Chapter 19

Motions for Diversion, ACD, Stetting

§ 19.01 THE NATURE OF THE MOTION; DEFENSE COUNSEL'S RESPONSIBILITIES

Many localities have more or less formal procedures for "diverting" criminal and juvenile delinquency cases out of the system. Such diversion procedures go by different names in different jurisdictions (including "adjournment in contemplation of dismissal" ("ACD") and "stetting"). *See, e.g.*, N.Y. FAM. CT. ACT § 315.3 (2018) ("adjournment in contemplation of dismissal": authorizing adjournment of a delinquency case "for a period not to exceed six months, with a view to ultimate dismissal of the petition in furtherance of justice"); WASH. REV. CODE ANN. § 13.40.080 (2018) ("diversion agreement": "a contract between a juvenile accused of an offense and a diversion unit whereby the juvenile agrees to fulfill certain conditions in lieu of prosecution"; a "diversion agreement may not exceed a period of six months"). In 2022, the ABA issued the AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS ON DIVERSION, *available at* https://www.americanbar.org/groups/criminal_justice/standards/diversion-standards/.

Unlike criminal cases, where diversion usually is available only at the pretrial stage, diversion in a delinquency case is available in some jurisdictions both prior to trial and after a respondent has been convicted (at trial or by means of a guilty plea). *See, e.g.*, N.Y. FAM. CT. ACT § 315.3(1) (authorizing an ACD in a delinquency case "at any time prior to the entering of a finding under section 352.1," which is a determination at "the conclusion of the [sentencing] . . . hearing" that "the respondent requires supervision, treatment or confinement," N.Y. FAM. CT. ACT § 352.1 (2018)). *Compare* CAL. WELF. & INST. CODE § 654.2(a) (2018) (authorizing pretrial diversion of a delinquency case for a period of six months, with possible extensions "to enable the minor to complete the program"; "If the minor successfully completes the program of supervision, the court shall order the petition be dismissed."), *with* CAL. WELF. & INST. CODE §§ 790 - 794 (2018) (providing for a "deferred entry of judgment" and possible dismissal of the case after a guilty plea: upon a minor's admission of "each allegation contained in the petition and waive[r] [of the] time for the pronouncement of judgment," the case is deferred for a period of 12 to 36 months and the youth is placed on probation with specified conditions; if the respondent successfully completes the program, "the court shall dismiss the charge or charges against the minor"); *compare* N.J. STAT. ANN. § 2A:4A-73(a) (2018) (providing for pretrial diversion of a delinquency complaint to an "intake conference" or a "juvenile conference committee"), *with* N.J. STAT. ANN. § 2A:4A-43(b)(1) (2018) (providing for a post-conviction "deferred disposition" with possible dismissal: upon a finding of delinquency, the court may "[a]djourn formal entry of disposition of the case for a period not to exceed 12 months for the purpose of determining whether the juvenile makes a satisfactory adjustment, and if during the period of continuance the juvenile makes such an adjustment, [the court may] dismiss the complaint"). *See also* N.Y. FAM. CT. ACT § 315.2 (2018) (authorizing an even broader remedy of

immediate dismissal of a delinquency petition "in the furtherance of justice," "at any time subsequent to the filing of the petition," upon the court's finding that "dismissal is required as a matter of judicial discretion" in light of "the circumstances of the crime," "the history, character and condition of the respondent," other statutorily enumerated factors, and any "other relevant fact[s] indicating that a finding would serve no useful purpose"); *State ex rel. Juvenile Department of Multnomah County v. Dreyer*, 328 Or. 332, 334, 338, 341, 976 P.2d 1123, 1125-26, 1128 (1999) (a delinquency petition can be dismissed in the furtherance of justice after adjudication even though the applicable statute "does not itself grant juvenile courts the authority to dismiss a delinquency petition after adjudication, [because] the statute establishes that the legislature contemplated that petitions might be dismissed at that stage").

The usual features of diversion, at both the pretrial and postconviction stages, are that the delinquency case is held in abeyance for a designated period of time and one or more conditions are set that the respondent must satisfy in order to obtain its ultimate dismissal. Such conditions usually include that the respondent must remain arrest-free for a specified period of time and must attend school regularly. In addition, a respondent may be required to successfully complete a community-based program of some sort (*e.g.*, alcohol or drug treatment; counseling of some sort (such as individual or family counseling, or anger management)); perform a certain number of hours of community service; provide restitution to the complainant; comply with a curfew; and/or meet periodically with a probation officer or other agency official. *See, e.g.*, WASH. REV. CODE ANN. § 13.40.080(2) (2018) (the conditions of a diversion agreement may include "[r]estitution limited to the amount of actual loss incurred by any victim"; "[a]ttendance at up to ten hours of counseling and/or up to twenty hours of educational or informational sessions at a community agency"; and "[r]equirements to remain during specified hours at home, school, or work, and restrictions on leaving or entering specified geographical areas"). In some jurisdictions, certain types of restrictive conditions can be imposed in connection with post-conviction diversion, not pretrial diversion. *Compare Derick B. v. Superior Court*, 180 Cal. App. 4th 295, 298, 306, 102 Cal. Rptr.3d 634, 635, 642 (2010) ("the juvenile court does not have the authority to impose a Fourth Amendment waiver as a condition of informal supervision" when a delinquency case is diverted prior to trial; "a Fourth Amendment waiver condition" is not specifically authorized by the applicable statutes and is "essentially inconsistent with the stated philosophy and purpose of the informal supervision under [these statutes] . . . to divert the minor away from formal juvenile probation"), *with* CAL. WELF. & INST. CODE § 794 (2023) ("When a minor is permitted to participate in a deferred entry of judgment procedure [upon the minor's admission of the charges], the judge shall impose, as a condition of probation, the requirement that the minor be subject to warrantless searches of his or her person, residence, or property under his or her control, upon the request of a probation officer or peace officer."). Upon the respondent's satisfaction of whatever conditions were set, the charges are dismissed. If the respondent fails to complete the program or violates some other condition of the diversion arrangement, the case is usually restored to the court calendar to resume the customary progression of a delinquency case (which, depending upon the stage of the case when diversion took place, may mean that the case is restored to the trial calendar or is set for sentencing). *See*, *e.g.*, *State v. Marino*, 100 Wash. 2d 719, 725-27, 674 P.2d 171, 174-75 (1984) ("The similar

