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## Conflicts of Interests in the Representation of Children

### Cover Page Footnote

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# CONFLICTS OF INTERESTS IN THE REPRESENTATION OF CHILDREN

Nancy J. Moore\*

## INTRODUCTION

CONFLICTS of interests arise whenever the representation of a client may be materially limited by the lawyer's duties to either another client or a third person or by the interests of the lawyer herself.<sup>1</sup> Analyzing such conflicts typically requires identifying situations involving a potentially impermissible conflict, determining whether the conflict is consentable, and, if it is, obtaining consent after full disclosure.<sup>2</sup> Conflicts analysis is difficult enough when the client is an adult.<sup>3</sup> When the client is a child, however, the analysis is complicated by a number of factors.

For example, in the wide variety of cases in which children (or their interests) are involved, the child's role varies enormously. In some cases, the child is actually a party; in others, the child has a legal interest of some sort; in still others, the outcome will affect the child only indirectly. Moreover, a child's interests can be protected in a variety of fashions, some of which involve legal representation, some of which involve appointment of a guardian *ad litem* (who may be a lawyer), and some of which involve indirect protection through the participation of the parent. Even when it is clear that the lawyer's role is actual representation, it may be unclear to whom the lawyer turns when decisions on behalf of the child are to be made. In some cases, the child may sue (or be sued) only through the parent as guardian or next friend. In other cases, the child may be named as a party, but the

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1. Model Rules of Professional Conduct Rule 1.7 (1983) [hereinafter Model Rules]; see also *id.* Rule 1.8 (prohibited transactions); *id.* Rule 1.9 (representation of former clients); *id.* Rule 1.10 (imputed conflicts); *id.* Rule 1.11 (conflicts involving government lawyers); Model Code of Professional Responsibility EC 5-1 (1981) [hereinafter Model Code] (stating that "[t]he professional judgment of a lawyer should be . . . solely for the benefit of his client and free of compromising influences and loyalties"). By 1994, the District of Columbia and all but six states had adopted some form of the Model Rules. ABA/BNA Lawyers' Manual on Professional Conduct 1:3 to 1:4 (1994).

2. ALI-ABA Comm. on Continuing Professional Education, A Practical Guide to Achieving Excellence in the Practice of Law: Standards, Methods, and Self-Evaluation § 2.2(a) & cmt. (1992) (discussing lawyer's duty to fully disclose to the client); Charles Wolfram, Modern Legal Ethics § 7.2.4, at 343 (1986); see Restatement (Third) of the Law Governing Lawyers §§ 201-216 (Tentative Draft No. 3, 1990).

3. See, e.g., Nancy J. Moore, *Conflict of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Tex. L. Rev. 211 (1982) (discussing the difficulties in analyzing conflicts in the simultaneous representation of multiple clients and the inadequacies of both the Model Code and the Model Rules).

parent may assert the right to make some or all decisions on the child's behalf. In still others, the child may not be a party at all, but the court may permit or assign a lawyer to represent either the child or the child's guardian or guardian *ad litem*. Finally, the lawyer may choose or be asked to represent more than one party; for example, the lawyer may attempt to represent both parent and child, agency and child, or multiple siblings. All these situations involve at least the potential for conflicting interests; however, only some of the issues raised are amenable to resolution through conflict of interests analysis. Moreover, even among those issues that do fall within the purview of conflict of interests rules, there are several unique aspects of the representation of children which ultimately call for an analysis far more complex than that typically encountered in even the most intractable conflicts issues involving adults.

#### I. THE IMPORTANCE OF CLIENT IDENTIFICATION: CONFLICTING INTERESTS VERSUS "CONFLICT OF INTERESTS"

It is a common misperception that the presence of conflicting interests necessarily signifies a "conflict of interests" problem—that is, one in which applicable standards of professional conduct may require separate representation.<sup>4</sup> Conflict of interests standards, however, apply only when there is some interest or duty on the part of the lawyer which interferes with her *representation of a client*.<sup>5</sup> Thus, if we want to talk about a lawyer's conflicts of interests in the representation of children, we need to eliminate from the discussion those situations in which the lawyer has not formed an attorney-client relationship with a child.<sup>6</sup>

This situation sometimes arises in proceedings such as custody, abuse and neglect, and termination of parental rights. These are all proceedings in which the outcome will profoundly affect a child's life, regardless of whether the child is a formal party to the litigation,<sup>7</sup> yet

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4. See *infra* notes 10-20 and accompanying text.

5. See sources cited *supra* note 1. The only exception involves conflict of interests rules which preclude lawyers from undertaking representation adverse to former clients. Model Rules, *supra* note 1, Rule 1.9.

6. Lawyers who serve in nonrepresentative fiduciary capacities (such as trustees or guardians) may well have conflicts of interests; for example, those resulting from other fiduciary obligations or from self-interest. These conflicts, however, will be governed by law which is applicable to fiduciaries generally (including nonlawyer fiduciaries) and not by the conflict of interests provisions of lawyer codes. See, e.g., Restatement (Second) of Trusts § 170 (1959) (duty of loyalty). Such conflict of interests dilemmas are beyond the scope of this Article.

7. Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 423, 424-25 (1993); see also James K. Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 Harv. C.R.-C.L. L. Rev. 565, 570-80 (1976) (identifying the legal proceedings where the need for child advocacy is crucial); Martin Guggenheim, *The Right to Be Represented But Not*

it is not uncommon for courts to assume that the child's interests will adequately be protected either by another party to the proceeding<sup>8</sup> or by the court itself.<sup>9</sup> Although some of these cases involve lawyers improperly representing multiple clients with conflicting interests (for example, agency and child or parent and child), others raise no "conflict of interests" issues at all.

For example, in a case severely criticized by at least one commentator,<sup>10</sup> a child welfare agency sought to remove a five-year-old girl from her foster parents after the foster parents attempted to adopt the girl, in violation of a contract they signed with the agency.<sup>11</sup> According to the agency's attorney, the foster parents, by coming to view themselves as the child's true parents, had created a difficult and damaging situation necessitating the child's removal.<sup>12</sup> Carefully delineating the various ways in which the interests of the agency (as well as the foster parents) potentially conflicted with the interests of the child,<sup>13</sup> the commentator castigates not only the court majority for failing to appoint separate counsel for the child, but also the agency's attorney, disparagingly remarking that "[t]here is an absurd pathos when a child's *presumed advocate* [that is, the agency's attorney] argues that foster parents are unqualified for indulging the infant with too much love in a comfortable home."<sup>14</sup> The commentator concludes by arguing that the case vividly "demonstrates the danger of a court's presuming, without inquiry, that a certain party can properly represent the

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*Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76, 77 (1984) (discussing the necessity of independent representation of children in legal proceedings).

8. Cf. *In re Jewish Child Care Ass'n*, 156 N.E.2d 700, 700 (N.Y. 1959) (where child had no counsel in dispute between foster parents and child welfare agency). *Jewish Child Care Ass'n* is discussed *infra* notes 11-20 and accompanying text.

9. See, e.g., *People ex rel D.K.*, 245 N.W.2d 644, 648 (S.D. 1976) (holding that although it was within power of court to appoint counsel to represent interests of child in neglect case, it was also within inherent power of court to protect child by waiving physician-patient privilege to allow admission of medical testimony).

10. See Genden, *supra* note 7, at 567-70 (discussing *Jewish Child Care Ass'n*).

11. *Jewish Child Care Ass'n*, 156 N.E.2d at 701-02.

12. *Id.* at 705 (Dye, J., dissenting).

13. Genden, *supra* note 7, at 569. Genden states:

There was no true advocate for Laura's best interests in this custody struggle. While it first appeared that the [foster parents] were taking a position parallel to Laura's interests in the suit, they were actually advocating their own interests in adoption. It was unclear where Laura's best interests lay. Her welfare may have been better served by a permanent placement, either with adoptive parents or her own mother, than by the foster home placement which was all the agency could offer. The Jewish Child Care Association had to defend its own prestige, self-image, obligations, and rights. No party was certain to speak up for Laura, let alone take a position in her behalf uncolored by self-interest.

*Id.* (footnotes omitted).

14. *Id.* at 568-69 (emphasis added) (footnotes omitted).

child" without considering "the child as a distinct individual whose interests must be clearly presented."<sup>15</sup>

It may very well be that the child should have been given her own attorney, or at least provided with some other means by which her interests could be "clearly presented" to the court.<sup>16</sup> The reason, however, has nothing to do with any violation of conflict of interests standards by the agency's attorney or with any failure of the court to recognize an ethical problem involving the agency's attorney. The attorney represented one client only and that client was clearly the welfare agency and not the child. Moreover, the court did not even presume that the child was directly or even indirectly *represented* by the state's attorney. Rather, what the court apparently presumed was that the nature of the proceedings were such that the *interests of the child* would sufficiently be protected so that the child did not need either to be made a formal party or otherwise to be heard through her own representative.<sup>17</sup> One might well disagree with this conclusion,<sup>18</sup> but not because the state's attorney was burdened with any potentially unethical conflict of interests. Rather, in these situations, it would be far more accurate to argue that what is needed is an advocate for a

15. *Id.* at 569-70.

16. Thus, numerous commentators have urged that representation be provided on behalf of children in similar proceedings, including custody disputes. *See, e.g.*, Henry H. Foster, Jr. & Doris J. Freed, *A Bill of Rights for Children*, 6 Fam. L. Q. 343, 374 (1972) (stating that the implementation of a child's right to counsel is the most effective way to protect the child's interests); Genden, *supra* note 7, at 570-80 (discussing six types of litigation in which independent representation may be beneficial); Monroe L. Inker & Charlotte A. Perretta, *A Child's Right to Counsel in Custody Cases*, 5 Fam. L. Q. 108 (1971) (calling for independent representation in custody disputes); James R. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 Vill. L. Rev. 521, 546 (1977) (calling for independent representation in child abuse proceedings). *But cf.* Guggenheim, *supra* note 7, at 77 (urging reconsideration of need for appointed counsel when child is too young to provide effective guidance).

At present, nearly all states mandate that a guardian *ad litem* or attorney be appointed for the child in civil judicial proceedings arising from a charge of abuse or neglect. 2 Donald T. Kramer, *Legal Rights of Children* § 16.24 (2d ed. 1994). A majority of jurisdictions authorize courts to appoint representatives for children involved in custody proceedings. 1 *id.* § 2.25.

17. Jonathan Hafén makes a similar point when he attempts to distinguish between representation of the child and representation of the *child's interests*. *See* Hafén, *supra* note 7, at 424 & n.3 (observing that when the parents' interests do not conflict with the child's, the interests of the child are "implicitly represented" by the parents). Even this articulation is confusing, however, because it would not be accurate to say that the state's attorney in this case represented the child's interests, even implicitly. Rather, the court seems merely to assume that *it* can determine where the child's best interests lie, given an adversarial proceeding in which both the agency and the foster parents present evidence and make arguments on that very question. This assumption is forcefully challenged by all the various authorities arguing in favor of direct representation of the child or the child's interests, through either an attorney or a guardian *ad litem*. *See supra* note 16 and accompanying text.

18. *See supra* note 16 and accompanying text.

presently *unrepresented child*<sup>19</sup> as opposed to an *inadequately* represented child.<sup>20</sup>

Even when a lawyer expressly appears on behalf of a child, failure to clarify the precise role of the lawyer may cause conflict of interests problems to be raised inappropriately. For example, lawyers are commonly appointed to represent one or more children in a variety of proceedings, and the question often arises whether separate counsel must be appointed when the children—for example, multiple siblings—differ in their views as to the appropriate outcome.<sup>21</sup> If the lawyer is serving solely as a guardian *ad litem*, then the answer should be “no.” This is because a guardian *ad litem* is traditionally viewed as an agent of the court, to which it owes its principal duty of allegiance, and not strictly as legal counsel to a child client.<sup>22</sup> Although the guardian *ad litem* is required to ascertain the child’s wishes, feelings, attachments, and attitudes (because they are relevant to determining the child’s best interests), there is no requirement that the guardian advocate such wishes and feelings.<sup>23</sup> Thus, if the lawyer-guardian concludes that the best interests of all the children are the same (despite their different desires), then there is not even a potential conflict of interests.<sup>24</sup>

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19. See *In re Tyease J.*, 373 N.Y.S.2d 447, 449 (Surr. Ct. 1975). Criticizing an earlier opinion of the New York Court of Appeals in which that court had granted an adoption by a stepfather on the urging of the natural mother and over the objection of the natural father, the court in *Tyease J.* stated:

No attorney appointed by any court appeared for that infant in [the Court of Appeals case]; it is to be hoped that the Court of Appeals or the Legislature will shortly mandate such representation, as was provided in the case at bar. Without such representation, the natural parent vigorously focuses on parental rights and claims. The approach centers on whether “this child belongs to me,” without an equal inquiry, on behalf of the *unrepresented infant* on whether “this parent belongs to me.”

*Id.* at 450 (emphasis added).

20. In *State ex rel. Juvenile Dep’t v. Wade*, 527 P.2d 753 (Or. Ct. App. 1974), *overruled by* 547 P.2d 175 (Or. 1976), two children appealed a decision terminating parental rights on the ground that they were entitled to “independent” legal representation. The court of appeals saw the issue as “whether either the district attorney or the counsel for the parents is capable of providing the children with the ‘effective’ representation to which they have a constitutional claim.” *Id.* at 756. The court then concluded that because of the potential conflicts between the interests of the children and those of both the state and the parents, the children had not obtained such effective representation. *Id.* at 757. A better conclusion would have been that, contrary to an applicable Oregon statute, the children had obtained no representation at all.

21. See, e.g., *In re J.P.B.*, 419 N.W.2d 387, 388 (Iowa 1988) (involving 13-year-old daughter who opposed termination of parental rights and claimed her constitutional right to effective assistance of counsel was denied because her court-appointed attorney and guardian *ad litem* also represented her brother who favored termination).

