

VERSION 1
24 Jun 14

**BUSINESS RULES FOR THE PROVISION OF VLC SERVICES
TO MINORS AND CLIENTS WITH DIMINISHED CAPACITY**

The following guidance is provided to assist Navy VLC in establishing legal representation for minors and clients with diminished capacity and for executing legal advice, aid, and advocacy for those victims. This guidance has been approved by Commander, Naval Legal Service Command and shall remain in effect until or unless revised or cancelled by that authority. Questions regarding implementation of these policies shall be referred to Chief of Staff, Navy Victims' Legal Counsel Program, or his/her Deputy.

Definitions

1. **Sexual Assault Victim.** A person who alleges she or he suffered direct emotional or physical harm as a result of the commission of a sex-related offense as defined by state or federal law or the Uniform Code of Military Justice (UCMJ) Articles 120, 120a, 120b, 120c, 125, or an attempt to commit such offenses.
2. **Diminished capacity.** A person whose capacity to make adequately considered decisions in connection with their representation is diminished, whether because of minority, mental impairment, or for some other reason. Refer to Rule 1.14 of the JAG Rules of Professional Conduct (JAGINST 5803.1D) for additional guidance.
3. **Minor.** A person under the age of 18. A "minor" may alternatively be referred to as a "child" herein.
4. **Eligibility.** The following individuals who are eligible for military legal assistance per 10 U.S.C. § 1044 are eligible for VLC services, to include: Navy members on active duty; Navy reserve personnel on active duty or on inactive-duty training at the time of the assault; other Department of Defense service personnel and retirees when assaulted by an active-duty Navy member; dependents, including spouses and children, of active duty Navy members when assaulted by an active duty Navy member; and some overseas DON civilians. Refer to NAVADMIN 087/14 for additional information.

5. **Guardian.** A person appointed to act as a *general* guardian over the person and their affairs by a competent family or dependency State court of law, also known as a "conservator," "custodian" or "curator."

6. **Guardian ad litem.** A person appointed by a State civil or criminal court to represent the *legal* interests of a minor or person with diminished capacity in a particular cause before the court.

7. **Article 6b Designee.** A person appointed by a military judge or other designated authority in accordance with UCMJ § 806b to assume and enforce the victims' Article 6(b) rights under said section.

Business Rules

1. **Applicability.** These business rules apply to the legal representation of minors and persons with diminished capacity who are otherwise eligible for VLC services on or after 24 June 2014. All Navy VLC shall adhere to these rules in the formation of any attorney-client relationship with minor or diminished capacity sexual assault victims.

2. **Representation.** The sexual assault victim is the VLC's client at all times. The VLC has an ethical obligation to advocate for the client's expressed interests. In accordance with Rule 1.14 of JAGINST 5803.1D, when a client's capacity is diminished due to age or other reason, the VLC must, as far as reasonably possible, maintain a normal attorney-client relationship with the client. This means that VLC shall assess each client's capacity separately on a case-by-case basis to determine if a particular client has the considered judgment and capacity to direct VLC services. If VLC determines that a minor or diminished capacity client has sufficient considered judgment and capacity to direct VLC services, that client shall retain VLC in a traditional attorney client relationship.

All child and diminished capacity clients should, at a minimum, be personally contacted and interviewed by the VLC to determine the client's wishes and assess the client's well-being and capacity to direct the representation. Unless impossible, it is critical for the VLC to observe the child and the child's

interactions with others (parent(s), guardian, the attorney, FAP personnel, counselors, law enforcement, etc.) and assess the severity of the injuries, the child's general health and condition and the child's mental acuity and ability to listen, understand, reason and make decisions. Even children four years of age or old enough to communicate orally should personally meet and communicate with VLC on one or more occasions to allow VLC to assess the child victims' capacity to direct the VLC's representation.

a. **Determining whether a minor or diminished capacity victim has considered judgment and the capacity to direct the representation.** Determining whether a minor has considered judgment and the capacity to direct representation is of paramount importance and VLC shall take care to devote sufficient time and opportunity to make an accurate assessment of such matters both initially and throughout representation of the child victim.