rights at stake in probation revocation, plea bargain agreements, and pretrial diversions persuade us that . . . [a defendant] is entitled to have factual disputes resolved by a neutral fact finder [when the prosecutor seeks to terminate a diversion agreement and resume prosecution of criminal charges]. This includes an independent determination that the deferred prosecution agreement was violated, by a preponderance of the evidence with the burden of proof on the State. . . . This requirement best safeguards the . . . [defendant's] right to have the agreement administered equitably, with full protection of the constitutional rights relinquished in the bargain. The State is not unduly burdened as it has no interest in proceeding to prosecution in any case unless a violation has, in fact, occurred. ¶ Once the court has resolved the factual disputes, determining whether a violation of the agreement has occurred, it has a basis for reviewing the reasonableness of the prosecutor's decision to terminate. Clearly, the court is not in a position to require that prosecution be recommenced. Discretion to finally bring the case to trial still rests with the prosecutor. Other options may still be open in a particular case, such as reducing the charges if a plea bargain is reached, offering a new diversion arrangement, or dismissing charges where appropriate. We therefore find that the court's review of a prosecutor's termination decision should consist of assessing its reasonableness in light of the facts the trial court determines at [the] hearing." . . . ¶ . . . The trial court [here] clearly did find the prosecutor's decision to terminate reasonable in light of the facts ascertainable from the evidence. This finding satisfies the standard of review we hold appropriate for pretrial diversion terminations."); *United States v. Hicks*, 693 F.2d 32, 33-34 (5th Cir. 1982) ("The government argues that the district court did not have the power to review the decision to terminate appellant from the [diversion] program. It argues that the court would be participating in the decision to charge. Weaving the argument from the strands of prosecutorial discretion and separation of powers, it seeks to insulate the pretrial diversion program from any and all judicial review. ¶ That would take us too far. The court below, in holding this hearing, was not participating in the decision to charge. The diversion agreement is a contract. The government sought to hold the accused to his side of the bargain, i.e. the waiver of his speedy trial rights. The court was entitled to hear evidence on the violations to make sure that the government had lived up to its side of the bargain. ¶ The court is also charged with the responsibility for safeguarding the constitutional rights of the accused. An apt analogy is the plea bargain. Like pretrial diversion, the plea bargain is an agreement between the prosecutor and the accused. The court has a duty to supervise this process and insure that the defendant's plea is voluntary and that he is informed of his constitutional rights. ¶ . . . [W]e think the analogy sufficiently persuasive to defeat the government's argument that the court lacks jurisdiction to hold a hearing. Our holding is of a limited nature. We do not decide that the court is required to hold a hearing prior to termination of the agreement, with or without request by defendant. We simply hold that in this case the court was entitled to decide whether defendant should be held to his waiver of speedy trial." Because "the trial court found that the defendant had violated the terms of his agreement," the prosecutor's decision to resume prosecution is plenary.).

In many of the jurisdictions that have such a diversion option, the prosecutor has complete discretion whether to employ this option in a particular case. *See, e.g.*, COLO. REV. STAT. § 19-2.5-401 (2023) ("As an alternative to a petition filed pursuant to section 19-2-512, an

adjudicatory trial pursuant to part 8 of this article, or disposition of a juvenile delinquent pursuant to section 19-2-907, the district attorney may agree to allow a juvenile to participate in a diversion program established in accordance with section 19-2-303."). Although judicial approval may be needed if the case has progressed beyond a certain stage (usually arraignment), judges commonly sign off on any diversion arrangement supported by the prosecutor.

In some jurisdictions, a statute or rule or local practice authorizes the court to grant a defense request for diversion notwithstanding a prosecutor's objection. *See, e.g.*, N.Y. FAM. CT. ACT § 315.3 (authorizing a judicial grant of an ACD "upon motion of . . . the respondent," and omitting any requirement of prosecutorial consent even though the statute's adult court analogue, N.Y. CRIM. PROC. L. § 170.55(1) (2018), expressly requires the prosecutor's consent for a judicial grant of a defense motion for an ACD in a criminal case); *In re Lee*, 282 Mich. App. 90, 96, 761 N.W.2d 432, 436 (2009) (in cases involving charges governed by the Crime Victim's Rights Act, the family court's customary power to divert juvenile delinquency cases is modified to the extent that "the court must afford both the prosecuting attorney and the victim of the alleged offense the opportunity to address the court regarding the court's intent to remove the case from the adjudicative process").

In jurisdictions that authorize the court to grant diversion over a prosecutor's objection, counsel should consider making a motion supported by a proposed diversion plan in any promising case in which the prosecutor has rejected defense counsel's request for the favorable exercise of the prosecutor's discretion to divert the case out of the system. Even in jurisdictions in which court-ordered diversion requires prosecutorial consent, such a motion may nonetheless be a valuable tool because a prosecutor who initially rejected a defense attorney's appeal to his or her discretion may thereafter acquiesce in diversion if a judge – who has been persuaded by the motion that diversion is the right outcome – leans on the prosecutor to cooperate. See § 19.04 *infra*.

Counsel's responsibilities to a client in a criminal or delinquency case include the obligation to explore the possibility of diversion in appropriate cases. *See* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, PLEAS OF GUILTY (4th ed. 2017), Standard 14-3.2(e), *Responsibilities of defense counsel* ("At the outset of a case, and whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of a diversion of the case from the criminal process.").

The following sections of this chapter address steps that counsel can take to seek diversion in a delinquency case at either the pretrial or postconviction stages. Post-conviction diversion is discussed further in § 14.06(b) and (c) *supra* and § 38.03(c) *infra*. Section 37.02(e) *infra* addresses the separate remedy of a motion for immediate dismissal of the Petition for "social reasons" or in "the furtherance of justice."

§ 19.02 INVOKING THE PROSECUTOR'S DISCRETION IN THE FIRST INSTANCE

Generally, in any case in which the circumstances of the crime and/or the respondent's background or other aspects of the case make it realistic to seek diversion, counsel should begin by attempting to persuade the prosecutor to divert the case (or, if judicial approval is required, to join with defense counsel in requesting this relief from the judge). If the prosecutor's agreement can be secured, this is always the easiest way to obtain diversion.

