the record to reflect that we tried to make an offer of proof concerning the excluded testimony [or evidence] [or argument]." (GREAT issue).
E. If the court tells you to make your offer of proof later (e.g. "when we recess for lunch"), remember that the burden's on YOU to bring it to the court's attention again.
F. State that the exclusion of the evidence violates whatever evidence rule or doctrine is in play, and the defendant's right to present a defense under the Fifth, Sixth, Eighth, and Fourteenth Amendments. If you do not state the constitutional basis for admissibility, we cannot argue that basis on appeal (see V, just below).

IV. You Have To Get A Ruling on Your Objection. If you don't insist on a ruling, your client will have no issue on appeal. Keep a list going of the things you have to do to preserve your objections, e.g. if the judge says you can put something on the record at a later time, make a note.

V. CONSTITUTIONALIZE!

A. Substantive issues and the prejudice standard are at stake.
B. Non-constitutional: we have to show a reasonable possibility of a different result.
C. Constitutional: the state has to show harmlessness beyond a reasonable doubt.
D. If you don't raise it, we can't argue it on appeal.
E. NEVER MAKE AN OBJECTION THAT DOES NOT STATE A CONSTITUTIONAL GROUND (more on this later).

VI. Limiting Instructions Are Potentially Crucial.

A. A limiting instruction restricts the legal relevance and use of evidence.

B. A request for a limiting instruction is not an empty exercise – potentially significant for sufficiency and closing argument.

C. If you don't request a limiting instruction, the evidence can be used for any purpose (think about corroborative statements).

D. And in that vein, make specific motions to excise non-corroborative or otherwise objectionable portions of purportedly corroborative statements.

□

VII. Motions to Strike are Potentially Crucial.

A. If the prosecutor's question was OK, but the answer was objectionable you must move to strike ("Move to strike the answer.") or we cannot raise the issue on appeal (if the court denies the motion to strike).

B. <u>If the court sustains your objection, but the witness answers anyway, you must move to strike, or we lose the issue on appeal</u> (and may have a good issue if the judge denies the motion to strike).

C. Be alert for the question that itself was objectionable. Object as soon as it is clear that the question is objectionable.

D. You have to decide whether a cautionary instruction does more harm than good.

□

VIII. <u>Even if your objection was sustained</u> and your motion to strike was granted, if what the jury heard was sufficiently catastrophic, ask that the jury be excused and <u>move for a mistrial</u>, asserting that the damage cannot be undone and is a violation of constitutional rights.

□

IX. When your objection is overruled, and what the jury heard was sufficiently catastrophic, also move for a mistrial.

□

PRESERVING OTHER ISSUES BEFORE (AND MAYBE DURING) CLOSING ARGUMENT

I. Jury Instructions

A. Requests must be in writing. Write out what you want the judge to say. If it's in writing, it's preserved if the judge refuses to give it.

B. If it's a pattern instruction, submit the request in writing, quoting the text of the pattern instruction.

C. Oral requests are void. Oral requests are void. Oral requests are void.

D. If you know something objectionable is coming, make your objection in writing. If not, an oral objection during the charge conference is sufficient to preserve the issue.

E. Insist that the judge commit in writing to the precise words he or she is going to use so you can have an adequate opportunity to lodge specific objections.

II. When something "non-verbal" and prejudicial happens in the courtroom, put it on the record, and move for whatever corrective action is appropriate.

A. What needs to be stated for the record, or filed with the clerk, or put into evidence outside the presence of the jury so that someone reading the transcript and looking at the court file will understand?

B. Displays of emotion by spectators.

C. Actions of the prosecutor (e.g. yelling on cross, pointing at a particular juror in argument, intimidation of a witness when standing at the witness stand).

D. Shackling of the client, particularly if the court refuses a hearing on necessity.

E. Etc. etc. etc. etc. etc.

III. State on the record with the jury absent what happened at significant bench conferences.

IV. If something bad happens outside the courtroom (prejudicial contact with jurors, for instance), insist on an evidentiary hearing. If the judge denies an evidentiary hearing, put on the record your summary of the facts you know. Consider moving for a mistrial if whatever happened cannot be cured by a less drastic remedy.

□

V. Get Powerpoint presentations by the prosecution in the record (copies of the slides and copies of the software). Get a picture of other visual aids used by the prosecution in the record. Get copies of audio and video record filed with the clerk of court. If possible, make indices of the portions played before the jury if the whole recording isn't played.

□

VI. MOVE TO DISMISS AT THE END OF THE EVIDENCE ON THE GROUND THAT THE EVIDENCE IS INSUFFICIENT, WHETHER THAT'S AT THE END OF STATE'S EVIDENCE OR YOUR EVIDENCE OR THE STATE'S REBUTTAL, ETC. WHEN ALL THE EVIDENCE IS IN, MOVE TO DISMISS. EVERY TIME. Make a specifc argument if appropriate, but always add or begin with, "The defendant moves that the evidence was insufficient on every element of the offense in violation of the Sixth and Fourteenth Amendments."

□

VII. Jury Selection: Trial Strategy Comes First

A. Fight tooth and nail for the questions you want to ask.
B. Constitutionalize the adverse rulings.
C. Under current law, restrictions on questioning are not preserved unless you exhaust peremptory challenges.
D. Don't worry about the current law – don't exhaust peremptory challenges to preserve the issue if you will lose good jurors or open yourself up to bad prospective jurors.
E. Don't exhaust peremptories to preserve a denied cause challenge if you will lose a good juror or open yourself up to bad prospective jurors.

F. Preserving the denied cause challenge:

1. You **must** peremptorily excuse the juror **unless** you are already out of peremptory challenges.
2. If you are out of peremptory challenges when you make the cause challenge, state on the record that you would excuse the juror if you had any peremptory challenges left (probably not necessary, but a nice touch).
3. If you are not out of peremptories, again, you **must** excuse the juror.
4. When you exhaust peremptories, you **must** renew the cause challenge and have it denied.

VIII. Batson

A. The race and gender of every prospective juror must be in the record.

B. Questionnaires can be the vehicle, but you must make them a part of the record.

C. Object if the judge does not find a prima facie case.

D. If the court finds a prima facie case or asks the prosecutor for an explanation or the prosecutor volunteers an explanation, ask for an opportunity to rebut.

E. Renew previous objections when making subsequent objections.

F. Renew the objections at the end of jury selection.

G. Read State v. Barden, 362 N.C. 277, 279-80, 658 S.E.2d 654 (2008), the core of which is as follows:

"On remand, a judge presiding over a criminal session shall consider the voir dire responses of prospective juror Baggett and those of Teresa Birch, a white woman seated on defendant's jury, in light of Snyder v. Louisiana, 552 U.S. ___, 128 S.Ct. 1203, L. Ed. 2d (2008), Rice v. Collins, 546 U.S. 333, 163 L. Ed. 2d 824 (2006), and Miller-El v. Dretke, 545 U.S. 231, 162 L. Ed. 2d 196 (2005), cases decided after defendant's prior Batson hearing. The State shall have an opportunity to offer race-neutral reasons for striking juror Baggett while seating juror Birch. The court should determine whether these

explanations are race-neutral under the framework set forth in these United States Supreme Court decisions, which were not available to it at the time of the 2003 hearing. If the court upholds the strikes after this new hearing under Batson in light of Snyder, Rice, and Miller-El, the defendant's sentence will stand. If not, he is entitled to a new trial."

H. The big point is that the courts have now proclaimed comparative analysis of the prosecutor's exercise of a peremptory against a black juror when a very similar white juror was not struck is a very relevant part of the analysis.

□

IX. Get times in the record, e.g.:

A. How long did jurors deliberate, accounting for recesses, reinstruction, lunch, etc.? (always get this)
B. How long did jurors take looking at prejudicial photographs?
C. Even how long did a witness sit in silence after you posed the crucial question?

□

X. Get into the record jury notes and communications with the judge.

□

XI. Use jury selection to let jurors know the lawyers may be objecting during the trial.

A. They have all watched TV.
B. If you are doing your job, most of them will like you.
C. They can stand some drama.

□

XII. OBJECT TO IMPROPER JURY ARGUMENT!

A. Appellate counsel with some frequency read objectionable closing argument of prosecutors where there is no objection by trial counsel. Object to bad argument. Object Object Object.

B. **"Although he did not object at the time, defendant now argues that the argument by the prosecutor was grossly improper. Where a defendant fails to object, an appellate court reviews the prosecutor's arguments to determine whether the**

argument was so grossly improper that the trial court committed reversible error in failing to intervene ex mero motu to correct the error. Only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting ex mero motu an argument that defense counsel apparently did not believe was prejudicial when originally spoken."

[from a recent decision, which sounds like many other decisions]

C. To sum up, no objection = *ex mero motu* standard of review = we lose.

D. Pre-argument motions to prohibit bad argument are fine for whatever deterrence value they may have, but do not count on them to preserve objections to bad argument.

E. Specifically, if the prosecutor has a reputation for improper argument, file a motion before argument asking for a ruling prohibiting what he does, tailored to the specific facts of the case (e.g. name-calling, using evidence outside the purpose for which it is admitted). Whether or not the judge denies your motion in whole or in part, YOU MUST OBJECT DURING THE ARGUMENT TO THOSE PARTS THAT ARE OBJECTIONABLE. Otherwise the appellate court will hold, and at gut level feel, that you have waived the argument.

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XIII. ***RECORD*** – have opening statements and closing arguments recorded in every non-capital trial. G.S. §15A-1241 gives you the **right** to recordation upon request. (Recordation is automatic in capital trials.)[1]

§ 15A-1241. Record of proceedings.

(a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:

(1) Selection of the jury in noncapital cases;

[1] I realize that this checklist is prepared for use in capital trials, but the principles articulated in it are applicable to all criminal trials. Get jury selection and arguments recorded in all criminal trials. It may make the difference between winning and losing on appeal.

(2) Opening statements and final arguments of counsel to the jury; and

(3) Arguments of counsel on questions of law.

(b) **Upon motion of any party** or on the judge's own motion, proceedings excepted under subdivisions (1) and (2) of subsection (a) **must be recorded.** The motion for recordation of jury arguments must be made before the commencement of any argument and if one argument is recorded all must be. Upon suggestion of improper argument, when no recordation has been requested or ordered, the judge in his discretion may require the remainder to be recorded.

.....

(emphasis added)

A. If necessary, change the culture in your jurisdiction by asking for recordation of argument in every case.

B. Record because it may be a deterrent, sometimes.

C. Record because it is absolutely crucial to preservation of prosecutorial misconduct in closing argument, and to full appellate presentation of other issues.

D. Do not decide to get recordation in the middle of argument when you hear something bad – reconstruction is a mess and may prejudice your client if you get fact-found away by the judge.

XIV. ***LISTEN.*** You will be emotionally and physically drained at the end of the trial, but you cannot relax. You have to be focused on what the prosecutor is saying. ***TAKE NOTES DURING CLOSING ARGUMENT TO KEEP YOU*** **FOCUSED.**

Further, if the prosecutor is doing something objectionable, for instance getting up in the defendant's face, you must object and state for the ***record*** what happened.

XV. What are you ***listening*** for? What follows are general categories of objectionable argument.

A. Something that wasn't in evidence. DA just makes it up or talks about evidence that was excluded outside the presence of the jury.

B. Jail conditions: televisions, weight rooms, three hots and a cot at taxpayer expense. This argument is likely not supported by evidence and deprives the defense of the opportunity to confront such argument with evidence of the reality of life imprisonment without parole. If the argument is not sustained, ask off the record for a recess and to reopen the evidence to present an accurate picture of life imprisonment without parole.

C. Arguing evidence that was struck or to which an objection was s sustained.

D. Any comment on the defendant's "failure" to testify, particularly cast as a right that the defendant has that the jury should not hold against him.

E. Any comment based on assertion of a privilege or constitutional right (e.g. marital privilege ["Where's his wife if he didn't do it. Why didn't she testify?"]; right to silence ["Don't you know if he won't there, he would have told the police about this silly alibi."]; again, the testimonial privilege ("Now, the defendant has the right not to testify.")

F. The DA's personal opinion ("I think he was lying." "I don't believe a word of what he said."). In particular, watch out for, "This is the worst case that has ever come before a jury in this county."

G. Name calling and mud-slinging. ("Animal." "Liar." "Not a human being." "Child of Satan." "S.O.B.") Etc. etc. etc.

H. References and comparisons to historic monsters ("He's the same as Hitler."), or monstrous historical events ("Oklahoma City," "Columbine.").

I. Evidence argued for a purpose outside the basis for its admission into evidence. The classic is arguing a conviction admitted for impeachment as character evidence ("Anyone convicted of breaking into another person's house is the same kind of person that would kill them once there are in there.").

J. "The community demands that you convict this defendant," and similar arguments that society demands a conviction because of a generalized problem (gang violence, domestic violence).

K. Unsupported assertions of characteristics of a class of cases ("In the penalty phase of a capital case, they always put on the mama to tell us what a bad, bad man daddy was.").

L. Guilt based on previous proceedings (arrest, probable cause hearing, grand jury proceedings, prosecutor's decision to try the case).

M. The guilt or guilty plea of a co-defendant as evidence of guilt of the defendant on trial.

N. Arguing the facts of appellate decisions (usually OK to argue and quote relevant statutes and case law).

O. Intimations that appellate review will fix any mistakes the jury makes.

P. Intimations that the judge wouldn't have let evidence in unless it was trustworthy.

Q. Addressing jurors personally ("Ms. Adams, can you put him where he belongs? Mr. Smith can put him where he belongs?" etc etc

R. "It could have been you, Mr. Adams," or "It could have been any one of you," i.e. putting jurors in the place of the victim.

S. Personal attacks on defense counsel's integrity or veracity.

T. Argument based on ethnicity ("Welcome to America, Mr. Hernandez.") or economic status ("You are paying for his public defender, folks.") or any other general characterization based on some group classification.

U. In particular, watch out for argument about experts being paid for with the jurors' and other citizens' taxes.

V. **GENERALLY, IF IT SEEMS UNFAIR OR WRONG OR VERY FAR OUT THERE, IT PROBABLY IS**.

XVI. **<u>OBJECT TO IMPROPER ARGUMENT.</u>** *But do not object unless you think the argument is improper.* You cede the high ground and violate several ethical directives if you object to closing argument in bad faith. Be attentive; don't be stupid. Leave the misconduct to the prosecutor.

□

XVII. *If you think objecting to closing argument will alienate the jury, drop that thought.* Most jurors are probably going to like you. They all watch TV and enjoy some drama in the courtroom. They will just think you are being a lawyer. If your objection is sustained, the DA may look like an ass. If the judge overrules your objection in a nasty way and you have maintained the high ground, the jury may think he's an ass and count that in favor of your client. If you object and the client is convicted, you have preserved the error for appeal.

A. Object as specifically as the judge will let you, e.g.:

1. "Objection, not in evidence, due process."
2. "Objection, personal opinion, due process."
3. "Objection to the inflammatory argument, due process."

B. If the judge indicates the he or she doesn't want you to make a specific objection, fine, or if you can't articulate exactly why the argument is improper, keep a list going, and after argument is over and before the jury is instructed, ask for a hearing to flesh out the basis for your objection. The delay may give you a better opportunity to fully articulate your objection. Even if you make a specific objection, you may be able to sharpen it in such a hearing.

C. <u>*In this hearing, always constitutionalize. State specifically that you contend that the improper argument violated your client's right to a fair trial and to due process of law under the sixth and fourteenth amendments. In the penalty phase, in addition, state that the argument violated your client's eighth amendment right to a reliable capital sentencing proceeding.*</u>

D. Move for a mistrial as appropriate, <u>but only if you want one</u>.

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SOME SUGGESTIONS FOR PRESERVING SPECIFIC GROUNDS, AND, IN PARTICULAR, CONSTITUTIONAL GROUNDS

These suggestions are different strategies to try to make preservation as efficient as possible. Some judges will make things difficult. The important thing is that you achieve the goal of full preservation.

I. **The first time you encounter a particular category of objectionable evidence** that has not been the subject of a motion to suppress or motion in limine, consider asking to be heard outside the jury "on a matter of law." If the court rules against you after you have fully argued the grounds, then after that state the grounds in summary fashion, e.g.: "Objection: relevance, due process, hearsay, confrontation."

II. What if the judge yells at you for making specific objections before the jury, for example: "Objection, relevance, hearsay, confrontation."

A. Keeping it up and letting him or her yell and perhaps find you in contempt is an option, but probably not a good option. Requesting that the judge declare that he or she will find you in contempt if you keep it up is an option. The judge will either say you will be in contempt, and then you are good shape, or will back off.