To determine whether the minor has considered judgment and the capacity to direct the representation, VLC should focus on the minor's decision-making process, rather than the minor's actual decision. VLC should determine whether the minor understands the risks and benefits of the minor's legal position and whether the minor can reasonably communicate the minor's wishes. VLC should consider the following non-exhaustive list of factors when determining whether the minor has considered judgment and sufficient capacity to direct the representation:

- (1) the child's chronological and intellectual age;
- (2) the child's developmental stage;
- (3) the child's cognitive ability;
- (4) the child's socialization;
- (5) the child's emotional and mental development;
- (6) the child's expression of a relevant position;
- (7) the child's ability to communicate with the attorney;
- (8) the child's ability to articulate reasons for a legal position; and,
- (9) the child's relevant and available reports such as reports from social workers, psychiatrists, psychologists, and schools relating to the child's capacity or intellectual development.

It should be noted that a minor may be capable of considered judgment even though the minor has a significant cognitive or emotional disability.

VLC should be sensitive to cultural, racial, ethnic, or economic differences between the VLC and the minor because such differences may inappropriately influence the attorney's assessment of whether the minor has considered judgment. In other words, VLC should meet the minor, regardless of the minor's age or disability, in an environment that will facilitate reasonable attorney-client communications. VLC are encouraged to meet with the minor in multiple different environments, which may include the minor's school or home or other environment, when reasonable and necessary so that VLC may establish a relationship with the minor and accurately assess their capacity and considered judgment.

In making a determination regarding considered judgment, VLC may seek guidance from professionals, family members, school officials, and other concerned persons. VLC should also determine if any evaluations are needed and advocate them when appropriate. At all times VLC must recognize the attorney-client privilege and maintain confidentiality with the minor victim.

(i) If the VLC determines that the minor or diminished capacity client has the considered judgment and capacity to direct the representation, the VLC shall explain and have the client execute the scope of representation letter attached as Enclosure (1). Both the client and VLC should be provided and retain a copy of the signed letter. VLC should seek the non-offending parent or guardian's signature as an acknowledgement on Enclosure (1) and retain a copy of that acknowledgement in the VLC's case file. If the VLC is unable to secure the non-offending parent or guardian's signature, VLC should note the date and to who(m) the acknowledgment was offered on Enclosure (1) and retain a copy in their client file.

(ii) If the VLC determines that the minor or diminished capacity client does not possess the considered judgment and capacity to direct any aspect of the VLC's representation, the VLC shall consult with the client's non-offending parent or guardian to determine if they desire to retain VLC to provide victim services for the minor or diminished capacity client. If the non-offending parent or guardian desires to retain VLC, VLC shall explain and have the non-offending parent or guardian

execute the scope of representation letter attached as Enclosure (2). The scope letter provided will plainly explain that while the non-offending parent or guardian is authorizing the representation, the minor is the client in all instances and that while the parent or guardian may be consulted along with other persons by the VLC, the minor remains the client and the parent does not direct the representation. Further, while the VLC may seek input from the non-offending parent or guardian, final legal decisions rest with the VLC. The only person other than the minor who may direct VLC legal services for the minor is a court appointed "guardian" as the term is defined above. The non-offending parent or guardian who retained VLC for the child victim should be provided and retain a copy of the signed letter, as should the VLC.

(iii) When determining whether a minor or diminished capacity client possesses considered judgment and capacity to direct some, any or all aspects of VLC representation, VLC shall remain cognizant of the guidance contained in Rule 1.14 of JAGINST 5803.1D. When a client's capacity is diminished due to age or other reason, the VLC must, as far as reasonably possible, maintain a normal attorney-client relationship with the client. A minor or diminished capacity client's inability to provide considered judgment or a lack of capacity to direct VLC on one or more matters during the course of the victim's representation does not automatically mean that the victim is unable or lacks the capacity to direct VLC on other matters. Accordingly, VLC should carefully consider whether the minor or diminished capacity client does not possess the considered judgment and capacity to direct any aspect of the VLC's representation vice a lack of capacity to direct certain aspects of the representation. The VLC should inquire thoroughly into all circumstances that a careful and competent person in the child's position should consider in determining the child's best decision regarding the issue in question. After consultation with the child, child's parent(s) (if there does not appear to be any conflict), the child's FAP or other mental health counselor or therapist, and VLC leadership, VLC shall advocate on the particular issue what the VLC determines to be the best decision for the child under the circumstances. In such an instance, the child victim shall continue to direct the VLC in all other areas where the child maintains sufficient capacity and considered judgment. VLC should exercise his/her reasoned judgment, considering rule 1.14, to determine if the minor or

diminished capacity client should be permitted to direct a particular matter on his or her own accord.

b. All Minor or Diminished Capacity Sexual Assault Victims.
When representing all minor or diminished capacity victims:

(1) Routine contact and access to the victim will be critical to effective representation. When face-to-face contact with a child is not reasonably possible or is otherwise not necessary, VLC must still seek meaningful contact with the child utilizing other means. These situations may include: (a) the child is located in a remote area; and, (b) the child is of a sufficient chronological or developmental age to permit the VLC to remotely assess and establish attorney-client relationship. The VLC, however, should have face-to-face contact with the child as early as possible in the relationship and absolutely prior to any court proceeding where the child victim's rights are in issue. Contact should include, at a minimum, regular telephonic communications, as well as in person and written communications as available and when appropriate. While the cooperation and support of the competent minor's non-offending parent or guardian may not always be necessary, it should be sought, with the client's consent, to facilitate access to the client and the client's relevant records.

