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**GUIDELINES FOR OBTAINING INFORMED CONSENT FROM  
MINOR CLIENTS**

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VERA INSTITUTE OF JUSTICE • UNACCOMPANIED CHILDREN PROGRAM • JULY 2019

## Introduction

All attorneys are required to obtain “informed consent”<sup>1</sup> from clients regarding important decisions throughout the attorney-client relationship, such as whether to retain an attorney initially, whether to pursue or waive legal rights, and whether and with whom to share confidential information. However, for attorneys who represent children, particularly preschool- and early elementary-age children, obtaining such consent is extremely challenging. Children as young as 2 are able to express preferences on matters affecting their daily life but generally do not recognize the connection between their preferences and their reality, much less the effect of the former on the latter.<sup>2</sup> Additionally, while children begin learning how to think strategically around age 5; are capable of thinking ahead and acting according to their anticipations by 7;<sup>3</sup> and become capable of “complex planning ability” by age 12,<sup>4</sup> their ability to use the “counterfactual reasoning”<sup>5</sup> necessary to make the kinds of important decisions required of them in the legal world does not begin to develop until late adolescence—and is not fully present until early adulthood.<sup>6</sup> To complicate matters further, children who suffer traumatic experiences, such as abuse or neglect, frequently lag behind in their cognitive and psychosocial development.<sup>7</sup>

This document seeks to fill in a gap in legal-ethics literature likely resulting from these complexities. Multiple sources instruct attorneys not to assume a child’s inability to direct their representation just because of his or her age and direct attorneys to preserve all of a child’s legal interests, or if necessary, take “protective action” when a child is unable to do so.<sup>8</sup> Yet none of these sources—or any other—gives thorough guidance to attorneys specifically on the question of informed consent. This gap in information is particularly detrimental to attorneys representing unaccompanied immigrant children (UC). Between

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<sup>1</sup> The American Bar Association’s Model Rule of Professional Conduct (MRPC) Rule 1.0(e) defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

<sup>2</sup> Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 918-929 (1999), <http://my.hdle.it/72121219>.

<sup>3</sup> Isabelle Brocas & Juan D. Carrillo, *The Determinants of Strategic Thinking in Preschool Children*, 13 PLoS ONE 1, 2 (2018) <http://my.hdle.it/72122324>.

<sup>4</sup> Shamita Mahapatra, *Development of Planning Behavior and Decision-Making Ability of Children*, 7 J. EDU. & PRACTICE 74, 76 (2016) (giving examples such as “adopting strategies, developing new ones, and evaluating their actions against the achievement of their goal”), <http://my.hdle.it/72122334>.

<sup>5</sup> Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, & Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 441 (2006) (defines counterfactual reasoning as “the ability simultaneously to hold several different hypothetical, or abstract, ideas in working memory and to manipulate those ideas while imagining the consequences of different permutations of facts or circumstances,” i.e., the kind of reasoning necessary to make a genuinely informed decision about waiving or asserting legal rights), <http://my.hdle.it/72121477>.

<sup>6</sup> *Id.*

<sup>7</sup> CHILD WELFARE INFORMATION GATEWAY, CHILDREN’S BUREAU, LONG-TERM CONSEQUENCES OF CHILD ABUSE & NEGLECT 3-4 (2019), <http://my.hdle.it/72122163>.