Section 14.16 *supra* identifies the types of considerations that are likely to affect a prosecutor's views about possible resolutions of a juvenile delinquency case. When seeking prosecutorial agreement to pretrial diversion, it will often be effective to appeal to a prosecutor's sense of justice by citing evidence of the respondent's innocence. Even if the prosecutor is unwilling to drop the charges altogether, s/he may agree to diversion. See also § 9.06 *supra*. Additionally or alternatively, counsel might point out flaws in the validity or sufficiency of the prosecution's evidence or reasons to question the availability of evidence the prosecution will need at trial. (In making such pitches to a prosecutor, however, counsel needs to be wary of alerting the prosecutor to holes in the state's case that the prosecutor could plug if the case goes to trial after all. See § 19.03(a) *infra*.) For both pretrial and postconviction diversion, a juvenile court prosecutor who subscribes to the rehabilitative ideal of juvenile court may be swayed by defense arguments that diversion offers the best hope for redressing whatever problems the respondent may be experiencing at school or home or in the community. In any case involving allegations of a serious crime and/or a respondent with a prior record, a prosecutor is likely to be concerned about community safety. If an available diversion program offers means for keeping tabs on the respondent, or resources for dealing with problems that appear to have been factors in the respondent's delinquent behavior (like school problems, alcohol or drug abuse, or problems at home), the prosecutor may regard diversion as a satisfactory alternative to continued prosecution. Docket congestion and his or her own workload also tell with a prosecutor. Particularly if a case is relatively unimportant (in terms of the egregiousness of the crime and the probable future dangerousness of the accused) and if preparing and presenting it in court are going to involve much time and work, the prosecutor will tend to favor a non-court disposition. This is particularly so if s/he is confident that the disposition will leave pertinent parties – principally the police and the complainant (and, where relevant, the news media) – satisfied.

The following two sections discuss what counsel can do if the prosecutor rejects defense counsel's request for diversion. Section 19.03 focuses on jurisdictions in which the applicable statute or rule authorizes a judge to grant diversion upon defense request even though the prosecutor objects. Section 19.04 addresses the types of arguments that counsel can make to a judge when the statute or rule requires prosecutorial consent to diversion.

§ 19.03 SEEKING A JUDICIAL ORDER OF DIVERSION IN JURISDICTIONS IN WHICH PROSECUTORIAL CONSENT TO DIVERSION IS NOT REQUIRED

In some jurisdictions, a statute or court rule or case law identifies specific criteria for a court to consider when assessing whether to grant diversion. *See, e.g.*, *In the Matter of Jonathan M.*, 107 A.D.3d 805, 806-07, 966 N.Y.S.2d 522, 524-25 (N.Y. App. Div., 2d Dep't 2013) ("The

Family Court has broad discretion in determining whether to adjourn a proceeding in contemplation of dismissal . . . . Although, as it is often stated, a respondent is not entitled to an adjournment in contemplation of dismissal merely because this was his or her 'first brush with the law' . . . , a respondent's criminal and disciplinary history is nevertheless relevant to a court's discretionary determination of whether to adjourn a proceeding in contemplation of dismissal . . . . Other relevant factors include, but are not necessarily limited to, a respondent's history of drug or alcohol use . . ., a respondent's association with gang activity . . ., a respondent's academic and school attendance record . . ., the nature of the underlying incident . . ., a respondent's decision to accept responsibility for his or her actions . . ., any recommendations made in a probation or mental health report . . ., the degree to which the respondent's parent or guardian is involved in the respondent's home and academic life . . ., and the ability of the respondent's parent or guardian to provide adequate supervision"). *See also, e.g.*, *State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993) ("Tennessee case law directs that 'the following factors and circumstances should be considered in determining [whether] diversion is warranted [in an adult criminal case]: circumstances of the offense; the criminal record, social history and present condition of the defendant, including his mental and physical conditions where appropriate; the deterrent effect of punishment upon other criminal activity; defendant's amenability to correction; the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and defendant; and the applicant's attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement.'"; "while the circumstances of the case and the need for deterrence may be considered as two of many factors, they cannot be given *controlling* weight unless they are 'of such overwhelming significance that they [necessarily] outweigh all other factors'"); *People v. Whitmill*, 86 Cal. App. 5th 1138, 303 Cal. Rptr. 3d 444 (2022) (reversing an order denying a defendant's motion for mental health diversion: "[California Penal Code] § 1001.36 authorizes pretrial mental health diversion for defendants with qualifying mental health disorders. . . . As used in the statute, 'pretrial diversion' means '"postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment."' *Id*. at 1147-48, 303 Cal. Rptr. 3d at 450. The six threshold eligibility requirements are set forth in section 1001.36, subdivision (b)(1)(A)-(F). First, the court must find defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders. . . . ¶ Second, the court must find 'the defendant's mental disorder was a significant factor in the commission of the charged offense.' . . . ¶ Third, 'a qualified mental health expert' must opine that 'the defendant's symptoms of the mental disorder motivating the criminal behavior would respond to mental health treatment.' . . . ¶ Fourth, subject to certain exceptions, the defendant must consent to diversion and waive his or her right to a speedy trial. . . . ¶ Fifth, the defendant must agree to comply with treatment as a condition of diversion. . . . ¶ Finally, the court must find defendant will not pose an 'unreasonable risk of danger to public safety . . . if treated in the community.'" *Id*. at 1148-49, 303 Cal. Rptr. 3d at 450-51. "Here, the trial court stated: '[W]hat I have here is a defendant who had three years in the county jail suspended. And that's designed to create a strong disincentive to commit any new crime. That does not give me

great confidence.' . . . We find nothing in the diversion statute suggesting the Legislature intended to give courts discretion to deny diversion simply because diversion is or may be less motivating than probation or prison. The trial court appeared to be grafting on a seventh element that defendants show they do not need to be additionally motivated. The trial court's conclusion that diversion is insufficiently motivating is simply a challenge to the underlying premise of diversion itself." *Id*. at 1155, 303 Cal. Rptr. 3d at 456.). *Cf*. N.Y. FAM. CT. ACT § 315.2(1)(a)-(g) (2018) (directing a Family Court judge to consider the following specific factors "individually and collectively," when determining whether to dismiss a juvenile delinquency Petition outright in the "furtherance of justice": "the seriousness and circumstances of the crime"; "the extent of harm caused by the crime"; "any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition"; "the history, character and condition of the respondent"; "the needs and best interest of the respondent"; "the need for protection of the community"; and "any other relevant fact indicating that a finding would serve no useful purpose").

In jurisdictions that lack such an inventory of relevant criteria, counsel may find it useful to cite statutes, rules or caselaw from other jurisdictions as illustrations of the types of factors that legislatures and courts have deemed to be appropriate determinants of the suitability of diversion.

