PRACTICE ADVISORY

CHILDREN IN IMMIGRATION PROCEEDINGS: CONCEPTS OF CAPACITY AND MENTAL COMPETENCY

Produced for the Vera Institute of Justice’s Unaccompanied Children Program

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I. INTRODUCTION

In law, medicine, and psychology, the concepts of capacity and competency are used in a wide variety of contexts where children are in the position of decision-maker. Questions may arise regarding a child’s competency to consent to or to deny medical treatment or psychotherapy, or a child’s capacity to contract, to understand rights in the juvenile justice context, or to make decisions involving their own custody in child welfare. Legal systems are particularly concerned with “whether children are capable of exercising certain rights or being held accountable for their actions,” and with balancing children’s participation in decision-making to guarantee appropriate respect for their capacities with protections against inappropriate burden of responsibility and harm due to their still evolving capacities.

There have already been some efforts to incorporate recognition of children’s evolving capacities into various aspects of immigration law and policies. This practice advisory will explore the concepts of capacity and mental competency, ethical considerations, and comparative domestic and international contexts to provide guidance and best practice recommendations for practitioners working with immigrant children. A second partner practice advisory, “Children in Immigration Proceedings: Child Capacities and Mental Competency in Immigration Law and Policy,” will provide guidance on how these concepts relate to forms of relief available to immigrant children. These practice advisories provide possible courses of action and do not necessarily provide a “right” answer. Whenever there is a reference to a specific organization or individual attorney, the relevant contact information can be found in Appendix D.

We will begin with developing a general understanding of the concepts of capacity and competency, which will be presented in more depth in this practice advisory. In the literature on this topic, physicians, psychologists, and lawyers use these terms very differently, at times using “capacity” and “competency” interchangeably or setting forth competency as a legal construct that analyzes capacities from a clinical point of view. Dr. Thomas Grisso, whose work will be referred to in both practice advisories, is an expert on forensic psychology and juvenile justice, and his work has been influential in setting national standards for forensic mental health evaluations. He notes the importance of distinguishing between competencies and capacities and understanding how legal systems make judgments about legal competency that can be based on physical, mental, and social capacities. For the purposes of this practice advisory, capacity generally refers to an individual’s ability to make a decision or perform a task in a given context. Children are presumed to have capacity and capable of expressing their points of view and wishes. In the immigration context, a child’s capacity is implicated in a wide

1 The author would like to thank the following individuals for their assistance and counsel during the writing of the practice advisories: Juliann Bildhauer, Lauren Burke, Ben Caspar, Dree Collopy, Elizabeth Dallam, Katherine Fleet, Rebekah Fletcher, Shay Fluharty, Elizabeth Frankel, Lisa Frydman, Dr. Thomas Grisso, Kristen Jackson, Theo Liebman, Anne Middaugh, Erika Pinheiro, Brett Stark, Lindsay Toczylowski, Justin Tullius, David Thronson, Veronica Thronson, Lorilei Williams, and Maria Woltjen. All errors and omissions are solely those of the author.


5 Vera Secure and Staff Secure Working Group, Capacity and Mental Competency, 2010, notes on file with author.
variety of decisions or tasks ranging from, but not exclusive to, filing for legal relief from removal, providing assistance to his or her attorney, seeking removal or voluntary departure, agreeing to be interviewed as a victim or witness of trafficking or a crime, and not risking inadmissibility due to acts or decisions made as a child.

**Capacity** is a broad concept that refers to an individual’s ability to make a decision or perform a task in a given context. A child is presumed to have capacity and to be capable of expressing his or her point of view and wishes.

Next, it is important to distinguish the concept of mental competency from child capacities. “Mental competency” is a legal construct tied to due process in a proceeding. In *Matter of M-A-M*, the Board of Immigration Appeals (“BIA”) laid out the test for determining mental incompetency in the case of an adult respondent who was diagnosed with schizophrenia and delineated a process for ensuring adequate safeguards for individuals deemed to be mentally incompetent. *Franco v. Holder* and a subsequent policy issued by the Executive Office for Immigration Review (EOIR) provide enhanced procedural protections to unrepresented detained respondents with mental health disorders.

While children’s cases can certainly be evaluated under this framework, there are additional considerations about children that can impact due process distinctly, particularly child development factors, which will be explored in both practice advisories. Children’s cases call for a different construct of analysis and safeguards.

**Mental competency is not the same as capacity.** Mental competency laid out in *Matter of M-A-M* is a discretionary framework for immigration judges developed in the case of an unrepresented adult respondent and elaborated in EOIR Phase 1 guidance. It is necessary to develop a child-specific framework for considering children’s capacities in the immigration system, whether represented or appearing pro se.

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8 Phase I of the Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders, Apr. 2013, Executive Office for Immigration Review.

9 Scott, Elizabeth S., Scott N. Dickon Rapucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, Law and Human Behavior, Vol. 19 No. 3 (Jun. 1995), describes the importance of analyzing developmental, judgment, and contextual capacities into an understanding of adolescent decision-making, that will be described in more detail in the description of factors in analyzing child capacity.
II. EXPLORING AND UNDERSTANDING EVOLVING CHILD CAPACITIES

A. General Considerations

In exploring and understanding child capacities, it is important to keep in mind some general points about capacity:

- A child is *a priori* assumed to have capacity, ensuring that a child’s point of view and sense of autonomy are preserved\(^{10}\);
- A child below a certain age is **not** presumed to lack capacity to determine his or her wishes in legal proceedings\(^{11}\);
- A child’s chronological age is not determinative of developmental capacities, so while there are bright-line age-based guidelines, it may still be necessary to advocate for a case-by-case approach;
- Capacity is focused on the child’s decision-making ability, not on whether there is agreement with the child’s decision;
- A child’s capacities evolve and change within different contexts and time-frames which means children can demonstrate functioning in some areas and still be developing in other areas (e.g., developing normally cognitively but demonstrating emotional delays, or vice versa)\(^{12}\);
- A child’s development is not linear and will sometimes be context specific such that a child may experience spurts, delays, and temporary regressions, and be highly sensitive to environmental influences\(^{13}\);
- A child may be capable of performing a task in an ideal situation, but some contexts, such as a legal setting, may place so much pressure on a child or present so many cultural barriers that it impacts his or her capacity to perform the task (e.g., when preparing for a hearing, a child may be able to practice in a safe setting, but when testifying in court becomes unable to bear the pressure)\(^{14}\);
- Just because a child’s capacity is impacted by one factor does not mean that the child is mentally incompetent or incapable in all respects to make any decision or that his or her point of view should be discounted.

The ways in which a child’s capacity can be impacted are outlined below in three broad categories: intellectual and cognitive disabilities, mental health disorders, and child development. Children’s behavior may raise overlapping concerns in these categories.

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\(^{11}\) ABA Standards for Unaccompanied Alien Children, *supra* note 6, at Rule V.A.1.d. and Comment.


\(^{13}\) *Ibid*.

B. Three Main Categories of Factors Impacting Child Capacities in Legal Contexts

1. Intellectual and Cognitive Disabilities

Intellectual and cognitive disabilities are characterized by significant limitations both in intellectual functioning and in adaptive behavior covering many everyday social and practical skills. These are generally considered permanent conditions that cannot be treated with medications and often manifest prior to the age of eighteen. These disabilities may be the result of serious physical traumas, such as accidental traumatic brain injuries from being shaken violently, which can impact cognitive functioning. Additionally, even though more children worldwide are surviving premature births, malnutrition, birth defects, birth injury, and childhood illnesses such as measles, encephalitis, and cerebral palsy, these can still lead to intellectual and cognitive disabilities.

2. Mental Health Disorders

Mental health disorders that include “diagnosable mental, behavioral, or emotional conditions that substantially interfere with or limit one or more major life activity” may also impact child capacity. Mental health problems are diagnosed through the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM-IV). These may include such diagnoses as schizophrenia, anxiety, and post-traumatic stress disorder, among others. Some mental health disorders may not affect legal competency and others can be remediated with medical and psychological support.

In the case of children’s mental health disorders, these can intersec t with intellectual and cognitive disabilities or general developmental factors in such a way that could contribute to severe impairment among younger children but rarely yield findings of incompetency among adults. Another challenge is that children with clear limitations may not fit neatly into current diagnostic criteria and such children may erroneously be found competent despite significant impairment. For example, initial symptoms of schizophrenia, such as extreme social isolativeness, may not meet diagnostic criteria, but may profoundly impact a child and prevent functional communication with an attorney.

3. Child Development

Child development includes neurobiological, cognitive, and psychosocial components that intersect to impact child and youth thinking and decision-making within the legal context. These child developmental factors are particularly under-explored in the immigration context where much of the case law on adult respondents is focused on mental health disorders or cognitive or intellectual disabilities.

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15 ACLU Deportation by Default, supra note 6, at 12.
16 Ibid.
18 ACLU Deportation by Default, supra note 6, at 12.
19 Ibid.
20 Kruh, supra note 12, at 27.
21 Ibid.
22 Ibid.
23 Scott & Steinberg, Rethinking Juvenile Justice, 2008.
As already noted, the intersection of developmental processes and mental disorders can make it difficult to distinguish between the two. Nevertheless, developmental issues alone can impact capacity. There is empirical evidence that still-maturing abilities in physical, cognitive, social, and emotional domains can cause competency issues similar to adults with mental disorders, such as impairment of judgment or inability to assist counsel.

**Use of the term “maturity”:** The term “mature” or “immature” is often used to describe children and youth. “Maturity” is not defined clinically and should not be used as a global description for a child. Maturity or immaturity can be applied to specific legal capacities such as “cognitively immature” or “emotionally immature” after evaluation of a child by a competent expert.

**Cognitive Development:** There are two key cognitive capacities. The first is “understanding,” defined as the ability to comprehend information relevant to the decision. The second is “reasoning,” defined as the ability to use this information logically to make a choice. As individuals grow, they become more capable of abstract, multidimensional, planned, and hypothetical thinking. For instance, adolescents have broader experiences and can process information quicker as a result of their more developed cognitive capacities in comparison to younger children. Children who are still developing cognitively can also demonstrate competency-related problems similar to adults with cognitive disorders. For example, depending on their stage of cognitive development, children may have difficulty understanding more complex legal concepts such as pleadings, remembering information presented by attorneys, or applying knowledge to unique or unanticipated circumstances.

**Psychosocial Development:** There is also a range of psychosocial capacities to take into consideration that includes the following:

(1) **Autonomy (conformity and compliance):** This relates to the ability to make independent decisions and appropriate use of the perspective of others without being overly or inadequately conforming or compliant. Children generally transition from being more highly oriented to caregivers to being more influenced by peers and then shift towards autonomy as they approach adulthood. Younger children may over-rely on adults, such as their attorneys, to make decisions for them and adolescents may over-rely on their peers.

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24 Kruh, supra note 12, at 46.
25 Ibid.
26 Kruh, supra note 12, at 47; See also Feld, Barry, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26, at 46.
27 Kruh, supra note 12, at 47.
29 Scott, supra note 23, at 36.
30 Ibid.
31 Ibid.
32 Kruh, supra note 12, at 51.
33 Ibid.
34 Scott, supra note 23, at 36.
35 Kruh, supra note 12, at 53.
(2) **Perception and attitudes about risk:** Adolescents tend to take greater risks than other age groups because the process of evaluating risks is linked to functioning in the prefrontal cortex which for adolescents is still in development. As a result, they often “see fewer possible outcomes of their risk-taking, underestimate the likelihood of negative outcomes, and overvalue the benefits of having fun and obtaining the approval of others.”36

(3) **Perspective:** There are two primary types of perspectives: interpersonal and temporal. The interpersonal perspective refers to the ability to take the perspective of another person. Children tend to struggle with the ability to understand the perspective of another person, which may lead to ineffective communication. The temporal perspective is the ability to consider short-versus long-term consequences when making decisions. Adolescents tend to favor short-term consequences.

(4) **Temperance:** This refers to the ability to maintain emotional and behavioral control and to modulate impulsivity, the capacity for self-management, and self-regulation.37 Lack of temperance can lead a child to disengage from the legal process if he or she feels shame or humiliation.

**Neurobiological Development:** Finally, there are neurobiological capacities in the course of child development into adulthood. Brain structure and function in the pre-frontal cortex of the brain where “executive functions” are located evolve throughout adolescence into the mid-20s.38 These executive functions include “advanced thinking processes that are employed in planning ahead and controlling impulses, and in weighing the costs and benefits of decisions before acting.”39 Examples include the ability to differentiate among conflicting thoughts, to distinguish between good or bad and right or wrong, to work towards a defined goal, or to exercise self-control to avoid socially unacceptable outcomes. There are also complex interactions between hormonal systems and neurobiological development, timing of puberty related to peers, and environmental factors like family stress that can lead to behaviors that have a significant impact on a child’s functioning in a legal context.40 These behaviors can include reckless, sensation-seeking conduct for some children in early and mid-adolescence or rebelliousness or depression in others.41

36 See id. at 54.
37 Ibid.
38 Scott, supra note 23, at 44.
39 Ibid.
40 Kruh, supra note 12, at 50.
41 Scott, supra note 23, at 48; See also Kruh, supra note 12, at 50.
RECOMMENDED BEST PRACTICES

- To the greatest extent possible, incorporate a module in all trainings for attorneys, legal assistants, and accredited representatives who are working with children that includes:42
  - concepts of capacity and mental competency;
  - general considerations of children’s evolving capacities; and
  - an understanding of factors impacting child capacities in legal contexts such as intellectual and cognitive disabilities, mental health disorders, and child development.

- Work towards identifying and contacting two to three experts on child psychology in your region who could assist with trainings or consultations to support capacity-building for attorneys and other staff working with children.

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42 Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Report of the Working Group on Determining the Child’s Capacity to Make Decisions, 64 FDMLR 1339 (Mar. 1996) (hereinafter referred to as the “Fordham Working Group Recommendations”), stating the Working Group recommends providing appropriate training for lawyers who represent children to minimally include being familiar with child development and basic skills involved in interviewing children. The Fordham Working Group Recommendations are also included as Appendix B.
III. IDENTIFYING EVOLVING CHILD CAPACITIES

In various legal settings where children are decision-makers, judges, attorneys, guardians ad litem, and medical professionals are asked to consider the capacity of the child. This is a challenging task, even for professionally-trained psychiatrists, psychologists, and social workers. This practice advisory is not promoting that attorneys or friends of the court evaluate a child’s capacity; however, those who interact with a child have a responsibility to identify or respond to indicia of child capacity concerns, remembering always that a child has evolving and shifting capacities and that his or her voice and point of view must always guide the process. This section will focus on practical tools for identifying possible child capacity concerns, including an initial indicia checklist and guidance on gathering more information, working with younger children, and distinguishing capacity from other considerations.

A. Practical Tools for Identifying Child Capacity Concerns

1. Possible Indicia of Child Capacity Concerns

Concerns about a child’s capacity in the legal process may first arise during a legal service provider’s initial contact with the child through a Know Your Rights presentation or legal screening. Concerns may also be raised by those providing care and custody to the child, or by an immigration judge, or by ICE attorneys or officials. Indicia may also manifest themselves later in the immigration process. It is also important to recognize that children may be in very stressful and traumatic circumstances and to be aware that a response to these circumstances may rise to the level of impairing the capacity of a child. Although it may be challenging, pay close attention to how children are responding to questions posed by attorneys or judges and to how they are adapting to and acting in federal custody or within their communities. The indicia checklist below can aid in evaluating a child’s capacity:

Checklist: Indicia of Child Capacity Concerns

- Difficulty remembering or knowing things, such as name, date of birth, place of birth, names of parents, country of origin
- Difficulty retaining information, such as:
  - The rules in the facilities or places where they are being held in custody
  - The nature of the family reunification process and release from custody
  - The concepts of legal rights, courts, attorneys, judges, changes of venue, legal forms of relief, etc.
- Difficulty understanding the attorney
- Erratic or sudden behavioral changes, attitudes, or decisions
- Excessive or sudden anger, hostility, or defiance
- Excessive or sudden anxiety, fear, sadness, or depression
- Detached or indifferent attitude
- Inattentive or distracted demeanor
- Disorganized speech, peculiar or odd statements or beliefs

43 Grisso, supra note 28, at Appendix C. Some of the indicia on this checklist have been adapted from this questionnaire.
Seeing or hearing things not present and other bizarre or unusual behavior
Difficulty seeing the consequences of their actions
Difficulty solving problems, and/or trouble thinking logically through choices or decisions
Difficulty responding to questions or communicating with the attorney, or constantly changing answers
Easily confused or experiences significant confusion about questions
Emergence of self-harming behaviors such as cutting

The fact that a child exhibits one or more of these indicia of capacity concerns does not mean that the child is incompetent or incapable, but should indicate to an attorney the need to make further inquiry and possibly refer the child for a mental health forensic assessment.

2. **Guidance for Information-Gathering on Child Capacity Concerns**

Beyond the initial indicia checklist, an attorney can also explore the possible factors impacting capacity in more depth by gathering additional information about the child. In gathering this information, it is critical to consider your ethical obligations to the child because you may need to speak to doctors, custodians, parents, or caregivers. Practical tips on your ethical obligations in doing this information-gathering are provided in Section V of this practice advisory.

### Guidance for Gathering Information on Children with Possible Intellectual and Cognitive Disabilities

- Determine whether the child was ever previously viewed or identified as disabled in any way in school, such as his or her enrollment in special educational classes or any other informal steps taken at the school.
- Determine whether the child was ever previously viewed as disabled within his or her family or community. This is particularly important since many children do not have access to school, so there may be other indicators such as being isolated at work, or a child being unable to find work, or being relegated to menial tasks at work.
- Determine whether the child has ever suffered any head injuries or any other type of accident that may have led to traumatic brain injury.
- Determine whether the child has ever suffered physical abuse that may have caused head injuries.
- Determine whether the child has suffered any serious childhood illnesses or birth injuries that can have an impact on cognitive or intellectual functioning.
- Determine whether the child has been evaluated while at an ORR facility or at any other time in the U.S. or in his or her home country for cognitive or intellectual disabilities.

### Guidance for Gathering Information on Children with Possible Mental Health Problems

- Determine if there are changes in the child’s demeanor and listen carefully for statements that indicate suicidal thoughts, depression, suppressed appetite, or self-harming behaviors.
- Determine whether the child has ever previously been treated or hospitalized for a suicidal ideation, depression, or any other mental, behavioral, or emotional condition, or has engaged in self-medication, such as through the use of drugs or alcohol.
- Determine if the child is being supported with psychotropic or other medication, is receiving individualized counseling, or if and how the child responds to the group counseling sessions at federal facilities.
Determine if there has been an evaluation of mental health problems by a psychologist, psychiatrist, or social worker at any time in the child’s life.

### Guidance for Gathering Information on Children with Possible Developmental Concerns, for Children over Five or Six Years Old

With respect to autonomy, determine:
- Is the child being influenced by his or her peers?
- Are there other adults in the child’s life that may be telling the child to make certain statements or decisions?
- Is the child relying on the attorney to make the decision for him or her?

With respect to perception and attitudes about risk, determine:
- Does the child understand possible and likely negative consequences of a decision?
- Is the child seeking approval of others in making this decision?
- Does the child understand the risks involved with the decision?

With respect to perspective, determine:
- Does the child understand your role as the attorney and that it is not your role to make a decision for him or her?
- Is the child considering both short and long-term consequences of actions or decisions?

With respect to temperance, determine:
- Is the child able to maintain emotional and behavioral control when speaking with you or appearing in court or other proceedings?

Another way to conduct information-gathering or fact-finding is described in recommendations provided by a 1996 conference of national experts convened at Fordham Law School to address the complexities of representing children. The complete version of the Fordham Law School recommendations is in Appendix B of this practice advisory. The working group took the position that it is the child’s attorney who has the responsibility to determine whether the child has the capacity to express a reasoned position and provides guidance on factors for assessing capacity as part of the lawyering process. In addition to specific recommendations on ethical issues and training requirements for attorneys, the working group advises attorneys for children to include a fact-finding phase in their attorney-client relationship with child clients. The recommended three components for the fact-finding phase include the following:

### Fordham Law Recommendations: Fact-Finding Phase

- Understand the Developmental Stage of the Child Client:
  - Cognitive Ability
  - Socialization
  - Emotional Growth

- Present Medical Status:
  - Mental
  - Physical

- Personal History:

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3. **Guidance for Working with Younger Children**

In the case of younger children, the indicia will often immediately present themselves because the children are young or developmentally immature. This does not mean that the child completely lacks capacity or is mentally incompetent, but specialized techniques may be required to ensure that his or her point of view is understood, respected, and voiced in the process. At the same time, it is possible that you will determine that you cannot adequately ascertain the child’s capacity or point of view. The ABA has issued guidelines called “Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation.” In particular, the ABA guidance highlights the need for child-centered, research-informed advocacy, and holistic approaches for young children. The highlights of these guidelines are included below. In addition, also consider the practical tips on ethical guidelines in Section V of this practice advisory.