<sup>8</sup> A.B.A., STANDARDS FOR PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES 4 (1996), <http://my.hdle.it/72121970>; A.B.A., STANDARDS FOR THE CUSTODY, PLACEMENT & CARE, LEGAL REPRESENTATION, & ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES 17 (2018), [hereinafter “A.B.A. Standards for UCs”] <http://my.hdle.it/72122078>; AM. IMMIGR. L. ASS’N, ETHICAL ISSUES IN REPRESENTING CHILDREN 4-5 (2015), <http://my.hdle.it/72122156>; KRISTIN JACKSON, ET AL., AM. IMMIGR. L. ASS’N, REPRESENTING CHILDREN IN REMOVAL PROCEEDINGS 562 (2014), <http://my.hdle.it/72122157>; Barbara A. Atwood, *Representing Children Who Can’t or Won’t Direct Counsel: Best Interest Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 405-406, <http://my.hdle.it/72121892>; Alexandra Fung, *Anticipating And Contending With Conflicts And Ethical Challenges*, in JUSTICE FOR UNACCOMPANIED IMMIGRANT CHILDREN: AN ADVOCACY BEST PRACTICES MANUAL FOR LEGAL SERVICE PROVIDERS 48 (2016), <http://my.hdle.it/72122162>; CANDICE L. MAZE, A.B.A. CTR. ON CHILD. & THE L., ADVOCATING FOR VERY YOUNG CHILDREN IN DEPENDENCY PROCEEDINGS: THE HALLMARKS OF EFFECTIVE, ETHICAL REPRESENTATION 28, 34 (2010), <http://my.hdle.it/72121973>.

language barriers, cultural differences, high caseloads, limited time to spend with clients, and, frequently, no parent, guardian, or other caregiver to make decisions on behalf of a client, truly obtaining informed consent from minor clients is a challenging process, on made even more so by the lack of clear guidance.

This document, however, does not completely fill the current void. Instead, it offers attorneys an initial launching point for further conversations on the subject. By highlighting some of the most relevant resources covering three themes essential to obtaining informed consent—capacity, communication, and comprehension—this document is meant to serve as a foundation from which attorneys may develop best practices for obtaining informed consent from preschool- and early elementary-age children.

## **Assessing Children’s Capacity**

The most important factor in obtaining informed consent from a child is whether he or she has the ability—the capacity—to understand the information provided to him or her and make a decision based on that information. The American Bar Association instructs attorneys to presume a child’s capacity<sup>9</sup> but, if in doubt, to assess his or her ability to participate in immigration proceedings based on four factors:

1. factual understanding of the proceedings
2. rational understanding of the proceedings
3. ability to consult and assist defense counsel
4. decisional capacity.<sup>10</sup>

Factual understanding refers to a child’s ability to understand concepts such as “the basic roles, duties, and interests of the participants in the adjudication; his rights...the consequences of his various choices...[and] seeking legal relief.”<sup>11</sup> Rational understanding is essentially defined as the counterfactual reasoning discussed above<sup>12</sup> while the ability to consult and assist counsel asks whether a child can “receive and...express communications with counsel about [relevant] matters...identify witnesses with relevant information,” understand other’s testimony, and independently choose to—and provide—coherent, relevant testimony themselves.<sup>13</sup> Similarly, the A.B.A. defines children’s decisional capacity as their ability to direct a “self-interested course of action” independent of his or her attorney, family, caregivers, caseworkers, etc.<sup>14</sup>

While the A.B.A. standards provide a helpful framework, guidance on how to assess children’s capacity is still needed. Vera’s 2014 publication, *Children in Immigration Proceedings: Concepts of Capacity & Mental Competency* is a compilation of strategies and best practices for assessing capacity, particularly in the context of immigration proceedings.<sup>15</sup> This practice advisory discusses the difference between a child’s

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<sup>9</sup> *Id.*

<sup>10</sup> A.B.A. Standards for UCs, *supra* note 8 at 58.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; King, *supra* note 4.

<sup>13</sup> A.B.A. Standards for UCs, *supra* note 10.

<sup>14</sup> *Id.*

<sup>15</sup> M. ARYAH SOMERS, VERA INST. OF JUST. UNACCOMPANIED CHILD. PROGRAM, CHILDREN IN IMMIGRATION PROCEEDINGS: CONCEPTS OF CAPACITY AND MENTAL COMPETENCY (2014), <http://my.hdle.it/36832449>.

mental competency and his or her legal capacity<sup>16</sup> and contains checklists of 1) signs that may indicate capacity concerns,<sup>17</sup> 2) information-gathering strategies,<sup>18</sup> 3) guidance on ultimately assessing a child's capacity,<sup>19</sup> 4) specific advice on determining whether a child is able—and has chosen—to enter into an attorney-client relationship,<sup>20</sup> and factors to help guide attorneys when considering whether to take protective action on behalf of a child with diminished capacity.<sup>21</sup>

