

## 7.6 Investigating Capacity to Proceed

- A. Duty to Investigate
  - B. Sources of Information
- 

## 7.6 Investigating Capacity to Proceed

### A. Duty to Investigate

Counsel has a duty to make a “reasonable investigation” into the juvenile’s capacity to proceed to an adjudicatory hearing. *See Becton v. Barnett*, 920 F.2d 1190, 1192–93 (4th Cir. 1990) (counsel must make reasonable investigation into defendant’s capacity to proceed and must use reasonable diligence in investigating capacity; counsel may not rely on own belief that defendant was incapable of proceeding). Counsel should first try to discuss with the juvenile the issue of raising capacity and its consequences. However, when counsel has a “good faith doubt” as to the juvenile’s capacity to proceed, counsel should file an ex parte motion for a mental health expert or a motion for a capacity hearing. *See* ABA Criminal Justice Standards, Standard 7-4.2(c) (Responsibility for raising the issue of incapacity to stand trial) and Commentary; *see also infra* Appendix 7-1: Practical Tips for Attorneys on Using Capacity; *see generally* 1 NORTH CAROLINA DEFENDER MANUAL § 2.3A, Ethical Considerations (2d ed. 2013). For a further discussion of moving for funds for an expert or for a capacity hearing, *see infra* § 7.8, Obtaining an Expert Evaluation.

### B. Sources of Information

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

**Medical history.** Counsel should obtain the juvenile’s medical history, including any history of mental health treatment, and ask that the juvenile and the parent, guardian, or custodian authorize the release of medical and other records for the juvenile. If the hospital or facility has its own release form, counsel should have the juvenile and the parent, guardian, or custodian sign that form. A sample release form is available on the [Juvenile Defender website](#). Parents and other caretakers may be able to provide more specific information concerning past treatment and diagnoses.

**Witnesses.** The juvenile’s family and friends may have helpful information about the juvenile’s condition. Other people who see the juvenile daily, including staff at the

detention center if the juvenile is in secure custody, teachers, foster parents, group home staff, and social workers, may have observations relevant to the issue of capacity to proceed.

**School records.** School records that reflect poor academic performance, repeated suspensions, or an expulsion may be indicative of mental illness or other disability. Past or continuing concerns about the juvenile's level of functioning may be disclosed in school records. Counsel should review report cards, disciplinary records, and other school records that describe the juvenile's behavior. Under the Family Educational Rights and Privacy Act (FERPA), the school can release such records with the written consent of the juvenile's parent or guardian. 20 U.S.C. § 1232g. A sample release form is available on the [Juvenile Defender website](#). The school can also release the records in response to a subpoena or court order. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 4.7F, Specific Types of Confidential Records (2d ed. 2013). For additional information on obtaining school records, see Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J. L. & EDUC. 653 (2013).

**Individualized education program.** School records are a particularly good source of information if the juvenile has an Individualized Education Program (IEP), mandated by the federal government for each child in public school who has been identified as having a disability requiring a special education plan. The IEP must be tailored to the juvenile's needs as determined by evaluations and assessments by qualified professionals. As with other school records, the school can release records related to the juvenile's IEP with the written consent of the juvenile's parent or guardian or in response to a subpoena or court order.

**Commitment proceedings.** The juvenile may have been voluntarily admitted or involuntarily committed in the past. To obtain court records from prior proceedings, counsel may make a motion to the district court that heard the case. *See* G.S. 122C-54(d). For medical records not in the court file, the juvenile and the parent, guardian, or custodian can authorize the appropriate hospital or other facility to release those records. Counsel also may make a motion to the juvenile court to compel production of records from other court proceedings or medical records in the possession of a nonparty. *See generally* 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in Possession of Third Parties (2d ed. 2013).

**Other records.** Several other types of records may contain relevant information. For example, counsel should review any prior juvenile court records for the juvenile. Similarly, counsel should ask whether the juvenile's parent receives a monthly payment from the Social Security Administration as a result of the juvenile's disability. If so, counsel should review any available records related to the disability payments.