<table>
<thead>
<tr>
<th>ABA Guidelines for Working with Younger Children</th>
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<tbody>
<tr>
<td>✓ <strong>Learn the child’s history.</strong> This includes asking questions about prenatal care, the child’s health history, the nature of relationships with biological parents and caregivers, who cared for the child since the child’s birth, and familiar, comforting items for the child.</td>
</tr>
<tr>
<td>✓ <strong>Get to know the client.</strong> This includes visiting and interacting with the child because preverbal children communicate through their behavior. The ABA Guidelines provide a list of developmentally appropriate specific activities to help build the attorney-client relationship based on the approximate age of the child, ranging from 0 – 3 months old, 3 – 6 months old, 6 – 9 months old, 9 – 12 months old, 12 – 18 months old, 18 – 24 months old, 2 – 3 years old, 3 – 4 years old, and 4 – 5 years old.</td>
</tr>
<tr>
<td>✓ <strong>View “health” as an interconnected concept for very young children.</strong> To be aware of red flags that may appear across health and development domains, the ABA guidelines suggest understanding the connected needs of the whole child through a comprehensive health assessment. This may include understanding if the child is reaching developmental milestones or suffering from malnutrition or historical physical injuries.</td>
</tr>
<tr>
<td>✓ <strong>Observe the child’s interactions with substitute caregivers.</strong> In this case, it is important to note if the child’s needs are being met by the primary substitute caregivers, if the relationship appears to be nurturing and warm, or if the child looks to the caregiver to show new skills or as a point of reference.</td>
</tr>
<tr>
<td>✓ <strong>Understand the parent-child relationship.</strong> This includes considering the parental response to the child, if the parent makes an effort to interact with the child, and generally, the level of engagement and interest of the parent.</td>
</tr>
<tr>
<td>✓ <strong>Become familiar with the child’s environment.</strong> This includes observing the child’s access to developmentally-appropriate books and toys, whether the child has a safe place to sleep, availability of appropriate clothing, and whether the child’s cultural background and experiences are reflected in his or her living environment.</td>
</tr>
</tbody>
</table>

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46 See id. at 11-13.
B. Guidance for Distinguishing Child Capacities from Other Issues of Concern

Generally, a child’s capacities are considered in an ideal situation, but it is important to consider situation-specific effects on performance as well. Some of the factors highlighted below may or may not relate directly to capacities, but may impact a child’s performance or ability to exercise his or her capacities in the immigration context, and should also be raised with adjudicators when appropriate. For instance, in the case of children who are deaf, accommodations must be made for them in court or when appearing before USCIS, or for children with significant language, vocabulary, and comprehension issues, the court or other adjudicators must be informed so that the attorney can explain the need for additional time and resources to ensure the child understands his or her legal rights and information.

### Checklist of Distinguishable Factors Impacting Ability to Exercise Capacities

- Physical disabilities
- Language, vocabulary, and comprehension
- Cultural and educational background
- Custodial, placement, and post-release considerations
- Trauma- and migration-related factors

1. **Children with Physical Disabilities, Distinguishing and Overlapping with Capacity Concerns**

Children with certain physical disabilities such as deafness, muteness, and blindness may also present specialized challenges that may not relate to capacity. In fact, these children may very well have the capacity to understand and make decisions but are unable to communicate their point of view and decisions because of the lack of access to adults who are competent in sign language and alternative forms of communication.

At the same time, unaccompanied children who grew up abroad with these physical disabilities may still present capacity concerns because their limited access to language and schooling may have impacted their development and cognitive abilities, or they may have been subjected to abuse or violence in connection with their physical disability.

Catholic Charities in New York has worked on several of these cases and can be consulted for their experience in working with sign language interpreters and related considerations and concerns. (Relevant contact information can be found in Appendix D.)

2. **Language, Vocabulary, and Comprehension**

When exploring child capacities, it is important to use the appropriate language and vocabulary in order to accurately observe indicia of capacity concerns. With respect to language, it is critical that the attorney use the language with which the child is most comfortable and a qualified interpreter. Children from bilingual or multilingual households may experience delays in early development of language, and children from households speaking an indigenous language may be unable to communicate without an appropriate interpreter. Children in these situations may seem to exhibit a capacity issue, but it is actually a language issue. In addition, when

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interviewing and speaking with children, interviewing techniques should include sensitivity to vocabulary that may be entirely new to children and recognize the need to explain unfamiliar concepts. For example, a child may be asked to file a change of venue, but may not know what the “mail” or an “envelope” is and therefore will not understand the steps to take in a change of venue process. When working with children, many legal service providers use familiar concepts, such as a soccer game, to help explain immigration court proceedings. Refer to the best practices for Know Your Rights/legal screenings for children for more examples of how to make information accessible to children with or without capacity concerns.

3. Cultural and Educational Background

There are several contextual factors that may impact a child’s capacity that are specific to children in immigration proceedings. First, cultural factors may inform the way a child interacts with adults or his or her understanding of court systems. For example, in some cultures, it is disrespectful to disagree with an adult even in the case of abuse. Additionally, many children believe that courts are only for people who have committed crimes, and so they fear the immigration court rather than view court as a due process right. Some children have not experienced autonomy and agency in their cultural context and may have difficulty expressing themselves or viewing themselves as having rights, which requires more careful counsel and assistance from attorneys.

Second, the educational and employment background of the child may be closely intertwined with the development of language skills and vocabulary, which may in turn impact access to and understanding of information being provided to him or her in immigration proceedings. A limited educational background may make it difficult to explain certain concepts in a way that the child comprehends, but this does not mean that the child lacks cognitive capacity.

In these cases, it will be necessary to expend additional resources to ensure the child understands the concepts that are being presented to him or her and may require enlisting assistance from teachers and counselors.

4. Custodial, Placement, and Post-Release Considerations

The general context of custody can impact a child’s decision-making not because they lack capacity, but simply because they feel constrained by being in custody or under pressure in a removal proceeding, referred to as “detention fatigue.” Some advocacy efforts to alleviate this include the following: advocating for the child to receive special permission to go off-premises for a special event; identifying sources of support for the child such as music or art; connecting the child to a religious or faith-based service; providing reading materials; and helping the child re-focus on the underlying reasons for coming to the U.S. to try to help them recall that motivation and hope. There is also a different type of pressure on a child if they are close to aging out of federal custody. In these situations, there are few to no alternatives to release for the child, leading to the possibility of being transferred to an adult facility on his or her birthday.

48 Various staff members at ProBAR, Vera Institute of Justice Stakeholders Call, Mar. 2014, notes on file with author.
49 Interview with Lauren Burke, Founder and Director of ATLAS (Apr. 10, 2014) (notes on file with author).
50 Interview with Maria Woltjen and Elizabeth Frankel, The Young Center (Mar. 24, 2014) (notes on file with author).
There are children in federal custody with mental health concerns whose placement in certain facilities, such as a residential treatment center or a facility with specialized therapeutic services, could be indicia of child capacity concerns. Placement in these facilities does not mean that a child is incapable of making decisions or expressing opinions or that he or she is mentally incompetent. Placement in these facilities also does not necessarily mean that an assessment was completed. Nevertheless, if the child has been placed in specialized custodial settings for mental health reasons, additional interviewing and attention is highly recommended.

Cases where children require a home study or follow-up services under the TVPRA of 2008 do not necessarily indicate a lack of capacity or mental competency, but may be sufficient grounds to conduct further inquiry. Finally, with respect to children released from custody without any particularized services or legal referrals, there is much less information available about potential capacity or mental competency concerns. These considerations may have been overlooked while the child was in federal custody and the attorney may be the first person to evaluate and understand the child’s particular circumstances.

5. Trauma- and Migration-Related Factors

In the context of child migration, children may have experienced trauma during their journey. In addition, many children face heightened pressure because of a fear of return to their country of origin, familial pressure due to migration debts, or an obligation to send money back to family. These factors may cause a child significant temporary distress that may or may not rise to the level of a mental health disorder. The decision-making tools in the next section can help determine when a child may need a mental health intervention. A child may communicate the pressure that he or feels due to a migration debt or trauma he or she experienced during the journey. When this pressure or trauma severely impacts the child’s functioning and, therefore, his or her ability to make decisions, it is important to make proper referrals for a mental health assessment and supportive psychological services.
• Build an “Identification of Capacity Concerns” toolkit that provides guidance for information-gathering for attorneys, legal assistants, and accredited representatives, which includes:
  • An “Indicia Checklist” such as the one provided in this practice advisory to help guide attorneys in their daily work to identify possible child capacity concerns.
  • Tools on Information-Gathering based on either:
    ➢ “Guidance for Gathering Information for Capacity Concerns” provided in this practice advisory on further inquiry for children with possible intellectual or cognitive disabilities, mental health disorders, or child developmental concerns; or
    ➢ “Fact-Finding” categories from the Fordham Law Working Group that include understanding the developmental stage of the child client, medical status, and personal history.

• For working with younger children, refer to the tools provided in the ABA Guidelines, “Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation,” beginning with the points summarized and highlighted above.

• To the greatest extent possible, work to identify and distinguish capacity concerns from other considerations.
  ➢ Capacity concerns can arise from: physical disabilities; language, vocabulary, and comprehension; cultural and educational context; custodial, placement, and post-release considerations; and trauma- and migration-related factors.
  ➢ Once you identify a possible concern, focus on that particular factor to guide the child or help the child access the tools needed to express his or her point of view.

• When working with children with physical disabilities, such as deafness, muteness, or blindness consult the ABA Center on Children and the Law “Best Practices for Interviewing Children with Disabilities” guidelines:53
  ➢ Learn about the nature of the child’s communication abilities, such as possible lip reading, ability to speak or write responses, alternative languages, or the need for a specialized interpreter.
  ➢ Deaf children usually require two interpreters: Certified Deaf Interpreter for the child (CDI), and an American Sign Language interpreter for you (ASL). The CDI is a deaf adult certified in interpreting deaf communication, including, but not limited to, ASL. Young deaf children or children from abroad may not know ASL and may only know “home sign language” which is based on gestures. An attorney can look for resources at local schools or the state child services agency.

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IV. CAPACITY AND DECISION-MAKING ANALYSIS TOOLS

As noted, capacity works on a spectrum. Children may be able to make decisions related to one issue, but may struggle with understanding or explaining decisions on other issues. This section highlights practical tools that have been developed to assess and understand a child’s capacity to make various decisions in a given context.

A. Fordham Law School Working Group on Determining the Child’s Capacity to Make Decisions and the UNLV Conference Recommendations on Representing Children in Families

The 1996 Fordham Law School working group provides general recommendations on the representation of children and takes the position that an attorney representing a child should decide whether the child client has the capacity to express a position. They also have a responsibility to determine, facilitate, and maximize the child's capacity. Additionally, the working group notes that the weight given to the factors in the determination of capacity may vary depending on the issue and on the nature of the proceeding. The working group then provides recommendations on how to analyze a child’s decision-making ability after having completed a fact-finding or information-gathering phase.

<table>
<thead>
<tr>
<th>Determination of a Child’s Decision-Making Ability</th>
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<tbody>
<tr>
<td>✓ Identify and record the child client’s expression of a relevant position:</td>
</tr>
<tr>
<td>o Ability to communicate with the lawyer, and</td>
</tr>
<tr>
<td>o Ability to articulate reasons for a decision</td>
</tr>
<tr>
<td>✓ Identify and record the child’s individual decision-making process:</td>
</tr>
<tr>
<td>o Influence, coercion, or exploitation: are any of these three factors impacting the child’s decision-making and what or who is the source of the influence, coercion, or exploitation?</td>
</tr>
<tr>
<td>o Conformity: does the child seem to be conforming to a certain decision or to another person’s point of view, and what is the strength of his or her wishes?</td>
</tr>
<tr>
<td>o Variability and consistency: is the child’s state of mind showing variability or consistency?</td>
</tr>
<tr>
<td>✓ Identify and record the child’s ability to understand consequences:</td>
</tr>
<tr>
<td>o Risk of harm: does the child understand the risk of harm inherent to a decision?</td>
</tr>
<tr>
<td>o Finality of decision: does the child understand the finality of a decision and its consequences?</td>
</tr>
</tbody>
</table>

In 2006, the University of Nevada, Las Vegas, held a follow-up conference entitled, “Child Advocacy and Justice Ten Years After Fordham,” which built upon the Fordham recommendations regarding the role of attorneys for children. In particular, the conference laid out recommendations for (1) assessing a child’s capacity to formulate a position, (2) helping a child formulate a position, (3) dealing with children with diminished capacity, (4) dealing with children lacking capacity, and (5) helping children advocate for themselves. These
recommendations are provided in full in Appendix B.

B. Jean Koh Peters, “Decision-Making Loop” and “Seven Questions to Keep Us Honest”

Jean Koh Peters lays out a model for the representation of children in her seminal work, Representing Children in Child Protection Proceedings: Ethical and Practical Dimensions, which provides useful tools for representing children in immigration removal proceedings. In representing children, Peters posits that there should be a “competency default.”60 This means that the lawyer should proceed in the first instance as if the child understands the legal issues and can state his or her preferences.61 This is particularly important because it recognizes that even younger children can express a preference in the dependency context about their everyday lives, such as with whom they want to live, where they go to school, their feelings about their circumstances, and their hopes, even if they do not understand all of the intricacies of the court process.62

Peters argues that this competency default position will help attorneys clarify legal issues for the child client, ascertain how much the child can understand and express, and individualize the representation. In the context of various types of dependency proceedings, a child’s right to state a preference has been recognized and the attorney’s role in presenting this position, however unattainable, has been the preferred representational position.63

This is consistent with the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases, which indicate that it is the child’s attorney who should determine whether the child is “under a disability” with respect to each issue in which the child is called upon to direct the representation.64 The ABA standards do not accept the idea that children of certain ages are inherently “impaired,” “disabled,” “incompetent,” or lack capacity to determine their position in litigation.65 Furthermore, these standards recognize that the analysis of disability is contextual, incremental, and may be intermittent. A child may be able to determine some positions in his or her case but not others.66 Similarly, a child may be able to direct the attorney with respect to a particular issue under certain circumstances but not at under others.67

Peters presents two practical tools for working with child clients including: (1) Decision-Making Loop for counseling child clients based on the five steps and five principles of action essential to the decision-making process, and (2) “Seven Questions to Keep Us Honest” which can be used as an internal checklist for attorneys counseling children in the immigration context.68

61 See id. at 63.
62 Ibid.
64 American Bar Association Standards of Practice For Lawyers Who Represent Children In Abuse And Neglect Cases, Rule B-3.
65 Ibid.
66 Ibid.
67 Ibid.
68 Koh Peters, supra note 60, at 329.
**Decision-Making Loop: Five Steps of Action**

- **Step One:** Have the Child Understand the Legal Context. The child must have an understanding about the role of the lawyer in his or her life.
- **Step Two:** Have the Lawyer Understand the Child-in-Context. The lawyer must have an understanding of the child’s home situation, language capacity, schooling history, health history, etc.
- **Step Three:** Take a Snapshot of the Child-in-Context. This should be taken at the time of the decision-making in order for the lawyer to be fully up-to-date on the child’s current situation as things may change quickly. This includes thinking carefully about who or what circumstances may be impacting the child’s decision-making in that moment.
- **Step Four:** Understand All Actually Available Options. Lawyers should also be creative in thinking about options outside the range of traditional options that the system offers. Three recommended components of this process can be: (1) thinking about what the child wants and needs concretely, (2) thinking about what the system actually has to offer, and (3) brainstorming ways to bridge the gap between the child’s desires and the system’s offerings. This step may be a short one because children face a grossly restricted set of options, but it is critical because it forces attorneys to be creative before resigning themselves to these restricted options. This step can also prevent attorneys from failing to discuss any potentially harsh realities with the child client.
- **Step Five:** Counsel the Child About All of the Available Options and Learn His or Her Wish: In this step, drawings and visual images such as mapping, the decision tree, and the decision wheel – each described further in Section E below – can be used, along with writing out different options that the child has with respect to a decision and the consequences of each decision. For example, Peters suggests drawing different “homes” as options and to explore the details of each one alongside the child client.

**Decision-Making Loop: Five Principles of Action**

- **Principle One:** Action planning should begin where the child is and should lead in the direction the child wants to go. This requires that the lawyer know the values, routines, and attitudes of the child client and his or her preferred way of communicating, which can include the use of visuals, drawing, and mapping.
- **Principle Two:** The counseling process should concretely link legal requirements with the client’s available options. In this case, it is helpful to use visual aids to represent the available options, turning them face up and down to verify that the lawyer has explained to the child the options available in the proceeding and demonstrate to the child how legal requirements preclude or allow for that option in the child’s particular case.
- **Principle three:** The counseling process should incorporate methods that are meaningful and also constructive for the client. Develop ways to communicate with the client, which can include drawing, the use of puppets, role play, or direct conversation resembling interactions with adults.
- **Principle Four:** Be as clear as you can possibly be, but no clearer. It is important to describe materials on a client’s level in simple terms, but it is critical that the lawyer not oversimplify the problem in the process as this can mislead the client. When no clear option emerges, it is important for the lawyer to acknowledge that lack of clarity.
- **Principle Five:** Counsel the child about his or her own best interests. Ethical codes encourage lawyers to counsel their client about the lawyer’s view of the client’s best interests and the broader effects that any legal decision might have on the client’s life. This is the trickiest part of counseling a child client. The lawyer may be tempted to impose his or her own beliefs on the child, and so must exercise restraint.
Seven Questions to Keep Us Honest

✓ In making decisions about the representation, am I making the best effort to see the case from my client’s subjective point of view, rather than exclusively from an adult’s point of view?
✓ Does the child understand as much as I can explain about what is happening in her case?
✓ If my client were an adult, would I be taking the same actions, making the same decisions, and treating her in the same way?
✓ If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client?
✓ Is it possible that I am making decisions for the gratification of the adults in the case, and not for the child?
✓ Is it possible that I am making decisions in the case for my own gratification and not for that of my client?
✓ Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child?

In addition to the “Seven Questions to Keep Us Honest,” Peters provides this guidance: (1) before meeting with the child, write a memo to your file about whether you have a secret hope about what the child wishes to do, and (2) explore whether this is based on the child’s values or your values using the Seven Questions or another technique. When meeting with your client, stress to the child that it is the child’s values and goals that are paramount, not yours. After meeting with the child, write a summary of the session to analyze the session and any conclusions made, and consider the necessity of reopening the conversation with the child.


The University of Michigan, School of Social Work, created a guide for legal practitioners to evaluate the decision-making capacity of children. In particular, the guide makes suggestions for what a child’s lawyer should know about childhood development and then applies this knowledge to approaches for counseling child clients. There are four practical tools that can be adapted to the immigration context (attached as Appendix C to this practice advisory): (1) a “Determining Decision-Making Capacity Flowchart,” (2) a “Thinking Through a Specific Incident Worksheet,” (3) a “Setting Goals Worksheet,” and (4) “A 5-step Process for Decision-Making.”

D. Decision-Making Techniques with Younger Children

The ABA Practice and Policy Brief, “Advocating for Very Young Children in Dependency”, highlights the need for child-centered, research-informed advocacy, and holistic approaches for younger children. Depending on their age, children may be able to express a preference for who they want to live with, or describe a past experience through drawings or role-playing with dolls or stuffed animals. This can help guide an attorney in understanding a very young child’s position. This type of child-centered advocacy requires the attorney to take steps toward seeing the world through the child’s eyes. The Peters decision-making loop can be used with younger children as well.

69 Maze, supra note 45, at 9.
However, in many cases the attorney will need to engage in significant information-gathering because of the communication barriers with younger children who may be preverbal or have limited vocabularies and comprehension. These information-gathering practical tools are described in Section III of this practice advisory. In these cases, an attorney can and should base assessments of the case and the child’s position on the objective facts and information gathered, rather than on the attorney’s own personal beliefs. The attorney will need to balance whatever information can be obtained from the young child, together with information from family members, substitute caregivers, doctors, and teachers, while adhering to ethical obligations as outlined in Section V of this practice advisory.

E. Best Practices Developing in the Immigration Field

1. Visual Models

Many legal service organizations that work with immigrant children have developed a variety of visuals or drawings to guide decision-making that can be tailored to the particular child client. Some common examples are outlined below.

Visual Models for Decision Making

- **Maps with Reasons**: Draw a map of the United States on one sheet of paper and draw a map of the child’s country of origin on another sheet of paper. Inside each drawing, draw a line dividing the country and then list out the pros and cons of living in each country. This can help children visually see their reasons and help them think through each reason. For instance, a child may list family as a pro in his or her home country and fear of gangs as a con. Listing pros and cons helps the child see the balance between the two options. This is most useful in cases where children do have options to remain lawfully in the U.S. but may be considering voluntary departure or feeling doubt about seeking immigration relief.

- **Decision Tree**: Draw a tree on a sheet of paper and define the tree as representing a particular decision, such as filing for Special Immigrant Juvenile Status or living with mom or dad. Then, on one side of the tree write “Yes” and on the other side of the tree write “No.” Next, list out all of the reasons why the child would say yes to that decision and all of the reasons to say no to that decision and work together through each of them. This is similar to the drawing of maps, but the decision tree is more focused on a particular decision, and can help the attorney figure out why the child may not want to seek legal relief even if he or she is eligible.