Another helpful resource is from the National Immigrant Justice Center's (NIJC) manual for legal service providers, which discusses best practices for assessing and improving children's capacity and examples of possible protective measures for children with diminished capacity through UC-specific hypotheticals.<sup>22</sup> Examples of recommended practices highlighted through the hypotheticals include 1) assessing the decision-making *process*, rather than the decision itself,<sup>23</sup> 2) allowing sufficient time for improvement, if a particular condition or set of circumstances is impairing a child's communication or decision-making ability,<sup>24</sup> and 3) making sure to distinguish the child as the client separate from his or her caregivers and/or family members.<sup>25</sup>

## Communicating with Children

It is essential for attorneys to use age-appropriate communication strategies. These strategies assist in assessing a child's decision-making ability<sup>26</sup> and help ensure a child is genuinely informed. The UNICEF Guidelines on Child-Friendly Legal Aid contain helpful best practices for communicating with children, including,

1. At the beginning of every meeting, always explain who will be present, what their purpose in being there is, how long the meeting will take, and what will happen afterwards.
2. If a meeting will be recorded, always explain how, why, and how the information will be used afterwards.
3. Use simple, everyday vocabulary appropriate for the child's age and background, while avoiding talking down to or patronizing a child (particularly an older one).
4. Develop a child-friendly glossary of key terms or visual aids that children can keep with them.
5. Summarize what a child has said periodically throughout the meeting.
6. Sit at the same level as the child, preferably with nothing in between you.
7. React positively (and enthusiastically, when appropriate) to the child's answers.
8. Acknowledge and accept the child's emotions ("I can see that X makes you sad/mad/anxious...")

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<sup>16</sup> *Id.* at 1-6.

<sup>17</sup> *Id.* at 8-9.

<sup>18</sup> *Id.* at 9-14.

<sup>19</sup> *Id.* at 16-21.

<sup>20</sup> *Id.* at 25-27.

<sup>21</sup> *Id.* at 28-33.

<sup>22</sup> Alexandra Fung, *supra* note 7 at 48-56.

<sup>23</sup> *Id.* at 51.

<sup>24</sup> *Id.* at 50, 52. For strategies on how to improve children's communication ability, see *infra* notes 33-42 and accompanying text.

<sup>25</sup> *Id.* at 54-56.

<sup>26</sup> In fact, using child-friendly communication techniques will generally improve a child's capacity to make decisions and otherwise participate in the legal processes affecting them.

and reassure the child that it is alright to feel that way and to show their feelings.

9. At the end of the meeting, reiterate any decisions or next steps and thank the child for participating.<sup>27</sup>

The UNICEF guide also highlights specific information that attorneys should convey to their child clients in order to fully inform them, such as:

1. The role of the attorney and what he or she can (and cannot) do for the child.
2. How often the child can expect to hear from the attorney and his or her team.
3. What confidentiality is, how it will apply to other individuals in the child's case (ex: family members, shelter staff, immigration officials, etc.).
4. The nature of the proceedings and why the child is involved.
5. The role of other actors the child may encounter.
6. What it means to swear an oath before court and why the child may be asked to do so.
7. An estimation of how long the proceedings will take.
8. Measures in place for the child's protection and safety and how to access them (ex: how to request a doctor visit or how to report abuse).<sup>28</sup>

As noted in the UNICEF guidelines, developing child-friendly documents and visual aids can greatly improve a child's capacity to make a truly informed decision regarding their immigration case. To that effect, Chapter 3 of the NIJC manual lays out best practices for doing so, such as:

1. Use clear, culturally appropriate language.
2. Consider different formats (videos, graphics, etc.).
3. Detail how communication (and communication frequency) may differ between parties, such as different social services providers.<sup>29</sup>

This chapter of the NIJC manual is particularly helpful because it includes [links to different kinds of materials attorneys frequently use when working with child clients](#) (ex: videos explaining the SIJS process, retainers, authorizations for release or disclosure of records, etc.).<sup>30</sup>

