

Chapter 5

Intake and Diversion

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5.1 Overview

A. Role of the Juvenile Court Counselor

A juvenile court counselor must evaluate each complaint received alleging that a juvenile has committed a delinquent act. The juvenile court counselor then decides whether the complaint will be filed as a juvenile court petition or will be diverted from the court system. Because there is no magistrate or district attorney involved in this initial determination, the juvenile court counselor serves as the gatekeeper to the juvenile justice system.

The juvenile court counselor first evaluates the complaint to determine whether the allegations, if true, would constitute a delinquent act. If the allegations are not legally sufficient, the counselor should not approve the filing of a juvenile court petition. If the allegations are legally sufficient and constitute a *nondivertible* offense, a juvenile court petition must be filed. *See infra* “Nondivertible and divertible offenses” in § 5.3A, Preliminary Inquiry. If the allegations are legally sufficient but constitute a *divertible* offense, the juvenile court counselor decides whether a juvenile petition should be filed or whether the matter can be diverted from the juvenile court system through referral to community services.

B. Importance to Juvenile's Counsel

Although the decision whether to file a juvenile petition is crucial, the juvenile has no right to an attorney at this stage of the process. An understanding of intake and diversion, however, is often necessary for the juvenile's attorney to provide effective representation. Because only the juvenile court counselor has the authority to divert cases from court, counsel should be prepared to use any opportunity that might lead to diversion and a non-judicial resolution of the case.

First, counsel might be involved at the intake stage if privately retained or through prior appointment for the juvenile on another case. Counsel should advise the client on strategies most likely to lead to diversion and should participate in the intake interview if allowed. Second, if intake did not occur because of a missed appointment or similar circumstance, counsel should try to convince the juvenile court counselor or the court that the juvenile should have an intake evaluation that could lead to diversion. Finally, an offense initially deemed nondivertible by the juvenile court counselor might actually be divertible and the juvenile may still be eligible for an intake evaluation. *See infra* "Nondivertible and divertible offenses" in § 5.3A, Preliminary Inquiry.

5.2 Terminology Used in this Chapter

Complaint is the report from a law enforcement officer or from a member of the community made to the juvenile court counselor alleging delinquent acts committed by a juvenile. The complaint is typically recorded on the AOC juvenile petition form. *See [Form AOC-J-310](#)* (Juvenile Petition (Delinquent)) (Oct. 2008).

Delinquent juvenile is a person 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." G.S. 7B-1501(7).

Diversion is the decision of the juvenile court counselor not to authorize the filing of a petition in juvenile court even though the allegations, if true, would constitute a crime if committed by an adult. A diversion plan may consist of referral to community resources and may include a diversion contract between the juvenile court counselor, the juvenile, and the juvenile's parent, guardian, or custodian containing specific statutory requirements. G.S. 7B-1706(a), (b).

Intake is the "process of screening and evaluating a complaint alleging that a juvenile is delinquent or undisciplined to determine whether the complaint should be filed as a petition." G.S. 7B-1501(13).

Juvenile court counselor is the "person responsible for intake services and court supervision services to juveniles under the supervision of the chief court counselor." G.S.

7B-1501(18a). In some jurisdictions the juvenile court counselor who primarily provides intake services is referred to as the “intake counselor.”

Petition is the document filed in the office of the Clerk of Superior Court initiating a juvenile court proceeding. The petition is analogous to a warrant filed against an adult in criminal court.

5.3 Intake

A. Preliminary Inquiry

Screening of complaint. A juvenile court counselor determines whether a complaint alleges a matter within the jurisdiction of the juvenile court. The juvenile must have been at least age 6 and less than age 16 when the act was allegedly committed, and the allegations, if proven, must constitute a crime or infraction if committed by an adult. The court counselor should not file a petition if the complaint is not legally sufficient or is frivolous. G.S. 7B-1701.

Nondivertible and divertible offenses. The juvenile court counselor must authorize the filing of a petition if there are “reasonable grounds to believe that a juvenile has committed” one of the specified offenses. The following offenses are nondivertible because, if supported by sufficient evidence, they cannot be diverted by the juvenile court counselor:

1. murder;
2. first-degree rape or second degree rape;
3. first-degree sexual offense or second degree sexual offense;
4. arson;
5. any violation of Article 5, Chapter 90 of the General Statutes [North Carolina Controlled Substances Act] that would constitute a felony if committed by an adult;
6. first degree burglary;
7. crime against nature; or
8. any felony that involves the willful infliction of serious bodily injury on another or that was committed by use of a deadly weapon.