- **Decision-Making Wheel**: Draw a wheel with a hub. In the hub, define the problem, such as requesting voluntary departure. Then, go around the wheel, dividing it into nine sections asking the following questions:
  - What is the problem? (e.g., I do not really want to go back to my country.)
  - What are the choices you have? (e.g., My choices are limited because my lawyer tells me I am not eligible for legal relief.)

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70 See id. at 34.
What do you think the consequences of these choices will be for yourself and others who are involved? (e.g., I will not be able to pay my debt and I will have to come back to the United States.)

What values do you need to consider? (e.g., success, safety, etc.)

How do you feel about the situation? (e.g., I feel sad and confused.)

Is there anything else you need to learn about it? (e.g., I want to know if there are any other options for me to stay in the U.S.)

Do you need to ask for help? Who will you ask? (e.g., I need to ask my lawyer or I need to talk to my brother.)

What is your decision? (e.g., I want my lawyer to go to court and tell the judge that I do not want voluntary departure.)

Do you think you made the right decision? Why? (e.g., I am not sure.)

The South Texas Pro Bono Asylum Representation Project (ProBAR), National Immigrant Justice Center (NIJC), and the Refugee and Immigrant Center for Education and Legal Services (RAICES) have all developed best practices and tools utilizing drawing, maps, and analogies to work with very young children to understand their points of view and decisions. These organizations can all be consulted to obtain additional information on these techniques.72

2. Question Techniques

Atlas: DIY and Catholic Charities of New York have utilized the following question techniques to better understand child client decision-making when faced with choices such as voluntary departure when they are also eligible for relief.

<table>
<thead>
<tr>
<th>Question Techniques for Deciding Between Voluntary Departure and Relief</th>
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<tbody>
<tr>
<td>✓ Ask the child client the following question73: If you could create your future, what would you want it to look like? Then, walk through the various legal options and see how these intersect with his or her future hopes.</td>
</tr>
<tr>
<td>✓ Ask the child client the following question74: What factors or reasons motivated you to come to the United States? This can help the child remember his or her decision-making in the context of his or her point of origin, and also help define what is impacting him or her in the present and thus affecting his or her decisions.</td>
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</tbody>
</table>

3. Unique Project Models

To more systemically and holistically address the capacity and decision-making abilities of the children it represents, Catholic Charities of New York has developed a Medical-Legal Partnership Immigrant Youth Clinic, supported by Montefiore Medical Center, Community Pediatrics Programs, the Children’s Health Fund, and Catholic Charities Archdiocese of New York, which employs various best practices for working with youth who have capacity and/or mental competency challenges, among other concerns.75

72 Vera Bi-Monthly Conference Call, Friday (Mar. 14, 2014) (notes on file with author).
73 Interview with Lauren Burke, Founder and Director of ATLAS (Apr. 10, 2014) (notes on file with author).
The Young Center for Immigrant Children’s Rights also has an upcoming article detailing experiences of their unique child advocate model on issues of child capacity and mental competency and techniques for effectively working with child clients.\textsuperscript{76}

\textsuperscript{76} Interview with Maria Woltjen and Elizabeth Frankel, The Young Center (Mar. 24, 2014) (notes on file with author).
RECOMMENDED BEST PRACTICES

• Decide as an attorney or a legal service organization which of the following decision-making tools best suit your child clients:
  ➢ *Fordham Law School Determination of Child’s Decision-Making Ability*
  ➢ *UNLV Conference Recommendations Regarding the Attorney-Client Relationship*
  ➢ *Jean Koh Peters Decision-Making Loop and Seven Questions to Keep Us Honest*
  ➢ *University of Michigan Charts: (1) Determining Decision-Making Capacity Flowchart, (2) Thinking Through a Specific Incident Worksheet, (3) Setting Goals Worksheet, and (4) A 5-step process for Decision-Making*
  ➢ *Decision-Making Techniques With Younger Children*
  ➢ *Best Practices from the Immigration Field: Visual Tools and Question Techniques*
V. DEFINING THE ATTORNEY’S ROLE, ETHICAL CONSIDERATIONS, AND PROTECTIVE ACTION

In the course of interacting with children in the immigration context, it is critical to define the role of the attorney with respect to the child and the ethical obligations in connection with this role. For lawyers and legal assistants working with children in the current system, whether formally entered as attorney of record or as a limited appearance, the recommended position is to follow the ethical guidelines set forth for attorneys in the particular jurisdiction.

This practice advisory also takes the initial position that an attorney for the child should follow a representation model of expressed or stated interests.77 There are certain exceptions to this expressed or stated interest model when it comes to representing preverbal children and children with diminished capacity, some of which will be discussed in this section.

This section of the practice advisory will review issues regarding the capacity of children to consent and enter into an attorney-client relationship, and protective action that an attorney can take when a child client presents with impaired or diminished capacity.

Just because a child presents challenges related to capacity does not mean that an attorney, advocate, or legal assistant cannot continue to work with or advocate for the child.

A. Ethical Standards and Guidelines

There are three key standards and model rules cited in this practice advisory:

- ABA Model Rules of Professional Conduct (6th ed. August 2007). If the ABA Model Rules do not apply in the state of jurisdiction, it is necessary to look up the applicable state model rules of professional conduct.
- ABA Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States (August 2004)78.

77 The Fordham Working Recommendation and the ABA Standards for Unaccompanied Alien Children have also taken the position that an attorney for the child should use the model of expressed or stated interests.
78 ABA Standards for the Custody, Placement and Care; Legal Representation and Adjudication of Unaccompanied Alien Children in the United States (August 2004)
http://www.americanbar.org/content/dam/aba/migrated/immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf
79 ABA Standards for the Representation of Children in Abuse and Neglect Proceedings (February 1996)
http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.pdf
80 ABA Model Act Governing Representation of Children in Abuse and Neglect Proceedings (August 2011)
http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/empowerment/model_act_final.pdf
In addition to these standards, there are Institute of Judicial Administration/ABA Juvenile Justice Standards and National Juvenile Defense Standards that also explain the role of counsel in a child’s competency to stand trial. State-specific family court or child welfare attorney standards can also be consulted.

Most importantly, attorneys should always consult the ethical rules of the jurisdiction by which they are bound as the specific language and obligations may vary by state.

B. Capacity to Consent to Representation and Enter Into an Attorney-Client Relationship

In contrast to other systems where children are appointed legal counsel, the current immigration system operates in such a way that children must retain private attorneys or pro bono attorneys to represent them in immigration proceedings. As a result, practitioners may face the ethical concern of whether the child has the capacity to enter into or consent to the attorney-client relationship. There is limited authority on this issue, but below are general recommended considerations in navigating this ethical concern.

The attorney should take steps to analyze the child’s capacity to enter into the attorney-client relationship or to make decisions to guide the attorney. This inquiry is important in case the attorney needs to explain to an immigration judge or other decision-maker that the child is not capable of consenting to the representation and, therefore, may not be mentally competent to participate in legal proceedings.81

As a starting point, the attorney should presume capacity and approach the child with this presumption until there are indicia of capacity concerns. If capacity concerns are present, the attorney should then conduct further information-gathering to determine what factors are impacting capacity.82

Model Rule 1.14(a) of the ABA Model Rules of Professional Conduct (6th ed. August 2007), provides the following guidelines in the case of a client with diminished capacity:

When a client’s capacity to make adequately considered decisions in connection with representation is diminished, whether because of minority, mental impairment, or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

In Comment [1] to Model Rule 1.14, the normal client-lawyer relationship is described as being based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters, and goes on to note that with children, the ordinary client-lawyer relationship may not be possible in all respects. Comment [1] also notes, however, that children, even if viewed as having diminished capacity, may have the ability to understand, deliberate, and reach conclusions, such that children as young as five or six years of age, and certainly those of ten or twelve, could express opinions that are entitled to weight in legal proceedings concerning their custody. This could also apply to situations where the child has a physical disability, such as deafness or muteness, mixed with capacity issues, but may very well be able to articulate his

81 CAIR Coalition Mental Disabilities Practice Manual, supra note 6, at 21, addressing this issue in the adult context.
or her consent to representation. As such, in general, children are considered capable to consent to an attorney-client relationship.

If there is still concern over whether the child has consented to the representation, there are some additional arguments to support a position to represent the child.

First, a commonly-cited area in the issue of consent is contracting authority. Although children generally lack contracting authority, if they do contract, they have the right to disaffirm most contracts entered into during minority. There is also a common law exception that allows children to contract for “necessities of life.” Based upon these exceptions, it is arguable that the favored position is to view the child as having the capacity to enter into the attorney-client relationship.

Second, children have a due process right to be heard in the removal proceedings, and this could arguably be tantamount to choosing counsel as a way for the child to be heard. Merril Sobie, a family and children’s law expert, who has authored numerous articles on children’s rights, argues that when children are parties to a protective proceeding and are participants who enjoy equal or substantially similar rights to adult parties in a proceeding, the ability to retain counsel is implicit, and so their ability to consent is implicit as well. This can be argued analogously in the immigration context.

Third, there is further analogous support for consent to representation in state family court proceedings where the child has the right to choose counsel. In certain states like California, a child has the right to be represented by counsel of his or her own choice, but must possess minimally requisite capacity or maturity. Sobie concludes:

In sum, several states, including three of the most populous states in the union, California, New York and Illinois, have enacted statutes granting the child the right to choose his counsel. Several additional states provide for the appointment of counsel when the child so requests or when there is a conflict between the child’s position and that of the guardian ad litem. In addition, standards adopted by the American Bar Association and other groups underscore the basic right of the child to be represented by an attorney who the child wants, a lawyer who will develop and advocate a position consistent with her position. The existence of these provisions constitutes a strong statement in favor of the child’s need and right to be considered as an equal party to the proceedings capable, in many cases, of entering into a normal attorney-client relationship.

Fourth, the American Immigration Council (“AIC”) in its practice advisory on Representing Clients with Mental Competency Issues under M-A-M, also notes that “unless applicable state ethical rules require explicit consent to representation, you may still be able to represent a client whose competency issues affect his or her ability to

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83 Cunningham, supra note 2, at 287-88.
84 Interview with Katherine Fleet (Apr. 4, 2014) (notes on file with author).
86 See id. at 770.
87 See id. at 771.
88 See id. at 775.
consent to representation. 8 CFR 1292.1(a)(1) and (a)(4) state, without reference to consent, that attorneys and accredited representatives are entitled to appear in immigration proceedings. 89

Finally, the AIC also notes that governing law in multiple circuits presumes that all detainees want the assistance of counsel, and requires those who wish to proceed without counsel to knowingly and voluntarily waive their right to do so. 90 The ABA Standards on Unaccompanied Children adopt a Miranda-style standard for the Immigration Court when determining whether the child has knowingly, intelligently, and voluntarily accepted a remedy or relinquished the right involved. The determination should include an evaluation of whether the child has sufficiently understood the information received about the remedy or right involved, engaged in rational decision making, and accepted the remedy or waived the right of his or her own volition. The totality of the circumstances analysis specifically focused on five concepts: (1) the child understands the nature of the proceedings, (2) the child understands his legal rights, (3) the child understands the consequences of the proposed remedy, (4) the child accepts the proposed remedy, and (5) the child’s acceptance is truly voluntary. 91 So if the child’s consent to the attorney’s representation is challenged, then whoever is challenging the representation should be asked to demonstrate, in accordance with this guidance, that the child can knowingly and voluntarily waive his or her right to representation.

In addition to these arguments, there are also questions that you can ask of your child client to determine how you should proceed with the representation.

### Questions for Initial Determination of Consent 92

- Do you know which country you are in right now? (If the child can answer on his or her own that they are in the United States, then proceed to the next question. If not, use maps to explain the geography to the child and drawings, if necessary, to ascertain whether to proceed. If the child is preverbal, then refer to the guidance on younger children below.)
- Do you want to stay in the United States?
- Do you want me to help you do that?
- Can I help you in the courtroom or in your asylum proceeding? For this question, you may need to refer back to the concept of the court and why the child needs to go to court and talk to the immigration judge. Some best practices have included drawing the court, showing the Women’s Refugee Commission video “What Happens When I Go to Immigration Court?” and reviewing the court component of a Know Your Rights presentation with the child again to ensure comprehension.
- If you cannot achieve the child’s consent, then you may need to take protective action on behalf of the child as authorized under applicable ethical standards in your state of practice.

Additional guidance and best practices for maintaining a normal client-lawyer relationship with children are in the ABA publication, “Counseling Children and Youth in Times of Crisis: Tips to Achieve Success and Avoid

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89 American Immigration Council, LAC, Practice advisory, Representing Clients with Mental Competency Issues Under Matter of M-A-M, at 11, where there is additional support for this argument.
90 Ibid.
91 ABA Standards for Unaccompanied Alien Children, supra note 6, at VIII.C.1.
92 American Immigration Council, supra note 87. The author has added specific comments relevant to immigrant children in entering the attorney-client relationship.
Pitfalls,” and the ABA Standards related to Unaccompanied Alien Children in the United States, both publicly available on the ABA website.

C. Child Decision-Making and Protective Action

A child in removal proceedings will need to make many complex decisions throughout the process, and though a child may have the capacity to articulate one position, such as consent to representation, there may be other points in time where the child’s capacity is called into question.

It is important to recognize that the building of the attorney-client relationship is not always about seeking information to build the case, but is also about establishing rapport to understand the child’s decision-making in context, and to remember that every child requires an individualized approach.

The ABA Standards on Unaccompanied Children take the position that children have a right to full participation in decision-making and this position is reflected in this practice advisory. In particular, Rule III.F states that a child has the right to express his or her own views freely in all matters affecting him or her. The comment further provides that allowing a child to meaningfully participate in decision-making means ensuring that the process (1) be free from pressure on and manipulation of the child either to reach a certain decision or make a certain decision at all, (2) account for the child’s evolving ability to understand situations and respond to advice and guidance, and (3) provide the child with sufficient and understandable information to allow the child to make an informed decision.93 Sections III and IV of this practice advisory provide information-gathering and decision-making tools to meet this standard and requires that children meaningfully participate in the decision-making.

Once the practical tools for information-gathering and decision-making have been exhausted or are found not to be applicable because of the nature of the child’s capacity impairment, it may be necessary to take protective action. Model Rule 1.14(b) of the ABA Model Rules of Professional Conduct (6th ed. August 2007), provides that:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

In undertaking protective action, the lawyer, in accordance with Model Rule 1.14(c), is implicitly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests. Comment [8] recognizes the lawyer’s difficult position of needing to protect information that may harm a client’s interests by disclosing the client’s diminished capacity. For this reason, before discussing matters related to the client, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client’s interests. This means that an attorney can consult with family members or mental health experts so long as information is revealed only to the extent necessary to

93 ABA Standards for Unaccompanied Alien Children, supra note 6.
protect the child and so long as the lawyer has done an evaluation of whether the person consulted will act adversely to the child.

1. Consulting with Family Members as Protective Action

The ABA Model Rule recognizes that a child may wish to have family members or other persons participate in discussions or decisions. Generally, this will not affect attorney-client privilege, but the lawyer must keep the child’s interest foremost in mind and maintain confidentiality to the greatest extent possible. In this scenario, consulting with family members can be consistent with the child’s wishes.

There may be scenarios where the attorney cannot determine the child’s wishes, such as the case with preverbal children. In such a situation, an attorney may choose to consult with a child’s family members as a form of protective action. Comment [5] indicates that in taking any protective action, including family member consultation, the lawyer should be guided by factors such as the following:

<table>
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<th>Factors to Consider in Consulting Family Members</th>
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<td>✓ The wishes and values of the client to the extent known;</td>
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<td>✓ The client’s best interests; and</td>
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<tr>
<td>✓ The goals of:</td>
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<tr>
<td>○ Preserving the client’s decision-making autonomy to the extent feasible,</td>
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<tr>
<td>○ Maximizing client capacities, and</td>
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<tr>
<td>○ Respecting the client’s family and social connections.</td>
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If the attorney is unable to obtain information from the child due to the child being preverbal or due to serious capacity concerns, under the Model Rules, the attorney is still able to consult with family members to gather necessary information while taking into consideration the factors outlined above in Comment [5]. This action is in line with the duties of the attorney representing the child and meets the standard of due diligence in representation as demonstrated in other contexts, such as juvenile justice and child welfare.

In this context, however, there may be ethical concerns about consulting parents or legal guardians where there are allegations of abuse, abandonment, neglect, or something similar under state law or other federal laws for protection, such as asylum or trafficking cases. Consulting parents or legal guardians in this case could adversely impact the child’s legal interests or his or her safety or well-being. In this case, the first step is to determine whether there could be an actual conflict, by talking with the child to determine the relationship to the parent, legal guardian, or adult you intend to consult with in the process. Even if there is a conflict or you cannot make a determination, you may still need to consult with the parent to obtain basic information so long as the consultation does not prejudice the child client’s interest. The attorney should seek to obtain information from other adults in the child’s life that would not prejudice the child client and may also need to take other steps, such as seeking the appointment of a child advocate or guardian ad litem. Specific guidance on these issues in the context of seeking asylum before USCIS is described in more detail in the partner practice advisory, “Children in Immigration Proceedings: Child Capacities and Mental Competency in Immigration Law and Policy.”
2. Seeking the Appointment of a Guardian Ad Litem, Conservator, or Child Advocate as Protective Action

Another type of reasonably necessary protective action is seeking the appointment of a guardian ad litem, conservator or guardian.

It is recommended that attorneys seek the appointment of a child advocate from The Young Center for Immigrant Children’s Rights. The Young Center has developed a model for child advocates (a type of guardian ad litem) to advocate for the best interests of individual immigrant children, which includes accompanying children to immigration court, commissioning international home studies in certain cases, and providing best interest recommendations. The Young Center has developed resources and expertise on child capacity and decision-making in the context of immigration proceedings.

In some cases, it may also be possible to seek the appointment of a guardian ad litem in the state court. CAIR Coalition’s “Practice Manual for Pro Bono Attorneys Representing Detainees with Mental Disabilities in the Immigration and Detention Removal System” includes samples and guidance on petitioning for appointment of a guardian. AIC’s “Representing Clients with Mental Competency Issues under M-A-M” also highlights challenges in seeking the appointment of a guardian ad litem in cases with adult respondents.

There are also two cases that have dealt with the procedural safeguards for children in removal proceedings: Johns v. Department of Justice, 624 F.2d 522 (5th Cir. 1980), and Calero v. INS, 957 F.2d 50 (2d Cir. 1992). These two cases demonstrate the different ways in which courts have evaluated the due process rights at stake and arrived at different outcomes and perspectives on the role of the guardian ad litem in a proceeding.

In 1980, in Johns v. Department of Justice, the Fifth Circuit found that a five-year old child, allegedly kidnapped from her natural mother and illegally brought into the United States, must be appointed a guardian ad litem to represent her interests in a removal proceeding. The focus of the court was on the best interests of the child because of the court’s concern that neither the natural mother nor the alleged adoptive couple could adequately represent the child’s interests separate from their own. In Johns, the court did not directly address the capacity or legal competency of the child in the proceeding, but rather was focused on preserving the voice of the child in the proceeding through the appointment of a guardian ad litem.

In 1992, in Calero v. INS, the Second Circuit declined to appoint a guardian ad litem to a 15-year-old child in removal proceedings. The child sought appointment of a guardian ad litem pursuant to Federal Civil Procedure Act Rule 17(c) and argued that a failure to appoint a guardian ad litem would result in a due process violation. FCPA Rule 17(c)(2) provides that the court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action. In Calero, the court stated

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95 CAIR Coalition Mental Disabilities Practice Manual, supra note 6; See also American Immigration Council, supra note 88.
96 Johns v. Department of Justice, 624 F.2d 522 (5th Cir.1980).
97 It should be noted that in the Elian Gonzalez case, the INS took the position that Elian’s father was able to adequately represent Elian’s interests in the removal proceeding and focused on whether Elian’s father was being coerced and whether he was in a position to represent his child’s best interests. The INS concluded that there was no coercion and Elian’s father advocated for Elian’s return to Cuba. See Memorandum from Bo Cooper, General Counsel, to Doris Meissner, Commissioner of the INS (Jan. 3, 2000).
98 Calero v. INS, 957 F.2d 50 (2d Cir. 1992).
that Calero’s complaint failed to address how the appointment of a guardian ad litem would enhance his capability to address issues arising from the deportation proceedings. The only rationale cited by the court was that, being 15, the child was capable of communicating with his attorney about whether he wished to remain in the United States or return to his country of origin (in this case, El Salvador).