B. Consider broaching the issue pre-trial, and explaining the necessity to make specific objections.

C. **The judge cannot relieve you of the necessity to make specific objections.**

D. If the judge prohibits you from making specific objections in the presence of the jury, you still have to make them outside the presence of the jury. Do this at the earliest opportunity after the ruling in question, stating all grounds. Pair objections as suggested below.

III. What if the judge says, "Fine, make your specific objections"???

A. Make them. Associate non-constitutional bases with constitutional bases – the most common is "Hearsay – Confrontation." The most

common associations are laid out on the last pages of this manuscript.

B. State for the record in a written pre-trial notice that by "confrontation," for example, you mean the right conferred by the sixth and fourteenth amendments, and by article I, §23 of the N.C. Constitution.

C. Such a notice does NOT relieve you of the necessity to make specific objections.

D. What about something that comes in as the result of the denial of a motion to suppress or motion in limine? Simply "Renew the pretrial motion on the stated grounds," assuming that the pretrial motion stated all grounds. State applicable additional grounds not specified in a motion in limine. AND, renew the objection to each question that elicits testimony that was the subject of a pre-trial motion.

IV. What about line objections?

A. WATCH OUT. POTENTIAL TRAP.

B. There is case law that throws doubt on the validity of line objections in criminal cases.

C. Even assuming that line objections are valid, you must state specific grounds up front, just as with any objection.

D. Even assuming that line objections are valid, and that you state specific grounds up front, any objectionable testimony outside the line objection (that is, that is objectionable for a different or additional reason than initially stated) must be the subject of an additional objection.

E. For instance, if the line objection is hearsay/confrontation, and something that is completely irrelevant and prejudicial comes in during what otherwise is within the parameters of the line, you have not preserved the relevancy bases for objecting, or we lose that ground on appeal.

F. A line objection made at the time of the denial of a pre-trial motion IS CLEARLY NO GOOD. You must make the objection at trial.

G. **All things considered, don't rely on line objections.**

COMMON RELATED GROUNDS FOR TRIAL OBJECTIONS

I. If something is **unfair**, it violates **due process of law**. **Anything admitted in violation of a North Carolina Rule of Evidence, or statute, or case law is unfair.**

What you say in your pre-trial notice:

"When defense counsel state "due process," as the basis for an objection, what is meant is a violation of the right to fundamental fairness and due process of law guaranteed by the 5th and 14th amendments, and art. I, § 19 of the N.C. Constitution."

What you say when you object, whether or not you have filed a pre-trial notice: "Objection, (articulate North Carolina law violation) and due process."

Example: "Objection, Evidence Rule 608(b) and due process."

II. If something is **unreliable or irrelevant in the penalty phase**, it violates the **prohibition on cruel and unusual punishment**.

"When defense counsel state "eighth amendment," what is meant is a violation of the prohibition against cruel and unusual punishment guaranteed by the eighth amendment and art. I, § 27 of the N.C. Constitution."

What you say when you object: "Objection, 8th Amendment."

III. Include in all **hearsay** objections a **confrontation** objection.

"When defense counsel state "hearsay and confrontation," what is meant is a violation of the prohibition against inadmissible hearsay and of the right to confront adverse evidence guaranteed by the sixth and fourteenth amendments and art. I, § 23 of the N.C. Constitution."

What you say when you object: "Objection, hearsay and confrontation."

IV. Any impairment of your **right to put on evidence or argue admitted evidence for a permissible purpose**:

"When defense counsel state "right to a defense," what is meant is a violation of the right to the assistance of counsel, the right to due process of law,

and the right to confront adverse evidence guaranteed by the fifth, sixth, eighth, and fourteenth amendments and art. I, § 19, 23, and 27 of the N.C. Constitution."

What you say when you object: "Objection, 5th, 6th and 14th Amendments" or "Objection, right to defense."

V. Anything that impairs **fair jury selection** or the **impartiality or bias of jurors** (including taints outside the courtroom from exposure to media, to other information outside the evidence, or to prejudicial opinions of other persons)**:**

"When defense counsel state "right to fair jury selection" or "impartial jury," what is meant is a violation of the right to a fair and impartial jury guaranteed by the sixth and fourteenth amendments and art. I, §§ 19 and 24 of the N.C. Constitution."

What you say when you object: "Objection, 6th and 14th Amendments" or "Right to impartial Jury" or "Right to fair jury Selection."

VIII. Include "**due process**" in the objection to violation of any rule of evidence other than confrontation, including objections on relevance grounds or Rule 403 grounds.

Again, Never* Make *An Objection That Does Not Also State A Constitutional Ground.

SUGGESTED TEXT FOR A PRE-TRIAL NOTICE ON DEFENSE OBJECTIONS

Following the caption of your case:

DEFENSE NOTICE OF BASIS FOR PRE-TRIAL OBJECTIONS

The defendant through counsel gives notice that the following is the basis for objections that counsel may make in summary fashion during trial:

1. When defense counsel state "due process," as the basis for an objection, what is meant is a violation of the right to fundamental fairness and due process of

law guaranteed by the 5th and 14th amendments, and art. I, § 19 of the N.C. Constitution.

2. When defense counsel state "hearsay and confrontation," what is meant is a violation of the prohibition against inadmissible hearsay and of the right to confront adverse evidence guaranteed by the sixth and fourteenth amendments and art. I, § 23 of the N.C. Constitution.

3. When defense counsel state "right to defense," what is meant is a violation of the right to the assistance of counsel, the right to due process of law, and the right to confront adverse evidence guaranteed by the fifth, sixth, eighth, and fourteenth amendments and art. I, § 19, 23, and 27 of the N.C. Constitution.

4. When defense counsel state "right to fair jury selection" or "right to impartial jury," what is meant is a violation of the right to a fair and impartial jury guaranteed by the sixth and fourteenth amendments and art. I, §§ 19 and 24 of the N.C. Constitution.

ROLE OF THE JUVENILE DEFENDER

ROLE OF DEFENSE COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS[1]

An attorney in a juvenile delinquency proceeding or in an order to show cause proceeding against an undisciplined juvenile shall be the juvenile's voice to the court, representing the expressed interests of the juvenile at every stage of the proceedings. The attorney owes the same duties to the juvenile under the Rules of Professional Conduct, including the duties of loyalty and confidentiality, as an attorney owes to an adult criminal defendant.

The attorney for a juvenile is bound to advocate the expressed interests of the juvenile. In addition, the attorney has a responsibility to counsel the juvenile, recommend to the juvenile actions consistent with the juvenile's interest, and advise the juvenile as to potential outcomes of various courses of action.

The attorney for a juvenile shall meet with the juvenile as soon as practical; communicate with the juvenile in a manner that will be effective, considering the juvenile's maturity, physical, mental and/or emotional health, intellectual abilities, language, educational level, special education needs, cultural background and gender; educate the juvenile as to the nature of the proceedings; determine the objectives of the juvenile; and keep the juvenile informed of the status of the proceedings. The attorney should move the court for appointment of an interpreter if the primary language of the juvenile or the juvenile's parents or guardian is other than English and the attorney has difficulty communicating with them.

If the attorney determines that the juvenile is unable to understand the proceedings or otherwise cannot assist the attorney in representing the juvenile, the attorney shall move the court for an evaluation of the juvenile's capacity to proceed and otherwise proceed according to Rule 1.14 of the Rules of Professional Conduct.

The attorney for a juvenile should consider moving the court to appoint a guardian if it appears to the attorney that the juvenile does not have a parent or other adult to provide assistance in making decisions outside the scope of the attorney's representation.

Decisions whether to admit to allegations of a petition and whether to testify are those of the juvenile, after consultation with the attorney. Decisions regarding the method and manner of conducting the defense are those of the attorney, after consultation with the juvenile.

An attorney for the juvenile should be knowledgeable of dispositional alternatives available to the court. The attorney should inform the juvenile and the juvenile's parents or guardian of those alternatives, of possible recommendations to the court, and of the possible outcome of the hearing. At the dispositional hearing, the attorney shall provide the court with reasonable dispositional alternatives, if desired by the juvenile.

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[1] This statement of the role of defense counsel in juvenile delinquency proceedings was derived from a number of sources. *See, e.g.*, National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005); American Council of Chief Defenders, National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent*

Defense Delivery Systems (2005); Amy Howell & Brook Silverthorn, Southern Juvenile Defender Center, *Representing the Whole Child: A Juvenile Defender Training Manual*, § IV (2004); California Administrative Office of the Courts, *Effective Representation of Children in Juvenile Delinquency Court* (2004); Juvenile Justice Bulletin, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Access to Counsel* (2004); Katherine R. Kruse, Washington University Journal of Law and Policy, *Lawyers Should be Lawyers, But What does that Mean? A Response to Aiken & Wizer & Smith* (2004); Frank E. Vandervort, Michigan Bar Journal, *When Minors Face Major Consequences: What Attorneys in Representing Children in Delinquency, Designation, and Waiver Proceedings Need to Know* (2001); National Association of Counsel for Children, *Recommendations for Representation of Children in Abuse and Neglect Cases*, Part IV (2001); Barbara Butterworth, Will Rhee & Mary Ann Scali, American Bar Association Juvenile Justice Center, *Juvenile Defender Delinquency Notebook*, Chapter 2, § 2.2 (2000); Massachusetts Committee for Public Counsel Services, *Assigned Counsel Manual: Policies and Procedures*, Parts III. A.4 & J 1.2 (2000); Kentucky Department of Public Advocacy, *Juvenile Law Manual*, Chapters 1 & 3 (1999); IJA/ABA Juvenile Justice Standards, *Standards Relating to Private Parties*, Standard 3.1 (1996); Stephen Wizner, 4 Columbia Human Rights Law Review 389, *The Child and the State: Adversaries in the Juvenile Justice System* (1972)

Role of Juvenile Defense Counsel in Delinquency Court

National Juvenile Defender Center

Spring 2009

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Role of Juvenile Defense Counsel in Delinquency Court

Preamble and Scope

A. The Origin of the Role of the Juvenile Defender

In a series of cases starting in 1966, the United States Supreme Court extended bedrock elements of due process to youth charged in delinquency proceedings. Arguably the most important of these cases, *In re Gault*[1] held that juveniles facing delinquency proceedings have the right to counsel under the Due Process Clause of the United States Constitution, applied to the states through the Fourteenth Amendment. The Court added juvenile defense counsel to rectify the dilemma ensnaring juveniles across the country, in which juveniles received "the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[2] The Court clearly observed that juvenile defense counsel's role in delinquency proceedings is unique and critical: "[t]he probation officer cannot act as counsel for the child. His role . . . is as arresting officer and witness against the child. Nor can the judge represent the child."[3] The Court concluded that no matter how many court personnel were charged with looking after the accused child's interests, any child facing "the awesome prospect of incarceration" needed "the guiding hand of counsel at every step in

the proceedings against him" for the same reasons that adults facing criminal charges need counsel.[4]

The introduction of advocates to the juvenile court system was meant to change delinquency proceedings in several key ways. First, it was meant to infuse the informal juvenile court process with more of the jealously-guarded constitutional protections of adult criminal court and their attendant adversarial tenor. Perhaps more importantly, with attorneys explicitly assigned to advocate on their behalf, juveniles accused of delinquent acts were to become participants, rather than spectators, in their court proceedings. The Court observed specifically that juvenile respondents needed defenders to enable them "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the client] has a defense and to prepare and submit it."[5]

With its decisions in *Gault* and other cases,[6] the Court moved the treatment of youth in juvenile justice systems into the national spotlight. In 1974, with a goal of protecting the rights of children, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA).[7] The JJDPA created the National Advisory Committee for Juvenile Justice and Delinquency Prevention, which was charged with developing national juvenile justice standards and guidelines. The National Advisory Committee standards, published in 1980, require that children be represented by counsel in delinquency matters from the earliest stage of the process.[8]

At the same time, several non-governmental organizations also recognized the necessity of protections for youth in delinquency courts. Beginning in 1971, and continuing over a ten-year period, the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) researched, developed and produced 23 volumes of comprehensive juvenile justice standards, annotated with explicit policies and guidelines.[9] The IJA/ABA Joint Commission on Juvenile Standards relied

upon the work of approximately 300 dedicated professionals across the country with expertise in the many disciplines relevant to juvenile justice practice, including the judiciary, social work, corrections, law enforcement, and education. The Commission circulated draft standards to individuals and organizations throughout the country for comments. The final standards, which were adopted by the ABA in 1982, were crafted to establish a model juvenile justice system, one that would not fluctuate in response to transitory headlines or controversies.

By the early 1980s, there was professional consensus that defense attorneys owe their juvenile clients the same duty of loyalty as adult clients.[10] That coextensive duty of loyalty requires defenders to represent the legitimate "expressed interests" of their juvenile clients, and not the "best interests" as determined by the attorney.[11]

B. Present State of Juvenile Defense: A Call for Justice

Recognizing the need for more information about the functioning of delinquency courts across the country, as part of the reauthorization of the JJDPA in 1992, Congress asked the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) to address this issue. One year later, in 1993, OJJDP responded to Congress' request by funding the Due Process Advocacy Project, led by the ABA Juvenile Justice Center, together with the Youth Law Center and the Juvenile Law Center. The purpose of the project was to build the capacity and effectiveness of the juvenile defense bar to ensure that children have meaningful access to qualified counsel in delinquency proceedings. One result of this collaboration was the 1995 release of *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national review of the legal representation of children in delinquency proceedings.[12] The first systemic national assessment of its kind, the report laid the foundation for a closer examination of access to counsel, the training and resource

needs of juvenile defenders, and the quality of legal representation provided by each state's juvenile indigent defense system. The report highlighted the gaps in the quality of legal representation for indigent children across the country.

The findings of *A Call for Justice* prompted an outpouring of concern from judges and lawyers across the country, and pointed to the need for state-specific assessments to guide and inform legislative reforms. In response, a methodology was developed to conduct comprehensive assessments of access to counsel and quality of representation in individual states. Since 1995, first the ABA Juvenile Justice Center, and then the National Juvenile Defender Center, have conducted state-specific juvenile defense assessments in 16 states: Florida, Georgia, Indiana, Illinois, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Washington. Re-assessments have been conducted in Kentucky and Louisiana. County-based assessments were conducted in Cook County, Illinois, Marion County, Indiana and Caddo Parish, Louisiana. The National Juvenile Defender Center is continuously working with leaders in states who are interested in conducting juvenile indigent defense assessments.

Although each state has its own idiosyncrasies, hundreds of interviews in assessment after assessment reaffirm the findings first uncovered in *A Call for Justice*. Since the *Gault* decision, the role of the juvenile defender has evolved to require a complex and challenging skill set. Juvenile defense attorneys must have all the legal knowledge and courtroom skills of a criminal defense attorney representing adult defendants. In addition, juvenile defenders must be aware of the strengths and needs of their juvenile clients and of their clients' families, communities, and other social structures. Juvenile defenders must: understand child and adolescent development to be able to communicate effectively with their clients, and to evaluate the client's level of maturity and competency and its relevancy to the delinquency case; have knowledge of and

contacts at community-based programs to compose an individualized disposition plan; be able to enlist the client's parent or guardian as an ally without compromising the attorney-client relationship; know the intricacies of mental health and special education law, as well as the network of schools that may or may not be appropriate placements for the client; and communicate the long- and short-term collateral consequences of a juvenile adjudication, including the possible impact on public housing, school and job applications, eligibility for financial aid, and participation in the armed forces.

There are many juvenile defense attorneys who, in the face of daunting systemic and other obstacles, offer their clients zealous, holistic, client-centered advocacy. Unfortunately, as *A Call for Justice* first revealed, these attorneys are the exception and not the norm: in jurisdiction after jurisdiction, systemic and other barriers prevent juvenile defenders from realizing the constitutionally-mandated vision of their role. For example, on average, juvenile defenders' caseloads are staggeringly high, and these crushing caseloads have redounding repercussions: plea agreements function as a case management tool and are entered into without previous, independent investigation; pre-trial advocacy to test the strengths and weaknesses of the government's case is often set aside; and already scarce resources, stretched thin to provide basic services, like office space, computers, desks, and files, are not available for investigators, social workers, and expert witnesses. Also, across the country, juvenile court suffers from a "kiddie court" mentality where stakeholders do not believe that juvenile court is important. Finally, in some jurisdictions, because they view juvenile court first and foremost as an opportunity to "help a child," judges and other system participants undermine attorneys' efforts to challenge the government's evidence and provide zealous, client-centered representation, considering such advocacy an impediment to the smooth function of the court. As a result, many juvenile courts still operate in a pre-*Gault* mode in which the defense attorney is irrelevant, real

lawyering cannot occur, and the fair administration of justice is impeded.