22. *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993) (citations omitted).

23. See *id.*

24. Even when the lawyer appears as a legal representative of more than one child, it is not always clear that conflicting desires result in a conflict of interests under rules of professional conduct. The weight of authority is that an attorney must advo-

Finally, the applicability of conflict of interests analysis is also problematic in representations involving multiple family members where there is significant ambiguity regarding the precise identity of the lawyer's client or clients. For example, a parent will often retain a lawyer regarding a matter in which a child's interests are involved, with the parent fully expecting not only to select and compensate the lawyer, but also to play a significant role in directing the course of the representation. If the lawyer represents the parent alone, then standard conflicts analysis simply does not apply, regardless of any disagreements or other conflict of interests between parent and child. On the other hand, if the lawyer represents *both* parent and child, then standard conflicts analysis is clearly relevant in deciding what to do if the clients disagree during the course of the representation or if the lawyer believes that it may be in the child's best interest<sup>25</sup> to sue or take other adverse action against the parent. Even when the lawyer represents the child alone (and not the parent), standard conflicts analysis could result in significant limitations on a parent's ability either to pay for the lawyer's services or to direct or influence the lawyer's independent judgment on behalf of the child.<sup>26</sup> Given all these different possibilities, it is critical that the lawyer understand exactly whom she is (and is not) representing.

When the representation involves multiple family members, client identification depends on a number of complex factors, including the

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cate the child's wishes and desires, except perhaps when the child is very young. See Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors* 681, 693-706 (1987). However, there is some authority that even an attorney representing a child in a nonguardian capacity should "advocate the child's best interest, not the child's wishes." *J.P.B.*, 419 N.W.2d at 391 (quoting *In re Marriage of Rolfe*, 699 P.2d 79, 86-87 (Mont. 1985)). If the attorney is to advocate the child's best interests, then it may be sufficient for the attorney to inform the court of both the children's different desires and the basis for the attorney's determination that their interests are the same. "[S]uch an approach obviates the expensive and burdensome practice of appointing both a guardian *ad litem* and attorney for each child in a family to ensure that the child's expressed wishes as well as best interest are advocated." *Id.* at 392.

Standard conflicts questions clearly do arise when a lawyer represents multiple children in a traditional lawyer-client relationship—that is, advocating legitimate client desires. See *infra* notes 66-72 and accompanying text. They also apply when a lawyer has conflicts attributable to the lawyer's dual role as both attorney and guardian *ad litem*. See *infra* notes 114-18 and accompanying text.

25. Even if the lawyer's role is to advocate the child's wishes and not what the lawyer determines to be in the child's best interests, see *supra* note 24, the lawyer should counsel the child regarding the lawyer's views. As with adult clients, lawyers should always "exercise independent professional judgment and render candid advice." Model Rules, *supra* note 1, Rule 2.1. Of course, the client is free to reject the lawyer's advice whenever a particular decision is allocated to the client. *Id.* Rule 1.2; see also Jean Koh Peters, *Representing Children in Child Protective Proceedings*, 64 *Fordham L. Rev.* 1505, 1513 (1996) [page 9 in manuscript] (stating that lawyers should counsel the client regarding the client's best interests in order to assist clients in making decisions).

26. See *infra* part IV.



desires and expectations of all the interested parties (including the lawyer).<sup>27</sup> Ideally, these are matters which the lawyer will raise at the outset of the representation in an effort to clarify the nature of her relationship with both parent and child. Unfortunately, the subject is often left unaddressed, with the result that one or more of the parties may have expectations which are not shared by the others.<sup>28</sup> Here, the identity of the client may depend on the nature of the representation itself—for example, whether it involves a custody, abuse or neglect, or termination of parental rights proceeding,<sup>29</sup> a juvenile delinquency proceeding,<sup>30</sup> or a civil litigation brought by a parent on a child's behalf.<sup>31</sup> In addition, client identification may further be com-

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27. For an extended discussion of the extent to which putative client expectations are sufficient to establish an attorney-client relationship, see Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. Rev. 659 (1994).

28. There are a number of recurring situations which are fraught with potential ambiguity regarding the identity of a lawyer's client or clients, including representation involving entities and their constituent members, representation involving family members, representation involving transactions between buyers and sellers or borrowers and lenders, and representation of fiduciaries. *Id.* at 695. In all of these areas, lawyers who fail to clarify the nature of their representation are increasingly being sued by individuals who reasonably believed that the lawyers represented them, even when the lawyers did not intend to do so. *See id.* at 695-703.

29. *See infra* notes 33-36 and accompanying text.

30. *See infra* notes 37-41 and accompanying text.

31. *See infra* notes 42-60 and accompanying text. Another area which is particularly fraught with ambiguity concerns representation involving children with disabilities. For example, under the Individual with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491 (1994), when a dispute arises with school officials, both the parents and the child have a right to contest any aspect of a proposed program of special education. *See, e.g.,* Rappaport v. Vance, 812 F. Supp. 609, 612 (D. Md. 1993) (citing 20 U.S.C. § 1415(a)), *appeal dismissed*, 14 F.3d 596 (4th Cir. 1994). Thus, the lawyer could be representing either parent or child or both. Although in many cases there is no disagreement between parents and children, there are certainly circumstances in which a child old enough to express a preference will disagree with what the parent wants. Whether this disagreement will even surface may depend on the extent to which the attorney believes she is representing the child (and is thus bound to at least find out what the child's preferences are). For a discussion of conflicts of interests in the representation of children with disabilities, see David H. Neely, *Handicapped Advocacy: Inherent Barriers and Partial Solutions in the Representation of Disabled Children*, 33 Hastings L.J. 1359, 1395-1400 (1982); *see also* Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625 (1979) (identifying various difficulties inherent in the legal representation of severely retarded individuals). For an interesting discussion of client identification under the IDEA, raised in a unique context, compare *Rappaport*, 812 F. Supp. at 611 (denying attorney's fees to a father representing his child at an IDEA hearing and holding that because protection extends to parents as well as children, a parent who represents child also represents himself, and attorneys' fees cannot be awarded to pro se litigants) with *Miller v. W. Lafayette Community Sch. Corp.* 645 N.E.2d 1085, 1087-88 (Ind. Ct. App. 1995) (acknowledging rights and interests of parents under IDEA statute, but refusing to follow *Rappaport* and concluding that at all times student, not parents, was father's client).

plicated by the presence of difficult, frequently unresolved, legal issues regarding the status of children vis-à-vis their parents.<sup>32</sup>

Perhaps the easiest cases in which to determine the client's identity are those where the lawyer appears in a custody, abuse or neglect, or termination of parental rights proceeding. Here, there is little potential for ambiguity, probably because the conflict of interests between parent and child is so glaring.<sup>33</sup> The parents are formal parties to the proceeding and will typically be represented by their own counsel at an early stage of the proceeding. The attorney for a parent is unlikely to believe that she actually represents the child as well (although some attorneys may mistakenly believe that they have an ethical duty to compromise their representation of the parent in order to protect the child).<sup>34</sup> Nor is a child likely to view the parent's attorney as his representative. Courts have increasingly recognized the need for children to be separately represented (either by a guardian *ad litem* or by an attorney advocate).<sup>35</sup> When such an attorney is appointed, it will be clear (in most cases) that this attorney represents the child only. What is sometimes less clear—and will receive more extensive discussion below<sup>36</sup>—is the extent to which a parent may play any role in the selection of a particular lawyer to represent the child in these cases.

Of course, in delinquency cases, the children are themselves formal parties to the proceedings; indeed, they are the only persons whose interests are *directly* affected by the outcome.<sup>37</sup> Thus, it is not surpris-

32. See *infra* note 61 and accompanying text.

33. The existence of a conflict of interests should not in itself preclude a finding that an attorney-client relationship has been established if in a particular case, there is either an express or implied agreement or reasonable reliance on the part of the putative client. See Moore, *supra* note 27, at 664-65.

34. This surmise is based on anecdotal evidence. Certainly to the extent that the child is not represented at all, attorneys may feel a *moral* obligation to make at least some effort to protect the interests of the child. Under the Model Rules, such efforts are permissible only in advising the client, see Model Rules, *supra* note 1, Rule 2.1, and in disclosing a client's intent to commit a crime threatening imminent death or serious bodily harm. See *id.* Rule 1.6(b)(1); see also State *ex rel.* Juvenile Dep't v. Wade, 527 P.2d 753, 757 (Or. Ct. App. 1974) (stating that attorney's duty to parents "not modified or diminished in any way by any obligation to protect the 'best interests' of the child"), *overruled by* 547 P.2d 175 (Or. 1976).

35. See, e.g., *In re Lackey*, 390 N.E.2d 519, 522 (Ill. App. Ct. 1979) (holding that representation by public defender of parents and public defender's appearance as guardian *ad litem* for child constituted actual conflict of interest and reversible error), *aff'd*, 405 N.E.2d 748 (Ill. 1980).

36. See *infra* part IV.

37. Parents may be directly affected in a minority of cases—for example, where the parent might be required to participate in a particular dispositional plan. See, e.g., Nat'l Advisory Comm. on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention: Report of the Task Force on Juvenile Justice and Delinquency Prevention Standard 16.6* (1976) [hereinafter *Juvenile Justice and Delinquency Standards*] (requiring separate counsel in such cases), discussed in Janet R. Fink, *Who Decides: The Role of Parent or Guardian in Juvenile Delinquency Representation*, in *Ethical Problems Facing the Criminal Defense Lawyer* 119, 124 (Rodney J. Uphoff ed., 1995). Parents are also significantly affected in cases where there is a

ing that there is a consensus among both lawyers and commentators that a lawyer who enters an appearance in such a proceeding does so on behalf of the child and not the parent.<sup>38</sup> Nevertheless, parents often expect to play a significant role in the course of the proceeding. If this occurs they may come to believe that the lawyer is representing their interests as well as the child's.<sup>39</sup> Lawyers wishing to avoid such confusion can simply explain to the parents that the lawyer represents the child only and not the parents. Still, difficult questions may arise regarding the ethical propriety of any attempt by a lawyer to represent *both* parent and child (for example, at the express request of a parent), as well as the suitability of a lawyer's permitting the parent—who may both select and pay the attorney—to direct or influence the lawyer's judgment on behalf of the child. These are questions which do indeed implicate standard conflict of interests analysis,<sup>40</sup> and thus will be discussed in detail below.<sup>41</sup>

The potential for ambiguity is probably greatest when a parent or guardian contacts a lawyer for legal advice, possibly involving civil litigation, in a matter affecting the interests of a child. In the case of a guardian or other fiduciary (such as a conservator or trustee), if the lawyer is consulted *regarding the fiduciary's responsibilities*, then the

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possibility that the parents have abused or neglected the child. In such cases, lawyers should be careful not only to ensure that a parent does not mistakenly believe that the lawyer is representing the parent, but also to avoid giving any legal advice, except the advice that the parent should obtain separate counsel. *See, e.g.,* Model Rules, *supra* note 1, Rule 4.3 cmt. (instructing how to deal with unrepresented persons).

38. *See, e.g.,* F. Lee Bailey & Henry B. Rothblatt, *Handling Juvenile Delinquency Cases* § 2.4 (1982) ("The youngster [the lawyer is] defending is [the lawyer's] only client."); Fink, *supra* note 37, at 119 ("[I]t is the child, not the parent, who is the client and decision maker."); 1 Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Court* § 2.03 (1991) ("[I]t is the child, and not the parent or guardian, who is the 'client . . . .'"); Stanley Z. Fisher, *Parents' Right and Juvenile Court Jurisdiction: A Review of Before the Best Interests of the Child*, 1981 Am. B. Found. Res. J. 835, 843-44 ("[C]ourts and commentators have overwhelmingly understood [*In re Gault*, 387 U.S. 1 (1967),] to recognize delinquency defendant's independent right to counsel"). *But see* Joseph Goldstein et al., *Before the Best Interests of the Child* 129 (1979) ("*Gault* reaffirms the right of a child to have his own parents make decisions about what he needs."), *discussed in* Fisher, *supra*, at 844. Even Goldstein et al. may not dispute the fact that it is the child who is the client; rather, what they are contesting is the assumption that simply because the child is the client, the child has an independent right to retain or direct the lawyer. In other words, there is no necessary congruity between client identification and the allocation of decision making on behalf of a client. *But see infra* notes 162-69 and accompanying text.

39. In addition to believing that the lawyer will be loyal to them and their interests (as well as to the child and the child's interests), the parents may also believe that their communications with the lawyer are confidential. For a discussion of the limits of an attorney's duty of confidentiality to parents as nonclients, *see infra* note 107 and accompanying text.

40. Aside from conflicts, the questions raise serious and important issues regarding the allocation of decision making between parent, child, and attorney. Indeed, issues regarding the proper locus of decision making on behalf of children are themselves critical to the analysis of the conflict of interests issues. *See infra* part IV.

41. *See infra* part IV.

client is ordinarily considered to be the fiduciary and not the beneficiary.<sup>42</sup> Parents are the natural guardians of their children.<sup>43</sup> Nevertheless, unless the parent is also a trustee (for example, under the Uniform Gifts to Minors Act),<sup>44</sup> it is not at all clear when the parent is consulting the lawyer in a matter involving fiduciary responsibilities on the part of the parent.<sup>45</sup> As a result, there is enormous potential for confusion over whether the lawyer represents the parent, the child, or both, especially when the parent wants to bring civil litigation on behalf of the child.