G.S. 7B-1701.

“Serious bodily injury” is not defined in the delinquency statutes, but is defined in criminal statutes as “bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.” G.S. 14-32.4(a) (assault inflicting serious bodily injury); *see also* G.S. 14-318.4 (using an identical definition of serious bodily injury for felony child abuse). The term is also defined in motor vehicle statutes as “bodily injury that involves a substantial risk of death, extreme physical pain,

protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.” G.S. 20-160.1(b) (failure to yield causing serious bodily injury).

Divertible offenses include felonies not listed above as well as any act that would constitute a misdemeanor if committed by an adult.

Ordinarily, a juvenile court counselor will meet with the juvenile at the beginning of a divertible case in order to conduct a background investigation and determine whether the case should be diverted. However, some court counselors decide not to meet with juveniles charged with nondivertible offenses before the adjudication hearing. This could result in the dispositional hearing being delayed so that the counselor can complete a background investigation for the case. If the dispositional hearing is delayed, the juvenile may suffer adverse consequences, such as being held in secure custody pending disposition. Counsel should consider consenting to or requesting the preparation of a predisposition report after the filing of a nondivertible petition in order to avoid a delay in disposition if the juvenile is adjudicated delinquent.

B. Evaluation by Juvenile Court Counselor

Statutory requirements. If the complaint is legally sufficient, the juvenile court counselor must perform an evaluation to decide whether the complaint will be filed as a petition, the matter will be diverted, or no further action will be taken. G.S. 7B-1702. The evaluation must be based on criteria developed by the Division of Adult Correction and Juvenile Justice. The Division’s criteria for diversion can be found in Section 14B N.C. Admin. Code 11D .0102 and include the following seven factors:

- protection of the community;
- seriousness of the offense;
- juvenile’s previous record of involvement in the legal system, including previous diversions;
- ability of the juvenile and the juvenile’s family to use community resources;
- consideration of the victim;
- juvenile’s age; and
- juvenile’s culpability in the alleged complaint.

If practicable, the evaluation must include the following:

- interviews with the complainant and the victim if someone other than the complainant;
- interviews with the juvenile and the juvenile’s parent, guardian, or custodian; and
- interviews with people known to have relevant information about the juvenile or the juvenile’s family.

G.S. 7B-1702. The Court of Appeals has construed G.S. 7B-1702 to mean that the juvenile court counselor must conduct interviews “only when additional evidence is

needed to evaluate the factors provided by” the Division of Juvenile Justice. *In re T.H.*, 218 N.C. App. 123, 130 (2012). The evaluation decision still must be based on an individual assessment of the juvenile and the offense alleged. *See In re Register*, 84 N.C. App. 336, 348 (1987) (diversion decision in matter involving multiple juveniles could not be based solely on a juvenile’s ability or willingness to pay restitution).

Intake meeting with juvenile and parent. As part of the intake process, the juvenile court counselor usually sends a letter to the juvenile’s parent, guardian, or custodian requesting a meeting with the parent and juvenile. The juvenile and the parent sometimes miss the intake meeting for a number of reasons, including the parent’s work obligations, a change in residence, or reluctance to respond. If this occurs, defense counsel should still seek to convince the juvenile court counselor to divert the case or arrange another intake meeting if there is a possibility that the intake counselor might recommend entering into a diversion plan, reducing the charges, or continuing the case indefinitely.

Note: Any statement made by the juvenile to the court counselor during intake is not admissible at the adjudicatory hearing but may be admitted at disposition. G.S. 7B-2408.

C. Evaluation Decision by Juvenile Court Counselor

Time limits. The juvenile court counselor must complete the intake evaluation within 15 days of receipt of the complaint unless the chief court counselor grants an extension of up to 15 additional days. G.S. 7B-1703(a). If the court counselor approves the filing of a petition, the counselor must file the petition within the evaluation period. G.S. 7B-1703(b). Defense counsel should check each petition to see if it was timely filed. *See infra* 6.3C, Timeliness of Filing. There is no such time limit on when a *complaint* must be filed with the juvenile court counselor.

Assistance to complainant if petition approved. Upon approval of the complaint for filing, the statute directs the juvenile court counselor to assist the complainant in preparing and filing the petition if assistance is needed. G.S. 7B-1703(b). In practice, the juvenile court counselor or a law enforcement officer will usually draft the petition. The juvenile court counselor must then mark the petition “Approved for Filing” and sign and date it. *See In re Register*, 84 N.C. App. 336, 346–47 (1987) (record must affirmatively disclose that either the intake counselor or district attorney approved the filing of the petition). It is the responsibility of the juvenile court counselor to transmit the petition to the clerk of superior court for filing. G.S. 7B-1703(b).