As a general matter, whether the judge is bound by or chooses to consider an itemized list of factors, it is usually safe to assume that the judge will focus particularly on the circumstances of the alleged crime and the circumstances of the respondent's life. Although the arguments that counsel will make about these subjects naturally will turn upon the particulars of the case, the following two subsections offer some general suggestions.

§ 19.03(a) Addressing the Circumstances of the Crime

When seeking either pretrial or postconviction diversion, counsel presumably will want to emphasize any mitigating aspects of the crime. *See, e.g.*, *In re Israel M.*, 57 A.D.2d 274, 274-76, 871 N.Y.S.2d 2, 2-4 (N.Y. App. Div., 1st Dep't 2008) (vacating a disposition of probation and "remand[ing] with the direction to order an adjournment in contemplation of dismissal" in a felony assault case in which the respondent and another youth held their classmate on the ground while another youth "slashed [the victim] in the right shoulder with a pocket knife"; the appellate court emphasizes, *inter alia*, the respondent's "relatively minor involvement in the victim's injuries," that the respondent "had no knowledge that his classmate intended to use a pocket knife during their concerted efforts to 'scare' the victim for preventing them from working during their computer class," and that the respondent's "involvement can be fairly characterized as 'an act of thoughtlessness committed by an adolescent fooling around with some friends'"); *In the Matter of Juli P.*, 62 A.D.3d 588, 588-89, 879 N.Y.S.2d 134, 135 (N.Y. App. Div., 1st Dep't 2009) (vacating a 12-month conditional discharge and remanding for the less restrictive disposition of an ACD in an assault case because, *inter alia*, the respondent "injured his friend . . . recklessly rather than intentionally," and "this incident was an isolated outburst"); *In the*

Matter of Tyvan B., 84 A.D.3d 462, 462-63, 923 N.Y.S.2d 60, 61 (N.Y. App. Div., 1st Dep't 2011) (vacating a conditional discharge and remanding for an ACD on convictions of possession of graffiti instruments and possession of marijuana because, *inter alia*, "[t]he underlying offenses were minor and were appellant's first offenses," and "[t]hey occurred over a short period of time when, through no fault of his own, appellant was not receiving his psychiatric medication"). *See also, e.g.*, *State v. Tucker*, 219 Conn. 752, 761, 595 A.2d 832, 837 (1991) (affirming the trial judge's grant of "accelerated rehabilitation" in a drug sale case in adult criminal court, despite the prosecutor's objection, and also affirming the trial judge's early termination of the probationary period and dismissal of the charge because, *inter alia*, "[t]he defendant was a first time offender, and no evidence before the court suggested that his alleged sale of narcotics had been accompanied by violence or had resulted in harm to another"); *State v. Gutierrez*, 2008 WL 190989, at *1, *4 (N.J. Super. Ct. App. Div. Jan. 24, 2008) (per curiam) (affirming the trial judge's grant of pretrial diversion in a DWI case in adult criminal court, "over the objection of the Cape May County Prosecutor," because, *inter alia*, "no one was injured, defendant did not strike another vehicle or a pedestrian, defendant was not charged with any crimes other than possession of CDS [a controlled dangerous substance], and he did not leave the scene.").

When arguing in favor of pretrial diversion, counsel should scrupulously avoid disclosing to the prosecution the projected trial testimony of defense witnesses, or even revealing the respondent's version of the events. Since counsel cannot count on winning a motion for diversion, particularly if the prosecutor is opposing it, counsel cannot afford to reveal facts that, although supportive of the motion, would give discovery to the prosecutor and thereby undermine the respondent's chances of winning the trial in the event diversion is denied. Generally, counsel should focus upon mitigating aspects of the prosecution's version of the crime, beginning statements with such phrasing as: "even under the prosecution's version of the events . . . ." For example, counsel might say: "Even under the prosecution's theory of what happened, no one was injured and the complainant recovered her property."

Statements taken by counsel or a defense investigator from potential prosecution witnesses should seldom be submitted on a motion for pretrial diversion. These are too valuable for impeachment at trial, and too vulnerable to prosecutorial undercutting (by coaching the witness to explain away any impeaching material; by procuring additional witnesses to bolster an impeachable witness's weak points; etc.) to jeopardize. Counsel should ordinarily refrain from any use or even mention of such statements that can tip off their existence to the prosecutor. However, in cases where a statement will clearly be of no worth in cross-examining the witness at trial but contains assertions that would be persuasive in a motion for pretrial diversion (such as the assertions that a complainant wishes to drop the charges, or that s/he was not injured, or that s/he and the respondent have resolved their differences since the antagonistic events giving rise to the charges), counsel might consider attaching the statement to the motion.

In rare cases, counsel might also consider arranging for the respondent to take a private polygraph test and, if the respondent passes it, attaching the polygraph results to a motion for pretrial diversion. Although most jurisdictions exclude polygraph evidence at trial, the less

formal rules of evidence applicable to pretrial motions would likely allow the submission of polygraphic vindication on a diversion motion. Judges who tend to assume that all respondents are guilty may be more inclined to offer diversion over a prosecutor's objection if a polygraph test confirms a respondent's claim of innocence. Recourse to polygraph testing is most useful in cases in which counsel believes a client's exonerating story but can develop little or no evidence to support it other than the respondent's own assertions. Even in this situation, however, the dangers and uncertainties that attend polygraph procedures – including the risk of false positives – call for extreme caution: Counsel who are considering going the polygraph route should (1) *first* commission a confidential polygraph examination by a reputable examiner and (2) submit the results only if (a) the examiner reaches a firm conclusion of the truthfulness of the client's declarations of innocence *and* of all significant aspects of the client's story relating to his or her activities or whereabouts at the time of the crime; and (b) the recorded dialogue between the examiner and the respondent will not give the prosecutor a preview of unobvious aspects of the defense case at trial or provide the prosecutor with material for impeaching the respondent's trial testimony.

In describing the mitigating aspects of the crime, counsel should not play into rejoinders by the prosecutor or the judge that counsel is inappropriately minimizing the gravity of the offense or the trauma to the victim. It is often an effective tactic to state explicitly that counsel does not wish to minimize the gravity of the offense and then to go on to make the point that nonetheless the offense is less serious than many of the serious crimes prosecuted in juvenile court.