In Calero v. INS, the Second Circuit did not address the many other key capacities that are necessary for a child to make such a decision and, as a result, there is substantial room to argue issues of child capacity or mental competency. This is particularly the case since the field of competency to stand trial for juveniles has advanced significantly over the last two decades. Since Calero, the ABA has also developed standards specific to unaccompanied children in removal proceedings. In addition, though the court in Calero stated that the appointment of a guardian ad litem would be costly to the government and that the four unrelated adults who resided in the same home as the child could represent the child’s interests in the proceeding in lieu of a guardian ad litem, the TVPRA of 2008 now explicitly recognizes that unaccompanied children in removal proceedings can have a child advocate appointed. This child advocate would not be an unrelated adult living with the child who has no special child welfare training. Finally, the Calero court did acknowledge that a guardian ad litem can be constitutionally required in isolated, unusual, and egregious circumstances.

3. Best Interests Model as Protective Action

The Model Rules also authorize the attorney to take protective action in the client’s best interests. This opens the pathway for an attorney to present the best interests of the child in the immigration proceedings, particularly if a child advocate or guardian ad litem is not available in the process. This may also require attorneys to change their model of representation from expressed interests to best interests. It is critical to inform the child client and the decision-maker, whether a judge or officer, of this shift in representation and the rationale for the changed model. The Young Center has developed guidance on representing the best interests of children before immigration courts and can be consulted for guidance on this issue. The ABA practice brief, “Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation” and the ABA Standards for Representing Children in Abuse and Neglect Proceedings provide additional guidance on the best interests of children. Finally, Catholic Charities in Los Angeles has also developed expertise in the best interests model for individuals in removal proceedings with mental competency challenges.

4. Seeking a Mental Health or Forensic Assessments as Protective Action

It is also recommended to refer a child for a mental health assessment and a possible forensic assessment as a form of protective action. In some cases, it is possible that a federal facility has already ordered and conducted a mental health assessment, but it is unlikely to have ordered a forensic assessment. In any case, it may be difficult to obtain this record and it may not specifically reference the relevant capacities listed below or may include information irrelevant or harmful to the representation.

99 Ibid.
100 Calero v. INS, 957 F.2d 50 (2d Cir. 1992), at ¶8, stating “Given the routine nature in the instant complaint, we need not address whether the appointment of such a guardian may be constitutionally required in isolated, unusual and egregious circumstances.”
101 Interview with Maria Woltjen and Elizabeth Frankel, The Young Center (Mar. 24, 2014) (notes on file with author).
In the context of mental health assessments, it is very important to distinguish between mental health assessments that are focused on identifying cognitive disabilities, mental health problems, or child developmental considerations, and forensic psychological assessments that connect these factors to a specific legal competency.

Mental health assessments are often used in the immigration context to explain the impact of persecution or abuse, for example, in support of a child’s legal relief from removal. In contrast, forensic psychological assessments try to accurately translate legal criteria for competency into psychological terms and then translate back into relevant legal criteria for a final determination by a judge.\textsuperscript{103} For example, if the capacity in question is the child’s rational understanding of the nature of the proceeding, then a forensic assessment would evaluate the child’s developmental stage or cognitive disabilities. This assessment could then explain how this impacts the child’s ability to apply the factual knowledge he or she has to his or her actual case-related situation without distortion or irrationality, or to testify on his or her own behalf in an adversarial setting in immigration court.

In response to the need for forensic assessments in the legal context, mental health experts have worked towards developing standardized methods.\textsuperscript{104} The assessment process, however, is resource intensive and requires assessing an individual child’s competence with respect to a particular set of abilities, in light of the specific characteristics of the child and the circumstances of the child’s case.\textsuperscript{105} Forensic assessments view capacity along a spectrum and it is possible to have capacities to function in certain ways and not in others.\textsuperscript{106} In the juvenile justice context, Dr. Grisso has developed the Juvenile Adjudicative Competence Interview (JACI), the most widely-used forensic psychological assessment focused on competency of the child to stand trial in an adult system or adjudication in a delinquency hearing.\textsuperscript{107} The JACI and various guidelines on using it provide useful guidance on what to ask in forensic psychological assessments.

### Guidance on Specific Capacities to Evaluate in Forensic Psychological Assessments

As noted, there are no specific forensic assessment instruments in the immigration context, but below is a list of potential capacities that can be evaluated.\textsuperscript{108}

- Child’s ability to appraise possible outcomes and consequences of possible outcomes.
- Child’s understanding of the legal process including:
  - ability to understand the roles of the participants and other actors in the proceeding (e.g., the judge, the immigration officer, the government trial attorney, the child’s attorney, the advocate for child protection, and witnesses);
  - ability to understand the process and potential consequences of deportation or voluntary removal, or asserting an asylum claim; and

\textsuperscript{103} Grisso, Evaluating Competencies: Forensic Assessments and Instruments, at 42.
\textsuperscript{104} See id. at 43
\textsuperscript{106} Loue, Sana, Issues of Capacity in the Context of Immigration Law, Part I: Evaluation and Ethics, 09-7 Immigration Briefings 1, supra note 6, at 3.
\textsuperscript{107} Grisso, supra note 28, Appendix C.
- ability to waive a claim like asylum, and ability to grasp the stages and sequence of the immigration process.

✓ Child’s ability to assist his or her attorney in support of his or her claim including:
  - ability to adequately trust and work collaboratively with his or her attorney;
  - ability to present to his or her attorney a reasonably coherent description of the facts relevant to the case;
  - ability to reason about available options and to weigh the potential consequences of each; and
  - ability to reasonably assist his or her attorney in challenging government witnesses and monitoring hearing events.

✓ Child’s ability to participate in the hearing including consideration of:
  - ability to testify coherently
  - ability to control his or her behavior during the proceedings
  - ability to manage the stress of a hearing.

✓ Child’s intellectual, social, and emotional developmental factors, recognizing adolescents generally lag behind adults on measures such as risk-taking and future perspective.

In evaluating these capacities, it is important to keep in mind that each one should be carefully and thoughtfully addressed because raising incompetency issues can jeopardize the child’s credibility as a witness.\textsuperscript{109} Having a forensic psychologist assess the child’s competency to be a witness and any special challenges the child may have during testimony before court can help mitigate some of this concern. In these types of forensic assessments, children are usually given ground rules for the assessment, such as whether they understand that they can say, “I do not know,” and that repetition of questions does not mean that they did not answer “correctly.” Additionally, children are given neutral questions to assess their cognitive abilities. After the assessment, a forensic psychologist may be able to explain, for example, whether the child has the capacity to remember, to report memories, to communicate so as to be understood, to know the difference between truth and untruth, to recognize the moral obligation to tell the truth, to differentiate between fact and fantasy, and to reliably maintain these capacities (if present) under the pressure of courtroom circumstances. This type of “ability to testify” evaluation is used often in the child welfare system when children may need to testify in abuse and neglect proceedings.

A forensic assessment can then be used to negotiate stipulations with the trial attorneys prior to the child’s testimony, or in the case where testimony is being taken, to explain discrepancies in the record due to memory or other issues highlighted in the forensic assessment. In the absence of stipulations, the assessment can also be used to gauge what depth of testimony and responsiveness is reasonable to expect from this particular child (e.g., this may help explain gaps in testimony, lack of detail, etc.).

As noted, there are no specific forensic assessment instruments in the immigration context, so it will be necessary to work with the psychologist or psychiatrist, perhaps in consultation with the American Academy of Forensic Psychology or the American Psychology-Law Society, to determine what legal competencies need to be

tested for. Additionally, the ABA has guidance on mental health assessments for young children in “ABA Child Law Practice: Mental Health Assessments for Infants and Toddlers” (November 2005), which is available on their website.

D. Children Appearing Pro Se

In cases where children are appearing pro se without any attorney, including attorneys with limited appearance or friends of the court, the responsibility then falls upon the immigration judge or ICE Chief Counsel to ensure the child has capacity and that there are no mental competency concerns. This practice advisory, which is focused on practitioners representing immigrant children, does not seek to provide any specific recommendations to adjudicators and other stakeholders in the system with respect to capacity or competency determinations.

If a child is appearing pro se with an attorney present only as a friend of the court and, as a result of the child demonstrating issues of impaired or diminished capacity or mental competency concerns, the immigration judge asks the attorney to step in to assist the court, then the attorney should consider him or herself bound by the ethical obligations in their state of practice on representing clients with diminished capacity. In this situation, it is recommended that the attorney request that the court give him or her a continuance to conduct an inquiry into the child’s capacities and undertake any protective action necessary.

It is also important to note that the presence of an adult with the child, including an attorney, does not make the child competent. In the juvenile justice context, juveniles must possess competence to stand trial autonomously and an incompetent juvenile defendant cannot be made legally competent by virtue of assistance from an adult. Similarly, in the immigration context, it can be argued that a child in removal proceedings cannot be made mentally competent or capable of making a decision simply by the presence of an attorney, friend of the court, adult, or parent. While a parent’s statements may inform the court, the statements or decisions made by a parent should not be substituted for the child’s expressed wishes when the child is capable of expressing them.

111 Sheri L. Hill and JoAnne Solchany, ABA Child Law Practice: Mental Health Assessments for Infants and Toddlers, (Nov. 2005).
112 Kruh, supra note 12, at 29.
RECOMMENDED BEST PRACTICES

- Identify the relevant ethical guidelines applicable to attorneys, legal assistants, or accredited representatives.
- Incorporate questions on consent to representation in the process of explaining to the child his or her rights and responsibilities as a client.
- Determine the types of protective action that would be available in your region of practice when there is a concern that a child client has diminished capacity. These protective actions include:
  - Consulting family members
  - Seeking the appointment of a guardian ad litem or child advocate
  - Shifting to a best interests model of representation
  - Making a referral to mental health and/or forensic mental health assessment
VI. CHILDREN’S CAPACITIES IN COMPARATIVE LEGAL CONTEXTS

The concepts of capacity and mental competency have been explored in other legal contexts for children. Larry Cunningham, Associate Academic Dean and Professor at St. John’s School of Law, has extensive experience in the juvenile justice system and has analyzed policies on capacity in diverse legal settings. Cunningham notes that in law and policy children are sometimes deemed incapable as a matter of law, and in other cases, a decision-maker must make a case-by-case determination of whether a particular child is capable or not. Some of these areas will be explored briefly below for purposes of developing comparative arguments in support of cases in the immigration system, as well as for providing further resources to consult for additional information.

A. Delinquency and Juvenile Justice Systems

1. Competency to Stand Trial

While proceedings in the juvenile justice system are clearly distinct from immigration proceedings, concepts and cases in the juvenile justice system can be instructive for the representation of children in the immigration system.

Mental competency has long been recognized as a fundamental component of justice and fairness within adversarial systems. The earliest version of this concept focused on the capacity of the accused person to stand trial. This concept has evolved into a more complete adjudicative competency doctrine that covers a broad range of legal competencies in the criminal process. In the landmark 1960 Dusky case involving an adult defendant, the U.S. Supreme Court found that the Fourteenth Amendment due process clause of the U.S. Constitution requires procedural fairness. The Dusky test set forth by the U.S. Supreme Court evolved in a later case, Drope, to a basic four-fold test for competence to stand trial, and all states have since enacted a variant of Dusky. This concept was extended into the juvenile justice system in the 1960s, even though the Supreme Court has not specified whether competency to stand trial should be extended to juvenile court. The extension of due process rights recognized that the juvenile justice system had shifted from rehabilitative to retributive and punishment-oriented. In Kent, the U.S. Supreme Court held that a juvenile must be afforded due process rights, specifically that a waiver of jurisdiction from a juvenile court to a district court must be voluntary and knowing. Subsequently, in Gault, the Supreme Court required written notice of the charges, the right to be represented by counsel, the right to avoid self-incrimination, and the right to confront and cross-
examine witnesses.\textsuperscript{122} Over time, juvenile public defenders have increasingly raised the question of competence to stand trial, and legislatures and courts have also responded by explicitly recognizing competence to stand trial as a requirement for juvenile delinquency adjudications.\textsuperscript{123} There is disagreement over application of the standard, but courts and legislatures have agreed that the standard set forth in \textit{Dusky} is appropriate for deciding competence to stand trial in juvenile court proceedings.\textsuperscript{124}

Grisso provides an excellent conceptual framework for connecting four specific relevant capacities – understanding, appreciation, assisting, and decision-making – to particular legal competencies in the delinquency context.\textsuperscript{125}

<table>
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<th>CAPACITY</th>
<th>DESCRIPTION</th>
<th>LEGAL COMPETENCIES AT ISSUE</th>
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| Understanding    | Factual Understanding of the Proceedings          | • Factly understand basic roles of courtroom players, especially the role of attorney as zealous advocate  
• Factually understand the specific charges, penalties, pleas, collateral consequences of the proceeding, and rights in the proceeding. |
| Appreciation     | Rational Understanding or Appreciation of Proceedings | • Abstraction abilities to manipulate what is factually understood (i.e., that the child is in an adversarial process and has awareness of his or her personal role in the outcome of the proceedings)  
• Contemplate the implications and significance of what is rationally understood  
• Apply that knowledge in actual case-related situations without distortion or irrationality  
• Younger children and children with limited cognitive abilities may have distorted beliefs rooted in concrete thinking, incomplete understanding of the process, limited temporal perspective that impairs the ability to appropriately consider and apply information – including overgeneralizations, undergeneralizations, confusion, immature presumptions, and erroneous beliefs.\textsuperscript{126} |
| Assisting        | Ability to consult and assist defense counsel     | • Capacity to communicate with counsel, both receptively and expressively, about matters relevant to defense in a way that counsel can understand  
• Identify evidence and witnesses, follow and comprehend testimony, provide testimony with relevance, coherence, and independence of judgment |

\textsuperscript{122} \textit{In re Gault}, 387 U.S. 1 (1967); Kruh, \textit{supra} note 12, at 7.
\textsuperscript{123} Kruh, \textit{supra} note 12, at 8-9.
\textsuperscript{124} Kruh, \textit{supra} note 12, at 21.
\textsuperscript{125} Grisso, \textit{supra} note 102, at 2; Kruh, \textit{supra} note 12, at 38-44.
\textsuperscript{126} Kruh, \textit{supra} note 12, at 41.
<table>
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<th>Decision-Making</th>
<th>Decisional capacity</th>
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<td>• Some cognitively limited defendants or younger children may believe their role in court is to show up and behave, and may have limited memory, attention, tracking, processing, or rapport development with strangers.</td>
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<td></td>
<td>• Complex decision-making contexts require the child to be able to act autonomously, self-interested, and have rational expectations so they are not simply capitulating to the attorney or any other proxy decision-makers</td>
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<td>• Abstraction abilities are required for imagining alternative courses of action, thinking of potential consequences of these hypothetical actions, estimating the probability of their occurrence, weighing the desirability of the consequences based on one’s own preferences, and engaging in comparative deliberation about the alternatives and consequences.</td>
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Procedurally, defense counsel, prosecutors, or the judge can usually raise the issue of competency at any time during the course of the proceedings. Once it is raised in the proceeding, it then becomes necessary to conduct a competency hearing and the proceedings are halted until there is a legal determination and a decision on the outcome of competency. If there is a finding of lack of competency to stand trial, then there are different possibilities across jurisdictions: (1) the charges can be dismissed and the juvenile is released, (2) the juvenile is released to the community for out-patient services, depending upon the severity of the mental condition and the nature of the charge, (3) the juvenile may be placed in a mental institution, hospital, or similar facility until competency is restored or remediated, (4) the juvenile may continue to be detained and receive mental health services at the place of detention, or (5) the child can be appointed a guardian ad litem. In certain cases, juvenile courts have remanded these cases to child welfare authorities to provide residential services or special court monitoring. This area of law could be useful to immigration practitioners in formulating competency to stand trial arguments before the immigration court.

2. **Miranda Rights and the Interrogation of Children**

After *Dusky*, in 1966, the U.S. Supreme Court held in the *Miranda* case in the context of an adult defendant that statements made during a custodial interrogation are only admissible at trial if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning, and of the right against self-incrimination prior to questioning by police. The now-famous *Miranda* warning must contain language “that he or she has the right to remain silent, and that anything the person says will be used against

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127 Katner, *supra* note 10, at 303-08.  
129 Kruh, *supra* note 12, at 32.  
that person in court; the person must be clearly informed that he or she has the right to consult with an attorney and to have that attorney present during questioning, and that, if he or she is indigent, an attorney will be provided at no cost to represent her or him.” The standard for the waiver of rights is “knowing, intelligent and voluntary.”

Although the Supreme Court has not yet mandated any special procedures for children, some states have now required the presence of a parent or interested adult at a child’s interrogation. The application of the “totality of the circumstances” to analyze the Miranda standard waiver generally includes the “characteristics of the offender, such as age, IQ, prior contacts with law enforcement, circumstances surrounding the interrogation, such as location, methods, and lengths of interrogation.” With respect to the “knowing, intelligent and voluntary” standard, mental health scholars have questioned whether some juveniles possess the cognitive level, maturity, and judgment necessary to exercise the Miranda rights. Psychological research indicates that younger and mid-adolescent youths are not equal to adults in the interrogation room in that they do not have the same capacities to make rational decisions about rights and to appreciate the consequences of relinquishing them. Psychological research suggests that adolescents have difficulty grasping the basic concept of a right as an absolute entitlement that they can exercise without adverse consequences. They are more likely than adults to conceive of a right as something that authorities allow them to do, but which authorities may also unilaterally retract or withhold. Additionally, perception of time indicates that children often live in the present without much consideration for the long-term consequences of their actions and this present-time sense can lead a child to waive rights to an attorney or falsely confess in order to be released from custody and go home. Dr. Grisso provides extensive guidance on Miranda waiver evaluations for juveniles that could help inform whether children in the immigration context have waived similar rights.  

3. Doctrine of Doli Incapax: The Minor Defense

The doctrine of doli incapax literally means “incapable of committing a crime” and reflects the principle that children under a certain age do not understand that an action that they take is illegal and may not be able to distinguish between right and wrong. This is commonly referred to as the infancy or minor defense. This arises out of the common law concept that criminal culpability assumes the capacity to know wrongfulness and, therefore, in order to prove someone has committed a crime, one must prove that the person had the specific mens rea (or “guilty mind”) required to commit a crime. Even under common law, the infancy defense reflected an unwillingness of the criminal justice system to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts. This was also linked to the common sense view that punishment cannot deter an individual from commission of future wrongful acts where he is in fact
incapable of knowing right from wrong. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court invalidated the imposition of the death penalty on offenders who were younger than 18 when their crimes were committed. The Court found that the execution of minors violated the prohibition of "cruel and unusual punishment" found in the Eighth Amendment and applied to the states through the incorporation doctrine of the Fourteenth Amendment. The Court cited three areas of difference between children and adults in arriving at this conclusion: (1) juveniles’ lack of maturity and underdeveloped sense of responsibility results in impetuous and ill-considered actions and decisions, (2) juveniles’ increased vulnerability and susceptibility to negative influences (i.e., peer pressure) makes them more worthy of forgiveness for falling prey to those influences, and (3) because juveniles’ characters are not as well-formed as adults and their personality traits are more transitory and less fixed, their committing of heinous crimes is not evidence of irretrievably depraved characters.

**B. Dependency System**

The dependency system grapples with the important issues of a child’s capacity to make custody and placement decisions, to make decisions about themselves and their property, and to testify as victims and witnesses. In many important respects, challenges in the child protection system regarding competency are similar to those concerns raised in immigration contexts. For instance, a child alleges abuse by her stepfather, yet in the course of the dependency proceeding, expresses her interest to her attorney or the family court judge that she wishes to return to the home where her stepfather still resides. Attorneys in the child dependency system struggle with these cases just as much as advocates for immigrant children struggle with children who express a desire to return home after informing their attorney of abuse or persecution in their country of origin.

Although there are significant differences between the immigration and dependency systems, such as appointment of attorneys and guardians *ad litem*, it is instructive to consider how the dependency system has dealt with concerns around capacity. There are two areas of competency that commonly arise in dependency proceedings: a child’s capacity to express preferences in the context of the proceeding and a child’s testimony as a victim or witness in the proceeding.

1. **Children’s Expressed Interests**

In various types of dependency proceedings, a child’s right to state a preference has been recognized and the attorney’s role in presenting this position, however unattainable, has been the preferred representational position. It is then the duty of the judges to weigh this preference in the context of the case. Judges give varying weight to stated preferences of children. Most often age is most determinative, along with the child’s demeanor, significant accomplishments, intelligence, experience, and the judge’s own intuition.

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142 See *id.* at 512; *Roper v. Simmons*, 543 U.S. 551 (2005); See also *Graham v. Florida*, 560 U.S. 48 (2010) finding that sentences of life imprisonment without parole may not be imposed for non-homicide offenses committed under the age of 18 because doing so would violate the U.S. Constitution’s prohibition of cruel and unusual punishment.