Notice to complainant if petition not approved. Upon determination that a petition should not be filed, the juvenile court counselor must immediately notify the complainant of the decision. The notice must be in writing and must contain an explanation of the reasons for denial. In addition, the notice must inform the complainant of the right to have the decision of the juvenile court counselor reviewed by the prosecutor. G.S. 7B-1703(c).

Processing of denied complaints. In addition to notifying the complainant of the decision not to approve a petition, the juvenile court counselor must mark the complaint “Not Approved for Filing,” and either “Closed” or “Diverted and Retained” (that is, diverted, discussed *infra* in § 5.4, Diversion). G.S. 7B-1703(c). The juvenile court counselor must sign and date the decision on the complaint. If the case is closed and not diverted, the juvenile court counselor must destroy the complaint after the time has elapsed for review of the decision by the prosecutor. *Id.*

D. Review by Prosecutor of Denial of Petition

Request for review. The complainant may appeal the decision of the juvenile court counselor to the prosecutor. The complainant must request review with the juvenile court counselor within five days of receiving notice of the juvenile court counselor’s decision not to file a petition. The juvenile court counselor must immediately notify the prosecutor of the request and forward a copy of the complaint to the prosecutor. G.S. 7B-1704.

Review by prosecutor. The prosecutor must review the decision to deny the petition within 20 days of the notice to the complainant and must provide notice of the review to the juvenile court counselor and the complainant. The prosecutor is required to hold conferences with both the juvenile court counselor and the complainant. A decision must be rendered at the conclusion of the review either affirming the denial or directing the filing of a petition. G.S. 7B-1704, 7B-1705.

Victim’s rights under the Juvenile Justice Reinvestment Act of 2017. As part of the Juvenile Justice Reinvestment Act of 2017, the General Assembly amended G.S. 7B-1703(c) to provide that if the court counselor decides not to file a petition, the court counselor must notify not only the complainant, but also the alleged victim. The court counselor must inform both the complainant and the alleged victim of the right to request review by a prosecutor of the decision. The prosecutor must hold conferences with the complainant, the alleged victim, and the court counselor about the decision. The change applies to complaints filed on or after October 1, 2017. *See infra* §19.2, Changes Effective in 2017.

5.4 Diversion

A. Diversion Plan

Discretion of juvenile court counselor. Diversion is the determination by a juvenile court counselor that a petition will not be filed in juvenile court even though the complaint is legally sufficient to allege a delinquent act. The juvenile court counselor has discretion to divert any complaint unless the alleged offense is nondivertible. G.S. 7B-1706(a); *see supra* “Nondivertible and divertible offenses” in § 5.3A, Preliminary Inquiry. Because discretion to divert a case rests primarily with the juvenile court counselor, the court counselor has significant influence over the outcome of individual cases.

In some judicial districts, juvenile court counselors require an admission from a juvenile as a condition for diverting a case. Although this compels the juvenile to incriminate him or herself, there is no clear redress. The Juvenile Code grants juvenile court counselors wide discretion over the decision to divert cases, and there is no statutory authority for a court to review a court counselor's exercise of that discretion. If the decision to divert a case is contingent on the juvenile admitting responsibility, counsel should advise the juvenile of the consequences of an admission.

Terms of plan. The juvenile court counselor may formulate a plan of diversion that includes referral to community resources. Referral to the following resources may be included in a diversion plan:

- an appropriate public or private resource;
- a program to help the juvenile earn funds to pay restitution;
- a community service program;
- victim-offender mediation;
- regimented physical training;
- counseling; and
- a teen court program

G.S. 7B-1706(a).

In the discretion of the juvenile court counselor, a diversion plan may be incorporated into a formal diversion contract, which has more extensive requirements. G.S. 1706(a), (b); *see infra* § 5.4B, Diversion Contract.

A public or private resource might include mental health counseling, an after-school program, a tutoring program, or substance abuse counseling. The diversion plan should address any underlying problems of the juvenile or the juvenile's family and seek to prevent future involvement with the juvenile or the criminal justice system.

Many counties have restitution, community service, mediation, counseling, and teen court programs. As of the writing of this manual there is no regimented physical training program offered in North Carolina.