Under the procedural codes of most jurisdictions, a minor does not have the capacity to sue on her own behalf and may only sue or be sued through a "representative, such as a general guardian" or "by a next friend or by a guardian *ad litem*."<sup>46</sup> Absent unusual circumstances,<sup>47</sup> parents are entitled to bring lawsuits on behalf of their children. However, whether they do so as general guardians<sup>48</sup> or as next

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42. See, e.g., Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 Fordham L. Rev. 1319, 1321-22 (1994) (suggesting that the client is the personal representative, although some also recognize fiduciary duty may be owed from attorney directly to beneficiary); Report of Special Study Committee on Professional Responsibility: Counseling the Fiduciary, 28 Real Prop. Prob. & Tr. J. 825, 827 (1994) (stating that the great majority of courts conclude that client is a fiduciary and rejecting suggestion in Model Rule 1.7 comment that client might be an entity which includes the beneficiary); see also Moore, *supra* note 27, at 701-03 (discussing the inherent ambiguity in client identification for lawyer in representations involving fiduciaries).

43. See, e.g., Richard V. Mackay, *Guardianship and the Protection of Infants* 12 (2d ed. 1957) (noting that "[p]arents as natural guardians have complete control over the person and property of the child during minority").

44. Unif. Gifts to Minors Act §§ 1-13, 8A U.L.A. 375-413 (superseded in 1983 by the Uniform Transfers to Minors Act).

45. For a rare example of a situation in which it was clear that a parent consulted a lawyer in the parent's capacity as a fiduciary, see *Federer v. Allen*, No. CA 94-471, 1995 WL 42511, at \*3 (Ohio Ct. App. Jan. 5, 1995).

46. Fed. R. Civ. P. 17(c). The Rule states:

Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

*Id.* See generally 6A Charles A. Wright et al., *Federal Practice and Procedure: Civil* 2d § 1570 (2d ed. 1990) (discussing Fed. R. Civ. P. 17(c)).

47. See, e.g., *Susan R.M. v. Northeast Indep. Sch. Dist.*, 818 F.2d 455, 458 (5th Cir. 1987) (holding that father who consented to managing conservatorship, thereby relinquishing general representation of child to human services department, no longer had standing to pursue action on child's behalf under Education of All Handicapped Children Act).

48. See, e.g., *Bergstreser v. Mitchell*, 448 F.Supp. 10, 15 (E.D. Mo. 1977) (holding that mother, as "natural guardian," may bring suit on behalf of minor child without formality of mother being appointed "next friend"), *aff'd*, 577 F.2d 22 (8th Cir. 1978);

friends<sup>49</sup> or guardians *ad litem*<sup>50</sup> depends on the vagaries of state law.<sup>51</sup> It is also unclear what the significance of these distinctions might be as far as client identification is concerned.<sup>52</sup> General guardians are considered real parties in interest in most jurisdictions,<sup>53</sup> whereas next friends and guardians *ad litem* are merely nominal parties, with the minor being the real party in interest.<sup>54</sup> Even nominal parties, however, ordinarily have the authority to make decisions regarding the course of the litigation.<sup>55</sup> Therefore, characterizing the minor as the real party in interest does not necessarily mean that the client must be the child and not the parent (or both).<sup>56</sup>

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see also Jeffrey v. O'Donnell, 702 F.Supp. 513, 516 (M.D. Pa. 1987) (refusing to appoint guardian *ad litem* for minor children who sued through parents because the parents were their "natural guardians").

49. See, e.g., Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986) (holding that a civil rights action may be brought on behalf of four minor children by father acting as "next friend," provided the parent is represented by an attorney); Blue v. People, 585 N.E.2d 625, 626 (Ill. App. Ct.) (holding that father who brought suit on behalf of minor child challenging visitation orders was at most a "next friend" of minor plaintiff), appeal denied, 596 N.E.2d 631 (Ill. 1992), cert. denied, 113 S. Ct. 992 (1993); see also Garrick v. Weaver, 888 F.2d 687, 692-93 (10th Cir. 1989) (involving mother who sued individually and "as parent and next friend" of minor children).

50. See, e.g., Rutland v. Sikes, 203 F. Supp. 276, 277 (E.D.S.C.) (noting that father had been appointed guardian *ad litem* for son in state action in which both were defendants), aff'd, 311 F.2d 538 (4th Cir. 1962), cert. denied, 374 U.S. 830 (1962). At one time, next friends and guardians *ad litem* were distinguishable. The former was used to prosecute an action on behalf of an infant or incompetent and the latter was used to defend the infant or incompetent. This distinction, however, was abolished under Federal Rule of Civil Procedure 17(c). See 6A Wright et al., *supra* note 46, § 1572.

51. 6A Wright et al., *supra* note 46, § 1571.

52. There is no meaningful distinction between next friends or guardians *ad litem*, both of whom are clearly nominal parties and not real parties in interest. See Rutland, 203 F. Supp. at 277 (where failure to appoint guardian *ad litem* not grounds for vacating judgment because minor received adequate representation). There might be, however, a distinction between such nominal parties and a general guardian, who occupies a more permanent position. For example, general (or legal) guardians are often characterized as real and not nominal parties. See Fed. R. Civ. P. 17(a). For purposes of determining who the client is, however, any distinction between real and nominal parties is itself of questionable significance. See *infra* notes 53-56 and accompanying text. My thanks to my colleague Allan Stein for this point.

53. 6A Wright et al., *supra* note 46, § 1548.

54. *Id.* § 1570. Other than the fact that an action must be brought in the name of a real party in interest, *id.*, it is unclear what the significance of this distinction is. At one time, the distinction may have been critical in determining diversity of citizenship and venue. A 1988 amendment to the diversity statute, however, now makes the citizenship of the ward controlling even when general guardians and other more permanent fiduciaries sue in their own names. *Id.*

55. See, e.g., Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974) (holding that a guardian *ad litem* has authority to engage counsel, prosecute, control, and direct litigation). But see Torres v. Friedman, 215 Cal. Rptr. 604, 608 (Ct. App. 1985) (holding that father's powers of guardian *ad litem* were limited to procedural steps and did not extend to actions which prejudiced the substantive rights of the child, such as admissions, waivers, or stipulations).

56. If the parent's interests conflict with the child's, then courts have the power either to substitute another person as next friend or to appoint a guardian *ad litem*, even when the parent sues as general guardian. See, e.g., Horacek v. Exxon, 357 F.

To the extent that the question is addressed at all, most authorities assume that the attorney retained by a parent to bring an action on behalf of the child does form an attorney-client relationship with the child. For example, there are legal malpractice actions in which minors sue lawyers through a guardian or next friend regarding prior litigation in which the lawyer had been retained by a parent acting as guardian or next friend.<sup>57</sup> In addition, a line of cases holds that a nonattorney parent may not bring litigation as next friend of a minor and appear *pro se*, but rather must retain an attorney *for the child*.<sup>58</sup>

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Supp. 71, 74 (D. Neb. 1973) (appointing guardian *ad litem* for minor plaintiffs in civil rights action because parents' interests might conflict with those of children and such appointment did not displace parents as general representatives of children).

57. See, e.g., *Woodruff v. Tomlin*, 616 F.2d 924, 926 (6th Cir.) (involving a legal malpractice action against lawyer retained by father in litigation which the father had brought on behalf of daughters against third parties), *cert. denied*, 449 U.S. 888 (1980); *Hickox v. Holleman*, 502 So. 2d 626, 628 (Miss. 1987) (involving legal malpractice action against lawyers retained to prosecute medical malpractice action based on treatment of child); *Schlomer v. Perina*, 485 N.W.2d 399, 400-01 (Wis. 1992) (involving legal malpractice action against lawyer retained by parents in personal injury claims arising out of injuries to minor child). In none of these cases did the lawyers dispute the existence of an attorney-client relationship between the lawyer and the child.

58. See *Osei-Afriyie v. Medical College*, 937 F.2d 876, 883 (3d Cir. 1991); *Oltremari v. Kansas Social & Rehabilitative Serv.*, 871 F. Supp. 1331, 1332 (D. Kan. 1994); *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 172 (E.D. Va. 1994); *J.W. v. Superior Court*, 22 Cal. Rptr. 2d 527, 528 (Ct. App. 1993); *Blue v. People*, 585 N.E.2d 625, 626 (Ill. App. Ct.), *appeal denied*, 596 N.E.2d 631 (Ill. 1992), *cert. denied*, 113 S. Ct. 992 (1993). Earlier opinions stated that a minor child cannot bring suit through a parent acting as next friend if the *parent* is not represented by an attorney. See, e.g., *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (holding that unrepresented parent cannot bring suit on behalf of minor). However, the more recent cases make clear that the reasons for this rule include prohibitions on the unauthorized practice of law (because the parent, who is not a real party to the proceeding, cannot be representing himself or herself, and thus should not be representing the child) and the desire to protect the interests of the minor. In *Osei-Afriyie*, the court stated:

The choice to appear *pro se* is not a true choice for minors who under state law . . . cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect, and the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others.

It goes without saying that it is not in the interest of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

*Osei-Afriyie*, 937 F.2d at 883 (quoting *Cheung v. Youth Orchestra Found.*, 906 F.2d 59, 61 (2d Cir. 1990)). Nevertheless, even in *Osei-Afriyie*, the court simultaneously makes statements indicating some confusion as to whom the attorney is representing. For example, the court states: "[W]e agree with *Meeker v. Kercher* . . . that a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child." *Id.* (emphasis added) (citation omitted). Perhaps the obvious answer is that in some sense the attorney is representing both parent and child. See *infra* note 61 and accompanying text.

Courts have applied the same rule against *pro se* representation in the case of a trustee attempting to appear without an attorney in an action brought on behalf of a trust. See, e.g., *United States v. Rodriguez*, No. 91-55567, 1993 U.S. App. LEXIS

Such cases also hold that minors do not have the capacity to waive the right to be represented by counsel, and further, that parents will not be permitted to waive that right on behalf of their children.<sup>59</sup> Similarly, the American Bar Association's Model Rules of Professional Conduct ("Model Rules") indirectly acknowledge that lawyers often form attorney-client relationships with children even when a parent or other guardian may be making decisions regarding the conduct of the representation, thus suggesting a bifurcation between client identification and the allocation of decision-making authority.<sup>60</sup>

Of course, concluding that the lawyer is representing the child does not fully answer the client identification question. Unless the lawyer clearly states that she is not also representing the parent, the parent's reasonable expectations and reliance may form the basis for an attorney-client relationship, despite the contrary intentions of the lawyer.<sup>61</sup> In addition, lawyers still face such questions as the propriety of representing *both* the parent and the child (for example, when the parent is also a party to the proceeding) and how to deal with conflicts of interest between a child client and a nonclient parent who wants to be active in the representation.

## II. CONFLICTS OF INTERESTS PART I: REPRESENTING MULTIPLE PARTIES

Lawyers representing children are sometimes asked to represent more than one client, typically either multiple siblings or a child and one or both parents. Under standard conflicts analysis, the ethical propriety of any such joint representation is determined by (1) identifying any potentially impermissible conflicts, (2) deciding whether such conflicts are consentable, and (3) where they are consentable, obtaining voluntary consent after full disclosure.<sup>62</sup>

The first task—identifying potentially impermissible conflicts—is usually the easiest. Lawyers, however, sometimes fail to spot such conflicts, especially when there is no present adversity between the clients. Under Rule 1.7 of the Model Rules, lawyers may not simultaneously represent multiple clients (except, in some circumstances, with the clients' consent) if the representation of one client would be

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17374, at \*3 (9th Cir. July 9) (holding that a nonattorney trustee may represent himself pro se but cannot represent others), *aff'd*, 999 F.2d 544 (1993); C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697-98 (9th Cir. 1987) (noting that one's status as a trustee does not entitle him to the right to present arguments pro se in federal court).

59. *Osei-Afriyie*, 937 F.2d at 883.

60. Model Rules, *supra* note 1, Rule 1.14 cmt. 3 (stating "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client"). For a further discussion of the allocation of decision-making authority between parent and child, see *infra* part IV.

61. See Moore, *supra* note 27, at 673.

62. See Moore, *supra* note 3, at 216-21.

“directly adverse” to the other client or if the representation of either client would be “materially limited” by the lawyer’s duties to the other client.<sup>63</sup> Direct adversity under Model Rule 1.7(a) is rare, except when a lawyer sues one client on behalf of another, typically on an unrelated matter.<sup>64</sup> This adversity will seldom occur when one of the clients is a child.<sup>65</sup>

Material limitation under Model Rule 1.7(b) is far more common.<sup>66</sup> Many lawyers, however, incorrectly assume that such limitation occurs only when “in behalf of one client, it is [the lawyer’s] duty to contend for that which duty to another client requires him to oppose.”<sup>67</sup> The

63. Model Rules, *supra* note 1, Rule 1.7. Rule 1.7 states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

64. *See id.* Rule 1.7 cmt. 3; *see also* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.7:203 (2d ed. Supp. 1994) (discussing Model Rule 1.7).

65. *But cf.* *Woodruff v. Tomlin*, 616 F.2d 924, 935-38 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980). There, a father retained a lawyer to represent himself and his two minor daughters in an action brought on behalf of the daughters for injuries resulting from an automobile accident with a third party. *Id.* at 927. The other driver counterclaimed against the two daughters. *Id.* The jury returned a verdict indicating that the daughter-driver was negligent, whereas the daughter-passenger was not. *Id.* at 927-28. The court indicated that the daughter-passenger clearly should have been advised to bring a separate action against the daughter-driver and indirectly against the father, who owned the car and the insurance policy. *Id.* at 935. It is not inconceivable that the same lawyer who represented all three family members might have attempted to bring such an action in an attempt to recover damages for the daughter-passenger from the father’s insurance policy, thus invoking Model Rule 1.7(a). *Cf., e.g., Gibson v. Gibson*, 479 P.2d, 648, 653 (Cal. 1971) (abrogating parental immunity in action brought by unemancipated minor against father for injuries sustained in automobile accident). Of course, insurance companies are unlikely to permit representation of an insured by the same attorney who represents the complainant.

66. *See, e.g.,* 1 Hazard & Hodes, *supra* note 64, § 1.7:301 (stating that Model Rule 1.7(b) applies “at almost every turn”).