143 McClurg, *supra* note 63.

2. Child Victims and Witnesses

Child victims and witnesses testify often during child protective proceedings. Clinicians, judges, and law enforcement officers are educated about child development and psychology, and how to avoid undue influence, and suggestive or leading questions. Additionally, in every state in the U.S., there are case law and statutes regarding the basic requirements for the competency of child witnesses, focusing on the age of the child and the child’s understanding of the difference between the truth and a lie. In addition, tests for competency usually evaluate: (1) an understanding of the obligation to speak the truth on the witness stand, (2) the mental capacity at the time of the occurrence concerning which he or she is to testify, (3) a memory sufficient to retain an independent recollection of the occurrence, (4) the capacity to express in words his or her memory of the occurrence, and (5) the capacity to understand simple questions about the occurrence. In addition to these factors, a trial court may also consider whether there is any possible "taint" affecting the competency of the child witness. Some states hold that children under ages ten, twelve or fourteen, are presumptively incompetent to testify, unless a trial judge finds otherwise. Other jurisdictions have rejected presumptive ages for testimonial competency and have applied more flexible, case-by-case analyses. Other jurisdictions also establish a requirement for the child to indicate that he or she understands the difference between the truth and a lie and to agree to tell the truth while testifying. Still other jurisdictions will allow children’s out-of-court statements in the dependency context even if the child is not legally competent to testify. As noted in Section V above, in seeking a mental health assessment referral, it is possible to find psychologists with expertise in evaluating a child’s ability to testify in the child welfare system as well as in the context of an immigration proceeding.

C. Consent to Medical Treatment

Generally, minors are deemed incapable of giving informed consent for most medical procedures. However, exceptions have emerged from this general doctrine in cases of abortion rights and statutes waiving parental consent for certain types of treatment. For instance, one major exception is that adolescents can consent to receive treatment for sexually-transmitted diseases, substance abuse, mental health disorders, or to obtain contraceptives or pregnancy tests. However, these exceptions are statutory and not necessarily based on a concept of capacity, but rather as a matter of public health so that children can obtain access to treatment.
D. International Law and the U.N. Convention on the Rights of the Child

In the context of international law, the United Nations Convention on the Rights of the Child (CRC) sets forth two key articles, Articles 5 and 12, which respectively present the concepts of evolving capacities and child participation. Article 5 provides that parties to the CRC shall respect the responsibilities, rights, and duties of parents, members of extended family or community as provided by local custom, legal guardians, or other persons legally responsible for the child to provide, in a manner consistent with the evolving capacities of the child, appropriate directions and guidance in the exercise by the child of the rights enshrined in the CRC. This concept of evolving capacities set forth in Article 5 is viewed as being central to the CRC’s balance of recognizing children as active agents while also preserving their entitlement to protection in accordance with their youth. In particular, in viewing children as active agents, Article 12 of the CRC further provides that parties to the CRC shall assure to the child who is capable of forming his or her own views, the right to express those views freely in all matters affecting him or herself, and that the views of the child shall be given due weight in accordance with the age and maturity of the child. This provision explicitly recognizes the child’s autonomy and right to be an active agent in participating in decisions affecting his or her life. These international law provisions provide further support for action to be taken to protect and give voice to the child in any proceeding affecting them.

155 Lansdown, supra note 3, at 3-7.
157 Lansdown, supra note 3, at 3.
159 Lansdown, supra note 3, at 4.
VII. CONCLUSION

While there are definite challenges in working with children’s capacities, this practice advisory seeks to provide helpful and practical information, tools, techniques, and best practices. This practice advisory also provides a possible framework to develop a model for addressing child capacities in both an individual practitioner’s and legal service organization’s representation of immigrant children. This framework includes integrating training and education of attorneys and all staff that interact with immigrant children on the key topics relevant to child capacity, defining ethical obligations to the child client, and having toolkits prepared for the identification of and information-gathering on child capacity. With collaborative effort, children’s evolving capacities will become part of our daily practice with immigrant children and can help us all to advance the protection of children’s rights in the immigration context.
VIII. APPENDICES
APPENDIX A:

(1996 Fordham Law Review)
Fordham Law Review
March, 1996

Proceedings of the Conference on Ethical Issues in the Legal Representation of Children

*1339 REPORT OF THE WORKING GROUP ON DETERMINING THE CHILD'S CAPACITY TO MAKE DECISIONS

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Introduction

Peter Margulies's article, The Lawyer As Caregiver: Child Client's Competence in Context, and Discussion Leader James Bell's outline of issues, which was distributed prior to the Conference, guided this Working Group's discussion. Group members included public interest lawyers, family law practitioners, a law professor, a forensic psychiatrist, a clinical social worker, and representatives from two American Bar Associations programs.

The Working Group [FN1] sought to identify a set of factors to be considered by lawyers when determining a child client's capacity. Also, the Working Group agreed that once the lawyer determined that a child lacked capacity, then the lawyer should be guided by the findings of the Working Group on the Allocation of Decision Making.

The discussion below outlines the Working Group's recommendations and the corresponding commentary addresses the reasoning involved in establishing the recommendations.

PREAMBLE

As with adults, a lawyer has an ethical obligation to advocate the position of a child unless independent evidence exists that the child is unable to express a reasoned choice about issues that are relevant to the particular purpose for which the lawyer is representing the child. Where such evidence exists, the lawyer must engage in additional fact-finding to determine whether the child has, or may develop, the capacity to direct the lawyer's action in the particular context.

Commentary

The Working Group thought it important to identify a set of principles that would guide lawyers working with children regarding the determination of their clients' capacity to make decisions. The Preamble sets out these principles.

The Group agreed that as a starting point of a capacity analysis, the lawyer must presume the child client's capacity. Otherwise, any guidelines risk becoming a test that child clients must pass before they can obtain the same form of representation that is available to adults.

*1340 The question of capacity should not arise unless the lawyer has some reason to believe that the client does not have capacity. The ability of the child to express a preference constitutes a threshold requirement for determining capacity. Once that threshold is passed, the child is presumed to have capacity.

I. Using Age to Determine Child Capacity

A. Neither chronological age by itself nor legal condition is determinative of capacity.

B. A lawyer representing a child should decide whether the child client has the capacity to express a position. The lawyer also has a responsibility to recognize, facilitate, and maximize the child's capacity.

C. In making the decision regarding capacity, the lawyer should seek guidance from appropriate professionals and others including family members, probation services, school officials, clergy, and other concerned parties.

D. The weight given to the factors in the determination of capacity may vary depending on the issue and on the nature of the proceeding.

Commentary

The Group had lengthy discussions about the use of age to determine capacity. The Working Group rejected an absolutist approach to capacity at a certain age because it did not take into account individual factors and the consequences of any given decision for which capacity was being determined.

Two points of view surfaced during deliberations. One point of view held that age is one factor to be considered, if for no other reason than to provide an orientation point for evaluating capacity. Similarly, this viewpoint expressed a concern that the lack of any age cut-off would lead to the ridiculous result of considering a one-month-old child to have capacity.

The alternative point of view rejected those positions as arbitrary and limiting, and asserted that chronological age as a factor offered a poor proxy for maturity or developmental age. The Working Group found it impossible to imagine a setting in which a ten-year-old child and a twelve-year-old child with the same background, emotional maturity, developmental ability, and education should be treated differently when determining their capacity simply because one was two years older.

Ultimately the Working Group agreed that such distinctions could be avoided by the use of other more client-specific considerations that would rebut such a presumption. The contextual approach for determining capacity described in Peter Margulies's article was compelling *1341 because it recognized the fluidity of the determination. A client who has the capacity to make a decision with short-term consequences and minor risks might not have the capacity to make a more significant, long-term, life-threatening decision.

Working Group members also worried that, if the legal community did not consider age a powerful indicator of capacity, adolescents would lose some of the empowerment they have gained over the last few years. The Working Group does not intend the decision to reject age as a specific indicator of capacity to make it more difficult for adolescents or older children to be found to have capacity.

II. Providing Appropriate Training for Lawyers Who Represent Children

Commentary

Appropriate training will be necessary to maximize a lawyer's ability to use these guidelines. Such training would
include child development, interviewing techniques, psychology, and sociology. Ideally, lawyers and mental health professionals would jointly offer training for lawyers who represent children.

The guidelines may encourage lawyers to solicit additional information and in some cases a lawyer may wish to seek the assistance of a mental health professional or social worker in determining the abilities of the child as they relate to capacity. Lawyers must recognize, however, that mental health professionals should not determine capacity because this term constitutes a legal construct and involves making a legal determination.

Nonetheless, as the dialogue concerning capacity of child clients progresses, the legal community must continue to include other disciplines, as much for their insight regarding the art and science of lawyering as for their expertise in their own areas.

III. Fact-Finding Phase

Commentary on Fact-Finding Phase

When capacity becomes an issue, the lawyer should consider the following factors for assessing capacity. Much of this analysis should regularly occur in the normal lawyering process. Most importantly, the factors provided here should not become a test that a client must pass.

*1342 The lawyer should use these factors as a guide when making a decision about capacity. The Working Group intends these factors to help a lawyer evaluate his or her own prejudices and misconceptions about a client as well as to illuminate the client's situation and how that context may effect the client's decision-making ability. The second part of our recommendations addresses how the determination of capacity should be made.

A. Developmental Stage of the Child Client

1. Cognitive Ability

2. Socialization

3. Emotional Growth

Commentary

These factors may serve a function similar to the use of chronological age, yet are superior because they evaluate the child's maturity and development in a more accurate and in depth manner than a simple chronological designation.

B. Medical Status (Present)

1. Mental

2. Physical

Commentary

The mental and physical health of any client obviously comprises an important factor in determining capacity. The existence of drug abuse, alcoholism, or organic brain disease can affect decision-making ability. Similarly, nu-
trition, hyperactivity, attention deficit disorder, or a physical disability may affect a child's perception of the consequences of a specific decision and must be considered in determining the ability of the child client to make a specific decision.

That is not to say that a physically disabled client does not possess decision-making capacity, or even that she must prove her capacity. The physical and mental status of these clients simply presents one factor of which a lawyer should be aware when independent evidence of a child's inability to express a reasoned choice has caused the lawyer to question the capacity of a child client.

Knowledge of a physical or mental disability may help a lawyer to understand the reasoning of a child client, or may alert the lawyer to an additional need to facilitate the child client's communication. This presents an instance when a lawyer may actually help the child develop capacity by accommodating the child's specific needs.

C. Personal History

1. Life Experience (Individual Experience)

2. Family Background

*1343 3. Medical History

Commentary

The factors in this section allow a lawyer to consider the extent to which a child's background affects capacity. A child who comes from a background where families do not expect children to express preferences may require additional communication with the lawyer before the lawyer can determine whether the child has a reasoned preference. Certain factors in a child's medical history may complicate the ability to express such a preference, again suggesting that the lawyer must very carefully consider all available means of establishing communication.

IV. Determination Phase

Commentary

The Determination Phase comprises the second level of analysis to be conducted after a lawyer has become familiar with the child client by considering the factors set forth in the Fact-Finding Phase. A lawyer approaching this phase must exercise caution to separate any possible disagreement the lawyer may have with the child's decision from a determination that the child lacks capacity because of the decision made by the child.

Admittedly, the lawyer may find this an extremely difficult distinction to make. Because of the nearly irresistible instinct to use the substance of the decision as a test of the capacity of the client, the Working Group chose to focus the Determination Phase of the capacity inquiry on the decision-making process. An essential component of this phase requires the lawyer to separate out the evaluation of the client's ability to make a decision from the lawyer's evaluation of the decision itself. In saying this, the Working Group recognizes that times will exist when a client's decision is an indication that the client lacks capacity. Nonetheless, that evaluation must be based on the factors set forth and not simply on a disagreement with the client's preference.

Lawyers must exercise extreme caution to ensure they do not deny the child client a forum for having her voice heard through representation. The ultimate decision about the wisdom of a choice will be made by the judge. The lawyer considering capacity must be careful not to use the capacity determination to usurp the decision-making
function of the judge.

A. Expression of a Relevant Position

1. Ability to Communicate with Lawyer

2. Ability to Articulate Reasons

*1344 Commentary

These factors constitute the threshold for determining if a client possesses capacity. A client who cannot express a relevant preference cannot be said to be making a reasoned choice. This factor relates to the presumption of capacity contained in the Preamble for extremely young children. The factor is more fully developed when the lawyer considers whether the child can articulate reasons. The mere possession of an unexplained preference is not enough.

Whether the lawyer considers the articulated reasons for the preference reasonable must be determined in light of the factors set forth in the Fact-Finding Phase. What the lawyer may consider to be a perfectly reasonable preference for a child in one social circumstance may be completely unreasonable and unsupported for a child from a different setting. The trap the lawyer must avoid is evaluating the client's decision based on what would be the lawyer's preference in the same situation.

Instead, the lawyer must determine whether the child has shown the ability to express a relevant position and to articulate a reason to support that position, in light of that child's background and experiences. The lawyer may feel free to point out the ramifications of the child's decision, just as she would with an adult client who was making an imprudent decision. But the lawyer should not decide that the client lacks capacity simply because that lawyer feels the client is exercising poor judgement.

B. Individual Decision-Making Process

1. Influence - Coercion - Exploitation

2. Conformity

3. Variability and Consistency

Commentary

The question of how a child arrived at a decision raises a vital question for the lawyer considering capacity and goes to the heart of whether a child has capacity. Just as an adult's capacity to make a decision may be affected by undue influence and pressure from a variety of sources, so too may a child's. A lawyer who is considering capacity must determine whether the expressed preference of the child client stems from familial or societal pressures or if it reflects a reasoned decision.

A lawyer should consider whether this decision conforms with previous decisions and choices the child has made. A child who has always excelled in school and consistently sought additional educational opportunities may be experiencing some coercion if she now wishes to drop out of school and ride the rails with mom. Whether the child changes her mind frequently or is consistent in the expression of a *1345 preference provides another important indicator of the independence of a decision.
C. Ability To Understand Consequences

1. Risk of Harm

2. Finality of Decision

Commentary

These factors provide the key to determining which decisions a client is capable of making. Indeed, a child may demonstrate capacity to make one decision yet lack the capacity to make another. The lawyer should intensify her level of scrutiny of the child's decision as the risk of harm and the duration of the decision's effect on the child's life increase.

The Working Group was unable to define a standard for when a decision would bring about consequence so extreme that no child would have capacity. Indeed, occasions will arise when a child can articulate well-reasoned bases for a rational decision that will result in death. Thus, the Working Group was unwilling to endorse a standard that would deny capacity to children who make life-threatening choices. Instead, the lawyer should focus on the child's ability to articulate a well-reasoned, independent choice, with a true understanding of the consequences involved. This process presents an opportunity for the lawyer actually to help the child develop capacity by making sure that the child has actually thought through the long-range consequences of the decision.

Closing Comments

The Working Group emphasizes that it does not intend these guidelines to create a burdensome or cumbersome process for lawyers representing children. In the average case, the Fact-Finding Phase will take place in the routine course of representing the child, and the Determination Phase will not occur unless independent evidence raises a question concerning a child's capacity.


64 Fordham L. Rev. 1339

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APPENDIX B:
Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years after Fordham (2006)
**RECOMMENDATIONS OF THE UNLV CONFERENCE ON REPRESENTING CHILDREN IN FAMILIES: CHILD ADVOCACY AND JUSTICE TEN YEARS AFTER FORDHAM**

**INTRODUCTION**

During the nearly half century that legal norms have mandated appointment of counsel or other representation for children in legal proceedings, the children’s attorneys’ community has come to the conclusion that ethical legal representation of children is synonymous with allowing the child to direct representation. In the meantime, global norms have also recognized that children should participate and have a voice in legal proceedings that affect their legal interests. As children have come to the fore in this way, their attorneys have begun to view them as individuals who have much to say and whose wishes and needs are deeply connected to their families, communities and the social and material conditions that affect them all.

Embracing these norms and insights, children’s attorneys have become more mindful of the importance of discerning and presenting children’s voice and the limitations of viewing children in single dimensions. It is not surprising then that children’s attorneys have increasingly come to include professionals from other disciplines to assist in identifying and achieving justice for children. Children’s attorneys also recognize that children’s voice and the solution to many of their legal problems are grounded in family and community. But these attorneys struggle with whether and how to relate to families in light of legal barriers between children and parents involved in court proceedings and related ethical barriers between attorneys and non-clients. Attorneys further strive to bridge the gaps in basic racial, cultural and social cornerstones between them and their clients.

Moreover, children’s attorneys can find themselves, and the legal and related social systems that serve or govern children, inattentive to the complexity and individuality of the children and families that come before them. The result is that these often well-meaning professionals and systems sometimes substitute their own interests or ideas about what children need for the wisdom of the children and their families, and provide solutions that are neither welcome nor responsive to the need. In these instances, professionals and systems fail to appreciate the strengths and expertise of children and families regarding what they want, what they need, and how they define the problem. Moreover, these failures fall disproportionately and most punitively on African American and Latino children and families. Children’s attorneys can and often do confront these inequities and challenge these systems to provide and reconceive justice for children.

These Recommendations of the UNLV Conference on Representing Children in Families ("UNLV Recommendations") embrace and address the complexities and contradictions of seeking justice for children in legal and policy settings. Affirming and building upon the Recommendations of the Fordham Children’s Conference ("Fordham Recommendations"),¹ the UNLV Recommendations aim to chart a course for children’s attorneys to discern and amplify children’s voices in all of their complexity and to

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confront the contradictions of client-directed, multi-disciplinary, holistic, and contextual representation: to cabin
themselves to their role as legal experts and to consult children, their families and others with relevant knowledge and
expertise regarding the social and material interests of their child clients; and, with the client’s permission, not to confine
legal assessment or services to the particular legal issue for which the attorney was retained or appointed. The working
group reports that formed the basis for many of the recommendations provide additional context and discussion for these
principles.\textsuperscript{2}

\textbf{I. RECOMMENDATIONS REGARDING THE ROLE OF THE CHILD, FAMILY AND
COMMUNITY IN DEFINING AND ENHANCING THE CHILD’S VOICE}

Representing children is rewarding and challenging because children are becoming themselves and because they \textit{are}
themselves: strong and resilient, yet vulnerable due to their immaturity. Effective representation of children requires a
attorneys to simultaneously see each client through multiple lenses. While the individual child is the client and the
person, therefore, to whom the attorney owes the duties of loyalty, competence and confidentiality, the individual child is
also a member of a family and community, a son or daughter, a sibling, a student. Yet the attorney-client relationship is
individualistic so accounting for these deep connections and the lessons they bring to bear is both demanding and crucial
to the pursuit of justice for children. Those who represent children thus need special skills and strategies that account for
children’s unique developmental states and their identification with and situation in families and communities. Distorting
or ignoring either aspect of children’s lives results in compromised representation.

The recommendations in this section are intended to assist attorneys to maximize the child’s participation in
proceedings involving the child’s interests through deeply grounded representation. For children’s attorneys in both large
and small offices, competent and respectful representation of children requires an approach to practice that engages
families, their communities, and professionals from other disciplines, all of whom assist the attorney to understand the
child and the child’s needs pertinent to representation and help the attorney see the child in, and as part of, his or her
family and community. At the same time, children’s attorneys must be mindful of overreaching by acting without the
client’s consent and by overly involving him or herself and other outsiders into the child’s life. The recommendations in
this section call on children’s attorneys to recognize and embrace these contradictions that arise out of viewing the child
in all his or her individuality but not as an isolated individual.

\textbf{A. The Child’s Attorney’s Approach: Engaging Family and Community}

\textbf{1. Statement of Principle:}

Effective representation requires attorneys to be self-aware and respectful of the full context in which the client
lives. Contextualized representation is particularly important because there are often vast socioeconomic or racial
gaps between the attorneys and the clients they serve. As a result of these disparities, attorneys may not appreciate
all of the particular legal and social dimensions of the presenting problem that is the initial or primary subject of the
representation; the importance of the child’s

family, race, ethnicity, language, culture, gender, sexuality, schooling, and home; and the child’s developmental status, physical and mental health, and other client-related matters outside the discipline of law.

Moreover, the children’s attorney’s role, ethical obligations, and case load may limit his or her opportunity to see or be engaged with other non-professional adults important to the child. This isolation can inhibit the attorney’s ability to appreciate the child client as a multidimensional being with multiple connections to other adults. As a result attorneys may unwittingly substitute their values and experiences for those of the child. Effective representation therefore requires attorneys to utilize strategies to avoid overstepping their professional role and training.