B. Diversion Contract

Contract requirements. A juvenile court counselor may enter into a diversion contract with the juvenile and the juvenile's parent, guardian, or custodian with their consent. The juvenile court counselor must provide copies of the diversion contract to the juvenile and the juvenile's parent, guardian, or custodian after signing.

The diversion contract must set forth: the conditions agreed to by the juvenile and parent; the responsibilities of the juvenile court counselor; the length of the contract, which is not to exceed six months; and an explanation that violation of the contract by the juvenile may result in the filing of a petition, while successful completion will preclude the filing

of a petition. G.S. 7B-1706(b). If the diversion contract includes a referral to local programs, defense counsel should advise the juvenile and the juvenile's parent, guardian, or custodian to comply with any rules or instructions issued by the programs because the failure to do so could result in the termination of the diversion contract and the filing of a petition.

If a diversion contract is executed, the statute directs the juvenile court counselor to mark the *complaint* "Not Approved for Filing" as well as "Diverted and Retained." G.S. 7B-1703(c). In practice, this information is written on the juvenile petition form provided by the North Carolina Administrative Office of the Courts, also used by the juvenile court counselors to record the complaint. See [Form AOC-J-310 \(Juvenile Petition \(Delinquent\)\)](#) (Oct. 2008). The form also provides a section labeled "Post-Diversion Approval for Filing of Petition." This means that if a petition is later filed, the district court judge will know before adjudication that the juvenile violated a diversion contract. Nevertheless, defense counsel should object if the State presents evidence during the adjudication hearing about alleged violations of the diversion contract on the ground that such evidence is irrelevant to determining whether the juvenile committed the offense described in the petition.

Determination of compliance. Within 60 days of diversion, the juvenile court counselor must determine whether the juvenile and the juvenile's parent, guardian, or custodian have complied with the terms of the diversion plan or contract. G.S. 7B-1706(e). The juvenile court counselor must contact referral resources to determine whether there has been compliance with their recommendations for treatment or services. *Id.* If there has not been compliance, the juvenile court counselor may authorize the filing of a petition within 10 days of the determination of non-compliance. *Id.* If a petition is not authorized, the juvenile court counselor may continue the diversion plan or contract for up to six months from the date of diversion. *Id.* Failure to comply at any point during the continuance may result in the filing of a petition.

If a petition is filed because of non-compliance, defense counsel should investigate the nature of the violation of the diversion plan. This information should be accessible to the attorney through the juvenile court file. Counsel might be able to persuade the juvenile court counselor to reconsider going forward with the petition by providing information that explains or excuses the violation. A sincere recommitment to the terms of the diversion plan by the juvenile and parent may also convince the juvenile court counselor not to go forward with the filing of the petition.

Termination. A plan or contract for diversion ends upon the filing of a petition, upon the expiration of the term of the plan or contract, or six months after the date of diversion if no petition has been filed. G.S. 7B-1706(b), (e).

C. Court Counselor's Records of Diversion Plans and Contracts

The juvenile court counselor is required to maintain a file of diversion plans and contracts for determining whether a complaint has been previously diverted. These are not public

records and are not to be included in any juvenile court record maintained by the clerk of superior court. The plans and contracts must be destroyed when the juvenile reaches the age of 18 or is no longer under the jurisdiction of the juvenile court, whichever is longer. G.S. 7B-1706(d).

In some circumstances, a court may be able to consider a diversion plan or contract at disposition. In an unpublished decision, a juvenile court counselor recommended a higher dispositional level because, among other things, the juvenile had entered into two previous diversion plans for past offenses. *In re T.P.*, 194 N.C. App. 200 (2008) (unpublished). The Court of Appeals held that it was permissible for the trial court to take the court counselor's recommendation into consideration. *Id.* The decision does not address the extent to which a court may rely on diversion plans or on allegations about how the juvenile violated the terms of the plans. Counsel should object if the State presents inadmissible evidence at disposition about a diversion plan or the juvenile's alleged non-compliance. Although the trial court is permitted to consider reliable hearsay during a dispositional hearing, G.S. 7B-2501(a), out-of-court statements that led to the termination of a diversion contact may be too unreliable to support a dispositional order or even be considered. For example, statements about the juvenile's non-compliance likely occurred outside court and might involve multiple layers of unreliable hearsay. Further, statements the juvenile made when entering the diversion contract or during the period of the contract may have occurred while the juvenile was not represented by counsel and might implicate constitutional or statutory rights.