67. Canons of Professional Ethics Canon 6 (applied, as amended, until the adoption of the Model Code in 1970). This narrow view of a conflict of interests continued to define conflicts for many lawyers even under the subsequently adopted Canon 5 of the Model Code, which was intended to broaden the definition of a potentially impermissible conflict. Moore, *supra* note 3, at 218 n.29; *see Woodruff*, 616 F.2d at 939 (quoting Canon 6’s definition of a conflict in a case governed by Canon 5 of the Code) (Weick, J., dissenting). Rule 1.7(b) of the Model Rules is “a direct descendent of Canon 5 of the Code.” Hazard & Hodes, *supra* note 64, § 1.7:301.



more appropriate question, however, is whether there is any substantial risk that the lawyer's representation of either client would be adversely affected, either because the lawyer is not free to consider recommending courses of action that would be adverse to the other client (in violation of the lawyer's duty of independent judgment) or because the lawyer may unconsciously favor one client over the other (in violation of the lawyer's duty of loyalty, including the duty to maintain confidences).<sup>68</sup> Under this broader view of what constitutes a potentially impermissible conflict, situations likely to be covered include either parent and child or co-respondents in juvenile court proceedings,<sup>69</sup> multiple plaintiffs or multiple defendants in civil litigation,<sup>70</sup> multiple siblings in custody, abuse and neglect, or termination of parental rights cases,<sup>71</sup> and the rare instance in which a lawyer

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68. See Model Rules, *supra* note 1, Rule 1.7 cmt. 4; see also 1 Hazard & Hodes, *supra* note 64, § 1.7:301 (stating that Model Rule 1.7 "seeks to ensure that a lawyer's range of options on behalf of A are not limited by responsibilities that the lawyer also owes to B, whether B is another client, a third party, or the lawyer herself"); Moore, *supra* note 3, at 219-20 (noting that where a lawyer represents multiple clients, "his ability to render independent professional judgment on behalf of each is immediately affected").

69. See, e.g., IJA-ABA Joint Commission on Juvenile Justice Standards, Juvenile Justice Standards: Standards Relating to Counsel for Private Parties Standard 3.2 commentary, at 85 [hereinafter Juvenile Justice Standards Project] (stating that application of conflicts principles "ordinarily should lead counsel to avoid representation of both parent and child or more than one party in juvenile court matters"). For a detailed discussion of the differing interests between criminal codefendants, see Moore, *supra* note 3, at 271-86.

70. See, e.g., *Woodruff*, 616 F.2d at 935-36 (noting potential conflict where a lawyer represented two minor sisters in action against third party and one sister had potential cause of action against the other). See generally Restatement (Third) of the Law Governing Lawyers § 209 (Tentative Draft No. 3, 1990) (addressing the representation of parties with conflicting interests in civil litigation); Wolfram, *supra* note 2, § 7.3.3 (discussing conflicts that may arise between coparties in litigation). There is almost always at least a potential conflict of interests between coplaintiffs or codefendants in litigation, if only because of the possibility of disagreement regarding possible settlement offers. Even if the parties are unlikely to disagree, their circumstances may differ sufficiently that an attorney exercising independent judgment would clearly consider recommending different approaches to settlement and other litigation decisions.

71. See, e.g., *In re T.E.*, 582 A.2d 160, 163 (Vt. 1990) (observing that single attorney properly represented both children until conflict was created by one child seeking to be adopted, at which time children were represented by separate attorneys). The identification of a potentially impermissible conflict in these cases depends initially on (1) whether the lawyer is acting as an advocate or as a guardian *ad litem*, and (2) even when the lawyer is acting as an advocate, whether her role is considered to be representing either the best interests or the desires of the individual children. See *supra* note 24 and accompanying text. As with multiple parties in civil litigation, an attorney exercising independent judgment could better explore the potential for disagreement among the siblings, as well as better identify circumstances that call for different strategies or outcomes for different siblings.

is asked to represent both parent and child in a matter involving family reorganization or an allegation of parental misconduct.<sup>72</sup>

Having identified a potentially impermissible conflict, the lawyer should next determine whether the conflict is one which can be cured by obtaining the consent of the clients or whether it is "non-consentable."<sup>73</sup> Under Model Rule 1.7(b), a conflict is non-consentable unless "the lawyer reasonably believes the representation will not be adversely affected."<sup>74</sup> Regarding adult clients, non-consentable conflicts are uncommon,<sup>75</sup> but generally include conflicts between adversaries in the same litigation (a form of direct adversity), multiple parties to the same transaction whose interests or positions are fundamentally antagonistic,<sup>76</sup> and other situations where joint representation may be "objectively inadequate despite a client's voluntary and informed consent."<sup>77</sup> On the other hand, it is usually permissible for a lawyer to represent multiple parties whose interests are generally aligned,<sup>78</sup> although subsequent events may necessitate the lawyer's withdrawal.<sup>79</sup>

72. See, e.g., *In re Lackey*, 390 N.E.2d 519, 523 (Ill. App. Ct. 1979) (reversing termination of parental rights because parents were represented by public defender who also appeared in proceedings as guardian *ad litem* for child), *aff'd*, 405 N.E.2d 748 (Ill. 1980). At the very least, counsel for the child must be free to consider the possibility that the child's interests diverge from those of the parent or parents. See *supra* note 25 and accompanying text.

73. See Restatement (Third) of the Law Governing Lawyers § 202 & cmt. g (Preliminary Draft No. 4, 1991).

74. Model Rules, *supra* note 1, Rule 1.7(b); see also Model Rules, *supra* note 1, Rule 1.7(a) (conflict non-consentable unless "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client"). See generally Restatement (Third) of the Law Governing Lawyers § 202 (Preliminary Draft No. 4, 1991) ("Notwithstanding each affected client's consent, a lawyer may not represent a client if: (a) The lawyer represents an opposing party in the same litigation; (b) One or more of the clients is legally incapable of giving consent; or (c) Special circumstances render it unlikely that the lawyer will be able to provide adequate representation to one or more clients."); 1 Hazard & Hodes, *supra* note 64, § 1.7:305 (noting that a lawyer should not request or accept client waivers, unless she is independently satisfied that the representation will not be adversely affected); Wolfram, *supra* note 2, § 7.2.3 (discussing consentable conflicts).

75. Restatement (Third) of the Law Governing Lawyers § 202 cmt. g (Preliminary Draft No. 4, 1991). Some decisions take a broader approach to identification of non-consentable conflicts. The position taken by the *Restatement*, however, "is that in most circumstances concern for client autonomy warrants respecting a client's informed consent." *Id.* reporter's note cmt. g(ii). For a discussion of the justifications for paternalism in at least some cases, see Moore, *supra* note 3, at 233-40.

76. ABA/BNA Lawyers' Manual on Professional Conduct § 51:301 (1987).

77. Restatement (Third) of the Law Governing Lawyers § 202 cmt. g(iii) (Preliminary Draft No. 4, 1991).

78. ABA/BNA Lawyers' Manual on Professional Conduct § 51:301 (1987).

79. Cf. *Jedwabny v. Phila. Transp. Co.*, 135 A.2d 252 (Pa. 1957) (where owner-driver and two guests, all represented by same attorney, sued transportation company for injuries sustained in accident with streetcar; subsequently, defendant joined owner-driver as additional defendant and filed motion to disqualify common attorney from representing owner-driver as defendant), *cert. denied*, 355 U.S. 966 (1958).

Under these standards, the situations described above would not necessarily involve non-consentable conflicts—that is, if all of the clients were adults. The fact that one or more of the clients is a child, however, cannot be ignored. Indeed, it is extremely relevant in determining (1) the capacity of the client to give a valid consent; (2) the identity of an appropriate surrogate decision maker, when necessary; and (3) whether a particular conflict ought to be considered non-consentable precisely because one or more of the clients is a child.

According to the *Restatement of the Law Governing Lawyers* (“*Restatement*”), each client whose consent is required must have the “legal capacity to give consent,” and thus, any “[c]onsent of a person under a legal disability . . . normally must be obtained from a guardian or a conservator appointed for the person.”<sup>80</sup> As for children, the *Restatement* further asserts that “[c]onsent of a minor normally is effective when given by a parent or guardian of the minor.”<sup>81</sup> When the parent is not one of the other clients being represented by the lawyer—for example, if the lawyer is asked to represent multiple co-respondents in a juvenile proceeding or both the client and a third person as coplaintiffs or codefendants in civil litigation—then securing the parent’s consent on behalf of the child might not be problematic,<sup>82</sup> at least when the child and parent agree on the desirability of retaining a lawyer burdened with a potential conflict of interests.<sup>83</sup>

There will be times, however, when child and parent disagree. Take the example of two adolescent friends charged as co-respondents in a delinquency proceeding or codefendants in a civil tort action. They might be determined to present a united front, aided by a common attorney,<sup>84</sup> whereas at least one set of parents might be equally deter-

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80. Restatement (Third) of the Law Governing Lawyers § 202 cmt. g(ii) (Preliminary Draft No. 4, 1991).

81. *Id.*

82. *But see* Woodruff v. Tomlin, 616 F.2d 924, 927, 939-41 (6th Cir.) (holding invalid father’s consent to single attorney’s representation of two plaintiff-daughters where attorney failed to disclose possibility that one daughter would have claim against the other), *cert. denied*, 449 U.S. 888 (1980).

83. Of course, one of the reasons a child does not disagree with the parent might be that the child does not understand the nature or significance of the conflict. *See, e.g.*, Janet A. Chaplan, *Youth Perspectives on Lawyers’ Ethics: A Report of Six Interviews*, 64 Fordham L. Rev. 1763, 1768 (1996) (stating that children interviewed were not at all concerned about potential adverse effects of a lawyer representing conflicting interests). Lawyers may have a duty under some circumstances to consult with the child directly, especially if the child is mature enough to appreciate the situation. *See infra* notes 149-51 and accompanying text. If the matter is in litigation, the lawyer might also have a duty to inform the court of the conflict so that the court can determine whether to appoint or substitute a guardian *ad litem* for the child. *See infra* notes 90-93 and accompanying text.

84. For a detailed discussion of the possible benefits of joint representation of codefendants, see Moore, *supra* note 3, at 251-56. *Cf.* Nancy J. Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. Rev. 1, 31-32 (1979) (discussing the benefits of joint representation of witnesses of grand jury investigations).

mined to obtain separate counsel on behalf of their child, perhaps in the hope of negotiating favorable treatment or shifting the blame to the other child.<sup>85</sup> Moreover, the parents might well claim that as guardians of their children, it is their *right* to choose the attorney who will represent their child.

The right of parents to engage in decision making on behalf of their children will be more fully discussed later in this Article, in a section addressing a parent's role in not only selecting a particular attorney, but also in all of the other decisions to be made in the course of the representation.<sup>86</sup> Here, it may be sufficient to note, first, that the validity and scope of parental rights (as opposed to the rights of children) are highly contested<sup>87</sup> and, second, that although there are clearly some areas in which parents will control the decision-making process, this will not always be the case.<sup>88</sup> Indeed, there are some situations—for example, delinquency proceedings and civil cases where a parent has a competing financial interest in the subject of the lawsuit—where courts are virtually certain to reject a parent's right to decide (in opposition to the child's wishes) whether to consent to a potentially impermissible conflict of interests on the part of an attorney retained or appointed to represent a child.<sup>89</sup>

Even if parents do *not* have an exclusive right to select an attorney for their child, this does not necessarily mean that the right belongs to the child herself. On the contrary, it should also be considered whether, at a minimum, a surrogate decision maker ought to be appointed or whether the particular conflict ought rather to be deemed non-consentable in the absence of agreement between parent and child. For example, take the case of the two adolescent friends charged as corespondents or codefendants. Because the parents might be motivated (even unconsciously) by factors other than the best interest of the child, such as embarrassment or inconvenience or even a belief that the child deserves to be taught a lesson,<sup>90</sup> a court could determine that it is not the parent's right to decide whether joint representation should proceed. Nevertheless, the court might not be prepared to leave such an important decision to the minor alone. Although minors may have the "legal capacity" to retain an attorney of their own choosing in at least some circumstances,<sup>91</sup> many decisions

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85. Cf., e.g., Moore, *supra* note 3, at 271-79 (stating course of action an independent attorney might consider in multiple representation of criminal codefendants); Moore, *supra* note 84 (discussing multiple representation of grand jury witnesses).

86. See *infra* part IV.

87. See *infra* part IV.

88. See *infra* notes 149-51 and accompanying text.

89. See *infra* note 170 and accompanying text.

90. See Juvenile Justice Standards Project, *supra* note 69, Standard 3.2 commentary, at 85-87; Fink, *supra* note 37, at 123.

91. As noted earlier, the *Restatement* states that with respect to the representation of potentially impermissible conflicts of interest, each client whose consent is required must have the "legal capacity" to consent. See *supra* notes 80-81 and accompanying

insist (at least in litigation) that the court must satisfy itself not only that the particular minor is capable of choosing, but also that the minor has in fact selected competent counsel.<sup>92</sup> Given that the adolescent friends have chosen counsel burdened with a potentially impermissible conflict of interests, the court could appoint one or more guardians *ad litem* for the purpose of determining whether the joint representation in this case is in the best interests of each child. Alternatively, the court could find that the dangers of multiple representation in a delinquency proceeding are so considerable that absent parental consent, the conflict ought to be deemed non-consentable.<sup>93</sup>

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text. Unfortunately, it is unclear what "legal capacity" means in this context. On the one hand, the *Restatement* asserts that "[c]onsent of a minor normally is effective when given by a parent or guardian of the minor." See *supra* note 81 and accompanying text. However, this assertion ignores the complexities of the law relating to minors. For example, contracts entered into by minors are typically voidable, not void, and are, in any event, fully enforceable against the minor when the contract concerns "necessary" goods and services. See, e.g., 1 Kramer, *supra* note 16, § 10.01-02 (discussing the right of a minor to disaffirm a contract, as well as exceptions to the rule). Contracts between minors and attorneys have been enforced against minors under the doctrine of "necessities," as well as other theories. See generally E.R. Tan, Annotation, *Infant's Liability for Services Rendered by Attorney at Law Under Contract With Him*, 13 A.L.R.3d 1251 (1967) (discussing cases in which the infant may be held liable to pay for legal services). Moreover, contract doctrine aside, courts have increasingly recognized a minor's right to engage counsel of the minor's own choice, at least where the minor is capable of choosing and has selected competent counsel. See, e.g., *In re A.W.*, 618 N.E.2d 729, 733-34 (Ill. App. Ct.) (granting 13-year-old's motion to substitute for appointed guardian an attorney of her own choice in dispute following adjudication of wardship; minor was sufficiently mature and competent in making decision), *cert. denied*, 624 N.E.2d 811 (1993); *Fargnoli v. Faber*, 481 N.Y.S.2d 784, 786 (App. Div. 1984) (affirming family court ruling that children have the right to select impartial representation free from parental intervention).