C. Goals of These Principles

The Principles that follow are developed to describe the unique and critical role juvenile defense attorneys play in juvenile proceedings. Hundreds of interviews with juvenile justice system stakeholders reveal that the juvenile defense attorney's role is perceived differently by different courtroom actors. While there are of course exceptions, across the country, prosecutors and probation officers often view zealous juvenile defense attorneys as obstructionists who overlook the compelling needs of their clients in service to the single and monolithic goal of "getting the client off, and communicate, in direct and indirect ways, that the defender should be less adversarial. Similarly, judges rely on juvenile defense attorneys to advocate on the child's behalf, but only as a necessary cog in the machinery of the appearance of fairness and of judicial economy, and not as a zealous, client-centered advocate. Juvenile defenders themselves are unsure of their role. Most understand that, in theory, they are bound to zealously represent their clients' expressed interests. Nonetheless, in practice, many yield to the unified pressure from other stakeholders and from the seemingly irresistible momentum of the proceedings, and advocate for their clients' best interests. The reasons for this capitulation vary. Some set aside their ethical obligation because of a genuinely misguided understanding of their role; others sacrifice zealous advocacy because they have to triage staggering caseloads supported by scant resources; still others bow to systemic barriers that interfere with their advocacy. The defenders' role seems all the more ambiguous in specialty boutique courts, like drug court and mental health court.

In the vision of the *Gault* Court, the juvenile defense attorney is a critical check on the power of the state as it imperils the client's liberty interests. Defenders are not obstructionists; they

protect the child's constitutional rights. They do this through their practical, everyday duties – from interviewing the child outside of the presence of the child's parents, to objecting to inadmissible but informative evidence at adjudicatory hearings, to advocating for the least restrictive alternative at disposition, to pressing, at every stage, for the client's expressed interests. Each of these day-to-day duties has its grounding in defense counsel's mandatory ethical obligations. These Principles serve to inform indigent defense providers and the leadership of indigent defense organizations, judges, prosecutors, probation officers, and other juvenile justice stakeholders the specifics of the role of defense counsel in the delivery of zealous, comprehensive and quality legal representation to which children charged with crimes are constitutionally entitled.

The Role of Juvenile Defense Counsel

1. Duty to Represent the Client's Expressed Interests

ABA Model Rules of Professional Conduct (Model Rules): Preamble; 1.14(a) Client with Diminished Capacity; 1.2(a) Scope of Representation and Allocation of Authority between Client and Lawyer

At each stage of the case, juvenile defense counsel acts as the client's voice in the proceedings, advocating for the client's expressed interests, not the client's "best interest" as determined by counsel, the client's parents or guardian, the probation officer, the prosecutor, or the judge. With respect to the duty of loyalty owed to the client, the juvenile delinquency attorney-client relationship mirrors the adult criminal attorney-client relationship. In the juvenile defender's day-to-day activities, the establishment of the attorney-client relationship is animated by allocating the case decision-making, and practicing the special training required to represent clients with diminished capacity.

A. Establishment of the Attorney-Client Relationship: Juvenile defense counsel do not assume they know what is best for the client, but instead employ a client-centered model of advocacy that actively seeks the client's input, conveys genuine respect for the client's perspective, and works to understand the client in his/her own socioeconomic, familial, and ethnic context.

1. At every stage,[13] juvenile defense counsel works to provide the client with complete information concerning all aspects of the case, including honest predictions concerning both the short-term (e.g., whether the client will be detained pending trial or whether the client will win the probable cause hearing) and long-term (e.g., whether the child will be acquitted or whether, if found involved, the child will be committed and/or face additional collateral consequences) goals of the case. Juvenile defense counsel's abiding purpose is to empower the client to make informed decisions. Counsel's advice to the client about the likely advantages and disadvantages of different case scenarios is legally comprehensive, candid, and objectively relayed using age-appropriate language.

2. Operating under a client-centered model of advocacy allows juvenile defense counsel to enhance immeasurably the fundamental fairness of the system. Because no other courtroom actor serves the juvenile's expressed interests, without juvenile defense counsel, the juvenile would be subjected to a pre-*Gault* proceeding in which protecting the juvenile's due process rights are relegated to a mere technicality.

B. Allocation of Decision-Making: Unlike the other courtroom actors, who have no obligation to consider a juvenile's expressed interests in their recommendations and orders, juvenile defense counsel allows clients, to the greatest extent possible, to be the primary decision-makers in their cases.

1. Juvenile defense counsel enables the client, with frank information and advice, to direct the course of the proceedings in at least the following areas:

    a. whether to cooperate in a consent judgment, diversion, or other early disposition plans;

    b. whether to accept a plea offer;

    c. if the client can choose, whether to be tried as a juvenile or an adult;

    d. if the client can choose, whether to have a jury trial or a bench trial;

    e. whether to testify in his own defense; and

    f. whether to make or agree to a specific dispositional recommendation.

2. Other decisions concerning case strategy and tactics to pursue the client's goals, like the determination of the theory of the case, what witnesses to call, or what motions to file, are left to juvenile defense counsel, with the critical limitations that counsel's decisions 1) shall not conflict with the client's expressed interests concerning the areas listed in c, and 2) shall not conflict with the client's expressed interests in any other case-related area.

C. **Diminished Capacity:** Minority does not automatically constitute diminished capacity such that a juvenile defense attorney can decline to represent the client's expressed interests. Nor does a juvenile's making what juvenile defense counsel considers to be a rash or ill-considered decision constitute grounds for finding that the client suffers from diminished capacity. In fact, because of the unique vulnerabilities of youth, it is all the more important that juvenile defense attorneys firmly adhere to their ethical obligations to articulate and advocate for the child's expressed interest, and to safeguard the child's due process rights. In other words, in direct contrast to the pervasive informality that characterizes juvenile court practice in so many jurisdictions, minority sharpens defense counsel's ethical responsibilities, instead of relaxing them.

1. In light of current brain development research, it is clear that minority critically affects the scope of the juvenile attorney- juvenile client relationship. Current brain development research posits that youth are categorically less culpable than the average adult offender. This research has gained wide acceptance, as indicated most recently by the United States Supreme Court's opinion in *Roper v. Simmons*, 543 U.S. 551(2005), which struck down the juvenile death penalty as unconstitutional. The *Roper* Court concluded that youths are less culpable than the average adult offender because they: (1) lack maturity and responsibility, (2) are more vulnerable and susceptible to outside influences, particularly negative peer influences, and (3) are not as well formed in character and personality as, and have a much greater potential for rehabilitation than, adults. *Id*. at 569-570. This research requires juvenile defense counsel to be adept at using age-appropriate

language, motivational interviewing, visual aids, and other techniques effective in communicating with, and more specifically, effective in translating legal concepts to, children.

2. It is crucial to recognize that this research does not provide an argument for counsel to disregard a child's expressed interests merely because of the child's minority. To the contrary, the unique vulnerabilities of youth, make it all the more important for the child's lawyers to help the child identify and articulate his or her views to key players in the juvenile justice system. Any juvenile client capable of considered judgment is entitled to a normal attorney-client relationship. And, even youth of diminished capacity and other vulnerabilities have views, concerns and opinions that are entitled to weight in legal proceedings.

Additional sources:

- *IJA/ABA Juvenile Justice Standards, Standards Relating to Counsel for Private Parties (Juvenile Justice Standards): 3.1 The Nature of the Lawyer-Client Relationship; 5.2 Control and Direction of the Case; 9.3(a) Counseling Prior to Disposition*
- *ABA Standards for Criminal Justice, Standards Relating to the Defense Function (Criminal Justice Standards): 4-3.1 Establishment of Relationship*

2. Duty of Confidentiality and Privilege

Model Rules: 1.6 Confidentiality of Information

Juvenile defense counsel is bound by attorney-client confidentiality and privilege. The duty of confidentiality that juvenile defense counsels owe their juvenile clients is coextensive with

the duty of confidentiality that criminal defense counsels owe their adult clients. This duty includes:

A. **No Exception for Parents or Guardians:** There is no exception to attorney-client confidentiality in juvenile cases for parents or guardians. Practically, this fact means that juvenile defense counsel has an affirmative obligation to safeguard a client's information or secrets from parents or guardians; that interviews with the client must take place outside of the presence of the parents or guardians; and that parents or guardians do not have any right to inspect juvenile defense counsel's file, notes, discovery, or any other case-related documents without the client's expressed consent. While it may often be a helpful or even necessary strategy to enlist the parents or guardians as allies in the case, juvenile defense counsel's primary obligation is to keep the client's secrets. Information relating to the representation of the client includes all information relating to the representation, whatever its source.

B. **No Exception for Client's Best Interests:** There is no exception to attorney-client confidentiality in juvenile cases allowing disclosure of information in service to what counsel, parents or guardians, or any other stakeholders deem to be the client's best interests. Even if revealing the information might allow the client to receive sorely-needed services, defense counsel is bound to protect the client's confidences, unless the client gives the attorney express permission to reveal the information to get the particular services, or disclosure is impliedly authorized to carry out the client's case objectives.

C. **Private Meeting Space:** To observe the attorney's ethical duty to safeguard the client's confidentiality,

attorney-client interviews must take place in a private environment. This limitation requires that, at the courthouse, juvenile defense counsel should arrange for access to private interview rooms, instead of discussing case specifics with the client in the hallways; in detention facilities, juvenile defense counsel should have a means to talk with the client out of the earshot of other inmates and guards; and in the courtroom, juvenile defense counsel should ask for a private space in which to consult with the client, and speak with the client out of range of any microphones or recording devices.

Additional sources:

- *Juvenile Justice Standards: 3.3 Confidentiality*

3. Duties of Competence and Diligence

Model Rules: 1.1 Competence, 1.3 Diligence

A juvenile defense attorney provides competent, prompt, and diligent representation based in legal knowledge, skill, thorough preparation, and ongoing training.[14] With respect to the juvenile defender's day-to-day activities, the Duties of Competence and Diligence are expansive, encompassing the obligations to investigate, to zealously protect the child's due process rights from arrest through the close of the case, to engage in dispositional advocacy, and to access ancillary services.

A. Comprehensive Skill Set: Juvenile defense counsel possesses a comprehensive skill set that meets the client's legal, educational, and social needs.

1. Competent representation in juvenile delinquency matters requires legal training that encompasses rules of evidence, constitutional law, juvenile law and procedure, and criminal

law and procedure, as well as trial skills, such as examining witnesses, admitting documents into evidence, and making legal arguments before the court, and appellate procedure.

2. Competent juvenile defense counsel is also well-versed in the areas of child and adolescent development. Child and adolescent development research intersects with counsel's representation in many ways. For example, counsel might rely on recent development research in detention and disposition arguments. Counsel also might use the research to help counsel convey complex legal concepts in age-appropriate language.

3. Competent juvenile defense counsel has a working knowledge of and maintains contacts with experts in ancillary areas of law that often intersect juvenile delinquency matters, including but not limited to the collateral consequences of adjudication and conviction, expungement, special education, abuse and neglect, mental health, cultural competency, child welfare and entitlements, and immigration

4. Competent defense counsel engages in continuing study and education of juvenile-specific subject areas and complies with all relevant continuing legal education requirements.

B. Investigation: Juvenile defense attorneys promptly investigate cases to find witnesses, examine forensic evidence, locate and inspect tangible objects and other evidence that might tend to exculpate the client, that might lead to the exclusion of inculpatory evidence at adjudication or disposition, or that might buttress the client's potential defenses. This duty exists even when

the lawyer believes the client is guilty, and when the client has confessed in interrogation, in interviews with counsel, or to anyone else.

1. Juvenile defense attorneys promptly take the necessary steps to obtain discovery, including filing discovery requests, motions pursuant to *Brady v. Maryland*, and motions to compel if the prosecutor does not comply with counsel's request.

2. Based on leads from the client and from discovery received from the prosecutor, juvenile defense attorneys conduct independent investigation of, *inter alia*, the allegations against the client, of police conduct, of witnesses' backgrounds, and of any and all possible defenses and mitigating factors for disposition.

3. Juvenile defense attorneys do not allow clients to plead guilty without first reviewing the government's file, including police reports, results of forensic examinations and tests, photographs, and other evidence, discussing and pursuing possible exculpatory investigation leads, and providing a fair and informed assessment of the strengths and weaknesses of the government's case.

C. **Protecting Pretrial Due Process Rights:** Juvenile defense attorneys have a duty to protect the client's pretrial due process rights by obtaining discovery, filing motions, and making arguments to protect the client's rights while serving the client's expressed interests.[15]

1. To ensure that the court system is not being used for societal functions it was not meant to assume – for example, as the disciplinary arm of the school system, or as a reflection of the

racial, ethnic and class biases that often mark police arrest rates – juvenile defense attorneys file pretrial motions that seek pretrial release, that advocate for individualized plans that offer the least restrictive set of release conditions necessary to ensure the client's return to court and community safety, and that guard against infringement of the client's federal or state constitutional rights before and during the arrest, including motions to suppress tangible evidence, identifications, and statements.

2. Juvenile defense attorneys also file pretrial motions that clarify points of law, block the admission into evidence of inadmissible or prejudicial information, and otherwise ensure that the client will receive a fair trial.

D. Protecting Due Process Rights at Adjudicatory Hearings: Juvenile defense counsel has a duty to protect the client's due process rights and to pursue vigorously the client's expressed interests at adjudication.

1. Juvenile defense counsel ensures that, as *In re Gault* and its progeny clearly intended, juvenile adjudicatory hearings are adversarial proceedings in which the state bears the burden to prove its case beyond a reasonable doubt with credible, admissible evidence.

2. In accord with this constitutional imperative, juvenile defense counsel ensures fairness in the courtroom by litigating the case vigorously consistent with the presumption of innocence, regardless of counsel's opinion concerning either guilt or innocence or the client's need for social, educational, and other services.

3. Juvenile defense counsel litigate adjudicatory hearings aware of the elements of each charged allegation, the lesser-includeds for each charge, all the client's possible defenses, and relevant case law.

4. Juvenile defense counsel fulfill their role under *Gault* by adhering to and enforcing application of the rules of evidence, lodging objections, examining witnesses, filing written and oral motions, and challenging the credibility and admissibility of the state's evidence. This duty exists regardless of counsel's opinion of the client's guilt.

5. Juvenile defense counsel explains the right to testify, helps the client identify and weigh the advantages and disadvantages of testifying, and helps the client prepare if he decides to testify.

E. Preparing for and Engaging in Dispositional Advocacy: As part of the duty of competence and diligence, juvenile defense counsel has an affirmative duty to prepare for and engage in dispositional advocacy. Accordingly, at disposition, juvenile defense counsel offers the court strengths-based disposition alternatives that look beyond the options considered by the probation officer to address the child's expressed interests while being responsive to the court's concerns.

1. Dispositional investigation and advocacy begin at the initiation of the attorney-client relationship. Regardless of counsel's prognosis of the case outcome, counsel begins disposition planning and investigation at the earliest opportunity to maximize the chance that the appropriate investigation, evaluations and inter-

views are completed, and the necessary documents are located and submitted, with the end result that, should the client be found guilty, the client receives the most appropriate, least restrictive disposition with as little delay as possible.

2. Juvenile defense counsel investigates disposition alternatives beyond those available to and considered by probation officers and juvenile court counselors, drawing on community-based resources, according to the client's wishes.

3. Counsel thoroughly engages the child in disposition planning by helping the child identify and understand and weigh the available options. Counsel informs the client about the nature of the presentence investigation process and the importance of statements the client and the client's family might make to probation officers and youth court counselors. Counsel also advises the client about the right of allocution at disposition, and helps the client prepare if the client chooses to allocute.

4. As part of disposition preparation, juvenile defense counsel consults with mitigation specialists, social workers, and mental health, special education, and other experts to develop a plan consistent with the client's expressed interests.

5. At the disposition hearing, juvenile defense counsel prepares and presents the court with a creative, comprehensive, strengths-based, individualized disposition alternative consistent with the client's expressed interests.

6. As at the adjudicatory hearing, at the disposition hearing, juvenile defense counsel protects

the client's due process rights by challenging the state's evidence, including any hearsay and other inadmissible evidence that may be included in the presentence report, by cross-examining the state's witnesses, including the probation officer, and by proffering witnesses in support of the client's own disposition plan, according to the client's expressed interests.

F. Conducting Post-Disposition Representation:
Juvenile defense counsel has a duty to research and understand the legal rights to which the client is entitled and the legal options the client can access at the post-disposition stage of the case and, after consultation with the client, to pursue available options.

1. Juvenile defense counsel files timely notices of appeals, writs of *habeas corpus*, and other motions that challenge orders or outcomes that counsel believes are illegal or otherwise offend principles of fundamental fairness.