2. Recommendations for Practice Guidelines:

The following recommendations are a nonexclusive list of guidelines children’s attorneys should follow to ensure the attorney does not over-reach but most fully understands and respects the child, the child’s family and community.

a. Familiarity with Client’s World: Children’s attorneys should, with the client’s consent, be or become familiar with the child’s family, community and culture, and take precautions to not impose the lawyer’s own standards and cultural values.

b. Open Mind: Children’s attorneys should approach each client with an open mind, and avoid making assumptions based on the client’s race, ethnicity, culture, language, nationality, gender, actual or perceived sexual orientation, or gender identity.

c. Awareness of Own Biases: Children’s attorneys should be aware of their biases arising out of their own identities and experiences, and their lack of deep understanding of their clients’ identities and experiences.

d. Ongoing Reflection: Children’s attorneys should habitually reflect upon and assess the extent to which their personal opinions, values, and biases may affect the representation of their child clients.

e. Professional Distance: Children’s attorneys should maintain professional boundaries and guard against over-identifying with clients, taking care not to presume that shared cultural backgrounds between attorney and client mean that their perceptions and experiences are the same or to otherwise disregard the child’s individuality and independence from the attorney.

f. Engagement of Family and Community Members: With the child’s consent, the attorney should seek to identify and engage those with whom the child is connected and who can support the child’s ability to participate in the legal proceedings.

i. When possible, and with the client’s consent, children’s attorneys should engage the entire family, and help the family understand what to expect, and how they can participate in the proceedings;

ii. Children’s attorneys should recognize the importance for most clients to maintain connections to their families and communities, and should work with clients to positively resolve, where possible, family or community conflict with or rejection of the child.

g. Recognition of the Child’s Community: With the client’s consent, the attorney should meet with the child in his or her environment, and talk to people in the client’s school, place of worship, and neighborhood in order to gain a better understanding of the child’s world.

h. Examination of Whether Court-Imposed Conditions are Consistent with Reality, Safety, and Community Norms: The attorney should assess court-imposed conditions on the child and determine whether the conditions can be fairly imposed consistent with the child’s life, taking into account race, ethnicity, culture, gender, sexual orientation and identity, and the norms and social networks of the child’s community.

i. Utilization of Community Resources: Children’s attorneys should explore and utilize, when appropriate, community resources that would more effectively, accessibly, and holistically serve the needs of the child and family.

B. Keeping the Child at the Center of the Proceedings

1. Statement of Principle:

Even when legal proceedings specifically regard children, the child’s age, legal status, and social attributes can mask the child’s individuality, leading to decisions and
processes that marginalize the child’s identities, needs and interests. These risks are particularly prevalent when the legal and administrative actors carry high caseloads. These challenges command children’s attorneys to always engage in advocacy that keeps their individual client’s needs and interests at the center of such proceedings and resists boilerplate and stereotypical responses to child and family problems.

2. Recommendations for Practice Guidelines:

The following recommendations are a non-exclusive list of guidelines for children’s attorneys to keep the child at the center of the proceedings.

a. **Client Participation**: Children’s attorneys should encourage participation of the client, and the family when appropriate, in defining the problem and identifying solutions.

b. **Respectful Services**: Children’s attorneys should advocate for placements and services that are respectful of the client’s race, religion, ethnicity, language, nationality, culture, gender, sexual orientation and gender identity.

c. **Strengths-Based Services**: Children’s attorneys should advocate for strengths-based and individualized services and resources; and reach beyond boilerplate responses and standard resources of the social service agencies to identify culturally-sensitive, appropriate, and easily accessible community-based resources, material assistance and other services the child and family may need.

d. **Individualized Assessment and Treatment**: Children’s attorneys should oppose and challenge stereotypical treatment of child clients, including the following:

   i. Programs and services that reinforce stereotypes based on race, language, gender, or sexual orientation;

   ii. Court and agency assumptions that a child is sexually active based solely on his or her gender, sexual orientation or race;

   iii. Excessive or punitive juvenile court intervention based upon consensual sexual conduct;

   iv. Delinquency charging, adjudication and dispositions of girls of color, based on conduct that is perceived as aggressive or as falling outside of conventional gender norms;

   v. Child welfare client service plans that are generic, do not build upon the family’s strengths, are not tailored to the unique needs of the child and family, and do not contain clear and measurable goals.

e. **Children’s Right to Self-Expression**: Children’s attorneys should advocate for clients’ right to express their identity, principles and opinions.

f. **Destructive Delays**: Children’s attorneys should object to destructive delays in court and administrative proceedings and the provision of benefits, make a record of the harm to the child and family caused by delays, and take further affirmative action as needed to hold parties accountable for their delays.

g. **Feedback on Quality of Representation**: Children’s attorneys should habitually solicit feedback from their clients and the clients’ families regarding the quality of their representation.

C. Promoting the Child’s Participation in Legal Proceedings

1. Statement of Principle:

   An effective working relationship is necessary to engage the child. Such a relationship can be established only if attorneys listen carefully to their clients and explain matters to them in a developmentally appropriate manner, without legal jargon, before, during and after legal proceedings or events. Effective working relationships in which the child directs the legal representation requires attorneys to inform the child regarding the status of the case, consult with the child about goals, and afford the client the opportunity to ask and receive answers to questions.

2. Recommendations for Practice Guidelines:

   The following recommendations are a non-exclusive list of guidelines for children’s attorneys to promote the child’s participation in legal proceedings.

   a. **Participation of the Child**: Children’s attorneys should ensure that their child clients are informed, supported and empowered to be engaged participants in the legal proceedings. Attorneys should ensure that efforts are made to include children in their own proceedings unless the
child chooses not to participate or the court finds that the child’s presence in court would be detrimental the child.

b. **Communication with the Child Client:**
   i. When interviewing a client, particularly for the first time, children’s attorneys should, when developmentally appropriate, reserve at least one hour to get to know the client (e.g., the client’s genealogy, where the client lives, positive stories about the client). Ideally the interview should take place before the attorney appears in court;
   ii. Children’s attorneys should communicate and consult with the client in the course of regular face-to-face contact whenever possible and use other forms of communication, such as telephone calls and writing, as necessary and appropriate;
   iii. Children’s attorneys should utilize verbal and nonverbal methods to communicate that it is safe for the client to discuss sensitive or private matters, and should use language that does not contain implicit assumptions regarding the client’s experiences, beliefs or identity;
   iv. Children’s attorneys should develop the ability to respond appropriately and supportively to client disclosures of past sexual abuse and other trauma.

c. **Honor the Child’s Context:**
   i. Children’s attorneys should be continually aware of the child client’s identity, functional level, any disabilities, the history and nature of any trauma, and the level of maturity of the child’s thinking;
   ii. Because children do not exist in isolation from families, when counseling child clients, lawyers should recognize the role and meaning of family in the lives of their clients, and in understanding the client’s wishes, perspectives and decision-making process;
   iii. Children’s attorneys should listen to the child about the role of race, ethnicity, culture, language, religion, nationality and class in the child’s world and learn what is important to the client as it relates to the client’s race, ethnicity, culture, language, religion, nationality, and class;
   iv. Children’s attorneys should respect their clients’ gender identity, by, for example, using the name and pronoun the client prefers;
   v. Children’s attorneys should be aware of their own discomfort discussing sensitive, personal matters, such as sexual conduct, and develop the ability to discuss these issues in a candid and respectful manner;
   vi. To enhance the attorney’s ability to develop a relationship with the individual client, children’s attorneys should draw upon the teachings of, or experts within, other disciplines such as social work, education, history, health, and mental health to further the attorney’s understanding of items i-v.

D. **Determining the Scope of Representation**

  1. **Statement of Principle:**

     Decisions regarding the scope of representation are client directed, but generally children’s attorneys should provide representation through all aspects of the matter for which the attorney was retained or appointed. When attorneys represent children in context, they learn that the child’s legal (as well as social) interests are complex and interconnected. Thus decisions regarding one legal issue may have negative consequences in areas beyond the particular matter at hand. In this way, the scope of representation is porous and requires the attorney’s and client’s attentiveness and diligence in exploring options.

     It is the attorney’s duty to ensure that the client understands the scope of representation, including but not limited to: what the attorney will do (and what the attorney will not do), the roles and responsibilities of the attorney and client, the attorney-client privilege, and the term and duration of the representation. This obligation is ongoing because the joint understanding of the scope of representation may change over the course of the representation. When competent to do so and with the consent of the client (and when appropriate, the consent of the parent), lawyers should also endeavor to provide legal representation in ancillary matters, either within or beyond Juvenile Court, both during and after the original representation.
2. Recommendations for Practice Guidelines:

The following recommendations are a non-exclusive list of guidelines for children’s attorneys regarding the scope of representation.

a. Clarity Regarding Scope of Representation: Children’s attorneys should explain options regarding the scope of representation, confidentiality, the operation of the attorney-client privilege, and clarify the scope of representation to the client in developmentally and culturally appropriate ways, using writing where appropriate.

b. Identification of the Child’s Legal Needs: Children’s attorneys should identify all the legal needs of the client through all stages of the case, including post-disposition, and ensure that the child receives appropriate, quality representation if the client so directs.
   i. In juvenile justice and child welfare proceedings, children’s attorneys should understand the interconnections to other related substantive areas, such as health, housing, public benefits, education, domestic violence, immigration, and transnational issues;
   ii. Children’s attorneys should understand the cross-over issues and collateral consequences when children are or may be involved in more than one legal system, such as pleas that may subject the child to sex offender registration or other legal decisions that may affect the child’s immigration status.

c. Duration of Representation:
   i. In juvenile justice and child welfare proceedings, the representation should not end before the jurisdiction of the court ends unless the client terminates representation;
   ii. Unless the child objects, in juvenile justice matters representation should extend to preadjudication collateral issues, such as challenging a child’s inclusion in gang and other data bases or inappropriate educational or mental health labels;
   iii. Unless the client objects, post-dispositional representation should include:
      (A) Addressing the conditions and duration of confinement, including the consequences of confinement and available alternatives to confinement;
      (B) Challenging ineffective programs and services;
      (C) Proposing alternative, effective programs and services;
      (D) Addressing educational issues such as enrollment in school, enrollment in the right school, and the right to finish school;
      (E) Identifying and challenging legal barriers to re-entry;
      (F) Participating in development of an appropriate discharge plan and monitoring implementation; and
      (G) Addressing collateral consequences of the primary legal matter on issues regarding expungement, immigration, housing, education, and employment discrimination among others.
   iv. During the course of the representation, counsel should provide appropriate advice, advocacy and other assistance to clients with respect to their transition out of court jurisdiction.

d. Representation in Collateral or Ancillary Matters:
   i. Appointed children’s attorneys should, with the client’s consent, and when appropriate, the consent of the parent, petition the court for appointment and compensation on critical matters ancillary to the representation for which the attorney was appointed;
   ii. Children’s attorneys should, with the client’s consent, engage in age- and developmentally-appropriate representation that includes consideration of the needs of the child that extend beyond the present legal proceedings, such as immigration, education, mental health, health, and other aspects of child well-being, and should ensure that any identified needs are appropriately met. In addition:
      (A) Children’s attorneys should monitor the client’s placement to ensure that the client is not subjected to harassment or discrimination based on age, size, race, ethnicity, culture, language, nationality, religion, gender, sexual orientation or gender identity;
      (B) Children’s attorneys should ensure that they are knowledgeable about their clients’ educational status & needs, and that educational decision-makers, including judges & principals, consider & account for those needs to promote positive outcomes;
   iii. If a child’s attorney is not able to provide representation in an ancillary matter, he should assist the child in obtaining representation in that matter.3 If the child is able to obtain

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3. When possible, a law office representing children may wish to include staff who are competent in such frequently-recurring related issues.
representation in the other matter, counsel in the original matter should consult with that counsel, as appropriate and as the client directs. If the child is unable to obtain counsel in the ancillary matter, the attorney should educate, help empower and mentor the child, and the family when appropriate, to address the ancillary legal matter;

iv. Until the child is released from juvenile court jurisdiction, the child’s attorney should provide continuity of representation either within her own office or with other collaborative legal partners regarding entitlements and legal issues relating to medical services, housing, employment, immigration and education.

**E. Engaging in Multidisciplinary Practice**

1. **Statement of Principle:**

Children’s attorneys often draw on expertise outside of their legal training to provide contextualized representation to children, to better understand their client’s developmental, social and psychological situation, and to help inform their interviewing and counseling of the client. Thus, attorneys represent children in a multidisciplinary fashion that takes into account children’s place in their families and communities as well as the full range of systems in which the children are enmeshed. Even when children’s attorneys do not have professionals from other disciplines in their offices or on their staff, regular consultation and interaction with professionals from other disciplines is common in legal matters regarding children. These multidisciplinary connections are useful in both the representation of individual clients and systemic reform efforts.

2. **Recommendations for Practice Guidelines:**

The following is a non-exclusive list of guidelines children’s attorneys should follow to engage in effective and ethical multidisciplinary representation of children.

a. **Definition of Multidisciplinary Practice:**

i. Practice informed by knowledge of the existence, domains, methods, and practices of other disciplines in addition to law;

ii. Knowledge of when and how to access the services of professionals from other disciplines;

iii. Ability to collaborate with and evaluate the opinions of professionals from other disciplines.

b. **Preference for Multi-Disciplinary Teams:**

Children’s attorneys should practice in multi-disciplinary teams. Such teams can aid the attorney to learn how to build relationships and trust, assess body language, communicate effectively across race, ethnicity, culture, language and nationality, and better understand the client’s community.

c. **Multi-Disciplinary Teams Practice Guidelines:**

i. The multi-disciplinary team should operate to provide children with the benefits of the team approach while minimizing the potentially negative impact of having the client participate in repeated interviewing, evaluations or assessments.

ii. The multi-disciplinary team can be composed of staff employed or consultants retained by the attorney or firm representing the child or can be assembled on a case-by-case basis.

iii. In forming a team, attorneys should be sure to explain to other prospective team members the attorney’s professional obligations to the client. The attorney should also solicit from the prospective team members their understanding of their own professional obligations.

iv. Attorneys should ensure that all team members understand the way in which decisions will be made within the representation.4

v. Attorneys should be cognizant of the confidentiality implications of multi-disciplinary teams and should take steps to protect the confidentiality of client communications and other information.

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4 Although attorneys are ethically obligated to make final decisions about many aspects of the representation in consultation with the client, this decision-making will benefit most from the multi-disciplinary collaboration where the attorney seeks to learn as much as possible about the representation from each team member.
d. **Interpreters:** Children’s attorneys should engage competent interpreters to facilitate communication.

e. **Networks:** Children’s attorneys should also use networks of resources and expertise to help gain knowledge about transnational families and cultural competence when needed to represent their clients effectively.

f. **Expertise Regarding Bias and Discrimination:** Children’s attorneys should utilize empirical research, expert testimony and accepted professional standards to support nondiscriminatory treatment and services for their clients.

g. **Compensation for Experts:** Where necessary, lawyers should seek judicial approval to retain and compensate other professionals who provide necessary services.

**F. Other Conditions for Effective Representation**

1. **Statement of Principle:**

   Effective representation of the child in context requires knowledge and assessment of the client and his or her family, community, and other systems engaging the child. This level of representation requires adequate training and resources. In many legal contexts, representation of parents may be essential for achieving outcomes beneficial to and reflective of the whole child. The following recommendations for practice guidelines apply to parents’ attorneys as well.

2. **Recommendations for Practice Guidelines:**

   The following recommendations are a nonexclusive list of other conditions for effective legal representation for children and parents.

   a. **Training and Resources:** Children’s attorneys, and parent’s attorneys as well, should always:

      i. Be adequately trained;
      ii. Be adequately compensated;
      iii. Have strict caseload limits, and for attorneys representing children, caseloads limits should be based on the number of clients, rather than the number of cases;
      iv. Be provided with adequate resources to ensure that their representation is effective;
      v. Have access to information;
      vi. Spend considerable time out of court working on their cases; and
      vii. Have access to experts in other professions.

   b. **Community Based Practice:** Children’s and parent’s attorneys should be accessible to their clients, preferably in offices that are community-based and near community resources, and preferably in neighborhood legal services offices.

   c. **Juvenile Defender and Civil Legal Services Providers:** Juvenile defender and civil legal service providers should create specialized divisions for representing children in child welfare and juvenile justice matters. These divisions should construct and strengthen an emphasis on trial skills training in order to prepare and maintain a culture of aggressive advocacy, and expertise in child and adolescent development.

**G. Recommendations for Further Study**

1. Whether appointed counsel should be encouraged or required to have legal experience in the representation of both parents and children (although not in the same case).
2. Establishment of recommended caseload standards and limits for attorneys in legal matters involving children.
3. How pro bono practitioners should implement the UNLV Recommendations.
4. Existing legal or administrative barriers that prevent lawyers from extending their representation to matters related to, but outside, the original juvenile justice or child welfare proceeding.

**II. RECOMMENDATIONS REGARDING COMPETENCIES FOR CHILDREN’S ATTORNEYS AND CHILDREN’S JUSTICE SYSTEMS**

Children’s legal representation is a specialized field because it involves clients with a wide range of developmental abilities that in most cases will change over time and because there are special procedural rules, courts, and substantive laws that apply to
many child-related matters. In addition, children receiving legal representation are most frequently involved in disputes involving public agencies and courts, such as those addressing criminal justice, child welfare and domestic violence, and are more likely to be poor and of color. Attorneys who represent children must, therefore, possess a wide range of social and legal competencies, in addition to general competencies needed for ethical representation of any client. Similarly, parents’ attorneys and juvenile and family court judges must possess a range of social and legal competencies in addition to the law governing the particular cause of action at issue. The recommendations in this part apply to children’s attorneys and extend to other legal professionals, legal education and to the children’s justice system.

A Professional Competencies

1. Statement of Principle:

Children’s attorneys must be competent regarding their own professional norms and obligations and their own personal limitations. Legal representation of children is in most instances multidisciplinary because of the special knowledge and skills lawyers need to understand and relate to their child clients and because professionals from other disciplines are often participants in these matters or are called upon for their expertise. Children’s attorneys thus require knowledge about these other professions as well.

2. Recommended Competencies:

The following is a nonexclusive list of competencies children’s attorneys, and in many cases all legal professionals and decision-makers regarding children, should have.

a. Knowledge About Other Professions:
   i. Children’s attorneys should be able to recognize issues that require the services of other professionals and know how to access those services.
   ii. Children’s attorneys should have sufficient knowledge of other disciplines to formulate requests for evaluations and services from other professionals and to evaluate and use professional opinions.
   iii. Children’s attorneys should be familiar with fundamental principles governing practice in other disciplines, such as the necessity that practices be evidence-based and peer-reviewed.
   iv. Children’s attorneys should be aware of trends and norms in other disciplines that recur frequently in their practice, such as current treatments, evaluation methods, and outcome measures.

b. Best Practices: Children’s attorneys should be knowledgeable about best practices and existing standards in the various areas in which the lawyer is practicing, such as those promulgated by the National Juvenile Defender Center; National Legal Aid and Defender Association; and the American Bar Association.

c. Legal Ethics: Children’s attorneys should be knowledgeable about the ethics rules for legal representation.

d. Recognition of Personal Conflicts: Children’s attorneys should know how to ethically resolve conflicts between their clients’ wishes and the attorney’s personal views and to recognize when these personal views may make it necessary for them to withdraw from representation.

e. Awareness of Affects of Bias in Other Professions and Systems: Children’s attorneys should be aware of how bias in other professions and systems based on race, ethnicity, class, gender, sexual orientation, disability, or other attributes of the client or the client’s family or community can lead to inappropriate assessment and treatment of the child.

f. Expertise Regarding Transnational Issues: Because children are increasingly likely to live in transnational families and may have family members with different national citizenships, who live in other countries, and who speak different languages, children’s attorneys should have knowledge of international law, comparative law practices, and the impact of clients being part of transnational families. At a minimum, children’s lawyers should know how to identify and should utilize appropriate interpretation and translation services.
B. Substantive Law Competencies

1. Statement of Principle:

Representing children often involves specialized areas of the law such as child welfare, juvenile justice and education. Attorneys should, of course, be competent in those areas of practice, but must also have knowledge about the child’s interests and rights in other areas of the law that might be affected by the attorney’s efforts. These areas relate to the treatment of children in custody and to the various national statuses of children, such as Native American, immigrant or children of immigrants. Moreover, in all areas of the law, international law and norms are increasingly relevant, if not legally binding, in understanding transnational aspects of children’s lives and can illuminate other approaches and models regarding children and families.

2. Recommended Competencies:

The following is a nonexclusive list of substantive law competencies children’s attorneys, and in many cases all legal professionals and decision-makers regarding children, should have.

a. Legal Expertise: Children’s attorneys should be knowledgeable enough about legal doctrine to recognize the limits of their own professional expertise.

b. Intersections: Between Juvenile Justice and Child Welfare Matters: Children’s attorneys should understand the relationships and commonalities of juvenile justice and child welfare legal representation:

c. Additional Doctrinal Areas: Children’s attorneys, in addition to their primary doctrinal area(s) of representation, should be knowledgeable about:

   i. The range of remedies for individual and systemic civil rights violations;
   iii. Immigration Issues, including the ability to identify children who may fall under the jurisdiction of immigration and the laws listed in part iv. below;
   iv. International Law and Norms, including:
      (A) The International Covenant on Civil and Political Rights (1992);
      (B) The Convention against Torture, Inhuman and Degrading Treatment and Punishment (1994);
      (C) The two U. S. ratified optional protocols to the Convention on the Rights of the Child:
         The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the
         Optional Protocol on Child Soldiers, both ratified in 2002;
      (D) Convention on the Elimination of all forms of Racial Discrimination (1994);
      (E) Geneva Conventions relative to the Treatment of Prisoners of War (1949) and subsequent
         protocols;
      (F) Vienna Convention on the Law of Treaties (1969);
      (G) Hague Convention on the Civil Aspects of International Child Abduction (1988);
      (H) International Labour Organization Convention Concerning the Prohibition and
         Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst
         Forms of Child Labor Convention), ILO 182, ratified by the U.S. in 1999;
      (I) Customary law; and
      (J) The growing body of case law involving children, youth and families from regional human rights courts,
         such as the European Court of Human Rights and the Inter American Court of Human Rights.