(2) The VLC shall be vigilant to continually assess the client's capacity to direct the VLC's legal services throughout the term of the relationship.

(3) A VLC shall communicate with the client using developmentally appropriate language and communication methods, and shall assess at regular, frequent intervals the child's comprehension, thought processing, and ability to provide reasoned, coherent, thoughtful direction to the VLC.

(4) VLC should develop a position and strategy concerning relevant aspects of the proceedings that may potentially impact the victim's rights.

(a) When developing the child's legal position, VLC should ensure that the child is given advice and guidance and all information necessary to make an informed decision.

(b) VLC should give the client time to ask questions and consider the alternatives. VLC should obtain information from the client about the following when appropriate and with due consideration given to concerns about re-victimization and facilitating the victims overall recovery:

1. the client's feelings of safety;
2. the client's knowledge about the alleged crime;
3. the accuracy of information relayed to VLC by Trial Counsel or Law Enforcement;
4. any additional relevant facts not previously disclosed to Law Enforcement or Trial Counsel;
5. services being provided to the victim to assist in recovery;
6. any additional service that may be needed;
7. the client's concerns about the investigation or case;
8. the client's long- and short-term goals;
9. whether the client wishes to testify and participate in any criminal proceeding; and,
10. any other relevant information

(c) VLC should confer with the client as often as necessary after retention to ascertain all relevant facts and otherwise necessary information. After the VLC is fully informed on the facts and the law, the VLC should advise the client concerning all aspects of their matter. VLC should explain to the child in a manner appropriate to the child's level of development what is expected to happen before, during, and after each hearing; and should at reasonable regular intervals provide the child with updates regarding the status of their case.

(5) With the client's permission and absent conflict(s) of interest(s), the VLC is encouraged to involve the non-offending parent, family members, and other appropriate people in the minor or diminished capacity victim's life in the representation to the extent the VLC deems reasonable under the circumstances to help facilitate the minor victim's safety, recovery and participation.

(6) Should a VLC question or develop concern regarding the client's actual competency to direct VLC services on a

particular issue or in general, the VLC should discuss such concerns with his or her supervisory attorney, the VLC OIC and/or COS/DCOS VLC. These concerns must be evaluated on a case-by-case basis.

(7) In instances where the VLC and his/her supervising attorney disagree as to the competence of the child victim to direct VLC representation or where the VLC or his or her supervisory attorney believe measures are required to protect the child victim, they must notify Chief of Staff VLC prior to taking any action. With COS VLC approval, the VLC may take actions to include consulting with family members, medical or mental health professionals, or other professional services. The VLC may also consult with the Family Advocacy Program (FAP) multi-disciplinary team and/or relevant state or civil child development authorities to secure their assistance in rendering a confidential opinion on the client's competency to direct VLC legal services. The VLC should consider whether appointment of a guardian ad litem is necessary to protect the child's interests. In taking protective action, the VLC should be guided by such factors as the wishes and values of the child, the child's best interests, respecting the child's family and social connections (e.g., teachers, religious leaders, coaches), and his or her obligations pursuant to the Rules of Professional Conduct.

(8) VLC shall recognize that information relating to the representation of a client with diminished capacity is protected as confidential and is generally covered by the Attorney Client Privilege. VLC who have a diminished capacity client who is at risk of substantial, i.e. serious, physical, financial, or other harm unless action is taken and VLC cannot adequately act in the client's own interest are permitted to disclose confidential client information to third parties to aid the child client as authorized by their licensing authority's professional responsibility rules and in all cases only to the extent reasonably necessary to protect the client's interests.

(9) COS VLC, as VLCs' supervising attorney, retains the authority and prerogative to resolve any disagreements and direct necessary action of VLC should a difference of opinion develop between VLC counsel and his/her VLC supervisors on matters regarding representation of minor or diminished capacity clients.