2. At periodic intervals after disposition, juvenile defense counsel checks in with the client, with an eye towards averting any potential problems with the client's successful completion of disposition conditions, to maximize the client's chance at closing the case as quickly as possible.

3. In jurisdictions that hold regular post-disposition review hearings, juvenile defense counsel participates in these proceedings. In jurisdictions that do not hold regular post-disposition review hearings, juvenile defense counsel encourages periodic post-disposition reviews by filing motions to review that request hearings or other forms of relief, unless counsel's contract prohibits filing such a motion.

4. In preparation for probation and parole revocation hearings, juvenile defense counsel locates witnesses, investigates allegations, challenges the government's evidence, prepares a defense and offers relevant mitigating factors for the court's consideration.

5. Defense counsel also keeps a record of any difficulties with, or failings by probation officers, programs or other entities charged with providing service to the client in order to militate against violations of probations. If the client is detained, juvenile defense counsel helps the client to maintain contact with the client's family and/or other positive community-ties, in accordance with the client's wishes.

6. Because juvenile defense counsel's obligation is to the client, counsel can challenge conditions of confinement, either individually or as part of a larger strategy with other juvenile defense counsel.

7. Juvenile defense counsel helps the client expunge juvenile adjudications from the client's record, so that the client is better able to live as a productive, law-abiding citizen without the stigma of adjudication.

G. Accessing Ancillary Services: Juvenile defense counsel provides to the client, either directly or indirectly through referrals, assistance in ancillary areas of law that intersect juvenile indigent defense, with the goal of affording the client holistic representation. Juvenile defense counsel does whatever counsel can reasonably undertake to facilitate the relationship with the client and the provider, and ensure the attainment of the client's ultimate goal.

1. Juvenile defense counsel is familiar with special education law and works to ensure that the client is in an appropriate educational setting.

2. Juvenile defense counsel ensures that the client's rights are protected at school discipline or expulsion hearings.

3. Juvenile defense counsel is available to assist the client with intersecting, ancillary proceedings that may impact the client's case, including housing and immigration matters, as well as procedures for obtaining Medicaid or other public benefits.

4. Juvenile defense counsel who are prohibited from or face limitations in providing these services directly develop a network of providers to whom these cases can be referred so that ancillary representation is holistic and responsive to the client's legal needs.

Additional sources:

- *Juvenile Justice Standards: 4.3 Investigation and Preparation; 4.1 Prompt Action to Protect the Client; 7.2 Formality, In General; 7.3 Discovery and Motion Practice; 7.8 Examination of Witnesses; 7.9(a) Testimony by the Respondent; 9.1 Disposition, In General; 9.2 Disposition Investigation and Preparation; 9.3 Counseling Prior to Disposition; 9.4 Disposition Hearing; 9.5 Counseling after Disposition; 10.1 Relations with the Client after Disposition; 10.2 Postdispositional Hearings before the Juvenile Court; 10.3 Counsel on Appeal; 10.4 Conduct of the Appeal; 10.6 Probation Revocation; Parole Revocation; 10.7 Challenges to the Effectiveness of Counsel*
- *Criminal Justice Standards: 4-4.1 Duty to Investigate; 4-3.6 Prompt Action to Protect the Accused; 4-1.2(a) The Function of Defense Counsel, Commentary; 4-7.4 Opening Statement; 4-7.5 Presentation of Evidence; 4-7.6 Examination of Witnesses; 4-7.7 Argument to the Jury; 4-8.1 Sentencing; 4-7.9 Posttrial Motions; 4-8.2 Appeal, 4-8.3 Counsel on Appeal*

4. Duty to Advise and Counsel

Model Rules: 2.1 Advisor

To better enable the client to make a fully informed decision about the direction of the case, juvenile defense attorneys offer clients honest and comprehensive advice that considers the client's educational, familial, social, developmental, and other realities, in addition to the client's legal situation.

A. Pursuing Diversion Options: Consistent with the client's expressed interests, juvenile defense counsel negotiates, at every possible opportunity, for diversion and other means of case dismissal, regardless of counsel's own opinion of guilt or innocence or the client's need for services. Counsel advises the client on the advantages and disadvantages of each of these alternatives to adjudication, including the consequences of non-compliance with conditions of diversion.

B. Ensuring Ethical Plea Agreements: Juvenile defense counsel negotiates reasonable plea offers and ensures that clients make well-considered decisions concerning whether to plead or go to trial.

1. In negotiations with prosecutors, juvenile defense counsel represents and advocates for the client's expressed interests.

2. Juvenile defense counsel promptly relays plea offers, taking time to review the offer with the client in detail and using age-appropriate language, advises the client on the full panoply of rights relinquished by pleading, as well as the range of disposition options.

3. Juvenile defense counsel seeks to ensure the client has sufficient time to understand and weigh the offer.

4. Juvenile defense counsel's advice as to whether to accept the plea offer includes discussion of the long-term collateral consequences of a juvenile adjudication or transfer to and conviction in adult criminal court (e.g., in some jurisdictions, deportation if the client is undocumented, ineligibility for public housing, federal student loans, and military service). This discussion should also include: the possible dispositions and their impact on the client's life; if the client is likely to get probation; and the consequences of a probation violation.

Additional sources:

- *Juvenile Justice Standards: 6.3 Early Disposition; 7.1 Adjudication without Trial*
- *Criminal Justice Standards: 4-6.1 Duty to Explore Disposition Without Trial; 4-6.2 Plea Discussions; 4-5.2 Control and Direction of the Case*

5. Duty of Communication

Model Rules: 1.4 Communications

At every stage of the case, a juvenile defense attorney keeps the client informed of the case's legal progression in frequent discussions using age-appropriate language, so that the client is a fully informed and proactive participant at all stages of the proceedings.

A. Communication in Court: For in-court proceedings, juvenile defense counsel previews for the client each hearing before it happens, and reviews each hearing after it happens, providing an opinion as to how the specific hearing has affected the course of the overall case, and allowing the client ample opportunity to ask questions and raise concerns.

B. Communication outside of Court: Juvenile defense counsel keeps the client similarly informed about the case's progression outside of the courtroom by: soliciting and following up on the client's investigatory leads, sharing copies of and discussing motions filed, monitoring the client's compliance with release conditions, or, if the client is detained, making sure that the client is receiving adequate services, and being available to assuage the client's concerns as the case proceeds.

C. Communication and Confidentiality: Counsel creates a safe, comfortable, and, to the extent possible, private environment, and allocates adequate time for counseling; engages the youth with age-appropriate language; earns the child's trust over time; and offers balanced and objective advice when appropriate.

D. Communication with Detained Clients: If the client is detained pending trial, juvenile defense counsel visits the client at the detention facility, and informs the client's family how and when they can visit the client. If the detention facility is too remote, counsel keeps in regular phone contact with the client.

Additional sources:

- *Juvenile Justice Standards: 3.5 Duty to Keep Client Informed; 4.2 Interviewing the Client; 5.1 Advising the Client Concerning the Case*
- *Criminal Justice Standards: 4-3.1 Establishment of Relationship; 4-3.8 Duty to Keep Client Informed; 4-5.1 Advising the Accused*

Endnotes

1 387 U.S. 1 (1967).

2 Gault, 387 U.S. at 19 n. 23 (internal quotations and citation omitted).

3 *Gault*, 387 U.S. at 36.

4 *In re* Gault, 387 U.S. 1, 36 (1967).

5 *In re* Gault, 387 U.S. 1, 36 (1967).

6 *See Kent v.U.S.*, 383 U.S. 541 (1966) (holding that due process requirements apply to transfer proceedings); *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles have right to notice of charges, right to counsel, privilege against self incrimination, and right to confrontation and cross-examination); *In re Winship*, 397 U.S. 358 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications); *Breed v. Jones*, 421 U.S. 519 (1975)(rejecting the rigid categorization of juvenile proceedings as civil, and extending the protection offered by the Double Jeopardy Clause, which had traditionally been applied to criminal proceedings, to juvenile proceedings).

7 Pub. L. 93-415 (1974).

8 National Advisory Committee for Juvenile Justice and Delinquency Prevention, *Standards for the Administration of Juvenile Justice* §3.132 Representation by Counsel – For the Juvenile (1980).

9 For a description of the project, *see IJA/ABA Juvenile Justice Standards Annotated: A Balanced Approach* xvi-xviii (Robert E. Shepherd, ed., 1996).

10 Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 255-56 (2005).

11 *Id*.

12 ABA Juvenile Justice Center, Juvenile Law Center & Youth Law Center, *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (1995), available at http://www.njdc.info/pdf/cfjfull/pdf.

13 For purposes of this document, "stage" is broadly defined to include each step at which the state's power intersects the child's life, including, but not limited to, arrest, interrogation at the police station, at school, or at home, initial detention hearings, the probable cause hearing, and post-disposition hearings.

14 Under Model Rule 1.16(a)(1), *Declining or Terminating Representation*, if a lawyer cannot provide competent, prompt and diligent representation, and continued representation will result in violation of the rules of professional conduct, a lawyer can decline new cases or terminate representation. This rule gives important support to juvenile defense attorneys whose unmanageable caseloads prohibit the individualized, zealous advocacy to which juveniles are constitutionally entitled.

15 It should be noted that juvenile defense counsel is not the only stakeholder ethically charged with safeguarding the client's pretrial due process rights. Model Rule 3.8, *Special Responsibilities of a Prosecutor*, requires prosecutors to: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; not seek to obtain from an unrepresented defendant a waiver of important pretrial rights, such as the right to a preliminary hearing; and make timely disclosure to the defense of all mitigating or exculpatory evidence.

Endnotes

Appendix A

ABA Model Rules of Professional Conduct

Preamble and Scope

Preamble: A Lawyer's Responsibilities

1. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

3. In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12

and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

4. In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

5. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

6. As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their au-

thority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

7. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

8. A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

9. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within

the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

10. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

11. To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

12. The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities

compromises the independence of the profession and the public interest which it serves.

13. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

14. The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

15. The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

16. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

17. Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

18. Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several

government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

19. Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

20. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

21. The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

ABA Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Client-Lawyer Relationship
Rule 1.1 Competence – Comment

Legal Knowledge and Skill

1. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

2. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

3. In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

4. A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

5. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation

and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

6. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer – Comment

Allocation of Authority between Client and Lawyer

1. Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

2. On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule

1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

3. At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

4. In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

5. Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

6. The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

7. Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

8. All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

9. Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

10. When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially del-

icate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

11. Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

12. Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

13. If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Client-Lawyer Relationship
Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Client-Lawyer Relationship
Rule 1.3 Diligence – Comment

1. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

2. A lawyer's work load must be controlled so that each matter can be handled competently.

3. Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does

not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

4. Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

5. To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another

lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Client-Lawyer Relationship
Rule 1.4 Communication

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Client-Lawyer Relationship
Rule 1.4 Communication – Comment

1. Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

2. If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

3. Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

4. A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowl-

edge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

5. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

6. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the law-

yer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

7. In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Client-Lawyer Relationship
Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
   (1) to prevent reasonably certain death or substantial bodily harm;
   (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury

to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information – Comment

1. This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

2. A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark

of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

3. The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

4. Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

5. Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

6. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

7. Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information

to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

8. Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

9. A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to

carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

10. Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

11. A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

12. Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule

and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

13. A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

14. Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

15. Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the

nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

16. A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

17. When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the

use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

18. The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Client-Lawyer Relationship
Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Client-Lawyer Relationship
Rule 1.14 Client with Diminished Capacity – Comment

1. The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years

of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

2. The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

3. The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

4. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

5. If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

6. In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

7. If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect

the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

8. Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

9. In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

10. A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Client-Lawyer Relationship
Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Client-Lawyer Relationship
Rule 2.1 Advisor – Comment

Scope of Advice

1. A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

2. Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

3. A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept

it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

4. Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

5. In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Appendix B

Ten Core Principles for Providing Quality Public Defense Delivery Systems

Preamble

A. Goals of These Principles

The *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*[1] provide criteria by which a public defense delivery system[2] may fully implement the holding of *In re Gault*.[3] These Principles offer guidance to public defense leaders and policymakers regarding the role of public defenders, contract attorneys, or assigned counsel in delivering zealous, comprehensive and quality legal representation on behalf of children facing both delinquency and criminal proceedings.[4] In applying these Principles, advocates should always be guided by defense counsel's primary responsibility to zealously defend clients against the charges leveled against them and to protect their due process rights.

Delinquency cases are complex and their consequences have significant implications for children and their families. Therefore, every child client must have access to qualified, well-resourced defense counsel. These resources should include the time and skill to adequately communicate with a client so that lawyer and client can build a trust-based attorney-client relationship and so that the lawyer is prepared to competently represent the client's interests. These Principles elucidate

the parameters of this critical relationship already well established in legal ethics rules and opinions.

In 1995, the American Bar Association's Juvenile Justice Center published *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*, a national study that revealed major failings in juvenile defense across the nation. Since that time, numerous state-based assessments have documented in detail the manner in which these failings result in lifelong, harmful consequences for our nation's children.[5] These Principles provide public defense leaders and policymakers a guide to rectifying systemic deficits and to providing children charged with criminal behavior the high quality counsel to which they are entitled.

B. The Representation of Children and Adolescents is a Specialty.

Public defense delivery systems must recognize that children and adolescents are different from adults. Advances in brain research cited favorably by the Supreme Court in *Roper v. Simmons*[6] confirm that children and young adults do not possess the same cognitive, emotional, decision-making or behavioral capacities as adults. Public defense delivery systems must provide training regarding the stages of child and adolescent development.

Public defense delivery systems must emphasize that juvenile defense counsel has an obligation to maximize each client's participation in his or her own case in order to ensure that the client understands the court process and to facilitate informed decision making by the client. Defense attorneys owe their juvenile clients the same duty of loyalty that adult criminal clients enjoy. This coextensive duty of loyalty requires the juvenile defense attorney to advocate for the child client's expressed interests with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[7]

C. Public Defense Delivery Systems Must Pay Particular Attention to the Most Vulnerable and Over-Represented Groups of Children in the Delinquency System.

Because research has demonstrated that involvement in the juvenile court system increases the likelihood that a child will subsequently be convicted and incarcerated as an adult, public defense delivery systems should pay special attention to providing high quality representation for the most vulnerable and over-represented groups of children in the delinquency system.

Nationally, children of color are severely over-represented at every stage of the juvenile justice process. Defenders must zealously advocate for the elimination of the disproportionate representation of minority youth in juvenile courts and detention facilities.

Children with mental health and developmental disabilities are also overrepresented in the juvenile justice system. Defenders must address these needs and secure appropriate assistance for these clients as an essential component of quality legal representation.

Drug- and alcohol-dependent juveniles and those dually diagnosed with addiction and mental health disorders are more likely to become involved with the juvenile justice system. Defenders must advocate for appropriate treatment services for these clients.

Research shows that the population of girls in the delinquency system is increasing, and that girls' issues are distinct from boys'. Gender-based interventions and the programmatic needs of girls in the juvenile delinquency system, who have frequently suffered from abuse and neglect, must be assessed and appropriate gender-based services developed and funded.[8]

The special issues presented by lesbian, gay, bisexual and transgender youth require increased awareness and training to ensure that advocacy on their behalf addresses their needs.

Ten Principles

1 The Public Defense Delivery System Upholds Juveniles' Constitutional Rights Throughout the Delinquency Process and Recognizes The Need For Competent and Diligent Representation.

A. Competent and diligent representation is the bedrock of a juvenile defense attorney's responsibilities.[9]

B. The public defense delivery system ensures that children do not waive appointment of counsel and that defense counsel are assigned at the earliest possible stage of the delinquency proceedings.[10]

C. The public defense delivery system recognizes that the delinquency process is adversarial and provides children with continuous legal representation throughout the proceedings including, but not limited to, detention, pre-trial motions or hearings, adjudication, disposition, post-disposition, probation, appeal, expungement and sealing of records.

D. The public defense delivery system includes the active participation of the private bar or conflict office whenever a conflict of interest arises for the primary defender service provider or when the caseload justifies the need for outside counsel.[11]

2 The Public Defense Delivery System Recognizes that Legal Representation of Children is a Specialized Area of the Law.

A. The public defense delivery system recognizes that representing children in delinquency proceedings is a complex specialty in the law that is different from, but equally

as important as, the representation of adults in criminal proceedings. The public defense delivery system further acknowledges the specialized nature of representing juveniles prosecuted as adults following transfer/waiver proceedings.[12]

B. The public defense delivery system leadership promotes respect for juvenile defense team members and values the provision of quality, zealous and comprehensive delinquency representation services.

C. The public defense delivery system encourages experienced attorneys to provide delinquency representation and strongly discourages use of delinquency representation as a training assignment for new attorneys or future adult court advocates.

