

## **Appendix 7-1: Practical Tips for Attorneys on Using Capacity**

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Prepared by Valerie Pearce

1. Meet with client as soon as possible after appointment to case.
2. Take time to get to know client, establish rapport and trust. (See interview tips and information about what information to look for in the interview)
3. Observe client and family members.
4. After talking with client, interview family and other interested parties and obtain as much detailed information as possible.
5. Get releases signed for records.
6. Obtain and review discovery, including written statements and audio/video recordings of statements.
7. Decide if there is capacity to proceed or capacity limited to suppression issue.
8. If so, file appropriate motions for evaluations.
  - Evaluations should be completed by a competent, experienced evaluator knowledgeable about juvenile capacity. The evaluator must be skilled at doing culturally sensitive assessments of adolescent development. Mental health professionals qualified to diagnose mental disorders in adults are not necessarily qualified to identify adolescent developmental disabilities or mental illness. Be particularly attentive to qualifications of mental health examiners and the quality of their evaluations. You may need to obtain an order for the court to pay for a specific examiner who is qualified to do these types of evaluations in children. An expert witness will be helpful in explaining the research and its implications in juvenile court.
9. Gather complete records from the Department of Social Services, Schools, Medical records, Mental Health and Developmental Disability records, Substance Abuse records, Department of Juvenile Justice records, any psychological or psychiatric testing, including IQ tests, Special education records and IEP's, any written or oral statements made by the juvenile, any audio or video recording of interviews, investigator notes of all officers involved in interviewing, investigating, or transporting the juvenile, detention records, case management records, and any other agency or program involved with the juvenile that may be relevant.
10. You may need court orders to obtain some records.
11. Provide records to the evaluator.
12. Go over the statements and any audio or video recordings with a fine tooth comb, paying close attention to the interrogation environment, tone of voice, verbal and non-verbal communication between the juvenile and the officers, terms used, and observations of the juvenile's reactions.
13. File a written motion to suppress with an affidavit and request that a pre-trial hearing be set.

14. Consider putting together a memorandum of law to provide to the court, as well as copies of case law and research articles on this issue.
15. Be specific and detailed in laying out the circumstances for the judge that show that this was NOT a voluntary, knowing, or intelligent waiver.
16. Prepare for the hearing and subpoena witnesses. Use records and have copies for the court when helpful
17. Prepare your expert. The expert will need to be able to explain the research in simple layman terms and how it applies in this particular case.
18. Decide whether or not you will put the juvenile on the stand and if so, prepare him for what to expect in the courtroom.
19. Be prepared for adverse reactions from the Court and from court personnel. Be prepared to hear such comments as:
  - "If you do this, you will open up the floodgates."
  - "Are you going to raise capacity in every case?"
  - "This is just juvenile court, this court is about treatment and not punitive."
  - "The child needs to accept consequences for his actions and this is a door to services"
  - "Why are you trying to make this court like adult court?"
  - "This is just a delay tactic."
  - "This is a waste of court time and money."

Some suggested responses:

- "It is our job as juvenile defenders to ensure that the most vulnerable in our society are given every protection allowed under the Constitution."
  - "Justice naturally requires that we assure accuracy. It would be unfair to the alleged victims and to the courts if this child made statements that were inaccurate and the real suspects went unpunished because we assumed that the statements were true."
- Keep the court focused on this individual child and their individual circumstances.
20. Just because a child says they understand does not make it true.
  21. The ability to read does not equal understanding.
  22. The law presumes that children under the age of 18 are not capable of deciding about medical treatment, entering into binding legal contracts, or operating automobiles. Why then do we assume that they are capable of understanding complicated legal concepts and waive their constitutional rights?
  23. When involved in the suppression hearing, be sure to flesh out all of the details that add up to the totality of the circumstances. Most officers have not been trained on how to interview children. They are focused on obtaining a confession in order to prove their theory of the case and are trained in using adult tactics. Focus on what they did not pick up on and what they did not do as well as what they said and did in the interrogation of the child. Keep the focus on the fact that this was a "child" and not an adult.
  24. If the juvenile client takes the witness stand, keep the child focused on how they felt and what their perception was of the interrogation. You want the judge to see through the eyes of the child.
  25. If the judge denies the motion to suppress, continue to object for the record so that you do not waive the issue at trial and preserve the issue for appeal.