§ 19.03(b) Addressing the Circumstances of the Respondent's Life

In some jurisdictions, diversion is limited to respondents who have no prior convictions. Even in jurisdictions where diversion is not so limited, a respondent's lack of prior convictions will usually be an important factor to emphasize. In all jurisdictions, it is always worthwhile to stress the lack of prior *arrests* in any case in which the respondent has never been arrested before. *See, e.g.*, *In the Matter of Nigel H.*, 136 A.D.3d 1033, 1033-34, 26 N.Y.S.3d 301, 302-04 (N.Y. App. Div., 2d Dep't 2016) (the Family Court "improvidently exercised its discretion" in denying an ACD and instead "imposing a period of probation" in an arson case; the appellate court emphasizes that "Nigel H. had no prior criminal history and no problems in his foster home or at school, notwithstanding prior physical abuse and neglect by his biological parents," and that "[t]here is no indication that Nigel H. ever used drugs or alcohol, or was affiliated with a gang"); *In re Narvanda S.*, 109 A.D.3d 710, 711-14, 972 N.Y.S.2d 1, 2-5 (N.Y. App. Div., 1st Dep't 2013) (reversing a disposition of probation and remanding for an ACD in a case in which the respondent was convicted at trial of sexual abuse and forcible touching and had a record of absences from school, and in which a mental health expert recommended probation; the appellate court emphasizes, *inter alia*, that "[t]his was appellant's first and only contact with the juvenile justice system both before and after the incident," he "had no reported history of illegal drug or alcohol use, he was not involved with a gang," and "his academic performance . . . improved"). Of course, before making any such assertions about the respondent's prior record, it is essential

that counsel not only question the client and his or her parent(s) thoroughly but also check court records, probation records, and, if possible, police records.

Because many juvenile court judges consider a child's conduct at school to be an important consideration in assessing the child's character and predicting the likelihood of his or her commission of offenses in the future (see §§ 4.17, 4.21(b)(2) *supra*), counsel should cite any favorable aspects of the respondent's attendance record and academic performance as well as any participation in school activities. Counsel should provide the court with concrete evidence of the child's good school performance such as, *e.g.*, copies of the respondent's attendance records, showing that s/he regularly attends school; the respondent's report card(s), showing that s/he is receiving good grades; copies of any awards that the respondent has won at school; copies of exam papers on which the respondent received exceptionally good grades; copies of papers written for school that express constructive self-critical insights, unselfish attitudes, and touching feelings; and letters from teachers, deans, principals, and/or guidance counselors, attesting to the respondent's regular school attendance, good behavior, and good academic performance. *See, e.g.*, *In re Narvanda S.*, 109 A.D.3d at 713, 972 N.Y.S.2d at 4 (explaining that the court's decision to order an ACD is supported by, *inter alia*, "[l]etters from appellant's school social worker and two of his teachers [which] confirmed his progress in school (80 average) and his regular attendance"). If the respondent plays on any school teams, after-school teams, or community-center teams, counsel should obtain and append letters from coaches attesting to the respondent's reliability and good sportsmanship, along with photographs of any awards the respondent has won, particularly for good sportsmanship. If the respondent is involved in any activities such as orchestra, drama, art classes, or vocational training at school or after school, counsel should obtain and append letters from the teachers or supervisors, along with exhibits demonstrating the respondent's skill, such as pictures the respondent has drawn or pottery the respondent has made (which can have the effect not only of humanizing the respondent but also demonstrating that the respondent has talents that, if fostered and guided, will help keep the respondent out of trouble in the future).

The guiding philosophy of diversion in most jurisdictions is that the use of community-based rehabilitative services can obviate the need for expending the resources of the criminal and juvenile justice systems. Thus, it will usually be productive to present a judge with any information counsel can offer to show that the respondent is likely to benefit from rehabilitative services. As §§ 6.05 and 12.07 *supra* and § 38.09 *infra* suggest, counsel should identify a client's educational problems and any other sorts of problems (*e.g.*, substance abuse problems; psychological problems) as early in the case as possible and take steps to remedy them, including arranging for the client's participation in appropriate community-based programs so that s/he has a successful track record of participation in the program that can be cited at sentencing in the event of conviction. If the client is already participating in such a program at the time when pretrial diversion can be requested, evidence of the client's successful performance in the program may be very persuasive to a judge in deciding whether to grant diversion. *See, e.g.*, *In re Juan P.*, 114 A.D.3d 460, 460, 462-63, 464, 980 N.Y.S.2d 397, 398, 400-01, 402 (N.Y. App. Div., 1st Dep't 2014) (vacating a disposition of probation and remanding for an ACD because

this was the respondent's "first offense," he had a solid record of academic achievement, and he "participated in a sexual behavior program"); *In the Matter of Tyvan B.*, 84 A.D.3d 462, 462-63, 923 N.Y.S.2d 60, 61 (N.Y. App. Div., 1st Dep't 2011) (explaining that an ACD should have been granted at disposition because, *inter alia*, the respondent's mother "addressed her son's need for psychiatric treatment prior to any intervention from the court," and, "[a]t [the] time of the dispositional hearing [he] was receiving appropriate medication and therapy"). *See also, e.g.*, *State v. Gutierrez*, 2008 WL 190989, at *1 (N.J. Super. Ct. App. Div. Jan. 24, 2008) (per curiam) (affirming the trial judge's grant of pretrial diversion in an adult criminal case, "over the objection of the . . . Prosecutor," because, *inter alia*, "the probation officer pointed to defendant's enrollment in an outpatient drug and alcohol treatment program, and his 'amenability to treatment, [which] bode well for the likelihood of success with PTI [Pretrial Intervention] services'"). In such cases, counsel should obtain a letter from the program (and, ideally, from the respondent's own counselor), attesting to the client's faithful attendance and the progress s/he has already made.