3 The Public Defense Delivery System Supports Quality Juvenile Delinquency Representation Through Personnel and Resource Parity.[13]

A. The public defense delivery system encourages juvenile specialization without limiting access to promotions, financial advancement, or personnel benefits for attorneys and support staff.

B. The public defense delivery system provides a professional work environment and adequate operational resources such as office space, furnishings, technology, confidential client interview areas[14] and current legal research tools. The system includes juvenile representation resources in budgetary planning to ensure parity in the allocation of equipment and resources.

4 The Public Defense Delivery System Uses Expert and Ancillary Services to Provide Quality Juvenile Defense Services.

A. The public defense delivery system supports requests for expert services throughout the delinquency process whenever individual juvenile case representation requires these services for quality representation. These services include, but are not limited to, evaluation by and testimony of mental health professionals, education specialists, forensic evidence examiners, DNA experts, ballistics analysts and accident reconstruction experts.

B. The public defense delivery system ensures the provision of all litigation support services necessary for the delivery of quality services, including, but not limited to, interpreters, court reporters, social workers, investigators, paralegals and other support staff.

5 The Public Defense Delivery System Supervises Attorneys and Staff and Monitors Work and Caseloads.

A. The leadership of the public defense delivery system monitors defense counsel's workload to promote quality representation. The workload of public defense attorneys, including appointed and other work, should never be so large that it interferes with competent and diligent representation or limits client contact.[15] Factors that impact the number of cases an attorney can appropriately handle include case complexity and available support services.

B. The leadership of the public defense delivery system adjusts attorney case assignments and resources to guarantee the continued delivery of quality juvenile defense services.

6 The Public Defense Delivery System Supervises and Systematically Reviews Juvenile Staff According to National, State and/or Local Performance Guidelines or Standards.

A. The public defense delivery system provides supervision and management direction for attorneys and team members who provide defense services to children.[16]

B. The leadership of the public defense delivery system clearly defines the organization's vision and adopts guidelines consistent with national, state and/or local performance standards.[17]

C. The public defense delivery system provides systematic reviews for all attorneys and staff representing juveniles, whether they are contract defenders, assigned counsel or employees of defender offices.

7 The Public Defense Delivery System Provides and Requires Comprehensive, Ongoing Training and Education for All Attorneys and Support Staff Involved in the Representation of Children.

A. The public defense delivery system recognizes juvenile delinquency defense as a specialty that requires continuous training[18] in unique areas of the law. The public defense delivery system provides and mandates training[19] on topics including detention advocacy, litigation and trial skills, dispositional planning, post-dispositional practice, educational rights, appellate advocacy and procedure and administrative hearing representation.

B. Juvenile team members have a comprehensive understanding of the jurisdiction's juvenile law and procedure, and the collateral consequences of adjudication and conviction.

C. Team members receive training to recognize issues that arise in juvenile cases and that may require assistance from specialists in other disciplines. Such disciplines include, but are not limited to:

1. Administrative appeals
2. Child welfare and entitlements
3. Special Education
4. Dependency court/abuse and neglect court process
5. Immigration
6. Mental health, physical health and treatment
7. Drug addiction and substance abuse

D. Training for team members emphasizes understanding of the needs of juveniles in general and of specific populations of juveniles in particular, including in the following areas:

1. Child and adolescent development
2. Racial, ethnic and cultural understanding
3. Communicating and building attorney-client relationships with
   children and adolescents
4. Ethical issues and considerations of juvenile representation
5. Competency and capacity
6. Role of parents/guardians
7. Sexual orientation and gender identity awareness
8. Transfer to adult court and waiver hearings
9. Zero tolerance, school suspension and expulsion policies

E. Team members are trained to understand and use special programs and resources that are available in the juvenile system and in the community, such as

1. Treatment and problem solving courts[20]
2. Diversionary programs
3. Community-based treatment resources and programs
4. Gender-specific programming

8 The Public Defense Delivery System Has an Obligation to Present Independent Treatment and Disposition Alternatives to the Court.

A. The public defense delivery system ensures that attorneys consult with clients and, independent from court or probation staff, actively seek out and advocate for treatment and placement alternatives that serve the unique needs and dispositional requests of each child, consistent with the client's expressed interests.

B. The leadership and staff of the public defense delivery system works in partnership with other juvenile justice agencies and community leaders to minimize custodial detention and the incarceration of children and to support the creation of a continuum of community-based, culturally sensitive and gender-specific treatment alternatives.

C. The public defense delivery system provides independent post-disposition monitoring of each child's treatment, placement or program to ensure that rehabilitative needs are met. If clients' expressed needs are not effectively addressed, attorneys are responsible for intervention and advocacy before the appropriate authority.

9 The Public Defense Delivery System Advocates for the Educational Needs of Clients.

A. The public defense delivery system recognizes that access to education and to an appropriate educational curriculum is of paramount importance to juveniles facing delinquency adjudication and disposition.

B. The public defense delivery system advocates, either through direct representation or through collaborations with community-based partners, for the appropriate provision of the individualized educational needs of clients.

10 The Public Defense Delivery System Promotes Fairness and Equity For Children.

A. The public defense delivery system demonstrates strong support for the right to counsel and due process in delinquency courts to promote a juvenile justice system that is fair, non-discriminatory and rehabilitative.

B. The public defense delivery system recognizes that disproportionate representation of minority youth in the juvenile justice system is contrary to notions of fairness and equality. The public defense delivery system works to draw attention to, and zealously advocates for the elimination of, disproportionate minority contact.

Notes

[1] The original *Principles* were developed over an eighteen-month period through a collaborative venture between the National Juvenile Defender Center (NJDC) and the American Council of Chief Defenders, a section of the National Legal Aid and Defender Association (NLADA). NLADA officially adopted the original *Principles* on December 4, 2004. NJDC and NLADA collaborated on additional revisions to release this updated version, which NLDA officially adopted on June 4, 2008.

[2] For the purposes of these *Principles*, the term "public defense delivery system" denotes legal delivery systems that provide defense services to indigent juveniles facing delinquency proceedings. This term is meant to encompass public defender offices, contract, appointed, and conflict counsel, law school clinics, and non-profit legal providers.

[3] 387 U.S. 1 (1967). According to the *IJA/ABA Juvenile Justice Standard Relating to Counsel for Private Parties* 3.1 (1996), "the lawyer's principal duty is the representation of the client's legiti-

mate interests" as distinct and different from the best interest standard applied in neglect and abuse cases. The Commentary goes on to state that "counsel's principal responsibility lies in full and conscientious representation" and that "no lesser obligation exists when youthful clients or juvenile court proceedings are involved."

[4] For purposes of these *Principles*, the term "delinquency proceeding" denotes all proceedings in juvenile court as well as any proceeding lodged against an alleged status offender, such as for truancy, running away, incorrigibility, etc.

[5] Common findings among these assessments include, among other barriers to adequate representation, a lack of access to competent counsel, inadequate time and resources for defenders to prepare for hearings or trials, a juvenile court culture that encourages pleas to move cases quickly, a lack of pretrial and dispositional advocacy and an over-reliance on probation. For more information, see *Selling Justice Short: Juvenile Indigent Defense in Texas* (2000); *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana* (2001); *Georgia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2001); *Virginia: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2002); *An Assessment of Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (2003); *Maine: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Maryland: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Montana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *North Carolina: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2003); *Washington: An Assessment of Access to Counsel and Quality of Representation in Juvenile Offender Matters* (2003); *Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2006); *Florida: An Assessment of Access to Counsel and Quality of*

Representation in Delinquency Proceedings (2006); *Mississippi: An Assessment of Access to Counsel and Quality of Representation in Youth Court Proceedings* (2007); *Illinois: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (2007). All NJDC Assessments are available at http://www.njdc.info/assessments.php.

[6] 543 U.S. 551 (2005).

[7] *American Bar Association Model Rules of Professional Conduct*, Rule 1.1 Competence.

[8] *Justice by Gender*: jointly issued by the ABA and the NBA 2001.

[9] *See generally*, National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005) [hereinafter *Guidelines*]. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

[10] *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 3.

[11] A conflict of interest includes both codefendants and intra-family conflicts, among other potential conflicts that may arise. See also *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 2.

[12] For purposes of this Principle, the term "transfer/waiver proceedings" refers to any proceedings related to prosecuting youth in adult court, including those known in some jurisdictions as certification, bind-over, decline, remand, direct file, or youthful offenders.

[13] *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 8.

[14] *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 4.

[15] *See generally*, American Council of Chief Defenders Statement on Caseloads and Workloads, issued August 24, 2007; *see also* National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), 5.1, 5.3; American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992), 5-5.3; American Bar Association, S*tandards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993), 4-1.3(e); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts*, Chapter 13, "The Defense" (1973), 13.12; National Legal Aid and Defender Association and American Bar Association, *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services* (NLADA, 1984; ABA, 1985), III-6, III-12; National Legal Aid and Defender Association, *Standards for the Administration of Assigned Counsel Systems* (1989), 4.1,4.1.2; ABA Model Code of Professional Responsibility DR 6-101; *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 5.

[16] *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principles 6 and 10.

[17] For example, Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards* (1979); National Advisory Commission on Criminal Justice Standards and Goals, *Report of the Task Force on Courts*, Chapter 13, "The Defense" (1973); National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976); American Bar Association, *Standards for Criminal Justice, Providing Defense Services* (3rd ed., 1992); American Bar Association, *Standards for Criminal Justice: Prosecution Function and Defense Function* (3rd ed., 1993); *Standards and Evaluation Design for Appellate Defender Offices* (NLADA, 1980); *Performance Guidelines for Criminal Defense Representation* (NLADA, 1995).

[18] National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standard 7.2, footnote 2. *American Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 9; National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standards 1 to 9.

[19] A*merican Bar Association Ten Principles of a Public Defense Delivery System* (2002), Principle 9; National Legal Aid and Defender Association, *Training and Development Standards* (1997), Standards 1 to 9.

[20] American Council of Chief Defenders, *Ten Tenets of Fair and Effective Problem Solving Courts* (2002).

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PERFORMANCE GUIDELINES

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level

Adopted December 14, 2007

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level

Acknowledgments

The development of these Performance Guidelines for Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level was overseen by the North Carolina Juvenile Defender, Eric J. Zogry. The Commission on Indigent Defense Services ("IDS Commission") and Office of Indigent Defense Services ("IDS Office") are grateful to the following committee members and consultants, who generously gave their time and expertise to this project:

- Rhoda Billings, Retired Professor of Law, Wake Forest University, Winston-Salem, and IDS Commissioner
- Tamar Birckhead, Assistant Professor of Law, University of North Carolina, Chapel Hill
- Cameron Bush, Assistant Public Defender, Lumberton
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Preface

The primary goal of the Commission on Indigent Defense Services ("IDS Commission") is to ensure that indigent persons in North Carolina who are entitled to counsel at state expense are afforded high quality legal representation. *See* G.S. 7A-498.1(2). To further that goal, the Indigent Defense Services Act of 2000 directs the Commission to establish "[s]tandards for the performance of public defenders and appointed counsel." G.S. 7A-498.5(c)(4).

These performance guidelines are based largely on the "Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level" that have been promulgated by the IDS Commission, as well as a review of standards and guidelines in Georgia and Kentucky and the Juvenile Defender Delinquency Notebook published by the National Juvenile Defender Center. For several months, a Juvenile Delinquency Performance Guidelines Committee reviewed drafts of these guidelines and revised them to fit the nuances of North Carolina law and practice. Once a final proposed draft was complete, it was distributed to all private appointed counsel and assistant public defenders who handle delinquency proceedings, as well as all district court judges and other interested persons, for their comments and feedback. Based on the comments that were received, the Committee made a number of improvements to the guidelines. The full IDS Commission then adopted the attached performance guidelines on December 14, 2007.

These performance guidelines cover all juvenile delinquency cases in North Carolina. The guidelines are intended to identify issues that may arise at each stage of a delinquency proceeding and to recommend effective approaches to resolving those issues. Because all provisions will not be applicable in all cases, the guidelines direct counsel to use his or her best professional judgment in determining what steps to undertake in specific cases. The Commission hopes these guidelines will be useful as a training tool and resource for new and experienced juvenile defense attorneys, as well as a tool for potential systemic reform in some areas. The guidelines are not intended to serve as a benchmark for ineffective assistance of counsel claims or attorney disciplinary proceedings.

The IDS Commission believes that providing high quality juvenile defense representation is a difficult and challenging endeavor, which requires great skill and dedication. That skill and dedication is demonstrated by juvenile defense counsel across North Carolina on a daily basis, and the Commission commends those counsel. The Commission recognizes that the goals embodied in these guidelines will not be attainable without sufficient funding and resources and hopes the North Carolina General Assembly will continue its support of both quality indigent defense services and appropriate dispositional options for juveniles.

The IDS Commission thanks all of the juvenile defense attorneys who zealously represent juveniles across the state. In addition, the Commission thanks everyone who assisted in drafting these performance guidelines and who offered comments. The Commission plans to review and revise the guidelines on a regular basis to ensure that they continue to comply with North Carolina law and reflect quality performance, and it invites ongoing feedback from the defense bar and juvenile defense community.

North Carolina Commission On Indigent Defense Services

Performance Guidelines For Appointed Counsel in Juvenile Delinquency Proceedings at the Trial Level

SECTION 1: GENERAL PROVISIONS

Guideline 1.1 Function of the Performance Guidelines

(a) The Commission on Indigent Defense Services hereby adopts these performance guidelines to promote one of the purposes of the Indigent Defense Services Act of 2000—improving the quality of indigent defense representation in North Carolina—and pursuant to G.S. 7A-498.5(c)(4).

(b) These guidelines are intended to serve as a guide for counsel's performance in juvenile delinquency proceedings at the district court level and to contain a set of considerations and recommendations to assist appointed counsel in providing quality representation for juveniles. The guidelines also may be used as a training tool.

(c) These are performance guidelines, not standards. The steps covered in these guidelines are not to be undertaken automatically in every case. Instead, the steps actually taken should be tailored to the requirements of a particular case. In deciding what steps are appropriate, counsel should use his or her best professional judgment.

Guideline 1.2 Definitions

(a) *Juvenile*: Any person under the age of eighteen who is not married, emancipated, or a member of the armed forces of the United States, or any person who is 18 to 20 years of age and has been adjudicated delinquent and committed to a youth development center.

(b) *Juvenile delinquent or delinquent juvenile*: A juvenile who has been adjudicated delinquent of an offense that would be a crime if committed by an adult.

(c) *Appointed counsel*: An attorney appointed to represent a juvenile in a juvenile delinquency proceeding.

(d) *Expressed interests*: The stated desires of the juvenile client about the direction and objectives of the case.

SECTION 2: ROLE, QUALIFICATIONS, AND DUTIES OF DEFENSE COUNSEL

Guideline 2.1 Role of Defense Counsel

(a) An attorney in a juvenile delinquency proceeding is the juvenile's voice to the court, representing the expressed interests of the juvenile at every stage of the proceedings. The attorney owes the same duties to the juvenile under the North Carolina Rules of Professional Conduct, including the duties of loyalty and confidentiality, as an attorney owes to a client who is an adult criminal defendant.

(b) The attorney for a juvenile is bound to advocate the expressed interests of the juvenile. In addition, the attorney has a responsibility to counsel the juvenile, recommend to the juvenile actions consistent with the juvenile's interests, and advise the juvenile as to potential outcomes of various courses of action.

(c) An attorney in a juvenile delinquency proceeding should be familiar with the "Role of Defense Counsel in Delinquency Proceedings" approved by the Commission on Indigent Defense Services, available at www.ncids.org under the "Juvenile Defender" link.

Guideline 2.2 Education, Training, and Experience of Defense Counsel

(a) To provide quality representation, counsel must be familiar with the Juvenile Code and the substantive criminal law and procedure in North Carolina. Counsel should also be familiar with any applicable local rules of the judicial district, which can be obtained in the local clerk's office and may be available at www.nccourts.org, as well as the practices of the specific judge before whom a case is pending.

(b) Counsel has an ongoing obligation to stay abreast of changes and developments in juvenile law and procedure and criminal law and procedure and to continue his or her legal education, skills training, and professional development.

(c) Before accepting appointment to a juvenile delinquency case, counsel should have sufficient experience, knowledge, skill, and training in areas such as communication techniques with children and adolescents, adolescent brain development, motions practice, detention advocacy, pre-adjudication preparation, and adjudication, disposition and post-disposition advocacy to provide quality representation. Counsel should have knowledge and understanding of the practice and procedures of the local court counselor's office and the role and functions of other court actors. If appropriate, counsel is encouraged to consult with other attorneys to acquire pertinent additional knowledge and information, including information about the practices of judges, prosecutors, and other court personnel.