92. See, e.g., *Akkiko M. v. Superior Ct.*, 209 Cal. Rptr. 568, 571 (Cal. Ct. App. 1985) (holding that lower court, in proceedings concerning education of 10-year-old dependent of juvenile court, erred in barring representation by counsel of minor's choice without first ruling that child was not capable of choosing or did not select competent counsel).

93. See, e.g., *Fargnoli*, 481 N.Y.S.2d at 786 (refusing to permit children in custody proceeding to be represented by lawyers who had previously represented the mother). While the mother in *Fargnoli* presumably was willing to give her consent, she was not only a party to the proceeding, but a party with interests clearly in conflict with the minor children. Indeed it was this very conflict of interests between the mother and her children that warranted separate representation of the children in the first place. See *supra* note 89 and accompanying text.

The purpose of permitting adult clients to consent to the representation of conflicting interests is not only to allow them to secure the benefits of joint representation, but also to do otherwise would fail to respect their autonomous right to decide for themselves whether the potential benefits outweigh the potential risks. Moore, *supra* note 3, at 233-40. Of course, paternalism is often justified in the case of children, on the ground that they lack the capacity to engage in effective decision making on their own behalf. See, e.g., Gerald Dworkin, *Paternalism*, in *Philosophy, Politics, and Society* 78, 88-89 (Peter Laslett & James Fishkin eds., 1979) (using the example of children as a paradigm for determining when paternalism might be justified in the case of adults). The difficulty here is deciding whether, and if so, when, children should be deemed to be capable of engaging in effective decision making and thus entitled to have their autonomy respected. See Martin Guggenheim, *A Paradigm for Determining*

Not surprisingly, these difficulties in conflicts evaluation are substantially increased when the parent is also a prospective client. Here, even when there is no disagreement between parent and child, the fact that the normal decision maker on behalf of the child (that is, the parent) is the other interested client suggests that there may be a need for a surrogate decision maker.<sup>94</sup> In some circumstances, however, this additional layer of protection may be unnecessarily burdensome and intrusive. For example, both parent and child may be suing a third person to recover damages from an accident in which both were injured.<sup>95</sup> Although there is at least the potential for conflicts of interests between parent and child, their interests are generally aligned; therefore, the advantages of retaining a single lawyer are obvious and seem clearly to outweigh any potential for harm.<sup>96</sup> Absent some reason to suspect that the parent is not acting in the best interests of the

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*the Role of Counsel for Children*, 64 Fordham L. Rev. 1399, 1406-07 (1996) (stating that the principle of adult autonomy is wholly inapplicable with regard to young children and only partially applicable to older children, depending on their maturity or competence).

94. Cf. Restatement (Third) of the Law Governing Lawyers § 202 cmt. g(ii) (Preliminary Draft No. 4, 1991) ("When the person who normally would make the decision whether or not to give consent—members of a corporate board of directors, for example—is the other interested client of the lawyer, special arrangements must be made to constitute an independent person or body empowered to consider whether or not to consent.").

95. In *France v. A.P.A. Transp. Corp.*, 267 A.2d 490 (N.J. 1970), a father and his two children, by their father as guardian *ad litem*, sued defendants for personal injuries and property damages as a result of a crash between an automobile owned and operated by the father and a tractor-trailer. *Id.* at 491. In a second action, the father sued as administrator of the estate of his wife, who had died in the accident, in a wrongful death action for the benefit of the husband and the two surviving children. *Id.* The case was further complicated by a counterclaim against the father for all sums due to the estate of his wife, thus raising the doctrine of intrafamily immunity. *Id.* Absent the counterclaim, the primary conflict between the father and his children concerned the allocation of any settlement funds. See, e.g., *Auerbach v. McKinney*, 549 So. 2d 1022, 1029 (Fla. Dist. Ct. App. 1989) (where parent seeks compensation from same settlement funds as child, guardian *ad litem* must be appointed for the child prior to court approval of the settlement).

Parents are also parties in their own right when they sue for damages derivative to injuries to the child. See, e.g., *Shockley v. Prier*, 225 N.W.2d 495 (Wis. 1975) (describing medical malpractice action in which parents sued both on behalf of their injured child and on their own behalf for loss of consortium of child).

96. The primary areas of potential conflict include the possibility of a counterclaim by the defendant against the parent or even a direct action by the child against the parent, assuming that intrafamily immunities have been abolished, and allocating any settlement funds. See *supra* note 95. The court will have to approve any settlement on behalf of a minor, and many courts will insist on the appointment of a guardian *ad litem* for the child whenever the parent is seeking compensation from the same settlement funds as the child. See *supra* note 95. Nevertheless, given the parties' common interests in establishing the negligence of the defendant, it seems overly burdensome to routinely require two separate attorneys in any case in which a parent and child are coplaintiffs in a personal injury action. Thus, it is not surprising that courts do not routinely appoint a guardian *ad litem* for the minor plaintiff upon the filing of a complaint in such an action. See *infra* notes 97-98 and accompanying text.

child in consenting to the dual representation, routine appointment of a guardian *ad litem* for that express purpose is unwarranted,<sup>97</sup> particularly since the court is in a position to replace the parent as next friend in the event any significant conflict develops.<sup>98</sup>

There are other situations in which the mere potential for conflict should not prevent a parent from consenting to joint representation on behalf of both parent and child. For example, lawyers are often consulted by parents for advice on legal problems involving both themselves and their children, such as issues relating to education for children with disabilities (in which the relevant legislation explicitly grants rights to both the children and their parents).<sup>99</sup> Litigation is typically only a last resort, and thus the court's protection may never be invoked. Nevertheless, if the interests of both clients appear to be compatible and there is no reason to believe that the parent is not acting in the child's best interests,<sup>100</sup> then once again it seems both unwarranted and overly intrusive to require either a surrogate decision maker or separate legal representation.<sup>101</sup> Here, it is up to the lawyer to be alert to changing circumstances, to bring any developing conflicts to the attention of the clients, and to be prepared to with-

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97. Cf. *infra* notes 162-69 and accompanying text (noting that according to one proposal, absent a conflict of interest, parents might be presumed to be the appropriate decision maker in the legal representation of their children).

98. See *supra* note 35 and accompanying text; see also Jeffrey v. O'Donnell, 702 F. Supp. 513, 515-16 (D. Pa. 1987) (where parents in home schooling case successfully resisted defendants' move to have guardian *ad litem* appointed for minor children; court agreed that parents were natural guardians and that if an actual conflict of interest arose, a guardian *ad litem* could be appointed).

99. See, e.g., Rappaport v. Vance, 812 F. Supp. 609, 610-11 (D. Md. 1993) (discussing federal legislation that grants rights to the child's parents to challenge matters relating to the child). But cf. Miller v. W. Lafayette Community Sch. Corp., 645 N.E.2d 1085, 1088 (Ind. Ct. App. 1995) (holding that representation by attorney-parent in IDEA action was not pro se representation; sole client was child, and thus child was entitled to recover attorney's fees). See generally 3 James A. Rapp, Education Law § 10.03[2][h] (1995) (detailing who has standing to bring suit under the Rehabilitation Act and the Education for All Handicapped Children Act).

100. Cf. *infra* notes 162-69 and accompanying text (noting one proposal which suggests that absent a conflict of interest, there is a rebuttable presumption that the parent is the appropriate decision maker).

101. Another alternative would be for the attorney to represent either the parent or the child and have the other party go unrepresented. This alternative can be dangerous because the unrepresented person often relies on the attorney to protect his or her interest, and it can be very difficult for the attorney to avoid giving legal advice to the unrepresented person. However, giving such legal advice would not only violate disciplinary rules, see, e.g., Model Rules, *supra* note 1, Rule 4.3 cmt. (stating that "[d]uring the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel"), but also might subject the attorney to liability for any negligence. See, e.g., Moore, *supra* note 27, at 699 (detailing the "gratuitous undertaking" theory of third-party liability).

draw in the event that the positions of the clients become fundamentally antagonistic.<sup>102</sup>

At the other extreme, there are certainly some circumstances in which the potential for conflict is so strong (and the consequences of inadequate representation so severe) that any proposed joint representation ought simply to be prohibited. An obvious example is a lawyer who is asked to represent both parent and child in a delinquency proceeding involving the child.<sup>103</sup> If the parent is either directly or indirectly responsible for the initiation of charges, then the conflict of interest is both apparent and irreconcilable, particularly if the parent will be the complaining witness.<sup>104</sup> Even where the parent did not initiate the charges, the parent may have interests contrary to the best interests of the child. Thus, parents may be motivated by a desire to teach the child a lesson or they may be "largely disinterested or apathetic toward the proceedings."<sup>105</sup> Even where there is no immediately observable hostility, the likelihood of a significant conflict developing is at the same time considerable and difficult to assess at the outset of the proceeding. For all these reasons, the risk of harm to the child of dual representation is clearly substantial. Moreover, while there are obvious benefits to having a single lawyer represent multiple co-respondents in a juvenile proceeding (which may outweigh the equally obvious potential for harm),<sup>106</sup> it is difficult to see any particular advantage to the child of having the parent represented by the same attorney. In the rare case in which the lawyer is convinced that there might be such an advantage—for example, when assuring the confidentiality of communications between parent and lawyer is critical to obtaining information vital to the child's defense<sup>107</sup>—then the

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102. See Model Rules, *supra* note 1, Rule 1.16(a)(1) (stating that a lawyer must withdraw if continuing representation will result in violation of rules of professional conduct).

103. An even more obvious example would be any attempt by a lawyer to represent both parents and children in a dependency procedure, although such attempts must be rare. See Christopher N. Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases*, 64 *Fordham L. Rev.* 1857, 1868 (1996) (no court has permitted joint representation in this situation).

104. See, e.g., Juvenile Justice Standards Project, *supra* note 69, Standard 3.2 commentary, at 85-86 (noting that according to empirical study of juvenile courts in three cities, parents initiated such proceedings in 17% of delinquency cases in one city and in 11% of the cases in the other two cities).

105. *Id.* at 86 (citation omitted); see also Fink, *supra* note 37, at 122 (stating that "[a] parent may . . . instruct counsel not to seek immediate bail or pretrial release to 'teach the child a lesson'").

106. See *supra* notes 95-96 and accompanying text.

107. Ordinarily, a nonclient parent's communications with the attorney would not be covered by the attorney-client evidentiary privilege, and while such communications would be covered under the professional rule of confidentiality, disclosures could be made for the benefit of the child. See *infra* notes 136-40 and accompanying text. It is at least conceivable that there will be cases in which in order to secure communications essential to the effective defense of the child, the parent would need additional assurances of confidentiality, in which case the parent would need to enter



court can consider appointing a guardian *ad litem* to render consent on behalf of the child.

### III. CONFLICTS OF INTERESTS PART II: OTHER FORMS OF MATERIAL LIMITATION

Although potentially impermissible conflicts most frequently arise when a lawyer simultaneously represents two or more clients, a lawyer's representation of a child client can also be jeopardized by the lawyer's duties to a nonclient or by the lawyer's own interests.<sup>108</sup> Both situations are generally addressed using the same conflicts analysis approach suggested above.

For lawyers representing adults, the most common form of duties to nonclients are the lawyer's continuing obligations of loyalty and confidentiality to *former* clients. Thus, under Rule 1.9 of the Model Rules, lawyers are absolutely precluded from undertaking representation adverse to a former client in a substantially related matter (except with the consent of the former client).<sup>109</sup> Even when the representation is not clearly adverse, or where the matters are not substantially related, Model Rule 1.7(b) requires lawyers to identify situations in which their continuing obligations to a former client may materially limit their representation of a present client.<sup>110</sup> Thus, a lawyer who has formerly represented a parent in an abuse or neglect proceeding might not be precluded under Rule 1.9 from representing the child in a subsequent delinquency proceeding;<sup>111</sup> nevertheless, a potentially impermissible conflict will arise under Rule 1.7(b) if the lawyer has confidential information about the parent that the lawyer would be

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into an attorney-client relationship with either the lawyer representing the child or another lawyer. There may be reasons, financial or otherwise, why the parent either cannot or will not retain a separate lawyer.

108. See *supra* note 63. Under Model Rule 1.7(b), there is a potentially impermissible conflict of interests whenever the representation of a client "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests . . ." Model Rules, *supra* note 1, Rule 1.7(b) (emphasis added).

109. Model Rules, *supra* note 1, Rule 1.9(a). Rule 1.9(a) states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." See generally 1 Hazard & Hodes, *supra* note 64, § 1.9:103 (detailing the approach under the Model Rules); Wolfram, *supra* note 2, § 7.4.3 (discussing Model Rule 1.9(a)).

110. See Model Rules, *supra* note 1, Rule 1.7(b); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995) (discussing lawyers' limitations resulting from responsibilities to former clients).