C. Scientific Competencies

1. Statement of Principle:

To develop meaningful attorney-client relationships with children and protect their legal rights and interests, children’s attorneys need special knowledge regarding the social, psychological and biological development of children, as well as other social, psychological and medical expertise regarding mental, physical and social health and well-being of children.
2. Recommended Competencies:

The following is a nonexclusive list of scientific competencies children’s attorneys, and in many cases all legal professionals and decision-makers regarding children, should have.

a. **Cognitive Development.**

b. **Brain Development.**

c. **Child and Adolescent Development**, including sexual identity development, and the range of developmentally typical sexual behaviors.

d. **Family Systems Theory.**

e. **Developmentally Appropriate and Effective Child Interviewing Skills.**

D. Cultural Competencies

1. **Statement of Principle:**

To develop meaningful attorney-client relationships with children, protect their legal rights and interests, and understand the consequences of various decisions, children’s attorneys need to be knowledgeable about their clients’ worlds and be reflective about their own worlds. This approach helps attorneys to work effectively cross-culturally, value diversity, manage difference, and adapt to diversity and the cultural contexts of the communities they serve.

2. Recommended Competencies:

The following is a nonexclusive list of cultural competencies children’s attorneys, and in many cases all legal professionals and decision-makers regarding children, should have.

a. **Cross Cultural Knowledge**: Attorneys should have sufficient understanding of their clients’ cultures to understand their legal needs, assess the affects of various courses of action on their clients’ lives, competently interview and counsel their clients, and understand the objectives of representation. These competencies include the ability to communicate with clients in a developmentally appropriate manner about sexual orientation, gender identity and sexual behavior.

b. **Sensitivity Regarding Bias**: Attorneys would be aware of bias surrounding race, ethnicity, class, sexual orientation, and gender identity;

c. **Community Based Programs**: Attorneys should be familiar with community-based programs and resources, and be able to assess whether such programs provide inclusive and nondiscriminatory services with respect to race, gender, language, nationality, sexual orientation and gender identity;

d. **Leadership Skills**: Attorneys should have skills to help foster systemic change and community empowerment.

e. **Multilingual Skills or Resources**: Children’s attorneys should be able to effectively communicate with and understand their clients’ needs.

E. Children’s Justice System Competencies

1. **Statement of Principle:**

In addition to children’s attorneys, other attorneys and judges involved in children’s justice systems need special competencies in the areas of child development, other relevant social and physical scientific theory, resources in the children’s communities, cross cultural expertise, and alternative dispute resolution mechanisms. Although alternative dispute resolution mechanisms have great potential for recognition of the importance of families in children’s lives, the legal system has been slow to embrace the value of these processes for addressing concerns related to children and families outside of domestic custody matters. In any event, unless these alternative processes are based on sound principles, participants may not benefit from them.

2. **Recommendations for Judicial Competencies:**

The following is a nonexclusive list of competencies judges who adjudicate matters regarding children, including domestic violence cases, should have.
a. Children’s Participation: Judges should be knowledgeable about how to appropriately engage children as participants in juvenile court proceedings.

b. Child Development and Family Systems Theory: Judges should be knowledgeable about adolescent development and family systems theory.

c. Judicial Delays: Judges should be knowledgeable about the harms to children and families caused by court processing delays and judicial decision-making delays.

d. Multidisciplinary Representation: Judges should be knowledgeable about the necessity and benefits of multidisciplinary representation.

3. Recommendations Regarding Alternative Dispute Resolution:

a. The children’s justice system should utilize sound and appropriate alternative dispute resolution mechanisms in disputes regarding children.

b. To achieve the potential benefits of alternative dispute mechanisms, any alternative process should reflect the following principles:
   i. Respect for the dignity and rights of all individuals and families;
   ii. Treatment of all children as members of families;
   iii. Appreciation of individual, family and cultural differences;
   iv. Identification and utilization of strengths to empower children and families.
   v. Emphasis on meaningful participation of the child, family, and other individuals important to the child;
   vi. Voluntary alternative dispute resolution processes;
   vii. Extension of privilege and confidentiality to statements made in alternative dispute resolution processes.

4. Recommendations regarding Law Offices Involved in Child Advocacy:

The following is a nonexclusive list of recommendations for law offices involved in child advocacy.

a. Preferred Providers: Institutional providers, such as juvenile defender or civil legal services offices are the preferred sources for provision of legal representation to children and families, where funding is available.

b. Support for Systemic Reform Activities: Juvenile defender and civil legal services offices should create a culture and have sufficient resources, expertise and support for their attorneys to engage in challenges to existing practices that stigmatize or contribute to the hostile environment that confront our clients.

c. Accountability: Juvenile defender and civil legal services offices should develop systems to be held accountable for the services they provide by:
   i. Engaging in strategic planning to develop measurable goals and outcomes;
   ii. Providing for periodic internal and external evaluation of goals and outcomes;
   iii. Creating effective data systems to document services and outcomes;
   iv. Ensuring services are designed to meet the unique needs of clients relative to race, gender, language, nationality, ethnicity, and disability;
   v. Soliciting regular client feedback and modifying practice;
   vi. Ensuring knowledge of the newest developments in the field.

F. Education and Training for Children’s Attorneys and Other Law Trained Members of the Children’s Justice System.

1. Statement of Principle:

Achievement of many of the competencies listed in the UNLV Recommendations will require specialized and ongoing education and training. As the primary training ground for attorneys in this country, law schools have a role to play in providing educational opportunities for future children’s attorneys and other legal professionals involved in children’s matters, such as judges, prosecutors and parents’ attorneys. It would be beneficial then if law students had the option to study in areas that will help them achieve competency in children’s legal matters. In addition, law schools can help promote the goals of enriching the understanding of the complex roles of race, ethnicity, language, nationality, culture, gender and class involved in representing children and
diversifying children’s justice systems by increasing emphasis on the diversity of law faculty and law student populations. To the extent that the areas of competence in the UNLV Recommendations are not part of the core curriculum of law schools or are not tested by bar examiners, attorneys need to make special efforts to receive this training beginning in law school and continuing after graduation. Law schools, bar associations, other professional organizations and institutional legal services providers all have roles in facilitating the competencies listed in these recommendations.

2. Recommendations for Law School Curricular Offerings:

Following is a nonexclusive list of curricular offerings that would aid in the preparation of attorneys who will be involved in the children’s justice systems.

a. Interdisciplinary and Collaborative Opportunities:
   i. Law school curricula should include interdisciplinary education and courses or programs that promote collaborative approaches;
   ii. Law schools should collaborate with other professional schools to develop curricula which address holistic and interdisciplinary approaches to representing children.

b. Children’s Law: Law school curricula should include courses in children’s law.

c. Cross Cultural Knowledge:
   i. Law school courses should devote significant attention to the roles race, ethnicity, language, nationality, culture, gender, sexual orientation and class play in the lawyer’s relationship with and advocacy for the client;
   ii. Law school courses related to children’s issues, criminal law, family law, and professional roles and responsibility should address race, ethnicity, language, nationality, culture, gender, sexual orientation and class;
   iii. Law school clinical courses should include training regarding race, ethnicity, language, nationality, culture, gender, sexual orientation, and class.

d. International Law: Law schools should provide courses regarding international, comparative, and transnational law, norms and practices that affect children and families in the areas identified in the UNLV Recommendations.

e. Holistic Representation: Law schools should provide training that emphasizes holistic representation of children as a means of minimizing the harm fragmented representation inflicts on child clients.

f. Children’s Law Clinics: Law schools offering Juvenile Justice, Child Welfare, Family Advocacy, Education, Immigration, or other clinics addressing children’s legal issues should include representation in ignored or underserved legal areas such as post-dispositional representation, pre-adjudicative issues such as removing children’s names from gang registries, and immigration issues.

3. Recommendations for Bar Associations, Legal Organizations and Law Offices:

The following is a nonexclusive list of training recommendations for bar associations, professional organizations and law offices.

a. Juvenile Defender and Civil Legal Services Offices: these specialized offices should provide or otherwise promote opportunities for education and training to their own staff and to legislators, policy makers, prosecutors, judges, and the private bar in the competencies listed in the UNLV Recommendations. When these educational opportunities are provided outside of traditional continuing legal education (“CLE”) formats, the offices should seek CLE certification for attendance at such programs. Public Defender offices should avoid using juvenile justice proceedings primarily as a training ground for adult felony trial work.

b. Requirement of Formal Training: The rules of professional responsibility and judicial ethics should require that any lawyer or judge involved in child welfare, juvenile justice or domestic relations cases participate in formal training on child and adolescent development and family systems theory before taking any such cases.

c. Implementing the UNLV and Fordham Recommendations: Bar associations and other legal organizations should help implement the UNLV and Fordham Recommendations by utilizing them in the training and assessment of children’s attorneys.
d. **Provision of Continuing Legal Education:** Bar associations should mandate attorneys involved in children’s justice and advocacy to receive CLE regarding the identification and elimination of bias in the legal profession. Bar associations and other legal organizations should provide CLE so attorneys can stay current regarding developments in related subject areas and the operations of other systems affecting children and families.

e. **Cross-Disciplinary Training:** Bar associations and other legal organizations should promote collaborative approaches to learning and provide cross-disciplinary education specifically.

**G. Recommendations for Further Study**

1. Examination of how the lack of basic common cultural and social cornerstones affects the quality of representation for poor children and children of color, and how to close the gaps between the professional class and the clients they serve. Minimally, the study should include:
   a. Consideration of creating a Rule of Professional Responsibility that requires child advocates to personally observe relevant locations and other significant matters central to the child and family; meet their clients in the client’s environment; and talk to people in the child’s school, religious community and neighborhood;
   b. Proposals for methods that maximize attorneys’ ability to know and understand the lives of their clients in order to improve advocacy and protect their clients’ interests;
   c. Appropriate race, ethnicity, and culture training curricula for child advocates, decisionmakers and stakeholders.
   d. The relationship, and need to distinguish, between race and class in the representation of children and among families, including:
      i. Analysis of how advocates and decision-makers often miss class issues;
      ii. Analysis of key system decision-making points to ensure that neither race nor ethnicity nor class result in worse outcomes for poor children and children of color, their families and communities.
   e. Collection and reporting of data that track disparities in the treatment of children and families on the basis of race, income, ethnicity, gender, gender identity, and sexual orientation; and qualitative review of both courtroom conduct and the decision-making in cases.
   f. Current successful child advocacy practices incorporating race, ethnicity and culture, including:
      i. Identification of policies and practices that demonstrate successful life outcomes for poor children and children of color, their families and communities;
      ii. Identification of the most effective manner of disseminating and garnering support for implementing such policies and practices.

2. Examine legal systems and practices from other legal traditions in order to use the entire world as an instructive laboratory. The comparative questions to investigate may include:
   a. Traditions of non-adversarial decision-making
   b. Decision-making in fora other than formal court process
   c. Structures and staffing of courts
   d. Meaning of “best interest of the child”
   e. Role of the child’s advocate.

3. Positive alternatives to the current adversarial structure for disputes regarding children, their deeds, and their needs. Minimally, the study should include:
   a. Analysis of the benefits of using a collaborative, multidisciplinary court structure to serve children, families, and communities with diverse experiences and perspectives.
   b. Analysis of the efficacy of non-adversarial models, such as restorative justice, to replace the current legal systems serving children families and communities with diverse experiences and perspectives, and their impact on public safety.

**III. RECOMMENDATIONS REGARDING THE ROLE OF CHILDREN’S ATTORNEYS IN ADVOCATING FOR REFORM**

Children’s attorneys play an important role in seeking legal and procedural reforms to improve the quality and provision of justice for children. Attorneys play this role when representing individual children and in policy making fora. In each of these contexts, children’s attorneys can advocate for child-centered, respectful and non-stereotypical approaches to children and families. Attorneys should, in policy matters and in
individual cases when their clients consent, work collaboratively with others who share similar concerns for children and their families. The recommendations in this part urge children’s attorneys to take, or continue to take, the lead in promoting child-centered justice and to venture beyond the more conventional direct representation of children to do so.

A. Promoting Child-Centered Fora

1. Statement of Principle:

Attorneys should engage in systemic change to create child-centered and child-friendly court processes and organizations.

2. Recommendations for Advocacy:

The following is a nonexclusive list of recommendations of areas for advocacy.

   a. **Protect the Child’s Right to be Present in Legal Proceedings**: Children’s attorneys should promote policies and practices that advance the objective of ensuring that children are present in all proceedings relating to them, including child welfare proceedings.

   b. **Promote Youth Participation and Organizations**: Children’s attorneys should promote the development of organizations that support the engagement of youth in the juvenile justice and child welfare processes both in individual cases as well as on a systemic level. Attorneys should advocate that youth, including youth representing diverse experiences and perspectives, participate in developing policies and practices affecting children and their families.

   c. **Promote Effective Programs and Challenge Those That Are Ineffective or Harmful**: Children’s attorneys should promote the use of best practice models, including evidence-based programs. Children’s attorneys should also hold service providers accountable for their care and treatment of children by challenging ineffective or harmful programs, policies or practices that do not meet the individualized needs of clients.

B. Promoting Family and Community Connections

1. Statement of Principle:

Children need to maintain connections to their families and communities and benefit from attempts to respect and strengthen families. Thus children’s attorneys often serve their clients by advocating for their clients’ families. Children’s attorneys also serve children by engaging the communities to which their child clients are connected. This engagement enables attorneys to learn about the effectiveness and deficiencies of existing legal systems affecting the child’s family and community, to exchange information with the community about existing and potential alternatives for problem-solving, and to collaborate with the community to generate ideas for improving conditions and resources for families and children.

2. Recommendations for Advocacy:

The following is a nonexclusive list of recommendations for family and community advocacy.

   a. **Contest Policies That Undermine or Harm Families**: Children’s attorneys should challenge policies, procedures that unnecessarily sever family ties, stigmatize parents based on race, culture, sexual orientation, language, nationality and poverty, and unduly interfere with family autonomy.

   b. **Child and Family Empowerment**: Attorneys should help promote empowerment of their child clients and their families by:
      
      i. Improving attorneys’ own listening and interviewing skills;
      
      ii. Incorporating habits of cross cultural lawyering into their practice;

      iii. Educating parents of children with disabilities to advocate in the educational and mental health systems;

      iv. Enhancing children’s and parents’ voices in the media.

   c. **Community Liaison**: Juvenile defender and civil legal services providers should create a position or role within their offices for children’s attorneys who act as community or stakeholder
liaisons. This role would be devoted to developing partnerships within the community and would include community education and systemic advocacy. Such attorneys would be responsible for outreach into the community, attendance at meetings with stakeholders and participation in community activities in which the interests of their client base may be affected. This liaison role should be informed by research, client voices, positive outcomes and cultural competence.

The goals of this liaison role would include, but not be limited to:

i. Achieving better dispositional outcomes for clients;
ii. Educating the community about who the clients are;
iii. Defusing the hostile environment for children;
iv. Achieving a better understanding of clients’ lives;
v. Enhancing and improving resources made available to the clients;
vi. Creating a foundation for dialogue between attorneys and community members with an interest in or influence over children’s well-being.

d. **Community Education:** Children’s attorneys should participate in community education to both provide and obtain information regarding the rights of community members, avenues of advocacy and cultural norms.

e. **Client and Family Input:** Children’s attorneys should seek input from current and former clients and their families with respect to ways to improve attorneys’ professional practice.

C. Eliminating Bias

1. **Statement of Principle:**

Because of their knowledge and access, children’s attorneys are in unique positions to advocate for policies, practices, and programs that promote the acceptance of all children regardless of whether they or their families meet or depart from dominant norms, and to actively challenge policies, practices, and programs that are discriminatory, stigmatizing, or harmful to child clients, their families, and their communities.

2. **Recommendations for Advocacy:**

The following is a nonexclusive list of recommendations for anti-bias advocacy.

a. **Promotion of Diversity in Justice Systems:** Children’s attorneys should advocate for racial, ethnic, class, gender, and sexual orientation diversity among judges, prosecutors, public defenders, and children’s attorneys. Attorneys, should engage courts and other appropriate agencies to employ the appropriate resources to address any gaps in knowledge about any of diverse experiences and perspectives.

b. **Consideration of Children’s Diverse Experiences and Perspectives:** Children’s attorneys should encourage administrative and judicial systems to take into account children’s diverse experiences and perspectives in assessing their risks and needs, and in placing and treating them appropriately, and to eliminate unnecessary detention or out of home placements. Children’s attorneys should challenge any such bias particularly around race and gender norms in these proceedings.

c. **Promotion of Individualized, Non-Stereotypical Services:**

i. Children’s attorneys should advocate that services, including those that are gender-specific, do not perpetuate assumptions and stereotypes based upon race, language, nationality, gender, sexual orientation, and gender identity and expression.

ii. Children’s attorneys should challenge policies and practices that stigmatize, exclude or discriminate against parents, family members and/or foster or adoptive parents on the basis of race, nationality, gender, sexual orientation, and gender identity and expression.

d. **Promotion of Child-Centered Approaches to Children’s Sexuality:**

i. Children’s attorneys should promote public health solutions to address juvenile prostitution and other commercial sexual exploitation of youth, including prevention, education and harm reduction.

ii. Children’s attorneys should challenge the disproportionate application of status offense jurisdiction to girls, especially girls of color. Children’s attorneys should also oppose policies that permit the transfer of status offenders into the delinquency system for violation of probation conditions.

iii. Children’s attorneys should challenge court and agency assumptions that any child is sexually active based solely on his or her gender, sexual orientation or race.
iv. Children’s attorneys should challenge policies and practices that unlawfully limit the access of children in the custody of state agencies to reproductive health services.

v. Children’s attorneys should challenge policies and practices that purport to protect the safety of lesbian, gay, bisexual or transgender children solely by isolating them from other children.

vi. Children’s attorneys should challenge policies and practices that criminalize or pathologize adolescent sexual behavior that is typical or common from a developmental perspective.

vii. Children’s attorneys should challenge excessive or punitive juvenile court intervention based upon the consensual homo- or heterosexually conduct of children.

e. Promotion of Accountability of the Systems that Serve Children: Children’s attorneys should advocate for mandated record keeping and public dissemination of disaggregated data regarding the children and families the agencies serve; the data should be disaggregated by race, gender, offense, geography, ethnicity, and income.

D. Expanding Methods of Advocacy

1. Statement of Principle:

In an effort to defuse the hostility toward children, children’s attorneys can and do engage in a range of strategies beyond litigation, including policy advocacy, media relations, and community organizing. At the same time, children’s attorneys must be mindful that advocacy not grounded in their clients’ lives can detract from positive policies and outcomes for children.

2. Recommendations for Methods of Advocacy:

The following is a nonexclusive list of recommendations for non-litigation advocacy methods.

a. Community Organizing.

b. Broad-Based Coalition Building

c. Research: To help identify advocacy strategies and goals, attorneys should utilize creative, multi-disciplinary research and analysis, regarding communities, including, but not limited to, the following:

i. Analysis of the financial conditions under which children are living and the impact of these conditions on the child’s life and decisions;

ii. Demographic analysis;

iii. Historical patterns of discrimination.

d. Policy Advocacy: Children’s attorneys should advocate for policies beneficial to children, their families and communities in legislative, planning and administrative fora.

e. Media Campaigns:

i. Children’s attorneys should take advantage of the full range of media sources including: writing op-ed articles and letters to the editor, cultivating relationships with reporters and editors, and utilizing community newspapers and non-English language media. When possible, attorneys should use public relations experts to help shape and articulate their message. Attorneys might also work with child clients or young advocates to help educate the public;

ii. Children’s attorneys should engage the media to expose deficiencies in the legal and social systems that affect children, and to help alter public perceptions detrimental to families who become the subject of state intervention;

iii. Wherever possible, not harmful, and only with express consent, children’s lawyers should seek to facilitate children and families’ abilities to tell their own stories;

iv. Children’s attorneys who advocate using the media should cultivate an expertise in this area. Attorneys who are less experienced should defer to those who have established an expertise in dealing with the media. Attorneys should be cognizant of the considerable risks media involvement can pose for a client and should carefully assess the benefits and detriments of engaging the media.

E. Recommendation for Further Study

Examine the effectiveness of youth curricula, such as the Youth Advocacy Center model in New York, that help train youth to advocate for themselves by setting long term goals, engaging in
research and plans to accomplish these goals, and making valuable connections with people and organizations that can help them accomplish these goals.