Guideline 2.3 General Duties of Defense Counsel

(a) Before accepting appointment to a juvenile delinquency case, counsel has an obligation to ensure that he or she has sufficient time, resources, knowledge, and experience to provide quality representation to the juvenile. If it later appears that counsel is unable to provide quality representation, counsel should move to withdraw. If counsel is allowed to withdraw, he or she should cooperate with new counsel to the extent that such cooperation is in accord with the North Carolina Rules of Professional Conduct.

(b) Counsel must be alert to all actual and potential conflicts of interest that would impair his or her ability to represent a juvenile client. If counsel identifies a potential conflict of interest, counsel should fully disclose the conflict to all affected persons and, if appropriate, obtain informed consent to proceed on behalf of the juvenile or move to withdraw. Counsel may seek an advisory opinion on any potential conflicts from the North Carolina State Bar. Mere tactical disagreements between counsel and a juvenile ordinarily do not justify withdrawal from a case. If it is necessary for counsel to withdraw, counsel should do so in a way that protects the juvenile's rights and interests and does not violate counsel's ethical duties to the juvenile.

(c) Counsel has an obligation to maintain regular contact with his or her juvenile client and to keep the juvenile informed of the progress of the case. Counsel should promptly comply with any reasonable request by the juvenile for information and reply to correspondence and telephone calls from the juvenile.

(d) Counsel should maintain a relationship with the juvenile client's parent or guardian, but should not allow that relationship to interfere with counsel's duties to the juvenile or the expressed interests of the juvenile.

(e) Counsel should appear on time for all scheduled court hearings in a juvenile's case. If scheduling conflicts arise, counsel should resolve them in accordance with Rule 3.1 of the General Rules of Practice and any applicable local rules.

(f) Counsel should never give preference to retained clients over juveniles for whom counsel has been appointed.

SECTION 3: INTERVIEWING THE JUVENILE

Guideline 3.1 Preparation for the Initial Interview

(a) Counsel should arrange for an initial interview with the juvenile as soon as practicable after being assigned to the juvenile's case. Absent exceptional circumstances, if the juvenile is in detention, the initial interview should take place within three business days after counsel receives notice of assignment to the juvenile's case. If necessary, counsel may arrange for a designee to conduct the initial interview.

(b) Before conducting the initial interview, the attorney should, if possible:

(1) be familiar with the charges against the juvenile and the elements of and potential dispositions for each charged offense;

(2) obtain copies of all relevant documents that are available, including copies of any petitions and related documents, recommendations and reports made by the court counselor's office, and law enforcement reports; and

(3) if the juvenile is detained:

(A) be familiar with the legal criteria governing the circumstances under which the court may order release and the procedures that will be followed in setting those conditions;

(B) be familiar with the different types of pre-adjudication release conditions the court may set, any written policies of the judicial district, and whether any person or agency is available to act as a custodian for the juvenile's release; and

(C) be familiar with any procedures available for reviewing the trial judge's determination to continue custody.

Guideline 3.2 The Initial Interview

(a) The purposes of the initial interview are to acquire information from the juvenile concerning the facts of the case and to provide the juvenile with information concerning the case.

If the juvenile remains in secure custody, counsel should also acquire information from the juvenile concerning pre-adjudication release.

(b) Counsel should communicate with the juvenile in a manner that will be effective, considering the juvenile's maturity, intellectual ability, language, educational level, special education needs, cultural background, gender, and physical, mental, and emotional health. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court and present at the initial interview.

(c) Information about the juvenile that counsel should attempt to acquire during the initial interview includes, but is not limited to:

(1) the juvenile's current living arrangements, family relationships, and ties to the community, including the length of time his or her family has lived at the current and former addresses, as well as the juvenile's supervision when at home;

(2) the immigration status of the juvenile and his or her family members, if applicable;

(3) the juvenile's educational history, including current grade level and attendance and any disciplinary history;

(4) the juvenile's physical and mental health, including any impairing conditions such as substance abuse or learning disabilities, and any prescribed medications and other immediate needs;

(5) the juvenile's delinquency history, if any, including arrests, detentions, diversions, adjudications, and failures to appear in court;

(6) whether there are any other pending charges against the juvenile and the identity of any other appointed or retained counsel;

(7) whether the juvenile is on probation or post-release supervision and, if so, the name of his or her court counselor and the juvenile's past or present performance under supervision;

(8) the options available to the juvenile for release if the juvenile is in secure custody; and

(9) the names of individuals or other sources that counsel can contact to verify the information provided by the juvenile, and the permission of the juvenile to contact those sources.

(d) Information about the specific juvenile delinquency matter that counsel should attempt to acquire from the juvenile includes, but is not limited to:

(1) the facts surrounding the juvenile delinquency matter;

(2) any evidence of improper police or other governmental conduct, including interrogation procedures, that may affect the juvenile's rights;

(3) any possible witnesses and where they may be located;

(4) any evidence that should be preserved; and

(5) evidence of the juvenile's capacity to stand trial and mental state at the time of the offense.

(e) When appropriate, counsel should be prepared at the initial interview to ask the juvenile to sign a release authorizing counsel to access confidential information, such as school records and medical or mental health records.

(f) Information counsel should provide to the juvenile during the initial interview includes, but is not limited to:

(1) an explanation of the procedures that will be followed in setting the conditions of pre-adjudication release if the juvenile remains in secure custody;

(2) an explanation of the type of information that will be requested in any future interview that may be conducted by a court counselor, and an explanation that the juvenile is not required to and should not make statements concerning the offense;

(3) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting counsel;

(4) the nature of the charges and potential penalties;

(5) a general procedural overview of the progression of the case, where possible;

(6) how counsel can be reached and when counsel plans to have contact with the juvenile next;

(7) the date and time of the next scheduled court proceeding in the case;

(8) realistic answers, where possible, to the juvenile's questions; and

(9) what arrangements will be made or attempted for the satisfaction of the juvenile's most pressing needs, such as medical or mental health attention, and contact with family members.

SECTION 4: PROCEEDINGS BEFORE THE ADJUDICATORY HEARING

Guideline 4.1 General Obligations of Counsel Regarding Pre-Adjudication Release

(a) Unless contrary to the expressed interests of the juvenile, counsel has an obligation to attempt to secure the prompt pre-adjudication release of the juvenile under the conditions most favorable to the juvenile.

(b) While hearings in delinquency proceedings are open pursuant to G.S. 7B-2402, counsel should consider moving the court to close any initial proceedings, including secure custody, first appearance, probable cause, and transfer hearings. Factors counsel should consider when making this request include the age of the juvenile, the nature of the charges, and any information that may be discussed during the hearing that could harm the juvenile. If requested by the juvenile, counsel should move to close the proceedings.

(c) If the juvenile is detained, counsel should try to ensure, prior to any initial court hearing, that the juvenile does not appear before the judge in inappropriate clothing or in shackles or handcuffs. If a detained juvenile is brought before the judge in detention clothing, shackles, or handcuffs, counsel should object and seek relief from the court pursuant to G.S. 7B-2402.1.

Guideline 4.2 Secure Custody Hearings

(a) Counsel should make all reasonable efforts to interview the juvenile prior to the initial secure custody hearing.

(b) At a secure custody hearing, counsel should be prepared to present to the court a statement of the factual circumstances and factors supporting release and to propose conditions of release, including those in G.S. 7B-1906(f). Counsel should consider preparing for the court a proposed release order that includes conditions of release. Counsel should consider the potential consequences of statements made by the juvenile at any secure custody hearing and advise the juvenile accordingly.

(c) If the juvenile is released, counsel should fully explain the conditions of release to the juvenile and advise him or her of the potential consequences of a violation of those conditions.

(d) If the juvenile remains in detention, counsel should alert the detention facility in writing and, if appropriate, the court, to any special medical, psychiatric, or educational needs of the juvenile that are known to counsel.

Guideline 4.3 First Appearance in Felony Cases

(a) Counsel should be aware of all statutory time limits for first appearance hearings in felony cases and should make any appropriate objections and motions.

(b) If counsel has not met with the juvenile before the first appearance hearing, counsel should meet with the juvenile as soon as possible after the first appearance and before the next hearing.

Guideline 4.4 Probable Cause Hearing in Felony Cases

(a) Counsel should be aware of all statutory time limits for probable cause hearings in felony cases involving a juvenile who is at least 13 years of age and should make any appropriate objections and motions.

(b) Counsel should discuss with the juvenile the meaning of probable cause and the procedural aspects surrounding a probable cause determination. Counsel should consider any concessions the prosecution might make if the juvenile waives, or does not oppose a continuance of, a probable cause hearing. Before waiving a probable cause hearing, counsel should consider the possible benefits of a hearing, including the potential for discovery and the development of impeachment evidence. Counsel also should be aware of all consequences if the juvenile waives a probable cause hearing, including the effect of waiver on the outcome of a transfer hearing. Counsel should be aware of local customs with respect to probable case hearings, including whether or not waiver of probable cause ensures that the juvenile's case will remain in delinquency court.

(c) In preparing for a probable cause hearing, counsel should be familiar with Article 22 of the Juvenile Code and should specifically consider:

(1) the elements of each of the offenses alleged;

(2) the law for establishing probable cause;

(3) the procedure for conducting a probable cause hearing under G.S. 7B-2202;

(4) factual information that is available concerning the existence or lack of probable cause;

(5) tactical considerations for whether to conduct cross-examination, full or partial, of prosecution witnesses;

(6) whether additional factual information and impeachment evidence could be discovered by counsel during the hearing;

(7) any continuing need to pursue release of the juvenile if the juvenile is in custody; and

(8) that counsel should not call the juvenile or defense witnesses to testify at the probable cause hearing unless there are sound tactical reasons for doing so.

(d) Counsel should make reasonable efforts to ensure that the probable cause hearing is recorded and, with permission of the court, should consider utilizing a personal recording device in case the court recording device fails.

Guideline 4.5 Transfer Hearings in Felony Cases

(a) Counsel should be aware of all statutory time limits for transfer hearings in felony cases involving a juvenile who is at least 13 years of age and should make any appropriate objections and motions.

(b) Counsel should prepare for a transfer hearing to the same degree as for an adjudicatory hearing and should be aware that the decision to transfer a juvenile to adult court may only be reversed upon a finding of abuse of discretion by the superior court.

(c) In preparation for the transfer hearing, counsel should be familiar with the procedures of a transfer hearing, with a particular focus on the eight factors the court must consider pursuant to G.S. 7B-2203.

(d) At the transfer hearing, counsel should review all information provided to the court by the prosecution and should be prepared to cross-examine any witnesses the prosecution presents.

(e) Unless the juvenile directs otherwise, counsel should present any evidence to the court that counsel believes will support a decision not to transfer. 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. Counsel should be prepared to present testimony to prevent transfer, including testimony by people who can provide helpful insight into the juvenile's character, such as teachers, counselors, psychologists, community members, probation officers, religious affiliates, family members, friends, employers, or other persons with a positive personal or professional view of the juvenile.

(f) Counsel should make reasonable efforts to ensure that the transfer hearing is recorded and, with permission of the court, should consider utilizing a personal recording device in case the court recording device fails.

(g) If the court orders transfer of jurisdiction to adult court, counsel should consider appealing the matter to superior court to request remand to district court and to preserve the issue for possible review in the appellate division.

SECTION 5: INCRIMINATING EVIDENCE AND CAPACITY TO PROCEED

Guideline 5.1 Search Warrants, Interrogations, and Prosecution Requests for Non-Testimonial Evidence

(a) Counsel should be familiar with the law governing search warrants under G.S. 15A-24 *et seq.* and applicable case law, including the requirements for a search warrant application, the basis for issuing a warrant, the required form and content of a warrant, the execution and service of a warrant, and the permissible scope of the search.

(b) Counsel should be familiar with the law governing a juvenile's protection against self-incrimination, including G.S. 7B-2101 and applicable case law.

(c) Counsel should be familiar with the law governing the prosecution's power to require a juvenile to provide non-testimonial evidence (such as participation in an in-person lineup, handwriting exemplars, and physical specimens), the potential consequences if a juvenile refuses to comply with a non-testimonial identification order issued pursuant to G.S. 7B-2103 *et seq*., and the extent to which counsel may participate in or observe the proceedings.

Guideline 5.2 Juvenile's Capacity to Proceed

(a) When defense counsel has a good faith doubt as to the juvenile's capacity to proceed in a delinquency case, counsel should consider consulting the capacity to proceed sections in the North Carolina Civil Commitment Manual and the North Carolina Defender Manual, available at www.ncids.org, and should:

(1) file an *ex parte* motion to obtain the services of a mental health expert and thereby determine whether to raise the juvenile's capacity to proceed; or

(2) file a motion questioning the juvenile's capacity to proceed or enter an admission under G.S. 7B-2401, G.S. 15A-1001(a), and applicable case law, in which case the court may order a mental health examination at a state facility or by the appropriate local forensic examiner.

(b) Although the juvenile's expressed interests ordinarily control, counsel may question capacity to proceed without the juvenile's assent or over the juvenile's objection, if necessary.

(c) After counsel receives and reviews the report from any court-ordered examination, counsel should consider whether to file a motion requesting a formal hearing on the juvenile's capacity to proceed.

(d) If capacity to proceed is at issue, counsel still has a duty to continue to prepare the case for all anticipated court proceedings.

(e) If the court enters an order finding the juvenile incapable of proceeding and orders involuntary commitment proceedings to be initiated, defense counsel ordinarily will not represent the juvenile at those proceedings but should cooperate with the commitment attorney upon request.

SECTION 6: CASE REVIEW, PREPARATION, AND DISCOVERY

Guideline 6.1 Charging Language in Delinquency Petition

(a) Counsel should review the delinquency petition in all cases and determine whether there are any defects, such as:

(1) the petition does not list all of the essential elements of the charged offense;

(2) the petition contains more than one charge in a single count; and/or

(3) the petition does not allege a crime for which the juvenile may be charged.

If there are defects, counsel should determine whether to move to dismiss the petition after considering all relevant factors, including but not limited to the type of defect, the likelihood of obtaining a favorable ruling, and the likelihood that the charge will be refiled. Counsel also should be aware of all potential consequences of a motion to dismiss, including alerting the prosecution to defects in the charging language.

(b) Even if the petition adequately charges an offense that would be a crime if committed by an adult, counsel should be sufficiently familiar with the language of the petition to recognize a fatal variance at trial and move to dismiss the charge if the evidence is insufficient to support the charge as pled.

(c) Counsel should be aware of all time limits under G.S. 7B-1703 that are applicable to the filing of a delinquency petition and should consider moving to dismiss the petition if the statutory time limits are not followed.

Guideline 6.2 Case Review, Investigation, and Preparation

(a) Counsel has a duty to conduct an independent case review and investigation. The juvenile's admissions of responsibility or other statements to counsel do not necessarily obviate the need for independent review and investigation. The review and investigation should be conducted as promptly as possible.

(b) Counsel should be aware that under G.S. 7B-2408, no statement made to the intake court counselor is admissible prior to the dispositional hearing.

(c) Sources of review and investigative information may include the following:

(1) *Petitions, Statutes, and Case Law.* Counsel should obtain and examine copies of all petitions in the case to determine the specific charges that have been brought against the juvenile. The relevant statutes and precedents should be examined to identify:

(A) the elements of the offense(s) with which the juvenile is charged;

(B) the defenses, ordinary and affirmative, that may be available, as well as the proper manner for asserting any available defenses; and

(C) any defects in the petitions, constitutional or otherwise, such as statute of limitations, double jeopardy, or others.

(2) *The Juvenile.* Counsel should conduct an in-depth interview or interviews of the juvenile as outlined in Section 3, *supra*.

(3) *Potential Witnesses.* Counsel should consider whether to interview potential witnesses, including any complaining witnesses and others adverse to the juvenile. If counsel conducts interviews of potential witnesses, he or she should attempt to do so in the presence of a third person who will be available, if necessary, to testify as a defense witness at the adjudicatory hearing. Alternatively, counsel should have an investigator conduct the interviews.

(4) *The Police and Prosecution.* Counsel should utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities, including police reports, unless sound tactical reasons exist for not doing so (*e.g.*, defense obligations under G.S. 7B-2301). *See* Guideline 6.3, *infra.*

(5) *The Courts.* If possible, counsel should request and review tapes or transcripts from any previous hearings in the case. Counsel should also review the juvenile's prior court file(s) and request that the court counselor provide the juvenile's prior court history from North Carolina Juvenile Online Information Network (NCJOIN).

(6) *Information in the Possession of Third Parties.* When appropriate, counsel should seek a release or court order to obtain necessary confidential information about the juvenile, co-juvenile(s), witness(es), or victim(s) that is in the possession of third parties. Counsel should be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

(7) *Physical Evidence.* When appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should view the physical evidence consistent with case needs.