In any case in which the respondent's behavior – at school or at home or both – has improved significantly since the time of arrest, this is a fact that a judge may view as particularly compelling. *See, e.g.*, *In re Narvanda S.*, 109 A.D.3d at 712-14, 972 N.Y.S.2d at 4-5 (explaining that the appropriateness of an ACD is shown by, *inter alia*, the respondent's "great strides in school performance in the almost 14-month period since the underlying offense": "Although appellant had 24 absences during the 2010-2011 school year, by the fall of 2011, when the hearing took place, his academic performance had improved and he only had four absences, two of which were attributable to court appearances in connection with the underlying petition. The November 2011 probation report indicates that prior to the incident, appellant had also been associating with some 'negative peers' at school, but after the petition was brought, he stopped contact with them."); *In re Besjon B.*, 99 A.D.3d 526, 526, 951 N.Y.S.2d 868, 868 (N.Y. App. Div., 1st Dep't 2012) (vacating a disposition of probation and remanding for an ACD in a case in which the respondent was convicted at trial of assault and menacing; the court explains that an ACD is appropriate because the offense was the 11-year-old respondent's "only conflict with the law," "[t]he circumstances of the assault were not particularly egregious," and "[a]lthough appellant's school record had been unsatisfactory, it had greatly improved by the time of the disposition"); *In re Jonnevin B.*, 93 A.D.3d 572, 572, 942 N.Y.S.2d 43, 44 (N.Y. App. Div., 1st Dep't 2012) (explaining that the trial court should have granted an ACD because of, *inter alia*, "the progress [the respondent had] made": "it appeared that appellant was living in an unstable home at the time of the offense and had subsequently been placed in a stable foster home, where he posed no behavioral problems and had been attending school without any absences or further disciplinary issues"); *In re Joel J.*, 33 A.D.3d 344, 345, 823 N.Y.S.2d 7, 9 (N.Y. App. Div., 1st Dep't 2006) (the appropriateness of an ACD was demonstrated by, *inter alia*, the respondent's "significant progress in the period of time between his arrest and the date of disposition": "He was subjected to random drug testing on three separate occasions, with negative results. Appellant appeared at each court session and was responsive to the services provided by SCAN (Supportive Children's Advocacy Network)."). *Cf.* § 4.21(d)(1) *supra*.

It will often be effective to have the client's parent(s) and/or other relatives inform the court – either in a letter or by addressing the judge orally in court – about the client's good behavior at home. Although a judge may discount such statements on grounds of bias, counsel should not underestimate the potential benefits. *See, e.g.*, *In re Narvanda S.*, 109 A.D.3d at 713, 972 N.Y.S.2d at 4 (explaining that the appropriateness of an ACD in this sexual abuse case was shown by, *inter alia*, the mother of the respondent "describ[ing] him as being nice and respectful towards the people in his community which he enjoys," and her report that "although he sometimes failed do his chores, he adhered to his curfew").

If counsel is able to obtain a statement from the complainant that s/he supports the handling of the case through a means other than a criminal prosecution, this will often be highly persuasive to a judge. *See, e.g.*, *Commonwealth v. Pyles*, 423 Mass. 717, 718, 724, 672 N.E.2d 96, 97, 100 (1996) (diversion in an adult criminal case was appropriate, notwithstanding the seriousness of the charge – assault with a dangerous weapon based on allegations that "the defendant, during an argument, cocked and pointed a handgun at his twelve year old nephew, in the presence of the boy's mother (defendant's sister)" – because, *inter alia*, "the victim's mother (defendant's sister) stated that it was unnecessary to incarcerate her brother to deal with the problem that had occurred"). (There is nothing wrong with defense counsel's talking to a complainant about dropping the charges, so long as counsel is honest and not overbearing. *See, e.g.*, N.Y. County Lawyers' Ethics Opinion 711, N.Y. LAW J., August 21, 1996, at 2, col. 3, *available at* https://www.nycla.org/siteFiles/Publications/Publications486_0.pdf (a defense attorney may "ask[ ] the complaining witness to request the prosecution to drop the charges," as long as counsel does not "bully" or lie to the witness or "seek to advise the complaining witness as to whether the benefits of dropping the charges outweigh the benefits of going forward"). It is usually a good idea to have a reliable witness present during the discussion, or unfounded charges against counsel may later be made.)

§ 19.04 SEEKING JUDICIAL RELIEF DESPITE A STATUTE OR RULE REQUIRING PROSECUTORIAL CONSENT TO DIVERSION

Even in a jurisdiction in which a statute or rule expressly conditions a grant of diversion on prosecutorial consent, it may nonetheless be worthwhile to file a motion for diversion with the court. Notwithstanding the apparently unequivocal language of the applicable statute or rule, it may be possible to persuade a judge that an exception is possible. *See, e.g.*, *State v. Bell*, 69 S.W.3d 171 (Tenn. 2002) ("[W]e hold that when the district attorney general denies pretrial diversion without considering and weighing all the relevant factors, including substantial evidence favorable to the defendant, there is an abuse of prosecutorial discretion. We further hold that in such a case, the proper remedy under the applicable standards of review requires a remand for the district attorney general to consider and weigh all of the relevant factors to the pretrial diversion determination." *Id*. at 173. "The district attorney general denied pretrial diversion because Bell failed to take responsibility for his actions, has a record of traffic offenses, acted recklessly, endangered persons other than the victims, and has an unstable work history. The district attorney general also cited a need to deter irresponsible driving by tractor-trailer drivers.

The district attorney general, however, failed to consider evidence favorable to Bell, such as his honorable discharge from the United States Army, stable marriage of thirteen years, high school diploma, and lack of a history of drug or alcohol abuse. Moreover, the district attorney general failed to set forth this favorable evidence in writing, weigh it against the other factors, and reach a conclusion based on the relative weight of all of the factors." *Id.* at 177-78. "[T]his case is remanded for the district attorney general's further consideration of the defendant's pretrial diversion application in a manner consistent with this opinion." *Id.* at 180.); *State v. Leonardis*, 73 N.J. 360, 375 A.2d 607 (1977) (under a pretrial diversion program established by court rule, "our rule-making power must be held to include the power to order the diversion of a defendant into PTI where either the prosecutor or the program director arbitrarily fails to follow the guidelines in refusing to consent to diversion" (*id*. at 375, 375 A.2d at 615). However, "great deference should be given to the prosecutor's determination not to consent to diversion. Except where there is such a showing of patent and gross abuse of discretion by the prosecutor, the designated judge is authorized . . . to postpone proceedings against a defendant only where the defendant has been recommended for the program by the program director and with the consent of the prosecutor." (*id*. at 381, 375 A.2d at 618).); *State v. Dalglish*, 86 N.J. 503, 509-10, 432 A.2d 74, 77 (1981) (under a pretrial diversion program established by statute after the *Leonardis* decision, "a court may not order the enrollment of a defendant in PTI unless he has demonstrated a patent and gross abuse of discretion by the prosecutor, [but] we have recognized that a remand to the prosecutor may be appropriate without such a showing in certain cases. . . . These are cases where a court finds that the prosecutor's decision was arbitrary, irrational, or otherwise an abuse of discretion, but not a patent and gross abuse, and also determines that a remand will serve a useful purpose. A remand might be proper, for example, where 'prosecutorial decision was based upon a consideration of inappropriate factors or not premised upon a consideration of all relevant factors,' . . . where the denial resulted from an incorrect evaluation of relevant factors, . . . where the prosecutor's belief that a particular factor is or is not present was unfounded or based upon unreliable information, . . . or where the prosecutor's statement of reasons is inadequate . . . , either because it lacks the necessary specificity or because it fails to give a rational explanation of the result."); *accord*, *State v. K.S.,* 220 N.J. 190, 104 A.3d 258 (2015) (remanding to the prosecutor because his decision denying PTI was based upon prior criminal charges that had been dismissed and juvenile charges that had been diverted and dismissed with nothing in the record to support the truth of the factual allegations underlying those charges); *State v. Greenlee*, 228 Kan. 712, 721, 620 P.2d 1132, 1139 (1980) (dictum) ("the prosecutor, although possessing wide discretion, is not immune from judicial review of the exercise of that discretion for arbitrariness"); *People v. Siragusa*, 81 Misc.2d 368, 371-73, 366 N.Y.S.2d 336, 341-43 (Dist. Ct., Nassau Cty. 1975) (although "[t]he statute makes the District Attorney's consent mandatory before the Court can grant a defendant an A.C.O.D. [adjournment in contemplation of dismissal]," the court nonetheless grants the ACOD over the prosecutor's objection because "[t]he Court finds that the prosecutor had originally given his consent" and subsequently "withdr[e]w that consent solely because the defendant refused to agree to release the County and the police from any civil liability," which "[t]he Court finds . . . to be an unreasonable condition amounting to undue pressure and an act of coercion and duress").