IV. RECOMMENDATIONS REGARDING THE ATTORNEY-CHILD CLIENT RELATIONSHIP

The recommendations in this part affirm and build upon the Fordham Recommendations regarding the role of counsel for the child, including the fundamental principle of client-directed representation for child clients. This part addresses additional prescriptions, methods, and strategies to achieve child-directed and child-centered representation while accounting for the significant role of families in children’s lives. Many of the recommendations in Part I of these Recommendations regarding the scope of representation, role of the child’s family and community, the approach of the attorney, and enhancing child participation are directly related to the nature and quality of the attorney-client relationship. These recommendations expressly reject the notion that there should be a bright line rule based on age or any other generic factor demarking when a child’s lawyer should treat the child as a traditional client or as an incapacitated client.

A. Role of the Attorney

1. Statement of Principle:

   Children’s attorneys should take their direction from the client and should not substitute for the child’s wishes the attorney’s own judgment of what is best for children or for that child. Children’s attorneys have the responsibility to create the conditions for and promote child-directed representation. Beside enhancing the child’s ability to direct representation, such conditions can also help teach the child to advocate for him or herself when the attorney is not present.

   When children have diminished capacity or are without capacity to direct representation, attorneys should conduct representation in principled ways. When the client lacks capacity to decide, the attorney may be required to interpose other viewpoints or even to substitute her judgment for that of the client. This important step involves gathering information from a wide range of sources as well as familiarizing oneself with the child’s family, community and culture in order to arrive at or to advocate for a decision the child would make if she or her were capable.

2. Recommendations for Practice Guidelines:

   a. Assessing the Child’s Capacity to Formulate a Position: The attorney should evaluate the child’s capacity to communicate and formulate a position for each decision the client would make and should not extrapolate to other matters the inability to communicate as to one matter.

      i. Only in the following limited circumstances, may the child’s attorney determine the child’s position on an issue, using the guidelines in parts IV.A.2.c and d below:

         (A) The child lacks sufficient capacity to communicate;
         (B) The child lacks the capacity to make adequately considered decisions in connection with the representation;
         (C) In child welfare cases, the child’s expressed preferences would be seriously injurious; or
         (D) When the attorney is functioning in a jurisdiction that requires the attorney to exercise substituted judgment or act as a guardian ad litem.

      ii. When assessing the child’s capacity to make a decision, the following apply:

         (A) Capacity to communicate does not include failure to communicate;
         (B) Generally, the only children who cannot communicate are those who are pre-verbal or otherwise unable to communicate their objectives;
         (C) When the child’s preferences would be “seriously injurious” does not mean merely contrary to the lawyer’s opinion of what would be in child’s interests.

   b. Helping the Child Formulate a Position: Children’s attorneys should employ the following strategies to help the client formulate a position.

      i. Establish or reaffirm the lawyer-client relationship;
ii. Directly and regularly address confidentiality;
iii. Start with the child’s agenda;
iv. Meet with the client regularly, and, with the client’s consent, the attorney should meet with the client in the client’s environment;
v. Assess the child’s capacity to decide but make sure this assessment does not serve as a proxy for formulating a position for the child;
vi. Empower the child to make certain, even if not all, decisions;
vii. Help the child to develop decision-making capacity:
   (A) Model the decision-making process by thinking through consequences with the child;
   (B) Help the child to understand the different pressures operating on him/her, including negative influences;
viii. Explore and determine the universe of options with the child:
   (A) Solicit the child’s suggestions;
   (B) To help further define options, ascertain that the child knows about available services;
   (C) After consultation with the client and if the child consents, consult with others with relevant information (such as the child’s parents, schools, kin, service providers, foster parents, individual evaluators);
ix. Encourage the child to speak with others (including parents);
x. Bring the child to court and explain the court process;
xi. Bring the child to administrative and informal proceedings related to his/her case;
xii. Help the child to understand whether or not the child has the right to participate in the proceedings;
xiii. Help the child to understand that the client has the right to have his or her wishes advocated without attribution.

c. Children with Diminished Capacity: When the child has diminished capacity, the child’s attorney should promote client-directed representation by:
i. Adopting a position requiring the least intrusive state intervention;
ii. Being guided by goals that are respectful of and reflect what the client would want and the decision the child would make if the child could formulate a position;
iii. Respecting the child’s family and social connections;
iv. Being familiar with the child’s family, community, and culture and take precautions to avoid imposing the attorney’s personal standards and cultural values;
v. Giving special weight to the parent’s preference in the absence of conflict regarding the particular matter at issue, parental incapacity, or harm to the child;
vi. Utilizing the following rights and values as further guidance:
   (A) Limitation of state intervention in the child’s life;
   (B) The child’s right to have his or her family respected;
   (C) The child’s liberty interest to be free from state custody; and
   (D) The family’s liberty interest in parental determination of what is in the child’s interests.

d. Children Lacking Capacity: When the child lacks capacity to communicate a position, the child’s attorney should effect client-directed representation by performing the following nonexhaustive list of duties, in addition to those listed above in Part IV.A.2.c above for the child with diminished capacity:
i. Obtain additional pertinent information through investigation and consultation;
ii. Involve parents in the process, but recognize that parents cannot direct the representation;
iii. Protect the child’s legal interests.
e. Helping Children Advocate for Themselves: Children’s attorneys should help their child clients become effective advocates and problem-solvers for themselves and to better understand and take active roles if they wish in court proceedings, placement decisions, and other administrative actions affecting them.

B. Disclosure of Confidential Information and Mandatory Reporting

1. Statement of Principle:

Mandated reporting and other disclosures of confidential information erode the attorney-client relationship and may deprive the child of defenses. In juvenile justice
matters, mandated reporting undermines effective assistance of counsel and the right against self-incrimination.

2. Recommendations for Practice Guidelines:

   a. Disclosure of Confidential Information: Children’s attorneys should protect the confidentiality of information relating to the child client and be particularly sensitive to the privacy of information regarding intimate matters concerning sex, sexual orientation and gender identity.

   b. Informing the Child Regarding Mandatory Reporting Statutes: In states where children’s attorneys are mandated reporters, the attorney should disclose that duty to the child.

   c. When Mandatory Reporting is Permitted: Reporting under mandatory reporting statutes should be undertaken only when:

      i. the child consents to reporting; or
      ii. in child welfare proceedings when the attorney has been appointed to represent the child’s “best interests,” has disclosed what that means to the child, and the lawyer determines reporting is in the child’s best interests.

C. Recommendations for Further Study

1. Measures attorneys can use to maximize the effective participation in the representation by clients with disabilities.

2. The attorney’s ethical obligation under mandatory child abuse and neglect reporting statutes when state professional responsibility rules permit disclosure of client confidences.

3. The questions the Fordham Recommendations raised regarding the role and duties of counsel for children in class actions and in other systemic reform advocacy.5

V. RECOMMENDATIONS REGARDING CHANGES IN THE LAW

By training and experience, children’s attorneys are in a unique position to understand how legal systems help and harm children and their families. Children’s attorneys can, and often do, advocate across a wide range of systems, including those involving legislatures, state agencies, and courts in order to effectuate meaningful changes in justice for children. Interdisciplinary collaboration can be beneficial to this advocacy. The recommendations in this part address areas in which children’s attorneys and their allies might advocate for change and include reforms that will require the enactment of new laws, rules, and written policies by courts, administrative agencies, and legislative bodies.

A. Appointment of Counsel for Children

   1. Statement of Principle:

      These recommendations reaffirm a core principle of the Fordham Recommendations that all children in child welfare proceedings should be represented by attorneys. These recommendations further prescribe that children involved in other types of legal matters in which their rights or interests are directly affected, should have attorneys appointed to represent them, if they so desire.

   2. Recommendations for Changes in the Law:

      a. Right to Client-Directed Representation in Child Welfare Proceedings: Children should have a statutory right to counsel in child welfare proceedings. Means of achieving this goal include curbing judicial or legislative discretion to dictate or define the child’s attorney’s role and interpreting or modifying the Child Abuse Prevention and Treatment Act’s (“CAPTA”) mandate for appointment of best interests representatives for children6 to include the appointment of a client directed attorney.

      b. Other Proceedings in Which Children Should Have Counsel: In addition to juvenile justice and child welfare matters, at a minimum, children should have a right to counsel in at least the

5. Fordham Recommendations, supra note 1, at pt. II.C.3.
following areas:

i. Status offense proceedings (i.e., truant, incorrigible or stubborn minors);

ii. Any case where the child could be held accountable for violation of a court order;

iii. Pre-arrangement proceedings (e.g., diversion proceedings, or where children sign admissions that could be used against them for impeachment);

iv. Expulsion and long-term exclusion from school and denial of educational services for homeless or immigrant children.

c. Appeals: Children should also have a right to appeal and to counsel on appeal.

d. All Stages of Juvenile and Family Proceedings: Representation in juvenile justice and child welfare proceedings should extend at least until the conclusion of the court’s jurisdiction over the child.

e. Children in the Adult Criminal Justice System: Children transferred or certified into adult criminal justice system should be provided at the earliest possible moment after arrest with attorneys who have expertise in juvenile and adult representation.

f. Quality of Legal Counsel: In all proceedings mentioned above, children should be provided with high quality legal counsel. Particularly when appointed counsel are not part of defender or civil legal services offices, the state or county should establish a system of quality assurance through an independent evaluation mechanism to ensure competent representation.

B. Appointment of Counsel for Parents in Child Welfare Cases

1. Statement of Principle:

Too often in child welfare cases, parents are left either unrepresented or inadequately represented. This practice undermines due process and impairs the court’s ability to achieve fair and appropriate outcomes for children. As representing children in child welfare, representing parents requires specialized legal and scientific knowledge and so whenever possible, representation for parents should be met by institutional providers, such as a defender or civil legal services offices.

2. Recommendation for Change in the Law:

In child protection cases, parents who are unable to retain counsel should have the right to high quality court-appointed counsel from the filing of the petition to the conclusion of the case.

C. Attorney-Client Privilege and Confidentiality

1. Statement of Principle:

For an attorney and a child-client to communicate effectively, the child must feel free to disclose information to counsel. In addition, it is often helpful, and even necessary, for family members or other adults the child trusts to participate in discussions regarding the representation and related matters. If these communications are not privileged and confidential, the flow of information among attorneys and children and parents is hindered. Similarly, mandatory reporting requirements, when applied to children’s attorneys, compromise the attorney-client relationship and counseling process to the detriment of children.

2. Recommendations for Changes in the Law:


   b. Exclusion of Children’s Attorneys from Mandatory Reporting Requirements.

D. Courts

1. Statement of Principle:

Attentiveness to the needs of children and families on all levels of the judicial system is needed to promote speedy, fair, and holistic problem solving and dispute resolution processes involving children and families.
2. Recommendations for Changes in the Law:

a. Holistic Representation of Children: Jurisdictions should permit lawyers to represent youth in more than one system. There should be no prohibitions on concurrent or dual representation, particularly for public defenders and legal services agencies.

b. Elimination of Bias: Legislatures should adopt statutes, and courts should adopt rules of professional conduct that prohibit lawyers, court officers, and agencies serving children, from discriminating against children and families on the basis of race, language, nationality, ethnicity, class, gender, sexual orientation, and gender identity.

c. Advisory Counsels: Courts should establish, or engage in partnerships with, youth advisory councils to advise the courts on the effectiveness of their policies and procedures. The councils should comprise alumni of foster care and juvenile delinquency systems. Other council should also include biological parents, foster and adoptive parents, children, and other family members affected by child welfare and juvenile justice systems.

d. Elimination of Delays:
   i. Trial and appellate courts should eliminate delays for the administrative convenience of courts, lawyers and agencies on the trial and appellate levels;
   ii. Court rules or state statutes should mandate courts to institute case management and tracking systems to monitor timelines of juvenile dockets and track the movement of children through the child welfare and juvenile justice systems;
   iii. Court rules or state statutes should mandate that appellate decisions in child welfare and juvenile justice matters be issued within an expedited time frame.

e. Court-Ordered Evaluations: The law should require that all court-based or court-ordered evaluations be conducted by qualified professionals, and be responsive to specific legal questions.

E. Juvenile Court Jurisdiction and Juvenile Sentencing

1. Statement of Principle:

Ensuring children are able to participate, be heard in, and be helped by court proceedings affecting their lives requires courts and agencies serving children to serve children in a developmentally appropriate manner that maximizes children’s opportunities to have their interests and well-being benefit from these proceedings. Juvenile court delinquency jurisdiction should be determined by the child’s age, not his or her offense while juvenile jurisdiction over dependant and delinquent children should be available as a resource for children and youth as long as they have the need and desire.

2. Recommendations for Changes in the Law:

a. Juvenile Court Delinquency Jurisdiction:
   i. Jurisdiction for juvenile court delinquency should not be invoked for youth younger than twelve years old at the time of their offense;
   ii. No child should be tried as an adult for any crime committed prior to his or her eighteenth birthday. Nevertheless, the following apply when existing law permits trial of a child as an adult:
      (A) The decision of whether to try a child as an adult should be made only by judges, in a manner consistent with the ABA/IJA Juvenile Justice Standards;
      (B) No child should be sentenced to a term of life in prison, and without parole, for any crime committed prior to his or her eighteenth birthday;
      (C) Children should never be incarcerated with adults.
   iii. Status as an alleged or adjudicated offender should not disqualify a youth from eligibility for services through the child welfare system.

b. Criminal Accountability of Parents for Children’s Actions: Laws should not include vicarious criminal or other sanctions that hold parents accountable for the behavior of their children and impose on parents the costs of prosecuting cases and placing children.

c. Juvenile Court Child Welfare Jurisdiction:
   i. State and federal law should allow youth in foster care to remain in care at their own
request until at least the age twenty-one and the juvenile court should continue to have jurisdiction over their cases;
ii. Children who have been in substitute care should be permitted to request reopening their child welfare cases;
iii. Children who have been in substitute care should have the right to return to substitute care any time before age twenty-one or later, should the law permit the court to retain jurisdiction until children are older than twenty-one. In the event of return to substitute care, the juvenile court case shall be reopened at a child’s request and the child should again have a right to counsel;
iv. Children in substitute care should remain eligible for medical insurance until at least age twenty-one;
v. These rights should not be conditioned on a youth being in school or in treatment, although all reasonable efforts should be made to identify the right school and to finish school.

d. Right to Petition for Orders of Protection: State statutes should permit persons under the age of eighteen to petition for relief under existing state domestic violence order of protection laws.

F. Conforming to and Utilizing International Law and Norms

1. Statement of Principle:

The United States should ratify and implement major international conventions and treaties, and conform to international norms with respect to ensuring the protection of children’s rights and interests. Article 12 of the United Nations Convention on the Rights of the Child (“CRC”) is particularly pertinent to realizing the Fordham and UNLV Recommendations. That Article grants children the right to participate and express their views, and potentially to be represented, in a vast number of proceedings beyond child protective proceedings. Article 12 further clearly contemplates representation of the child’s subjective viewpoint and wishes and not of the child’s best interests.

2. Recommendations for Changes in the Law:

a. CRC: The United States should ratify and implement the CRC.
b. CAPTA: The United States should amend CAPTA to conform to the following CRC provisions:
   i. Article 12, section 1, provides:
      State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
   ii. Article 12, section 2, provides:
      [F]or this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.
c. International Norms: The United States should immediately eliminate gross U.S. law and practice departures from current international law and norms, including:
   i. Children should not be incarcerated with adults;
   ii. Child offenders should not be sentenced to life without the possibility of parole;

G. Sexual and Reproductive Health

1. Statement of Principle:

Children are both agents in their own sexuality and sexual conduct and at times victims of coercion and manipulation or their own immaturity. Moreover, children in state custody or under court jurisdiction continue to have an interest in their own health, sexual and reproductive choices.

2. Recommendations for Changes in the Law:

a. Equal Access to Reproductive Health Care: Legislatures should adopt statutes and state agencies should adopt policies that permit youth in the custody of state agencies to access reproduc-
tive health services to the same extent as youth not in custody.

b. **Decriminalize Youth Involvement in Sex Trafficking or Prostitution:** Legislatures should decriminalize youth involvement in prostitution, trafficking or other commercial sexual exploitation.

c. **Exclusion of Children from Sexual Offender Registry Laws:** Legislatures should exclude persons under eighteen from sex offender registry laws and community notification.

**H. Rules Regarding Attorneys**

1. **Statement of Principle:**

The organized bar and the judiciary are positioned to take leadership roles in addressing the concerns expressed in these UNLV Recommendations and the UNLV conference proceedings regarding unequal treatment for youth involved in court proceedings based on race, ethnicity, culture, language, nationality, class, sexual orientation, and gender. The bench and bar are also well suited to address the lack of resources for children’s and parents’ attorneys that leads to high caseloads that in turn interferes with professional obligations under the American Bar Association’s professional standards.

2. **Recommendations for Changes in Professional Norms:**

   a. **ABA Rules of Professional Responsibility Should Address Bias:** The rules of professional responsibility should be revised to include a model rule requiring attorneys to take into account the impact of the client’s race, ethnicity, language and culture on the attorney-client relationship and representation.

   b. **Adequate Compensation for Representation:** Attorneys for children should receive:

      i. Adequate compensation;

      ii. Prompt compensation for litigation-related expenses, including the retention of consulting experts;

      iii. College and law school loan forgiveness for attorneys representing children;

      iv. Reasonable caseloads.

**I. Resources**

1. **Statement of Principle:**

Public funding for the needs of poor children and families is inadequate and often funded services do not correspond to the needs of children and families involved in court proceedings.

2. **Recommendations for Changes in the Law:**

   a. **Pew Commission Funding Recommendations:** Congress should implement federal financing recommendations of the Pew Commission on Children in Foster Care, resulting in more flexible funding for services to assist children and families, and reducing the number of children and families entering the dependency court system.

   b. **Extension of Pew Recommendations:** The broader Pew Commission Recommendations should be extended, as appropriate, to apply to children in other relevant systems.

**J. Recommendations for Further Study**

1. Whether children should have a right to counsel and/or a right to be heard in proceedings other than the proceedings listed above.

2. Whether in medical matters the parent should control decision-making, except when the minor is a mature minor.

3. Whether the language of CAPTA should be amended to provide for appointment only of lawyers for children in child abuse and neglect cases.

4. Whether, when and to what extent there should be a parent-child privilege.

5. Whether non-lawyer professionals working with lawyers should not be mandatory reporters.

6. The benefits and detriments of opening juvenile court proceedings to the public.
APPENDIX C:
Appendices to *Evaluating the Decision-Making Capacity of Children: A Guide for Legal Practitioners*

- Determining Decision-Making Capacity Flowchart
- Thinking Through a Specific Incident Worksheet
- Setting Goals Worksheet
- A 5-Step Process for Decision-Making
Evaluating the Decision-Making Capacity of Children
A Guide for Legal Practitioners

Rachel Martin • Jena Gutierrez • Jerome Galang
Appendix

- Determining Decision-Making Capacity Flowchart
- Thinking Through a Specific Incident Worksheet
- Setting Goals Worksheet
- A 5-Step Process for Decision-Making
Determining Decision-Making Capacity
Flowchart

YES
• Does the child understand the nature and consequence of his/her decision?

YES
• Does the child retain information, regarding the task, long enough to make the decision?

YES
• Does the child use or weigh the information as part of arriving at a decision?

YES
• Does the child communicate his/her decision in some way?

Yes

Thinking Through a Specific Incident Worksheet

1. What was the specific incident and where did it occur?

2. What were the child’s perceptions of what happened?

3. How did the child feel?

4. How strong were those feelings?

5. What was the child’s response to the incident?

6. How did the child perceive his/her own behavior?

7. What might the child do if something happened like that again?
Setting Goals Worksheet

In order for something to be a goal:

- It has to be important to you, personally.
- It has to be something you have a reasonable chance of achieving.
- It must be clearly defined and have a specific plan of action.

1. Define your goal.

2. Outline the steps needed to achieve it.

3. Identify possible barriers to achieving your goal and possible ways around them.
A 5-Step Process for Decision-Making

1. Identify feelings associated with issue.

2. Develop goals that might be helpful in solving the problem.

3. Explore consequences that might be associated with each goal.

4. Develop alternative options that might be helpful in dealing with possible snags in the plan.

5. Observe the actual consequences
APPENDIX D:
Contact List of Referenced Legal Services Providers
| 1. | Atlas: DIY  
278 44th Street, 2nd Fl.  
Brooklyn, NY 11232 | Lauren Burke  
Executive Director  
Phone: (347) 599-1641  
Email: lauren.burke@AtlasDIY.org |
| 2. | University of Minnesota  
96A Mondale Hall  
229-19th Ave South  
Minneapolis, MN 55455 | Ben Caspar  
Visiting Associate Clinical Professor of Law  
Phone: (612) 625-6484  
Email: caspe010@umn.edu |
| 3. | Catholic Charities of Los Angeles  
Community Education Programs  
Esperanza Immigrant Rights Project  
1530 James M. Wood Blvd  
Los Angeles, CA 90015 | Lindsay Toczylowski  
Directing Attorney, Representation Programs  
Phone: (213) 251-3519  
Email: LToczy@ccharities.org  
Erika Pinheiro  
Directing Attorney, Community Education Programs  
Phone: (213) 251-3538  
Email: EPinheiro@ccharities.org |
| 4. | Catholic Charities Community Services,  
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