(8) *The Scene.* When appropriate, counsel or an investigator should view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, lighting conditions, and seasonal changes). Counsel should consider taking photographs and creating diagrams or charts of the actual scene of the alleged offense.

(9) *Assistance from Experts, Investigators, and Interpreters.* Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate to:

(A) prepare a defense;

(B) adequately understand the prosecution's case;

(C) rebut the prosecution's case; or

(D) investigate the juvenile's capacity to proceed, mental state at the time of the offense, and capacity to make a knowing and intelligent waiver of constitutional rights.

If counsel determines that expert or investigative assistance is necessary and appropriate, counsel should file an *ex parte* motion setting forth the particularized showing of necessity required by *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985), *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993), and their progeny. If appropriate, counsel should also file a motion to have a foreign language or sign language interpreter appointed by the court. Counsel should preserve for appeal any denial of expert, investigative, or interpreter funding by making all proper objections and motions on the record.

(d) During case preparation and throughout the adjudicatory hearing, counsel should identify potential legal issues and the corresponding objections. Counsel should consider the strategy of making objections, including the proper timing and method. Counsel should also consider how best to respond to objections that could be raised by the prosecution.

Guideline 6.3 Discovery

(a) Counsel has a duty to pursue discovery procedures provided by the applicable rules of criminal procedure and the Juvenile Code (G.S. 7B-2300 *et seq*.) and to pursue such informal discovery methods as may be available to supplement the factual investigation of the case.

(b) Before filing a formal motion with the court, counsel must serve the prosecutor with a written request for voluntary disclosure, unless counsel and the prosecutor agree in writing to comply voluntarily with G.S. 7B-2300 *et seq*. Counsel must file a motion to compel discovery if the prosecution's response is unsatisfactory or delayed. Regardless of the prosecution's response, counsel should file a motion to compel discovery if the case is proceeding to an adjudicatory hearing.

(c) In exceptional cases, counsel should consider not making a discovery request or signing a written agreement under G.S. 7B-2300 on the ground that it will trigger a defense obligation to disclose evidence under G.S. 7B-2301.

(d) Unless there are sound tactical reasons for not requesting discovery or signing a written agreement under G.S. 7B-2300 (*e.g.*, defense obligations under G.S. 7B-2301), counsel should seek discovery to the broadest extent permitted under federal and state law, including but not limited to the following items:

(1) all information to which the juvenile is entitled under G.S. 7B-2300;

(2) all potential exculpatory information and evidence to which the defense is entitled under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) and its progeny, including but not limited to:

(A) impeachment evidence, such as a witness's prior adjudications or convictions, misconduct, or juvenile court record; bias of a witness; a witness's capacity to observe, perceive, or recollect; and psychiatric evaluations of a witness;

(B) evidence discrediting police investigation and credibility;

(C) evidence undermining the identification of the juvenile;

(D) evidence tending to show the guilt or responsibility of another;

(E) the identity of favorable witnesses; and

(F) exculpatory physical evidence; and

(3) to the extent not provided under statutory discovery, any other information necessary to the defense of the case, including but not limited to:

(A) the names, addresses, and availability of prosecution witnesses;

(B) the details of the circumstances under which any oral or written statements by the accused or a co-juvenile were made;

(C) any evidence of prior bad acts that the prosecution may intend to use against the juvenile;

(D) the data underlying any expert reports; and

(E) any evidence necessary to enable counsel to determine whether to file a motion to suppress evidence.

(e) Counsel should seek the timely production and preservation of discoverable evidence. If the prosecution fails to disclose or belatedly discloses discoverable evidence, counsel should consider requesting one or more sanctions, akin to those provided by G.S. 15A-910.

(f) If counsel believes the prosecution may destroy or consume in testing evidence that is significant to the case (*e.g.*, rough notes of law enforcement interviews, 911 tapes, drugs, or blood samples), counsel should file a motion to preserve the evidence in the event that it is discoverable.

(g) Counsel should timely comply with all of the requirements in G.S. 7B-2301 governing disclosure of evidence by the juvenile and notice of defenses and expert witnesses.

Guideline 6.4 Theory of the Case

During case review, investigation, and preparation for the adjudicatory hearing, counsel should develop and continually reassess a theory of the case. A theory of the case is one central theory that organizes the facts, emotions, and legal basis for a finding of not responsible or adjudication of a lesser offense, while also telling the juvenile's story of innocence, reduced culpability, or unfairness. The theory of the case furnishes the basic position from which counsel determines all actions in a case.

SECTION 7: PRE-ADJUDICATION MOTIONS

Guideline 7.1 The Decision to File Pre-Adjudication Motions

(a) Counsel should consider filing appropriate pre-adjudication motions whenever there exists a good faith reason to believe that the applicable law may entitle the juvenile to relief which the court has authority to grant.

(b) Counsel should consult the local rules of the judicial district to determine whether they establish deadlines for pre-adjudication motions and should comply with any such rules.

(c) The decision to file pre-adjudication motions should be made after thorough investigation and after considering the applicable law in light of the circumstances of each case, as well as the need to preserve issues for appellate review. Among the issues that counsel should consider addressing in pre-adjudication motions are:

(1) the constitutionality of the implicated statute(s);

(2) the sufficiency of the petition under all applicable statutory and constitutional provisions;

(3) the dismissal of a charge on double jeopardy grounds;

(4) the propriety and prejudice of any joinder or severance of charges or juveniles;

(5) the statutory and constitutional discovery obligations of the prosecution;

(6) the suppression of evidence gathered as the result of violations of the North Carolina Constitution, the United States Constitution, and applicable federal and state statutes, including:

(A) the fruits of any illegal searches or seizures;

(B) any statements or confessions obtained in violation of the juvenile's right to counsel, privilege against self-incrimination, or rights protected under G.S. 7B-2101; and

(C) the fruits of any unconstitutional identification procedures;

(7) whether there are grounds to prevent discovery or testimony or other evidence based on privilege;

(8) access to necessary support or investigative resources or experts;

(9) the need for a change of venue;

(10) the juvenile's calendaring rights under the Juvenile Code;

(11) the juvenile's right to a continuance in order adequately to prepare his or her case;

(12) matters of trial evidence that may be appropriately litigated by means of a pre-adjudication motion *in limine*, including exclusion of any pre-adjudication statements the juvenile may have made at intake;

(13) recusal of the trial judge;

(14) the full recordation of all proceedings;

(15) matters of courtroom procedure; and

(16) notice of affirmative defenses.

Guideline 7.2 Filing and Arguing Pre-Adjudication Motions

(a) Motions should be filed in a timely manner, comport with the formal requirements of statute and court rules, and succinctly inform the court of the authority relied upon.

(b) When a hearing on a motion requires the taking of evidence, counsel's preparation for the evidentiary hearing should include:

(1) investigation, discovery, and research relevant to the claim(s) advanced;

(2) subpoenaing of all helpful evidence, and subpoenaing and preparation of all helpful witnesses;

(3) full understanding of the burdens of proof, evidentiary principles, and procedures applicable to the hearing, including the potential advantages and disadvantages of having the juvenile and other defense witnesses testify;

(4) obtaining the assistance of an expert witness when appropriate; and

(5) preparation and submission of a memorandum of law when appropriate.

(c) Unless there are sound tactical reasons for not doing so, counsel should request that the court rule on all previously filed defense motions prior to the adjudicatory hearing.

(d) If a hearing on a pre-adjudication motion is held in advance of an adjudicatory hearing, counsel should attempt to obtain the transcript of the hearing for use at the adjudicatory hearing, if appropriate.

Guideline 7.3 Subsequent Filing and Renewal of Pre-Adjudication Motions

(a) Counsel should be prepared to raise during the adjudication proceedings any issue that is appropriately raised pre-adjudication, but could not have been so raised because the facts supporting the motion were unknown or not reasonably available.

(b) Counsel should be prepared to renew pre-adjudication motions or file additional motions at any subsequent stage of the proceedings if new supporting information is later disclosed or made available. Counsel should also renew pre-adjudication motions and object to the admission of challenged evidence at the adjudicatory hearing to preserve the motions and objections for appellate review pursuant to Rule 10(b) of the North Carolina Rules of Appellate Procedure and *State v. Tutt*, 171 N.C. App. 518, 615 S.E.2d 688 (2005).

SECTION 8: PLEAS

Guideline 8.1 Advising the Juvenile About Pleas

(a) Counsel should explain to the juvenile that certain decisions concerning a possible plea ultimately must be made by the juvenile, as well as the advantages and disadvantages inherent in those choices. The decisions that must be made by the juvenile include whether to admit or deny the allegations of the petition, whether to accept a plea agreement, and whether to testify at a plea hearing.

(b) After appropriate investigation and case review, counsel should explore with the juvenile the possibility and desirability of negotiating a plea to the charges rather than proceeding to an adjudicatory hearing. In doing so, counsel should fully explain to the juvenile the rights that would be waived by a decision to enter a plea and not proceed to the adjudicatory hearing, including the fact that an admission of the allegations of the petition is the same as an adjudication, and the impact of the decision on the juvenile's right to appeal.

Guideline 8.2 Preparation for Plea Negotiations

(a) In preparing for plea negotiations, counsel should attempt to become familiar with any practices and policies of the particular district, judge, prosecuting attorney and, when applicable, court counselor's office, which may affect the content and likely results of a negotiated plea bargain.

(b) Counsel should be familiar with:

(1) the various types of pleas that may be agreed to, including an admission of responsibility, a plea of no contest, a conditional admission in which the juvenile retains the right to appeal the denial of a suppression motion, a plea in which the juvenile is not required personally to acknowledge his or her involvement (*Alford* plea), and a plea to dismiss the case after adjudication under G.S. 7B-2501(d);

(2) the advantages and disadvantages of each available plea according to the circumstances of the case; and

(3) whether a proposed plea agreement is binding on the court.

(c) To develop an overall negotiation plan, counsel should be fully aware and advise the juvenile of the possible results of an adjudication, including:

(1) the maximum term of confinement for the offense;

(2) any requirements for registration such as sex offender registration, and for being fingerprinted and photographed;

(3) the possibility that an adjudication or admission of the offense could be used for cross-examination or sentence enhancement in the event of future criminal cases;

(4) the availability of appropriate dispositional options; and

(5) the potential collateral consequences of entering a plea, such as deportation or other effects on immigration status; effects on motor vehicle or other licensing; educational notifications; distribution of fingerprint and photographic information; and the potential exposure to or impact on any federal charges.

(d) In developing a negotiation strategy, counsel should be completely familiar with:

(1) concessions that the juvenile might offer the prosecution as part of a negotiated agreement, such as:

(A) waiving the probable cause hearing;

(B) declining to assert the right to proceed to the adjudicatory hearing on the merits of the charge;

(C) refraining from asserting or litigating a particular pre-adjudication motion;

(D) agreeing to fulfill specified restitution conditions or to participate in community work or service programs or other dispositional options;

(E) assisting the prosecution in investigating the present case or other alleged delinquent activity; and

(F) waiving a challenge to the validity or proof of a prior adjudication;

(2) benefits the juvenile might obtain from a negotiated agreement, such as:

(A) that the prosecution will not seek transfer;

(B) that the juvenile may enter an admission and preserve the right to litigate and contest the denial of a suppression motion;

(C) dismissal or reduction of one or more of the charged offenses, either immediately or upon completion of conditions of a deferred adjudication;

(D) that the juvenile will not be subject to further investigation or prosecution for uncharged alleged delinquent conduct;

(E) that the prosecution will not oppose the juvenile’s release pending disposition or appeal;

(F) that the juvenile will receive, with the agreement of the court, a specified disposition;

(G) that at the disposition hearing, the prosecution will take, or refrain from taking, a specified position with respect to the sanction to be imposed on the juvenile by the court; and

(H) that at the disposition hearing, the prosecution will not present certain information;

(3) information favorable to the juvenile concerning matters such as the offense, mitigating factors and relative culpability, prior offenses, personal background, familial status, and educational and other relevant social information;

(4) information that would support a disposition other than confinement, such as the potential for rehabilitation or the nonviolent nature of the crime; and

(5) information concerning the availability of dispositional options, such as treatment programs, community treatment facilities, and community service work opportunities.

Guideline 8.3 Ongoing Preparation During Plea Negotiations

(a) Notwithstanding plea negotiations with the prosecution, counsel should continue to prepare and investigate the case to the extent necessary to protect the juvenile's rights and interests in the event that plea negotiations fail.

(b) Counsel should keep the juvenile fully informed of any plea discussions and negotiations and convey to the juvenile any offers made by the prosecution for a negotiated agreement.

Guideline 8.4 The Decision to Enter a Plea

(a) If counsel and the prosecution reach a tentative negotiated agreement, counsel should explain to the juvenile the full content of the agreement, including its advantages, disadvantages, and potential consequences. Counsel should also inform the juvenile that any plea agreement may be rejected by the court and the consequences of a rejection.

(b) Counsel should again advise the juvenile of the possible results of an adjudication as set forth in Guideline 8.2(c), *supra*.

(c) Counsel may not accept or reject a plea agreement without the juvenile's express authorization. Although the decision to accept or reject a plea agreement ultimately rests with the juvenile, if counsel believes the juvenile's decisions are not in his or her best legal interests, counsel should make every effort to ensure that the juvenile understands all of the potential consequences before the juvenile makes a final decision.

Guideline 8.5 Preparing the Juvenile for Entry of Plea

If the juvenile agrees to a negotiated plea, prior to the entry of a plea, counsel should:

(1) fully explain to the juvenile the nature of the plea hearing and the meaning of the questions on the transcript of admission;

(2) fully explain to the juvenile the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences the juvenile will be exposed to by entering a plea; and

(3) fully explain to the juvenile the plea hearing process, the role he or she may play in the hearing, including answering questions of the judge, the need to speak clearly and audibly before the court, and the need to behave appropriately and respond in a respectful manner to the court.

Guideline 8.6 Entry of Plea

(a) Counsel should not allow a juvenile to plead responsible based on oral conditions that are not disclosed to the court.

(b) When the juvenile enters a plea, counsel should ensure that the full content and conditions of the plea agreement between the prosecution and defense are legibly recorded on the transcript of admission.

(c) Subsequent to the acceptance of a plea by the court, counsel should review and explain the plea proceedings to the juvenile and respond to any questions and concerns of the juvenile.

SECTION 9: THE ADJUDICATORY HEARING

Guideline 9.1 General Adjudicatory Hearing Preparation

(a) Counsel should explain to the juvenile that, although it is the juvenile's decision whether to deny the allegations of the petition and proceed to an adjudicatory hearing, decisions concerning adjudication strategy are ordinarily to be made by counsel, after consultation with the juvenile and investigation of the applicable facts and law. However, counsel should be aware that, under the North Carolina Rules of Professional Conduct, if counsel and a fully informed competent juvenile reach an absolute impasse as to tactical decisions, the juvenile's wishes may control.

(b) Throughout preparation and adjudication, counsel should develop a theory of the defense and ensure that counsel's decisions and actions are consistent with that theory.

(c) In advance of the adjudicatory hearing, counsel should take all steps necessary to complete thorough investigation, discovery, and research. Among the steps counsel should take in preparation are:

(1) interviewing and subpoenaing all potentially helpful witnesses;

(2) subpoenaing any potentially helpful physical or documentary evidence;

(3) filing applicable pre-trial motions, with supporting briefs, memorandum, case law, and other supporting documentation, if appropriate;

(4) when appropriate, obtaining funds for defense investigators and experts and arranging for defense experts to consult and/or testify on issues that are potentially helpful;

(5) obtaining and reading transcripts of any prior proceedings in the case or related proceedings; and

(6) obtaining photographs or preparing charts, maps, diagrams, or other visual aids of any scenes, persons, objects, or information that may aid the court in understanding the juvenile's defense.

(d) When appropriate, counsel should have the following relevant information and materials available at the time of the adjudicatory hearing:

(1) copies of all documents filed in the case;

(2) documents prepared by investigators;

(3) reports, test results, and other materials disclosed by the prosecution pursuant to G.S. 7B-2300 *et seq.*;

(4) a plan, outline, or draft of an opening statement, if appropriate;

(5) cross-examination plans for all possible prosecution witnesses;

(6) direct-examination plans for all prospective defense witnesses;

(7) copies of defense subpoenas;

(8) any prior statements of all prosecution witnesses (*e.g.*, transcripts and police reports);

(9) any prior statements of all defense witnesses;

(10) reports from defense experts;

(11) a list of all defense exhibits and the witnesses through whom they will be introduced;

(12) originals and copies of all defense documentary exhibits;

(13) copies of statutes and cases; and

(14) a plan, outline, or draft of the closing argument.