111. Under Rule 1.9(a), the representation is not prohibited unless the matters are "substantially related," and the new client's interests "are materially adverse to the interests of the former client." Model Rules, *supra* note 1, Rule 1.9(a). Unless the two matters arose from the same underlying events or a pattern of events, it is unlikely that a court would find that they are substantially related. Nor is it clear that the child's interests are materially adverse to the parents, who are not even parties to the delinquency proceeding.

precluded from using to the child's advantage.<sup>112</sup> As in multiple representation, the most difficult question to answer will be whether and under what circumstances the present client (the child) or a surrogate can effectively consent to the conflict of interests, particularly when the former client is the very parent who would normally be expected to give such consent on behalf of the child.<sup>113</sup>

For lawyers representing children, a more common example of a possible conflict arising from duties to nonclients is the lawyer in a child custody, abuse or neglect, or a termination of parental rights case who serves *both* as the child's attorney *and* as guardian *ad litem*.<sup>114</sup> As previously discussed, the guardian *ad litem* is traditionally viewed an agent of the court, to which she owes her primary duty of allegiance.<sup>115</sup> The attorney, however, is the child's representative and, as such, will typically be expected to advocate the child's wishes and desires, except perhaps when the child is very young.<sup>116</sup> Clearly there will be some circumstances in which the guardian's duty to the court may materially limit the lawyer's ability to effectively represent the child as client.<sup>117</sup> Moreover, as there is clearly no one to give effective consent on behalf of the child, it is virtually certain that the only proper resolution of this particular conflict is to separate the two roles

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112. See Model Rules, *supra* note 1, Rule 1.9(c) (stating that a lawyer who has formerly represented a client shall not thereafter "use information relating to the representation to the disadvantage of the former client" or "reveal information relating to the representation"); see also Fink, *supra* note 37, at 123-24 (discussing the Commentary to Standard § 3.132 of the Standards for Administration of Juvenile Justice, which requires separate counsel in cases where lawyer had represented parents in child protective, custody, or supervision matter).

113. See *supra* notes 80-89 and accompanying text.

114. See *G.Y. v. State*, 486 N.W.2d 288, 289 (Iowa 1992); *In re Baby Girl Baxter*, 479 N.E.2d 257, 260 (Ohio 1985); *In re Smith*, 601 N.E.2d 45, 53 (Ohio Ct. App. 1991); see also *Kollsman v. Cohen*, 996 F.2d 702, 706 (4th Cir. 1993) (discussing the difference between an attorney *ad litem* and a guardian *ad litem*). This is a common practice; indeed one that is explicitly sanctioned in some statutes. See, e.g., *G.Y.*, 486 N.W.2d at 289 ("The same person may serve both as the child's counsel and as guardian *ad litem*" [but] the court may appoint a separate guardian *ad litem*, if the same person cannot properly represent the legal interests of the child as legal counsel and . . . as guardian *ad litem*." (quoting Iowa Code § 232.89(4) (1989))).

115. See *supra* note 22 and accompanying text.

116. See *supra* note 24 and accompanying text.

117. Cf., e.g., *In re Baby Girl Baxter*, 479 N.E.2d at 260 (stating that the attorney-guardian for incompetent parent elicited testimony harmful to her stated desire to avoid termination of parental rights; failure of attorney to bring conflict in roles to attention of court warranted reversal of termination); see also *In re Smith*, 601 N.E.2d at 52-54 (following *Baxter* in case where lawyer served as both attorney and guardian *ad litem* of multiple siblings, and where as guardian *ad litem*, attorney did not concur with desire of all but one of the children to return home). But see *G.Y.*, 486 N.W.2d at 289 (holding that separate counsel is not required where child's wishes conflict with counsel's view of child's best interest).

and appoint either a new lawyer or a new guardian *ad litem* on the child's behalf.<sup>118</sup>

Aside from duties to nonclients, lawyers' own interests may impinge on the representation of a client. This is one of the most difficult types of conflict to monitor, as lawyers are understandably reluctant to reveal all the various ways in which they might be tempted to sacrifice a client's interest for their own. Moreover, while lawyers routinely reveal their own financial interests in the subject matter of the representation, they are less likely to disclose other types of personal interests.<sup>119</sup> For example, attorneys in juvenile court are often court appointed, and their concern for continued reappointment in future cases might well impact their willingness to take action on behalf of a client if the judge clearly disapproves.<sup>120</sup> Similarly, lawyers who work for child advocacy organizations often have strong ideological views about the best interests of children generally, which may not be consistent with best interests of a particular child.<sup>121</sup> The temptation to represent a "cause" rather than a client is particularly strong in class action litigation, where most of the clients (or their parents) will never be consulted.<sup>122</sup> Moreover, the problem is clearly exacerbated when the clients are minors, particularly if, as discussed below, the situation is one in which there is no adult decision maker interposed between

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118. See, e.g., *In re Baby Girl Baxter*, 479 N.E.2d at 260 (stating that the court should not hesitate to grant request of attorney to withdraw as guardian when attorney feels there is a conflict with his role as attorney). But see *G.Y.*, 486 N.W.2d at 289 (stating that where child's wishes conflict with counsel's view of child's best interest, court must be informed but separate counsel not required; court was concerned that "duplicious arguments" were "wholly unnecessary, and an obvious waste of the public treasury").

119. Conflicts resulting from a lawyer's self-interest are the least analyzed of all the conflicts arising under Model Rule 1.7(b) and its predecessors. See 1 Hazard & Hodes, *supra* note 64, § 1.7:309 (providing only one illustration of conflict involving lawyer self-interest); Wolfram, *supra* note 2, § 7.1.1 (only briefly mentioning that there are many possible ways in which lawyer's interests might conflict with client's). Nevertheless, lawyers who have a financial interest in the subject matter of the representation are often viewed as entering into a business transaction with the client, a conflict which is separately analyzed under 1.8(a) and its predecessor, Disciplinary Rule 5-104 of the Model Code. Model Rules, *supra* note 1, Rule 1.8(a); Model Code, *supra* note 1, DR 5-104. These types of conflicts have received extensive attention in the literature. See 1 Hazard & Hodes, *supra* note 64, § 1.8:200-203, at 262-65; Wolfram, *supra* note 2, § 8.11.

120. See Bailey & Rothblatt, *supra* note 38, § 2:4.

121. See, e.g., Alison M. Brumley, *Parental Control of a Minor's Right to Sue in Federal Court*, 58 U. Chi. L. Rev. 333, 346 n.62 (1991) ("In the decision to litigate there is the concern that the child serves as a plaintiff for some third party more interested in establishing precedent than in protecting the child's best interests." (citation omitted)); Hafen, *supra* note 7, at 447 ("The impetus behind an attorney disregarding parental direction may be the attorney's desire to promote a particular cause.").

122. See generally Robert H. Mnookin, *In the Interest of Children: Advocacy, Law Reform, and Public Policy* (1985). This volume addresses the many complex questions regarding test-case litigation on behalf of children. The book includes five detailed studies of test-case litigation, some of which were class action lawsuits.

the lawyer and the child client.<sup>123</sup> As with adult clients with disabilities, lawyers can exercise enormous power over clients who are children,<sup>124</sup> and attorneys can use the power to steer the litigation in their own desired directions. Unfortunately, there is very little that is presently done under rules of professional conduct to monitor these conflicts effectively.<sup>125</sup>

#### IV. CONFLICTS OF INTERESTS PART III: PARENTS AS INTERESTED THIRD PERSONS

Perhaps the most difficult (but fascinating) conflicts dilemmas for lawyers representing children are those which stem from a parent's role as an interested third person—that is, a person who typically not only hires and pays the lawyer to represent the child,<sup>126</sup> but also expects to be an active participant and decision maker in the course of the representation. Under standard conflicts analysis, a lawyer may

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123. See, e.g., *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) (discussing the conflicts that arise between the attorney representing the child and the child's parents). The litigation is extensively discussed as one of five case studies in Mnookin, *supra* note 122, at 68-147. It is also discussed in Hafen, *supra* note 7, at 452-53.

124. See Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. Rev. L. & Soc. Change 609, 622 (1989). Even if the client's handicap does not affect his or her mental ability, it can affect the client psychologically, thus impairing the client's ability to direct the course of the representation. See Neely, *supra* note 31, at 1365 & n.29.

125. It is certainly not the case, as Hafen suggests, that lawyers can ethically justify advocating a "cause" even when it is directly contrary to the interests of a child client. See Hafen, *supra* note 7, at 456-57 (relying on the preamble to the Model Rules, which states that "a lawyer should seek improvement of the law"). Such conduct would clearly violate Model Rules 1.1 and 1.3, which prescribe competent and diligent representation of clients, including "commitment and dedication to the interests of the client." Model Rules, *supra* note 1, Rules 1.1, 1.3 & cmt. The more likely scenario, however, is that the lawyer will be personally convinced that the "cause" she advocates is indeed in the best interests of the particular child client. Despite Model Rule 1.7(b), which requires the attorney to disclose any commitment to a cause that might influence the lawyer to act contrary to the client's best interest, see *supra* note 63 and accompanying text, it is difficult to determine how strong the lawyer's commitment would need to be before disclosure is required. See 1 Hazard & Hodes, *supra* note 64, § 1.7:309, at 255 (providing an illustration about how a lawyer's concern for his own reputation implies a requirement of disclosure and consent, but only after lawyer himself has acknowledged concern that his reputation will be tarnished by undertaking the proposed representation). If the lawyer is convinced that there is no real risk that such commitment will interfere with zealous representation, then the lawyer is highly unlikely to believe that any disclosure is required. Of course, even if disclosure were required, it is unclear who, if anyone, could effectively consent on the child's behalf. See *supra* notes 80-89 and accompanying text.

126. In some circumstances, courts have even directed parents to pay for a lawyer selected by either the court or the child. To protect the independence of the attorney, some commentators have cautioned against parental payment, including reimbursement of court-appointed counsel. See Fink, *supra* note 37, at 123 (citing IJA-ABA Juvenile Justice Standards). Nevertheless, there are jurisdictions that require parents to pay for counsel if they are financially able or to otherwise assume the cost of their children's representation. See *id.*

accept compensation from someone other than the client (usually an insurance company or an employer)<sup>127</sup> only if the lawyer (1) obtains the client's informed consent, and (2) avoids any form of interference by the third party payor in the representation.<sup>128</sup> Moreover, even if a nonclient third person is not paying for the lawyer, it is generally improper either to permit such a person to direct or influence the lawyer's independent judgment<sup>129</sup> or for the lawyer to share confidential information with such person except with the consent of the client.<sup>130</sup> When the client is a child and the interested third person is the parent, it is far from clear to what extent this standard analysis applies.

First, there is the problem of obtaining an effective consent to the third-party payment from a client who is a child. As previously discussed in regard to the multiple representation of parent and child,<sup>131</sup> the obvious difficulty is that the normal decision maker (the parent) is the very person whose possibly conflicting interests (arising here from the third party payment) suggest the need for the child client's consent in the first place. This difficulty is compounded by the fact that minors typically have no financial resources of their own; thus, it would be nearly impossible to determine if consent given by even a mature minor was truly voluntary.<sup>132</sup> Nevertheless, it is absurd to suggest that parents cannot (or should not) routinely retain and pay a lawyer to

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127. See Wolfram, *supra* note 2, §§ 8.4.1, 8.8.2. Conflicts of interests in representation involving insurance companies are often complicated by the expectation of some insurance companies that the lawyer is representing *both* the insurance company and the insured. See 1 Hazard & Hodes, *supra* note 64, § 1.7:304. This is sometimes, but less frequently true, with respect to employer-payers.

128. Model Rules, *supra* note 1, Rule 1.8(f). Rule 1.8(f) states:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

*Id.*; see also Model Code, *supra* note 1, DR 5-107 (providing a similar standard for compensation by third parties). See generally Wolfram, *supra* note 2, § 8.8.2 (discussing the Model Rules' and Model Code's requirements for third-party payors, and highlighting situations where the third party is the client's employer or where the client is indigent); 1 Hazard & Hodes, *supra* note 64, § 1.8:701 (same).

129. See Model Rules, *supra* note 1, Rule 1.7 cmt. (commenting that loyalty will be impaired whenever the interests of the lawyer or another person will "materially interfere with the lawyer's independent professional judgment in considering alternatives").

130. Model Rules, *supra* note 1, Rule 1.6.

131. See *supra* notes 80-89 and accompanying text.

132. Cf. Moore, *supra* note 3, at 244 (noting the importance of determining whether "a client's attempted consent is the result of either psychological or economic coercion (or perhaps simply an attempt to avoid offending either the other client or the lawyer), rather than a voluntary decision to encounter known risks in order to obtain a potential benefit" (footnote omitted)).

represent their child.<sup>133</sup> Perhaps this is because in the ordinary case (that is, excluding cases of inherent conflict such as custody, abuse or neglect, and termination of parental rights), parents are expected not only to "foot the bill,"<sup>134</sup> but also to play an active role in directing the course of the representation. Whether these expectations are justified is another question.

Standard conflicts analysis does not clearly envision or even provide for any such primary role for the parent of a child client. Under Rule 1.8(f) of the Model Rules, a lawyer may not accept compensation from someone other than the client (even with the client's consent) unless "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."<sup>135</sup> In addition, "information relating to representation of a client" must be protected from improper use or disclosure.<sup>136</sup> Neither the text nor the comment mentions any exception for parents of a client who is a child. Nevertheless, it is difficult to imagine this rule being applied to parents in all circumstances. For example, in litigation where the parent is bringing suit on behalf of the child, the parent's role as guardian, next friend, or guardian *ad litem* ordinarily contemplates that the parent (or any other adult authorized to bring the lawsuit) will be making decisions on the child's behalf, even though it is the child who is the actual client of the lawyer.<sup>137</sup> Similarly, aside from civil litigation, when a parent consults a lawyer on behalf of a young child, it is inconceivable that the lawyer would not look to the parent for guidance in most cases or that the parent would not reasonably expect the lawyer to do so. For example, when the child is too young to express her desires, the lawyer will almost always need to consult the parent to determine what course of action might be in the child's best interests, even if the parent is not actually directing the course of the representation.<sup>138</sup> Even when the child is old enough to express a preference (and the lawyer's role is to advocate such preferences rather than what the lawyer believes to be in the child's best interests),<sup>139</sup> the lawyer should counsel the child according to the lawyer's independent

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133. See Fink, *supra* note 37, at 123 (citing IJA-ABA Juvenile Justice Standards).