Kristin Jackson, Meredith Linsky, and Elissa Steglich provide helpful guidance on what information attorneys must communicate carefully to children in removal proceedings in their publication for the American Immigration Lawyers Association (AILA).<sup>31</sup> For example, the authors note the importance of carefully distinguishing the attorney from immigration and other government officials from the very first meeting and over the course of multiple meetings, if necessary. This is particularly important given that children from Mexico and Central America, and children currently in federal custody, are often unsure of

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<sup>27</sup> UNICEF ECARO, *Child-Sensitive Communication*, in GUIDELINES FOR CHILD-FRIENDLY LEGAL AID 21-24 (2018), <http://my.hdle.it/72122160>. The list above is not comprehensive, and practitioners are encouraged to review the full extent of Guideline 5.

<sup>28</sup> *Id.* at 25; this list is also not comprehensive, so practitioners are also encouraged to review the full extent of Guideline 6 on pages 25-26.

<sup>29</sup> Claire R. Thomas, *Customizing Documents for Children*, in JUSTICE FOR UNACCOMPANIED IMMIGRANT CHILDREN: AN ADVOCACY BEST PRACTICES MANUAL FOR LEGAL SERVICE PROVIDERS 15-18 (2016), <http://my.hdle.it/72122162>.

<sup>30</sup> *Id.* at 57.

<sup>31</sup> Jackson, et al., *supra* note 7 at 559-561.

the roles of the various government officials and individuals who they encounter.<sup>32</sup> The authors also recommend strategies on building rapport and communicating with children, such as allowing them to draw as they share their story<sup>33</sup> and defining legal terms (judge, attorney, court, etc.) by what they do or the purpose they serve.<sup>34</sup> Other useful tips, particularly for children who must communicate in a language other than their first, are to speak slowly, repeat key information often, and avoid speaking for too long without checking in with the child or allowing for a break. When a child (especially a young one) is operating in an unfamiliar language, 1.5 to 2 minutes is the optimal length of time he or she can follow a conversation.<sup>35</sup>

Almost all of the strategies referenced above assume attorneys are working with verbal children. In situations involving pre-verbal children, the A.B.A.'s publication, *Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation* is helpful. It contains recommendations to build trust and strengthen the attorney-client relationship with children as young as newborns. For example, the A.B.A. notes that children between 18 and 24 months are developing their gross, fine motor, and verbal communication skills. Thus, activities that incorporate one, or preferably all, of those skills—such as dancing, singing while using instruments or hand motions, and playing outside—can help attorneys develop rapport with very young clients while also helping a child's development.<sup>36</sup>

The A.B.A. article cited above also contains a chart detailing common developmental milestones for children from birth to 5 years old,<sup>37</sup> which is based on a publication from the American Speech-Language-Hearing Association (ASHA). The [original chart](#) includes more detailed milestones, as well as suggestions on how to help children improve their communication skills.<sup>38</sup> For example, ASHA suggestions for improving four- to five-year-olds' communication skills that could be adapted for the UC context include:

1. Acting out stories using dolls or puppets.<sup>39</sup>
2. Drawing a picture that the child describes.<sup>40</sup>
3. Teaching the child how to ask for help when they don't understand what a word means.<sup>41</sup>
4. Letting a child help plan an activity.<sup>42</sup>

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<sup>32</sup> *Id.* at 559-560.

<sup>33</sup> *Id.* at 560.

<sup>34</sup> *Id.* at 560-561.

<sup>35</sup> Eugene Jiang, *7 Tips to Improve Your Child's Listening Comprehension Skills*, KOOBITS (Dec. 26, 2012), <https://www.koobits.com/2012/12/26/7-tips-to-improve-your-childs-listening-comprehension-skills>;

<sup>36</sup> Maze, *supra* note 7 at 12-13 (2010). See pages 10-11 for suggested strategies for children younger than 18 months.

<sup>37</sup> *Id.* at 27.

<sup>38</sup> Am. Speech-Language-Hearing Ass'n [ASHA], *How Does Your Child Hear & Talk?*, <https://www.asha.org/public/speech/development/chart/> (last visited June 24, 2019).

<sup>39</sup> This strategy can be helpful both in gathering information from a child and for explaining to a child what will happen at different events, such as an interview with an asylum officer or a hearing with an immigration judge.