(e) Counsel should be familiar with the rules of evidence that apply in adjudicatory proceedings, the law relating to all stages of the adjudicatory process, including the standards of proof in each proceeding, and the legal and evidentiary issues that reasonably can be anticipated to arise during the adjudicatory hearing.

(f) Counsel should decide if it is beneficial to obtain an advance ruling on issues likely to arise at the adjudicatory hearing (*e.g.*, use of prior adjudications to impeach the juvenile) and, if appropriate, prepare motions and memoranda for such advance rulings.

(g) Counsel should arrange with court personnel and/or the sheriff's office for counsel to be able to confer with the juvenile in a confidential setting during the adjudicatory hearing.

(h) Counsel should consider moving the court under G.S. 7B-2402 to close any initial proceedings. Factors counsel should consider when making this request include the age of the juvenile, the nature of the charges, and any information that may be discussed during the hearing that could harm the juvenile. If requested by the juvenile, counsel should move to close the proceedings.

(i) Throughout preparation and adjudication, counsel should consider the potential effects that particular actions may have upon disposition if there is a finding of delinquency.

(j) Counsel should consider moving the court to sequester any witnesses who may be called to testify at the adjudicatory hearing.

Guideline 9.2 Juvenile Dress and Demeanor at the Adjudicatory Hearing

(a) When appropriate, counsel should advise the juvenile as to suitable courtroom dress and demeanor.

(b) If the juvenile is detained, counsel should try to ensure, prior to the court hearing, that the juvenile does not appear before the judge in inappropriate clothing or in shackles or handcuffs. If a detained juvenile is brought before the judge in detention clothing, shackles, or handcuffs, counsel should object and seek appropriate relief from the court pursuant to G.S. 7B-2402.1.

Guideline 9.3 Preserving the Record on Appeal

Throughout the adjudicatory process, counsel should establish a proper record for appellate review, including making reasonable efforts to ensure that the adjudicatory hearing is recorded. If a relevant and important non-verbal event occurs during the adjudicatory hearing, counsel should ask to have the record reflect what happened. With permission of the court, counsel should also consider utilizing a personal recording device in case the court recording device fails.

Guideline 9.4 Opening Statement

(a) Though an opening statement is not always presented at a bench hearing, counsel should consider the potential benefits of making an opening statement. If counsel decides to make an opening statement, counsel should consider whether to ask for sequestration of witnesses before the statement.

(b) Counsel should be familiar with North Carolina law and the individual trial judge's practices regarding the permissible content of an opening statement. If appropriate, counsel should ask the court to instruct the prosecution not to mention in opening statement contested evidence for which the court has not determined admissibility.

(c) Counsel should consider the strategic advantages and disadvantages of disclosure of particular information during opening statement.

(d) Counsel should have a clear understanding of his or her objectives in making an opening statement. Appropriate objectives include:

(1) introducing the theory of the defense case;

(2) providing an overview of the defense case;

(3) identifying the weaknesses of the prosecution's case;

(4) emphasizing the prosecution's burden of proof; and

(5) preparing the court for the juvenile's testimony or decision not to testify.

(e) Whenever the prosecutor oversteps the bounds of a proper opening statement, counsel should consider objecting, requesting a mistrial, or seeking cautionary instructions, unless sound tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

(1) the significance of the prosecutor's error; and

(2) the possibility that an objection might enhance the significance of the information in the court's mind, or otherwise negatively affect the court.

Guideline 9.5 Preparing for and Confronting the Prosecution's Case

(a) Counsel should anticipate weaknesses in the prosecution's proof, and research and prepare to argue corresponding motions for judgment of dismissal or not delinquent.

(b) Counsel should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

(c) Unless sound tactical reasons exist for not doing so, counsel should make timely objections and motions to strike improper prosecution evidence and assert all possible statutory and constitutional grounds for exclusion of the evidence. If evidence offered by the prosecution is admissible only for a limited purpose, counsel generally should request that the court limit consideration to the proper purpose.

(d) Counsel should seek to ensure that any statements made by the juvenile to the court counselor during the preliminary hearing and evaluation process be excluded from the adjudicatory hearing pursuant to G.S. 7B-2408.

(e) In preparing for cross-examination, counsel should:

(1) be familiar with North Carolina law and procedures concerning cross-examination and impeachment of witnesses;

(2) be prepared to question witnesses as to the existence and content of prior statements;

(3) consider the need to integrate cross-examination, the theory of the defense, and closing argument;

(4) determine what counsel expects to accomplish by cross-examination of each witness and avoid asking questions that are unnecessary or might elicit responses harmful to the defense case;

(5) anticipate witnesses the prosecution might call in its case-in-chief or in rebuttal, and consider a cross-examination plan for each of the anticipated witnesses;

(6) be alert to inconsistencies, variations, and contradictions within each witness's testimony;

(7) be alert to inconsistencies, variations, and contradictions between different witnesses' testimony;

(8) review any prior statements and prior relevant testimony of the prospective witnesses;

(9) when appropriate, review relevant statutes and local police regulations for possible use in cross-examining police witnesses; and

(10) be alert to issues relating to witness credibility, including bias and motive for testifying.

(f) Counsel should consider conducting a *voir dire* examination of potential prosecution witnesses who may not be competent to give particular testimony, including expert witnesses and

younger witnesses. Counsel should be aware of the law concerning competency of witnesses in general, and admission of expert testimony in particular, to be able to raise appropriate objections.

(g) Before beginning cross-examination, counsel should ascertain whether the prosecutor provided copies of all prior statements of prosecution witnesses as required by G.S. 7B-2300. If disclosure was not properly made, counsel should request appropriate relief similar to that found in G.S. 15A-910, including:

(1) adequate time to review the documents or investigate and prepare further before commencing cross-examination, including a continuance or recess if necessary;

(2) exclusion of the witness's testimony and all evidence affected by that testimony;

(3) a mistrial;

(4) dismissal of the case; and/or

(5) any other sanctions counsel believes would remedy the violation.

(h) At the close of the prosecution's case, counsel should move for a judgment of dismissal on each count charged. Where appropriate, counsel should be prepared with supporting case law.

Guideline 9.6 Presenting the Defense Case

(a) In consultation with the juvenile, counsel should develop an overall defense strategy. In deciding on defense strategy, counsel should consider whether the juvenile's interests are best served by not presenting defense evidence and relying instead on the evidence and inferences, or lack thereof, from the prosecution's case.

(b) Counsel should discuss with the juvenile all of the considerations relevant to the juvenile's decision to testify, including the likelihood of cross-examination and impeachment concerning prior adjudications and prior bad acts that affect credibility.

(c) Counsel should be aware of the elements of any affirmative defense(s) and know whether the defense bears a burden of persuasion or production.

(d) In preparing for presentation of the defense case, counsel should, where appropriate:

(1) develop a plan for direct examination of each potential defense witness;

(2) determine the effect that the order of witnesses may have on the defense case;

(3) consider the possible use of character witnesses and any negative consequences that may flow from such testimony;

(4) consider the need for expert witnesses;

(5) consider the use of demonstrative evidence and the most effective order of exhibits; and

(6) be fully familiar with North Carolina statutory and case law on objections, motions to strike, offers of proof, and preserving the record on appeal.

(e) In developing and presenting the defense case, counsel should consider the implications it may have for rebuttal by the prosecution.

(f) Counsel should prepare all defense witnesses for direct examination and possible cross-examination. When appropriate, counsel should also advise witnesses of suitable courtroom dress and demeanor.

(g) If a prosecution objection to a proper question is sustained or defense evidence is improperly excluded, counsel should rephrase the question or make an offer of proof.

(h) Counsel should conduct redirect examination as appropriate.

(i) At the close of all of the evidence, counsel should renew the motion for judgment of dismissal on each charged count.

Guideline 9.7 Closing Argument

(a) In developing a closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and should:

(1) highlight any weaknesses in the prosecution's case;

(2) point out favorable inferences to be drawn from the evidence;

(3) incorporate into the argument:

(A) the theory of the defense case;

(B) helpful testimony from direct and cross-examinations;

(C) responses to anticipated prosecution arguments; and

(D) any relevant visual aids and exhibits; and

(4) consider the effects of the defense argument on the prosecution's rebuttal argument.

(b) Whenever the prosecutor exceeds the scope of permissible argument, counsel should object or request a mistrial unless sound tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

(1) the significance of the prosecution's error;

(2) the possibility that an objection might enhance the significance of the information in the court's mind;

(3) whether, with respect to a motion for mistrial, counsel believes that the case will result in a favorable decision for the juvenile; and

(4) the need to preserve the objection for appellate review.

SECTION 10: THE DISPOSITIONAL HEARING

Guideline 10.1 Dispositional Procedures

Counsel should be familiar with applicable dispositional procedures, including:

(1) the effect that plea negotiations may have on the dispositional discretion of the court;

(2) the procedural operation of disposition;

(3) the practices of the court counselor's office in preparation of the pre-dispositional report, and the juvenile's rights in that process;

(4) the right of access by counsel and the juvenile to the pre-dispositional report;

(5) the defense dispositional presentation and/or memorandum;

(6) the opportunity to challenge information presented to the court for disposition;

(7) the availability of an evidentiary hearing to challenge information, and the applicable rules of evidence and burden of proof at such a hearing; and

(8) the participation that victims and prosecution or defense witnesses may have in the dispositional proceedings.

Guideline 10.2 Advising the Juvenile About Disposition

(a) If the juvenile enters a plea or is found delinquent, counsel should be familiar with and advise the juvenile of the dispositional requirements, options, and alternatives applicable to the offense, including:

(1) the applicable disposition laws, including the dispositional chart, calculation of the juvenile's delinquency history, and exposure to commitment to a youth development center;

(2) disposition continued;

(3) probation or suspension of confinement and mandatory and permissible conditions of probation;

(4) any mandatory requirements for registration, such as sex offender registration, or for fingerprinting and photographing; and

(5) the possibility of expunction and sealing of records.

(b) Counsel should be familiar with and advise the juvenile of the direct and collateral consequences of the adjudication and disposition including, as appropriate:

(1) credit for pre-adjudication detention;

(2) the likelihood that the adjudication could be used for sentence enhancement in the event of future criminal cases; and

(3) if applicable, other potential collateral consequences of the adjudication and disposition, such as deportation or other effects on immigration status; effects on motor vehicle or other licensing; and the potential exposure to or impact on any federal charges, educational notification, and distribution of fingerprint and photographic information.

Guideline 10.3 Preparation for Disposition

In preparing for disposition, counsel should:

(1) be aware and inform the juvenile of the judge's practices and procedures, if possible;

(2) maintain regular contact with the juvenile prior to the dispositional hearing, and inform the juvenile and his or her parent or guardian of the steps being taken in preparation for disposition and what to expect at the dispositional hearing;

(3) obtain from the juvenile relevant information concerning such subjects as his or her background and personal history, prior record, educational history, mental health history and condition, and employment history, if any, and obtain from the juvenile sources through which the information provided can be corroborated;

(4) utilize dispositional experts, including mental health, developmental, or educational professionals, if applicable;

(5) inform the juvenile of his or her right to speak at the dispositional proceeding, and assist the juvenile in preparing the statement, if any, to be made to the court, after considering the possible consequences that any admission or other statement may have on an appeal, subsequent adjudicatory hearing, adjudication on other offenses, or other judicial proceedings, such as collateral or restitution proceedings;

(6) inform the juvenile if counsel will ask the court to consider a particular disposition;

(7) collect and present documents and affidavits to support the defense position and, when relevant, prepare and present witnesses to testify at the dispositional hearing;

(8) prepare any expert or other witnesses to address the court;

(9) consult with any child and family treatment team, if appropriate and possible; and

(10) unless there are sound tactical reasons for not doing so, attempt to determine whether the prosecution will advocate that a particular type or length of confinement be imposed.

Guideline 10.4 The Pre-Dispositional Report

(a) Counsel should be familiar with the procedures concerning the preparation and submission of a pre-dispositional report by the court counselor's office.

(b) If a pre-dispositional report is prepared, counsel should:

(1) provide to the court counselor preparing the report relevant information favorable to the juvenile, including, where appropriate, the juvenile's version of the offense;

(2) prepare the juvenile to be interviewed by the court counselor preparing the report, if the juvenile has not already been interviewed;

(3) make reasonable efforts to review the completed report and discuss it with the juvenile before going to court;

(4) try to ensure the juvenile has adequate time to examine the report, unless directed by the court not to disclose information in the report pursuant to G.S. 7B-2413; and

(5) take appropriate steps to ensure that erroneous or misleading information that may harm the juvenile is challenged or deleted from the report.

Guideline 10.5 The Defense Dispositional Plan

Counsel should prepare a defense dispositional plan and, where appropriate, a dispositional memorandum. Among the topics counsel may wish to include in the dispositional presentation or memorandum are:

(1) information favorable to the juvenile concerning such matters as the offense, mitigating factors and relative culpability, prior adjudications, personal background, educational history, employment record and opportunities, and familial and financial status;

(2) information that would support a disposition other than confinement, such as the potential for rehabilitation or the nonviolent nature of the crime;

(3) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities;

(4) challenges to incorrect or incomplete information and inappropriate inferences and characterizations that are before the court; and

(5) a defense confinement proposal, if necessary.

Guideline 10.6 The Dispositional Hearing

(a) At the dispositional hearing, counsel should take the steps necessary to advocate fully for the requested disposition and to protect the juvenile's legal rights and interests.

(b) If appropriate, counsel should present supporting evidence, including testimony of the juvenile and witnesses, affidavits, letters, and public records to establish the facts favorable to the juvenile. Counsel should also try to ensure that the juvenile is not harmed by inaccurate information or information that is not properly before the court in determining the disposition to be imposed.

(c) If the court has the authority to do so, counsel should request specific orders or recommendations from the court concerning the place of confinement and any psychiatric treatment or drug rehabilitation, and against deportation or exclusion of the juvenile, if applicable.

(d) Counsel should identify and preserve potential issues for appeal, including making reasonable efforts to ensure that the dispositional hearing is recorded. With permission of the court, counsel should also consider utilizing a personal recording device in case the court recording device fails.

SECTION 11: POST-DISPOSITION OBLIGATIONS AND APPEALS

Guideline 11.1 Explaining the Disposition to the Juvenile

After the dispositional hearing is complete, counsel should fully explain to the juvenile the terms of the disposition, including any conditions of probation and implications of violating probation.

Guideline 11.2 Motion to Modify or Vacate

Counsel should be familiar with the procedures available under G.S. 7B-2600 to seek relief from the dispositional order and should utilize those procedures when appropriate.

Guideline 11.3 Right to Appeal to the Appellate Division

(a) Counsel should inform the juvenile of his or her right to appeal the judgment of the court to the appellate division, the action that must be taken to perfect an appeal, and the possible outcomes of a decision to appeal.

(b) If the juvenile has a right to appeal and wants to appeal, the attorney should enter notice of appeal in accordance with the procedures and timelines set forth in G.S. 7B-2602 *et seq.* and the Rules of Appellate Procedure, and should consider offering to the court a completed form appellate entries (AOC-J-470) appointing the Office of the Appellate Defender. Pursuant to Rule 33(a) of the North Carolina Rules of Appellate Procedure and Rules 1.7(a) and 3.2(a) of the Rules of the Commission on Indigent Defense Services, the entry of notice of appeal does not constitute a general appearance as counsel of record in the appellate division.

(c) If the juvenile does not have a right to appeal and counsel believes there is a meritorious issue in the case that might be raised in the appellate division by means of a petition for writ of *certiorari*, counsel should inform the juvenile of his or her opinion and consult with the Office of the Appellate Defender about the appropriate procedure.

(d) Where the juvenile takes an appeal, trial counsel should cooperate in providing information to appellate counsel concerning the proceedings in the trial court and should timely respond to reasonable requests from appellate counsel for additional information about the case.

Guideline 11.4 Disposition Pending Appeal

(a) If a juvenile decides to appeal the adjudication or disposition of the court, counsel should inform the juvenile of any right that may exist under G.S. 7B-2605 to be released pending disposition of the appeal and, prior to the appointment of appellate counsel, make such a motion when appropriate. Counsel should also consult with the juvenile as to the possible outcomes of such a motion.

(b) If an appeal is taken and appellate counsel is appointed, trial counsel should cooperate with appellate counsel in providing information if appellate counsel pursues a request for release.

Guideline 11.5 Post-Disposition Obligations

Even after counsel's representation in a case is complete, counsel should comply with a juvenile's reasonable requests for information and materials that are part of counsel's file. Counsel should also take reasonable steps to correct clerical or other errors in court documents.