134. There are jurisdictions which require parents to pay for the separate representation of their children, even in cases involving extreme conflicts of interests. See *supra* note 126.

135. Model Rules, *supra* note 1, Rule 1.8(f)(2). For the full text of this rule, see *supra* note 128.

136. Model Rules, *supra* note 1, Rule 1.8(f)(3). For the full text of this rule, see *supra* note 128.

137. See *supra* notes 46-60 and accompanying text.

138. For a discussion of the argument that parents have a legal right to determine the course of the representation, see *infra* notes 158-59 and accompanying text.

139. See *infra* notes 150-61 and accompanying text.

professional judgment, which will often necessitate that the lawyer consult parents and others knowledgeable about the child.<sup>140</sup>

Of course, one answer to the Model Rule 1.8(f) dilemma is to recognize that *if* parents have the right to direct or influence the lawyer representing their child, it is not because they are paying the lawyer's fee, but rather because of their status as parents. Moreover, the converse also must be true; that is, if parents have the right to direct or influence the lawyer representing their child, then the fact that they are paying her fee should not adversely affect that right. Nevertheless, the question remains whether and under what circumstances parents have a right to participate in the legal representation of their children.

As several commentators have already noted, current ethics codes provide little guidance on this score.<sup>141</sup> Thus, Rule 1.14 of the Model Rules deals extensively with the problem of decision making on behalf of clients under a disability,<sup>142</sup> however, neither the text of the rule nor its accompanying comment explicitly refer to the role of parents in the representation of their children. Moreover, although both the rule and the comment acknowledge the existence of disabilities attributable to a child's status as a minor,<sup>143</sup> their guidance seems to be directed primarily to lawyers representing adult clients with mental or physical disabilities.<sup>144</sup> As advocates for the adult-disabled are quick

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140. See, e.g., Juvenile Justice Standards Project, *supra* note 69, Standard 3.3(c) commentary (stating that securing parent's knowledge of matters relating to representation "often essential to effective counseling for the child"). Consulting with the parents raises questions pertaining to both the confidentiality of information relating to the child client and the confidentiality of information relating to the parents themselves. Older children may be able to consent to the lawyer's sharing information with the parents. See *id.* Standard 3.3(b) commentary (observing, however, that if the child insists on nondisclosure, even when the lawyer counsels to the contrary, the child's desires should be respected). With respect to very young children, see *id.* Standard 3.3(d)(i) (permitting disclosure if "such disclosure (1) will not disadvantage the juvenile and (2) will further rendition of counseling, advice or other services to the client").

141. See, e.g., Hafen, *supra* note 7, at 447, 451, 455-62 (noting that Model Rules are deficient in this area and making a proposal for change); Neely, *supra* note 31, at 1397-98 (highlighting similar deficiencies in the Model Code).

142. Model Rules, *supra* note 1, Rule 1.14. For the full text of the rule, see *infra* text accompanying note 147. For a discussion of the pertinent subsections in the comment to the rule, see *infra* notes 148-57 and accompanying text.

143. The text of the rule acknowledges that "a client's ability to make adequately considered decisions" can be impaired because of "minority," as well as "mental disability or for some other reason." Model Rules, *supra* note 1, Rule 1.14. For a discussion of the pertinent subsections in the comment to the rule, see *infra* notes 149-51 and accompanying text.

144. The reason for this is probably because both the rule and the comment focus primarily on incapacity by reason of mental or physical impairment. Although minority may in fact impair a person's ability to make adequately considered decisions, it does not always do so. See *infra* notes 149-57 and accompanying text (describing situations in which courts and legislatures have recognized minor's capacity to engage in effective decision making). Moreover, minority has an aspect of purely legal incapac-

to point out, there is a world of difference between minority and other forms of disability.<sup>145</sup> Indeed, one of the more striking differences may be the extent to which the parents of a minor (but not an adult) child can successfully claim a legal right to engage in decision making on behalf of their child.<sup>146</sup>

Rule 1.14 provides as follows:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.<sup>147</sup>

Under subsection (a), minority is acknowledged as a form of disability; it is unclear, however, whether the disability is one of strictly *legal* incapacity, such as the lack of capacity to enter into legally binding contracts, or simply an acknowledgment that minority, like mental or physical disability, may in fact impair a client's "ability to make adequately considered decisions."<sup>148</sup> The comment to the rule is similarly confusing. Although it recognizes that "an incapacitated person may have no power to make legally binding decisions," the comment goes on to note that the law has recognized "intermediate degrees of competence," referring explicitly to the tendency of courts to elicit the opinions of children "as young as five or six years of age, and certainly those of ten or twelve," in legal proceedings concerning their custody.<sup>149</sup> One could readily conclude, as several commentators have, that the rule presumes that children, particularly older children, who have "the ability to understand, deliberate upon, and reach conclu-

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ity, which is not present with regard to adults who are impaired but who have not been judicially declared incompetent. See *infra* notes 147-51 and accompanying text.

145. See, for example, Herr, *supra* note 124, at 619 n.49, which states:

Unfortunately, by coupling the status of a child with that of a person with mental disability, this comment may contribute to lawyers' stereotyped view of persons with mental disabilities as child-like. The consequence of such stereotypes and myths is the undermining of the respect normally accorded an adult client and an increase in the frequency of condescending behavior.

146. See, e.g., *id.* at 628 ("Most jurisdictions do not permit family members to give consent [to medical treatment] for disabled relatives who are over the age of majority.").

147. Model Rules, *supra* note 1, Rule 1.14. See generally 1 Hazard & Hodes, *supra* note 64, § 1.14:100-303 (providing an in-depth analysis of Rule 1.14); Wolfram, *supra* note 2, § 4.4, at 159 (discussing the lawyer's role with incompetent clients). There was no counterpart to Rule 1.14 in the Model Code. See Model Code, *supra* note 1, EC 7-11 to -12.

148. See *supra* note 144 and accompanying text.

149. Model Rules, *supra* note 1, Rule 1.14 cmt. 1.



sions about matters affecting [their] own well-being"<sup>150</sup> are not disabled and thus have the right to make decisions on their own behalf.<sup>151</sup>

Further, subsection (b) permits the lawyer to seek the appointment of a guardian "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."<sup>152</sup> Lawyers could reasonably conclude that a particular child has the cognitive ability to act in her own interest, and thus no guardian is required.<sup>153</sup> Moreover, this conclusion has strong support in various court decisions, as well as statutes, that acknowledge the capacity of mature minors to engage in effective decision making on their own behalf. Thus, minors have been afforded the right to make their own decisions, in at least some circumstances, concerning such important matters as retaining an attorney,<sup>154</sup> accepting and refusing medical treatment,<sup>155</sup>

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150. *Id.*

151. *See, e.g.,* Fink, *supra* note 37, at 120 (noting that juveniles are capable of "considered judgment"); Hafen, *supra* note 7, at 459-61 (concluding that the comment recognizes "intermediate degrees of competence"); *cf.* ABA Comm. on Ethics & Professional Responsibility, Informal Op. 1160 (1971) (stating that lawyer's duty in juvenile delinquency matters does not differ significantly from representation of adults accused of crime); Juvenile Justice Standards Project, *supra* note 69, Standard 3.1(b) & commentary (stating that, in general, determinations of child's interests is child's responsibility; if particular child is incapable of considered judgment, lawyer should look to guardian *ad litem* or assume role herself, consulting with parents only if their interests do not appear to conflict with child's).

152. Model Rules, *supra* note 1, Rule 1.14(b).

153. *See, e.g.,* Fink, *supra* note 37, at 120 (concluding that it is rare that Model Rule 1.14(b) will apply in delinquency proceedings, which mostly involve adolescents rather than young children); *see also* Juvenile Justice and Delinquency Standards, *supra* note 37, Standards 16.2-.3 (requiring lawyer to request appointment of guardian *ad litem* only if client incompetent to understand ramifications or make decisions); Juvenile Justice Standards Project, *supra* note 69, Rule 3.1(b) & commentary (same).

154. *See supra* note 91 and accompanying text.

155. Under common law, consent of a parent or guardian usually was necessary to authorize medical treatment of a minor except in emergency situations. *See* 1 Kramer, *supra* note 16, § 14.13. Most states have passed legislation that enlarges the range of situations in which minors may consent to medical treatment. For example, under such statutes, minors may obtain treatment for alcoholism, drug abuse, and pregnancy and obtain contraceptives and pregnancy detection services, without parental knowledge or consent. *Id.* § 14.14. Statutes permitting minors to obtain abortions without parental consent have been upheld against constitutional challenges brought by parents. *See Bellotti v. Baird*, 428 U.S. 132 (1976).

waiving constitutional rights in juvenile court,<sup>156</sup> and asserting such constitutional rights as the right to obtain an abortion.<sup>157</sup>

In response, parents will argue that there is no need to even consider seeking the appointment of a guardian under Model Rule 1.14(b) because *they* are already the guardians of their children.<sup>158</sup> Indeed, the comment provides that “[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.”<sup>159</sup> The problem, of course, is that as “natural guardians,” parents do not *necessarily* have the legal right to act on behalf of their children.<sup>160</sup> For example, in addition to the already mentioned areas in which children have been granted the right to engage in decision making on their own behalf, courts routinely hold that in claims involving a financial interest of a minor—for example, property and tort claims—if the parents and child have potentially competing financial interests, then the parent is an inappropriate guardian *ad litem* or next friend.<sup>161</sup>

Simply because parents do not *necessarily* have such a right does not mean that in the absence of a significant conflict of interests, parents should not be *presumed* to be the appropriate decision makers in the legal representation of their children. Indeed one commentator—Jonathan Hafen—has proposed an amendment to Model Rule 1.14

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156. See, e.g., *In re Manuel R.*, 543 A.2d 719, 724-25 (Conn. 1988) (stating that children under 16 may waive right to counsel if they have sufficient intelligence and capacity to understand the charges and possible punishment, as well as the dangers and consequences of representing themselves); *Commonwealth v. A Juvenile* (No. 1), 449 N.E.2d 654, 657 (Mass. 1983) (holding that a juvenile, 14 or older, can waive privilege against self-incrimination if juvenile was afforded an opportunity to consult with an interested adult or where the circumstances demonstrate that juvenile fully understood rights and knowingly and voluntarily waived them); see also Fink, *supra* note 37, at 122 (“Prerogatives, such as whether to waive the right to counsel, to plead guilty, to consent to searches of personal property in the child’s private areas, or to waive *Miranda* rights, are deemed personal to the child and may not be waived by a parent or other individual.”). See generally 2 Kramer, *supra* note 16, §§ 21.11, 21.14 (discussing waiver of right to counsel and the privilege against self-incrimination, respectively).

157. See, e.g., *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (holding that mature minor has right to obtain an abortion); see also *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439-42 (1983) (striking down municipal ordinance requiring either parental or judicial consent to abortion for minors under 15 because there was no opportunity for case-by-case evaluations of the maturity of pregnant minors wishing abortions).

158. See, e.g., *Jeffery v. O’Donnell*, 702 F. Supp. 513, 515-16 (M.D. Pa. 1987) (parents in home schooling case successfully resisted defendants’ move to have guardian *ad litem* appointed for minor children; court agreed that parents were natural guardians, and that if an actual conflict of interests arose, a guardian *ad litem* could be appointed).

159. Model Rules, *supra* note 1, Rule 1.14 cmt. 3.

160. See *supra* notes 152-57 and accompanying text.

161. See Brumley, *supra* note 121, at 337.

precisely along these lines.<sup>162</sup> There are several problems with the Hafen proposal. First, it does not establish any criteria to establish when a "conflict of interests" arises sufficient to rebut the presumption of parental decision making.<sup>163</sup> Second, and perhaps more important, the proposal fails to take adequate account of the claim of those advocates of "children's rights" who argue that children, at least where they are cognitively able, are entitled to make important decisions for themselves, regardless of the absence of any particular "conflict of interests" with their parents.<sup>164</sup> Of course, Hafen's intent is not to ignore, but rather to emphatically *reject* any such claims;<sup>165</sup> as previously noted, however, these claims are increasingly being recognized by courts and legislatures in a number of important areas, including the retention of counsel, accepting and refusing medical treatment, waiving constitutional rights in juvenile court, and asserting such constitutional rights as the right to an abortion.<sup>166</sup>

Ultimately, the Hafen proposal is defective because it improperly assumes that whether parents have the right to direct lawyers representing their children is a matter of "ethics law," to be decided primarily by lawyers formulating their own codes of professional conduct.<sup>167</sup>

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162. See Hafen, *supra* note 7, at 461-62 (1993) (suggesting an amendment to Model Rule 1.14 giving parents "a rebuttable right to direct the course of the representation" except when "the interests of the parent or parents conflict with those of the child, or the parent or parents have been found 'unfit' by an authorized agency or court"); see also Neely, *supra* note 31, at 1399 ("Parents or guardians should be entitled to a presumption that they speak for their child's interests.").