3. Additional Matters.

a. A standardized training aid entitled "When Kids Testify at Court-Martial" is included as enclosure (3) and may be provided to younger or developmentally challenged victims to help them understand the court-martial process and what occurs when they are called to testify. Where possible, the VLC shall make every effort to escort such victim to the courtroom or physical site of the testimony for familiarization prior to testifying. Where the VLC is not able to provide this familiarization, he or she shall work with the detailed Trial Counsel to ensure this occurs.

b. In all cases, the VLC should seek the support of the non-offending parent or guardian to contact the relevant victim advocate, therapist, FAP counselor or case worker, clinical social worker, medical provider, school counselor, teacher or other parties related to the case to the extent necessary to provide effective legal representation of the victim, and also to comply with all mandatory child, elderly and other abuse reporting requirements.

c. When deemed necessary for legal representation, the VLC should request the non-offending parent or guardian sign any release and consent forms required to give the VLC access to the victim's counseling, medical, school and other records relevant to his or her report of sexual assault.

4. When Article 6b Representative has been Appointed. Per §1701 of NDAA 2014, once a 6b representative has been appointed to promote and preserve the 6b rights of a minor or diminished capacity victim, VLC may cooperate with that agent to enforce those 6b rights, subject to the confidentiality, consent, and representation requirements established above.



Privileged - Attorney Work Product

Diminished Capacity Client – Considered Judgment/Capacity Assessment Worksheet

Use this form to document your assessment of a diminished capacity client's considered judgment and capacity to direct your legal services. This form should be utilized during VLC's initial assessment prior to retention and for re-assessment of capacity at frequent intervals throughout the representation

Initial Client Capacity Assessment				
<i>Client Name & Date of Birth:</i> _____				
<i>VLC Counsel Name & Date of Initial Assessment:</i> _____				
Meeting Information	<i>In Person</i>	<i>VTC</i>	<i>Telephone</i>	<i>Other (Describe)</i>
<i>Type of Meeting</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Length of Meeting & Persons Attending</i>				
Meeting Content	Yes	No	Unsure	Comments/Findings
<i>Developmentally Appropriate Language Used?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Were VLC Services Explained?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Did you Determine the Victim's Chronological Age?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>“ “ “ “ Intellectual Age?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Did you Assess the Victim's Cognitive Ability?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>“ “ “ “ Socialization?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>“ “ “ “ Emotional & Mental Development?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>“ “ “ “ Expression of a Relevant Position?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>“ “ “ “ Ability to Communicate with VLC?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

<i>“ “ “ “ Ability to Articulate Reasons for a Legal Position</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Did you examine any records that evidence the victim’s capacity or intellectual ability? If “yes” list what you consulted and determined.</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

Initial Client Capacity Assessment Continued...

<i>Person(s) Consulted & Their Relationship(s) to Client</i>	
Other Factors Considered	Comments/Findings

Initial Considered Reasoning/Capacity Findings & Conclusions

Follow On Client Assessment/Meeting Log

Meeting Information	<i>In Person</i>	<i>VTC</i>	<i>Telephone</i>	<i>Other (Describe)</i>
<i>Type of Meeting</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Length of Meeting & Persons Attending</i>				
Meeting Content	Yes	No	Unsure	Comments/Findings
<i>Developmentally Appropriate Language Used?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Did you Assess the Victim’s Cognitive Ability?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>“ “ “ “ Ability to Communicate with VLC?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>“ “ “ “ Ability to Articulate Reasons for a Legal Position</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Did you examine any records that evidence the victim’s capacity or intellectual ability?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

<i>If "yes" list what you consulted and determined.</i>				
<i>Person(s) Consulted & Their Relationship(s) to Client</i>				
Meeting Notes & Additional Considered Reasoning/Capacity Assessment				
Follow On Client Assessment/Meeting Log				
Meeting Information	<i>In Person</i>	<i>VTC</i>	<i>Telephone</i>	<i>Other (Describe)</i>
<i>Type of Meeting</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Length of Meeting & Persons Attending</i>				
Meeting Content	Yes	No	Unsure	Comments/Findings
<i>Developmentally Appropriate Language Used?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Did you Assess the Victim's Cognitive Ability?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>" " " " Ability to Communicate with VLC?</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>" " " " Ability to Articulate Reasons for a Legal Position</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Did you examine any records that evidence the victim's capacity or intellectual ability? If "yes" list what you consulted and determined.</i>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
<i>Person(s) Consulted & Their Relationship(s) to Client</i>				
Meeting Notes & Additional Considered Reasoning/Capacity Assessment				

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