

CHAPTER 18:

# **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

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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](http://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](http://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 cause 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](http://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.