<sup>40</sup> If an attorney needs to gather information from the child, this suggestion may be a less intimidating way to take notes on the child's story than more traditional means.

<sup>41</sup> For strategies on how to help children share when they don't understand something, see *infra* notes 42-49 and accompanying text.

<sup>42</sup> ASHA, *Four to Five Years*, <https://www.asha.org/public/speech/development/45/> (last visited June 24, 2019). This suggestion may only be suited for meetings with the child where an attorney can give the child options on what order they will do or talk about certain things or a similarly flexible activity. See also, ASHA, *Birth to One Year*, <https://www.asha.org/public/speech/development/01/> (last visited June 24, 2019); ASHA, *Two to Three Years*, <https://www.asha.org/public/speech/development/23/> (last visited June 24, 2019); ASHA, *Three to Four Years*, <https://www.asha.org/public/speech/development/34/> (last visited June 24, 2019).

Given the exponential increase in the immigration backlog, immigration attorneys will more regularly have relationships with clients lasting multiple years. Thus, incorporating these developmentally appropriate activities as much as possible into attorneys' regular meetings with their clients will likely have greater benefits as the child ages.

## Checking for Comprehension

Even when information is communicated in an age-appropriate manner to a child who has no capacity concerns, attorneys must ensure that he or she has genuinely understood the information given them to fulfill their ethical mandate. The strategies below can help attorneys check their clients' comprehension:

1. At the end of each meeting, ask the child if he or she has any questions or if there is anything else that he or she wishes to discuss.<sup>43</sup>
2. Periodically summarize what the child has said, inviting him or her to correct any misunderstandings.<sup>44</sup>
3. Ask specific questions ("What is the date of your next hearing?" rather than "Do you understand?").<sup>45</sup>
4. If a child has learned how to write, ask the child to take a few minutes at the end of a meeting a write down what he or she has learned (or summarize the meeting orally if the child cannot write); if any questions or inconsistencies arise, discuss them.<sup>46</sup>
5. Teach the child a "game" where he or she uses his or her fingers to indicate the child's level of understanding—five fingers for maximum understanding, one finger for minimal understanding;<sup>47</sup> this has the advantage of allowing a child to instantly indicate his or her level of comprehension as the attorney is talking, and it can be used with groups of children.
6. Use movement through another "game" where children move to particular areas within a room (ex: different corners or different chairs for "I don't understand," "I sort of understand," and "I understand") to indicate their comprehension. (You can add labels to the areas to help them remember where to go.) This activity could also be helpful in group settings.<sup>48</sup>
7. Check for comprehension at least three times each meeting.<sup>49</sup>
8. Wait three to seven seconds after asking a child a question before moving on or trying to rephrase the question; this wait allows him or her to understand and think of a response to the question,<sup>50</sup> reducing the likelihood that a child is saying what he or she thinks the attorney wants the child to say, and it is particularly helpful for children who may have to speak in a language other than

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<sup>43</sup> UNICEF ECARO, *supra* note 26 at 23.

<sup>44</sup> *Id.* at 22.

<sup>45</sup> *Id.*

<sup>46</sup> Saga Briggs, *21 Ways to Check for Student Understanding*, INFORMED (May 2, 2014), <https://www.opencolleges.edu.au/informed/features/21-ways-to-check-for-student-understanding/>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *6 Strategies Teachers Use to Help Kids with Learning & Attention Issues*, UNDERSTOOD (last visited May 2, 2019), <https://www.understood.org/en/school-learning/partnering-with-childs-school/instructional-strategies/6-strategies-teachers-use-to-help-kids-with-learning-and-attention-issues>.

their native one, who have learning disabilities, or who may be suffering from trauma.

## **Conclusion**

As noted at the outset, this resource seeks to provide attorneys with a framework for considering the elements necessary for obtaining informed consent from minor clients: capacity, communication, and comprehension. Legal service providers within the Vera network are encouraged to continue the conversation within their organizations and with other organizations within the network. Our hope is that these discussions will spur the development of more thorough guidance on the subject.