When filing a motion under these circumstances, defense counsel can (and ordinarily will) make the types of arguments described in § 19.03 *supra*. But it is always advisable – and often essential – also to present the judge with a reason to view the prosecutor's objection to diversion as unreasonable. This might be done by "'show[ing] that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment,'" especially if "'the prosecutorial error complained of will clearly subvert the goals underlying [the pretrial diversion program].'" *State v. Gutierrez*, 2008 WL 190989, at *1, *3, *5 (N.J. Super. Ct. App. Div. Jan. 24, 2008) (per curiam) (quoting this standard for a judicial override of a prosecutor's objection to diversion, and then applying the standard to hold that the prosecutor's "reject[ion] [of the] defendant from PTI [Pretrial Intervention Program] solely because of his immigration status" was "a patent and gross abuse of discretion that a reviewing court is obliged to overturn"). Cases holding that a prosecutor's discretion to withhold consent to diversion is judicially reviewable and was abused can be cited. *See*, *e.g.*, *State v. Maguire*, 168 N.J. Super. 109, 116-18, 401 A.2d 1106, 1110-11 (1979) (overriding the prosecutor's objection to diversion of three defendants as "arbitrary and capricious, and a patent and gross abuse of discretion" because the prosecutor's use of "exactly the same wording" in the "three separate letters" of denial, issued "seven months . . . [after] the [timely] applications," show that the prosecutor "failed to deal with defendants on a prompt and individual basis."; "The fact that defendants were involved in a single night of wrongful conduct does not justify grouping them as he did. We are dealing with young persons whose futures hang in the balance, and whose applications for diversion mandate prompt individualized study and consideration. This was not afforded to them here. Rather, it would appear that the prosecutor may have personal reservations about the philosophical underpinnings of PTI and the court's role in connection therewith. Such an attitude, however, should not deter him from acting on the individual merits of each case."); *People v. Siragusa*, 81 Misc.2d at 372, 366 N.Y.S.2d at 342 ("The practice of a prosecutor demanding releases of defendant's claims against the government and police officers in exchange for his consent to an A.C.O.D. [adjournment in contemplation of dismissal] must be discouraged"); *Commonwealth v. Benn*, 544 Pa. 144, 147, 149, 675 A.2d 261, 262, 264 (1996) (although "[it] is well established that admission to ARD [accelerated rehabilitative disposition program] rests with the discretion of the district attorney," "the district attorney committed an abuse of discretion" by denying the application for ARD based on appellant's previous "probation without verdict and expunged record"; "The abuse was compounded by [the district attorney's] weighing negatively the fact that appellant denied having a prior record. The only way that the district attorney could have known of appellant's record was to have had access to information that, by statute, should have been unavailable. . . . Further, the intent of the probation without verdict and expungement statutes would be obviated if the district attorney could use the ARD questionnaire to force disclosure of matters that the legislature has made private."); *State v. Curry*, 988 S.W.2d 153, 159-60 (Tenn. 1999) ("We agree with the trial court that the prosecutor failed to consider all of the relevant factors and, therefore, abused his discretion in denying the defendant's application for pretrial diversion."; "[T]he prosecutor's denial letter concentrated solely upon the circumstances of the offense and, arguably, a veiled consideration of deterrence. There was no apparent consideration given to the defendant's lack of a criminal record, favorable social

history, and obvious amenability to correction. Moreover, the prosecutor did not articulate or state why those factors that were considered, i.e., seriousness of the offense and deterrence, necessarily outweighed the other relevant factors. The evidence presented a close case on the diversion question; however, the failure by the prosecutor to consider and articulate all of the relevant factors constitutes an abuse of discretion."); *State v. Markham*, 755 S.W.2d 850, 852-53 (Tenn. Ct. Crim. App. 1988) (the district attorney general's denial of the applications for pretrial diversion was an abuse of discretion because "Appellees do not have criminal records, . . . they are persons of good character and are amenable to correction," "[t]here is no showing that the facts of this case are particularly flagrant in comparison with other criminal conspiracies designed to defraud the State," "[t]here is no evidence in the record which suggests that in this case deterrence is an overriding consideration," and "the district attorney general denied the application for diversion prior to completion of the pretrial investigation authorized by statute, [and thus] his decision was made without the benefit of the report, which found Appellees to be good candidates for diversion"). *See also State v. W.S.*, 40 Wash. App. 835, 836-838, 700 P.2d 1192, 1193-95 (1985) (reversing a juvenile court conviction and remanding for consideration of diversion because the juvenile court's diversionary unit declined diversion based on the agency's policy of denying diversion in all prostitution cases and a statement from the prosecutor's office recommending rejection because of "the prosecutor's policy that all juvenile prostitution cases were inappropriate for diversion"; "a denial based on the crime itself is arbitrary" and "a usurpation of legislative authority" when "it is clear that the Legislature intended such crimes as appropriate for diversion"); *In the Matter of Register*, 84 N.C. App. 336, 343-44, 346-47, 352 S.E.2d 889, 893, 894-95 (1987) (finding that the juvenile prosecutor's office improperly "injected" itself into the court intake counselor's assessments of whether delinquency petitions should be filed and improperly "preempted any action upon the part of the juvenile court counselor" by stating that the prosecutor's office "'will consent to the diversion of any [of the 17] case[s] involving damage to the property of [the complainant] . . . upon the condition that pro-rata restitution in the amount of $1,000.00 has been paid by or on behalf of the juvenile whose case is diverted'"; the appellate court vacates the convictions and sentences of the respondents who "were prosecuted simply because they were unwilling or unable to pay $1,000 each for damage done to . . . [the complainant's] home"'; the court holds that these prosecutions amounted to "selective prosecution").