163. Hafen could not possibly intend for the standard conflicts definition to apply. Under Model Rule 1.7(b), any actual disagreement between joint clients regarding a joint course of action would qualify as a conflict of interests, since the lawyer could not satisfy the desires of each. See *supra* notes 63-65 and accompanying text. But surely Hafen does not intend that any disagreement between child and parent over the course of the representation would serve to disqualify the parent as the effective decision maker. Some disagreements are clearly too trivial; moreover, the point of the presumption is precisely to give the parent authority in determining how the representation will proceed. Except in the case of children too young to voice an opinion, this authority is useless if it can be overridden at the first sign of disagreement between parent and child.

164. See, e.g., Brumley, *supra* note 121, at 343-46 (arguing in favor of greater recognition of children bringing "bad parenting" and other claims over the objection of their parents); Hafen, *supra* note 7, at 431-36 (extensively discussing the "children's rights" movement, including seminal articles by Hillary Rodham Clinton); Hillary Rodham, *Children's Policies: Abandonment and Neglect*, 86 Yale L.J. 1522 (1977) (reviewing a book about children's policy). See generally Hillary Rodham, *Children Under the Law*, 43 Harv. Educ. Rev. 487 (1973) (asserting that children are not necessarily incapable of decision making).

165. See Hafen, *supra* note 7, at 445-47 (rejecting radical view of "children's rights," in part because of overriding rights of parents and noting that the U.S. Supreme Court "has made clear that parents enjoy a constitutional right to raise their children as they see fit so long as their conduct vis-à-vis the child does not fall below a minimal threshold of 'unfitness'").

166. See *supra* notes 154-57 and accompanying text.

167. Cf., e.g., Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531, 609 (1994) (using "ethics law" to refer to ethics rules

On the contrary, the tension between "parents' rights" and "children's rights" can only be resolved as a matter of "other law,"<sup>168</sup> often by courts deciding difficult questions under federal and state constitutional law. These questions are hotly contested, with the law of both parents' and children's rights still in a relatively early state of evolution.<sup>169</sup>

In the meantime, as this "other law" continues to evolve, lawyers must be highly sensitive to the particular context in which the representation occurs. For example, in delinquency cases, courts and commentators generally agree that because it is the child whose due process rights are implicated, it is the child alone who decides, in consultation with the attorney, how the representation will proceed.<sup>170</sup> Similarly, parents are not likely to be granted any decision-making authority in child custody cases or cases involving claims of parental misconduct because it is the very fact of a conflict of interests between parents and child which creates the need for separate representation on behalf of the child.<sup>171</sup> In the absence of either authoritative law or a developing consensus among lawyers in the field, lawyers should at least consult with both parents and child (where feasible) to deter-

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promulgated in large part by organized bar). *But see* Nancy J. Moore, *Intra-Professional Warfare Between Prosecutors and Defense Attorneys: A Plea for an End to the Current Hostilities*, 53 U. Pitt. L. Rev. 515, 516 (1992) (stating that "ethics law" should encompass not only ethical codes, but also "other law" that applies to lawyers).

168. *See* Moore, *supra* note 167, at 516 (describing "other law" as law other than ethics codes, that affects lawyers and their relationships with clients—for example, criminal law and procedure, civil procedure, evidence law, agency law, tort law, contract law, securities law, and corporation law).

169. *See also* Brumley, *supra* note 121, at 334 (discussing the "unresolved nature of the relationship among the rights of minors, parents and state"); Andrew J. Kleinfeld, *The Balance of Power Among Infants, Their Parents and the State*, 4 Fam. L.Q. 320 (1970) (dealing with the status and rights of children). *Compare, e.g.,* Hafen, *supra* note 7, at 442-43 (debunking the "children's rights" movements in favor of "parental rights") with James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 Cal. L. Rev. 1371, 1426-46 (1994) (arguing that neither children's interests, parents' interests, nor societal interests justify parents' rights of control).

170. *See, e.g.,* Juvenile Justice and Delinquency Standards, *supra* note 37, Standard 16.2 ("[T]he ultimate responsibility for making any decision that determines the client's interests within the bounds of the law remains with the client."); Juvenile Justice Standards Project, *supra* note 69, Standards 3.1(b), 5.2 (stating that juvenile client generally retains control of the proceeding); Fink, *supra* note 37, at 119 (stating that "constitutional due process strictures, ethical mandates, and juvenile justice standards all underscore the fact that it is the child . . . who is the decision maker"); *see also* Fisher, *supra* note 38, at 844 (stating that while *Gault* did not decide any issue of parent-child conflict, any rule which gave parents the right to "exercise the range of a delinquency defendant's due process right" would be of "doubtful constitutionality").

171. *See supra* notes 33-35, 66-72 and accompanying text. Thus, in this context, the primary question is whether the lawyer should advocate the child's desires or her own determination of the child's best interests. *See supra* note 24.

mine if a plan of decision making can be adopted that will be satisfactory to all concerned.<sup>172</sup>

Even where it has been determined that parents have no legal right to *direct* the course of the representation, they may be entitled to be kept informed and to be regularly consulted, at least where no clear conflict of interests has emerged.<sup>173</sup> Indeed, a parent's presence is sometimes necessary to facilitate communication between the child and the lawyer, and in such cases the presence of the parent will not destroy the confidentiality of attorney-client communications.<sup>174</sup> Nevertheless, there will be times when communication from the parent to the attorney will not be covered by the attorney-client evidentiary privilege, presumably when the parent is not also a client and the communication is not strictly necessary to facilitate representation of the child. Such information is covered by the broader rule of confidentiality, which prohibits the lawyer to voluntarily refrain from revealing any information relating to the representation of a client.<sup>175</sup> However,

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172. In many cases, children will be willing to defer to the judgment of their parents. In others, both parents and child might be willing to follow the lawyer's recommendation whenever the parent and child disagree. In some cases, the parents might be willing to defer to the judgment of a mature minor. Of course, the parties could also agree to divide the decision making in some manner, perhaps the parent agreeing to defer in all but a few specified decisions (for example, when to accept a settlement offer).

173. See Fink, *supra* note 37, at 124 ("[J]uvenile delinquency standards also require lawyers to counsel and consult with parents so that they are able to advise their children appropriately."); *supra* notes 137-39 and accompanying text.

174. See, e.g., Juvenile Justice Standards Project, *supra* note 69, Standard 3.3(b) & commentary ("[W]hile a disclosure in the presence of a third party ordinarily will not be treated as privileged, the rule may differ if the third party is present in such capacity as to be identified with the client. Thus, a communication may be entitled to legal protection though, as sometimes happens, the client is accompanied by a parent." (citations omitted)). Because extremely young children are not typically involved in the juvenile justice system, the Standards apparently do not contemplate that parent communications themselves could be covered by the evidentiary privilege. See also *id.* Standard 3.3(c) (discussing voluntary preservation of secrets of juvenile clients parent or guardian). However, when the child is extremely young, the child may not be able to communicate effectively except with the assistance of the parent. Such communications should be covered under standard evidence law to the extent that the parent is viewed as a representative of the client for purposes of communication. See, e.g., Proposed Fed. R. Evid. 503(b)(1) (protecting communications between client or client's "representative" and lawyer or lawyer's "representative"); 1 Charles T. McCormick, McCormick on Evidence 334-35 & n.12 (4th ed. 1992) (including citation to 1876 case where court extended protection when mother was "present and acting in the character of confidential agent of her daughter"). In addition, in those circumstances in which the parent has the right to make decisions on behalf of the child (for example, next friend litigation), see *supra* notes 133-34 and accompanying text, communications from the parent to the lawyer and vice versa should also be protected. In these cases, the parent also should be viewed as a "representative" of the client.

175. Model Rules, *supra* note 1, Rule 1.6 (protecting all "information relating to the representation of a client" unless client consents or disclosure is authorized by specified exceptions). For a general discussion of the differences between the attorney-client evidentiary privilege and the professional rule of confidentiality, see Wolfram, *supra* note 2, §§ 6.1 to 6.7. Regarding the protection of parental communications

sometimes it may be in the child's best interest for the lawyer to disclose or use information gained from a parent, to the disadvantage of the parent. Parents should be told from the outset of the limits of confidentiality concerning their own communications with the lawyer and urged to retain their own counsel when necessary.<sup>176</sup>

As with decision making itself,<sup>177</sup> the question will occasionally arise whether children themselves have a right to keep their communications with the lawyer secret from their parents, or whether, to the contrary, parents have a right to know. Once again, these are questions that will ultimately be resolved outside the sphere of legal ethics, in the current competition between parent's rights and children's rights.<sup>178</sup> In the meantime, lawyers should raise these questions as early as possible, discuss them openly, and attempt to attain a consensus among the relevant parties. Of course, any decision not to discuss with a parent communications from the child to the lawyer does not necessarily rule out soliciting the parents' views and opinions, which will often be extremely helpful to the lawyer in the effective representation of the child.<sup>179</sup> Rights talk aside, parents usually have the best interests of their children in mind and should not be ignored as an important source of information and support.

#### CONCLUSION

When I was first asked to contribute an Article on conflicts of interests in the representation of children, I accepted with great pleasure. First, I was intrigued by the prospect of the Symposium itself—a gathering of expert practitioners and academicians exchanging manu-

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not covered under the narrower evidentiary privilege, see Juvenile Justice Standards Project, *supra* note 69, Standard 3.3(c) & commentary (where the standard "seeks to recognize the parents' legitimate expectations and the general importance of interviewing and counseling with regard to family relationships by emphasizing the ethical obligation of lawyers to hold parents' 'secrets' confidential to the extent they can consistent with rules of law and the primary responsibility to their clients' interests").

176. See Juvenile Justice Standards Project, *supra* note 69, Standard 3.3(c) & commentary. This rule may go too far in urging that a parent's secret communications not be revealed unless either the "parent competently consents to such revelation or use after full disclosure" or "such disclosure or use is necessary to the discharge of the attorney's primary responsibility to the client." *Id.* Rule 3.3(c)(ii). Although disclosure is clearly mandated when necessary to represent the child competently, lawyers may not owe parents any particular duty of care; thus, it is unclear why a parent's consent should be required when a lawyer wants to disclose for reasons short of those which mandate disclosure. This rule may unconsciously reveal the inevitable tensions in rules which generally view parents as third-party strangers in the legal representation of their child.

177. See *supra* notes 131-72 and accompanying text.

178. See *supra* notes 168-69 and accompanying text.

179. See Juvenile Justice Standards Project, *supra* note 69, Standard 3.3(c) commentary (asserting that the failure to seek information with child's parents and other relatives "may well qualify as abrogation of the lawyer's duty of prompt investigation;" "knowledge concerning these matters is often essential to effective counseling for the child").

scripts, ideas, and experiences on the wide range of ethical issues in representing children. Second, although I had written and lectured extensively on conflicts of interests in various aspects of legal practice, I had never seriously considered the unique aspects of dealing with children as clients and was looking forward to seeing what problems I would encounter. I have not for one moment regretted accepting the invitation; however, when I began to see how complex and intractable some of these issues are (and how little had been written about them), I did begin to wonder if I was truly up to the task. As my deadlines came and went (and the *Fordham Law Review* editors gently nudged me to submit my manuscript), I found that I could come to terms with my topic only by acknowledging that what I was contributing could best be viewed as the opening of a dialogue in which the various issues are identified and a few tentative solutions put on the table for further discussion.

Part of the difficulty was that my topic—conflicts of interests—was in a sense too narrow. As I began to research the topic, I quickly discovered that lawyers are actively involved in a myriad of situations involving a clash between the legal interests of children and the interests of others, such as parents, welfare agencies, or other siblings. Because the lawyer does not always represent the child, however, not all these situations present what ethics experts commonly would view as a true “conflict of interests” problem—that is, one that might be resolved under the conflict of interests provisions of current ethical codes. Thus, my first task was to try to identify and then address those situations in which my own conflicts expertise might be applicable. Even here, the task was complicated by the difficulty of determining precisely when a lawyer forms an attorney-client relationship with a child, as opposed to the parents—or when a lawyer is (consciously or unconsciously) representing *both* parent and child—or what it means to say that a lawyer is representing a child who can file a lawsuit only through a next friend, who is typically a parent. Having identified a wide range of potential problem areas, and suggested some tentative ways of thinking about just who is a client of the lawyer, I was only then able to turn to the conflicts provisions of the ethical codes themselves.

Here, I immediately ran into yet another conceptual difficulty. When the clients are adults, most conflicts are consentable. But it is unclear how a lawyer can obtain informed consent when the client is a child, particularly when the one who would normally give consent on behalf of the child, the parent, is the other client whom the lawyer is seeking to represent. Declaring all such conflicts “non-consentable” might be an easy way out; however, to do so would force a family to hire two separate lawyers in many situations where clearly one would do. Moreover, the problem is compounded when the conflict arises not because the lawyer is attempting to represent both parent and

child, but when the parent is viewed as a third-party payor. Here, it can only be concluded that the current ethics codes are clearly inadequate. It is often (but not always) the case that parents expect not only to select and retain a lawyer for their child, but also to be actively involved in the representation. Nevertheless, the current ethics codes treat them as if they were third-party strangers with no more legitimate interest in their child's representation than if they were insurance companies or employers. While putting some distance between lawyer and parent will sometimes be appropriate (for example, in custody cases and when there are allegations of parental misconduct), in many situations it is simply absurd.

Many of my questions remain unanswered. This is not only because so few of the ethics issues have been addressed by either ethics committees or by courts, but also because there are numerous questions that do not involve "ethics law" at all (or at least initially), but rather raise "other," substantive (or even procedural) law questions. The issues range from formation of an attorney-client relationship, to the legal capacity of children not only to retain their own attorneys but also to consent to a conflict of interests, to the legal rights of parents to direct the course of representation of their children, or at least be informed and consulted in a lawyer's efforts to exercise independent professional judgment on behalf of the child.

I am delighted to have been introduced to a whole range of issues with which I was previously unacquainted. As a parent, I find myself increasingly anxious to see how the battle between "children's rights" and "parents' rights" is resolved. As an ethics teacher and scholar, I look forward to further dealing with all these questions, both inside and outside the classroom.