Even if a judge is unable or unwilling to grant diversion over the prosecutor's objection, bringing the matter to a judge may cause the judge to put some pressure on the prosecutor to acquiesce. It is usually the case that prosecutors are far more willing to accede to a judge's strongly expressed wishes than to a request from a defense attorney.

§ 19.05 DEVELOPING AND IMPLEMENTING A PROPOSED DIVERSION PLAN

The key to securing diversion is ordinarily to convince the judge – or the prosecutor and the judge – that the respondent will be "crime-free" (which usually means *no further trouble to the authorities*) and well-behaved (according to the judge's/prosecutor's vision of appropriate social behavior) in the future. Thus, whatever counsel can do to develop and to set in motion a

specific, detailed regimen for the future correction of the problematic aspects of the client's life will ordinarily be indispensable. See § 19.03(b) *supra*. See also §§ 6.05, 12.07 *supra;* § 38.09 *infra*. Any movement on those fronts that counsel can effectuate before the diversion motion comes on for hearing will be especially valuable. But if none can be made by that time, counsel should try to demonstrate that the specificity and practicality of his or her proposed diversion program make it a sound bet for success in the future.

§ 19.06 GUILT, PENITENCE AND FUTURE PROMISE

In motions for diversion following a guilty plea, it is always useful to include a respondent's statement taking responsibility for his or her actions and expressing remorse. A visibly genuine display of contrition can sway a reluctant prosecutor or judge. *See, e.g.*, *In re Tyttus D.*, 107 A.D.3d 404, 404, 965 N.Y.S.2d 725, 726 (N.Y. App. Div., 1st Dep't 2013) (explaining that the appropriateness of an ACD is demonstrated by, *inter alia*, the respondent's having "accepted full responsibility for his actions and demonstrated sincere remorse and insight into his misconduct"); *In re Hakeem F.*, 92 A.D.3d 403, 404, 937 N.Y.S.2d 584, 585 (N.Y. App. Div., 1st Dep't 2012) (the factors showing the suitability of an ACD included that "[a]ppellant accepted full responsibility for his offense and demonstrated sincere remorse and insight into his misconduct"). Equally important, a prosecutor or judge may hold it against a respondent if s/he fails to express remorse. See § 38.26 *infra*. See also §§ 14.22(a) *supra*, 38.05(a), 38.16(b) *infra*.

The situation is more complicated in cases in which counsel is seeking a postconviction ACD after a conviction at trial and in which the client denies any wrongdoing. In such cases, an expression of remorse often is not feasible. If it is not, counsel should consider the alternative of obtaining a statement from the client admitting some degree of error or indiscretion in relation to the episode and expressing regret about the consequences. See § 38.26 *infra*.

There is an even more acute dilemma when counsel is seeking diversion at the pretrial stage. In some jurisdictions, there is a risk that a respondent's incriminating statement in connection with a diversion motion could be used against him or her at trial if diversion is denied. Although guilty pleas and incriminating statements made in guilty-plea colloquies or during plea negotiations are commonly inadmissible at trial if the plea is vacated or if the negotiations fall through (see § 14.29(c) *supra*), the applicable rules and precedents may not be broad enough to encompass incriminating statements made in connection with diversion motions. There is a strong argument that such statements are constitutionally inadmissible: Confessions made to police and prosecutors are held involuntary and inadmissible if "'obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence'" (*Hutto v. Ross,* 429 U.S. 28, 30 (1976) (per curiam); see the cases collected in § 24.04 *infra*); and an admission of guilt which is made in order to obtain the leniency of diversion is no different than an interrogating officer's promise of "leniency – no jail" (*Sharp v. Rohling*, 793 F.3d 1216, 1219 (10th Cir. 2015)). Nevertheless, counsel should check to see whether there is any law in his or her jurisdiction strengthening or weakening the case for inadmissibility if diversion is denied after a respondent has admitted guilt in an effort to obtain it.

If counsel believes that a statement of remorse is likely to improve the odds of obtaining pretrial diversion from the prosecutor or the judge and if the applicable statutes, rules, or caselaw do not insulate such a statement from being used against the respondent at trial, counsel and the client will have to determine whether the defense strategy on the diversion motion should be (1) to concede guilt (a) of the charged offense or (b) of some lesser offense, and to make the respondent's penitence an element of their argument for diversion; or (2) to urge that this is the rare case in which diversion is being sought by an accused person who is genuinely innocent; or (3) to try to keep the prosecutor or the court from getting into the issue of guilt-or-innocence at all, by couching the issue of diversion as wholly future-oriented – not backward-looking – and, if this attempt fails, whether (a) to fall back to position (1); or (b) to fall back to position (2); or (c) to persist in refusing to discuss the respondent's guilt or innocence. Choosing among these strategies and implementing one's chosen strategy involve considerations and techniques much like those discussed in Chapter 14 *supra*, relating to guilty pleas. If counsel believes that an admission of guilt will be important in obtaining diversion but the client resists it, counsel will need to work to persuade the client – without overbearing the client's will – to make the necessary admission. See §§ 14.01, 14.03-14.05, 14.12(b), 14.19-14.21 *supra*. If counsel is unsuccessful in this persuasion, counsel will have to work out with the client a game plan for the hearing on the diversion motion which implements strategy (3) with minimal damage. In any event, whether the defense strategy is (1) or (2) or (3), counsel will have to prepare for the hearing by explaining to the client exactly what will happen in court and by rehearsing the client to play his or her part in it. See § 14.22 *supra*.