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Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases

Kristin N. Henning
Georgetown University Law Center, hennink@law.georgetown.edu

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LOYALTY, PATERNALISM, AND RIGHTS: CLIENT COUNSELING THEORY AND THE ROLE OF CHILD'S COUNSEL IN DELINQUENCY CASES

*Kristin Henning**

"[My first task is] to get these kids help. If they don't agree with me, I don't care. I know what is in their best-interest better than their parents do."[1] Quote of child's defense counsel in Texas. October 2000.

"Sometimes we sell 'em down the river. I get confused as to whether to be an advocate or act in the best-interest of the child."[2] Quote of child's defense counsel in Maine. October 2003.

"I have a Public Defender, but it isn't quite the same as having a lawyer. He works with the judge, not like a real lawyer. If he were real, then he would not follow along with the judge."[3] Quote of juvenile defendant in Washington. October 2003.

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* Associate Professor of Law, Georgetown University Law Center; Deputy Director, Juvenile Justice Clinic; J.D., Yale Law School; L.L.M., Georgetown Law Center; A.B. Duke University. I thank Wally Mlyniec and Annette Appell for careful reading and detailed commentary on early drafts and I thank Angela Serranzana and Kathleen Pirozzolo for their invaluable research assistance.

1 TEX. APPLESEED FAIR DEF. PROJECT ON INDIGENT DEF. PRACTICES IN TEX.—JUVENILE CHAPTER, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 24 (2000) [hereinafter TEXAS ASSESSMENT], *available at* http://www.texasappleseed.net/inprint/pdf/sellshort.pdf.

2 ABA JUVENILE JUSTICE CTR. & NEW ENGLAND JUVENILE DEFENDER CTR., MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 28 (2003) [hereinafter MAINE ASSESSMENT], *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/juvenile_indigent_defense_20031001/mereport.pdf.

3 ABA JUVENILE JUSTICE CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 32 (2003)

> "The purpose of [the disposition] stage is for all parties to assist in developing a dispositional plan. The minor's attorney at this stage must consider and recommend what is in the minor's best-interests, even if it is contrary to the minor's wishes."[4] Quote of judge in Illinois. 1995.

In the 1967 landmark case *In re Gault*,[5] the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment guarantees an accused child the right to counsel in delinquency cases.[6] In 1979 and 1980, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and the American Bar Association (ABA), respectively, published *Juvenile Justice Standards* that instructed child's counsel to provide zealous advocacy as directed by the client at all stages of the delinquency proceedings.[7] Since then, numerous scholars and leaders in the juvenile justice community have endorsed a traditional, client-directed model of advocacy in delinquency cases.[8] Yet, despite the weight of scholarly opinion, the role of the zealous, expressed-interest advocate is far from uniform in juvenile practice. As evident from the anecdotal evidence at the start of this article, best-interest advocacy persists in the practice of many juvenile courts across the country. In stark contrast to the expressed-interest model, an attorney advocating in the best-interest of the child may discount or altogether ignore the wishes of the child client and instead make decisions that he or she

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[hereinafter WASHINGTON ASSESSMENT], *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/juvenile_indigent_defense_20031001/wareport.pdf.

4 *In re* W.C., 657 N.E.2d 908, 918 (Ill. 1995).

5 387 U.S. 1 (1967).

6 *Id.* at 41.

7 STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 3.1(a), 9.4(a) (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1979). In 1971, the Juvenile Justice Standards Project was initiated at the Institute of Judicial Administration. The standards were first published as a tentative draft in 1975 and 1976, and final revised drafts were published in 1980. NAT'L ADVISORY COMM. FOR JUVENILE DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE (1979).

8 *See, e.g.*, Martin Guggenheim, *The Right To Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984); Ellen Marrus, *Best-Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288 (2003); Wallace J. Mylniec, *Who Decides: Decision Making in Juvenile Delinquency Proceedings*, *in* ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 105, 109 (Rodney J. Uphoff ed., 1995); Lisa A. Stanger, Note, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 FORDHAM L. REV. 1123 (1996).

believes to be most appropriate for the care or rehabilitation of the child.[9]

The long adherence to best-interest advocacy may be attributed to any number of systemic or normative variables including significant limitations in the language and holding of *In re Gault*; the inadequacy of state statutes implementing the juvenile's right to counsel; the deeply entrenched history of paternalism in the juvenile justice system; and normative objections to ceding autonomy to children. Even absent normative objections to client-directed advocacy, the most zealous advocate will often find it difficult and sometimes impossible to engage in traditional client-directed advocacy with children and adolescents. Cognitive limitations in the youth's decisionmaking capacity along with the youth's frequent lack of trust for adults, limited ability to recall and recount information, and poor and changing value systems may all frustrate the traditional attorney-client paradigm.

Unfortunately the Model Rules of Professional Conduct have been only marginally useful in providing guidance to attorneys who represent clients of diminished cognitive capacity. Even the Rules' nominal commitment to some "normal" or "traditional" attorney-client relationship for minors,[10] by itself, does not provide counsel with a particularly vivid picture of how the attorney-client relationship should look in any given context. Within the rubric of "traditional," expressed-interest advocacy, there appears to be a wide range of ethically acceptable attorney-client paradigms. Viable paradigms might differ in how much direction the client will provide to his or her attorney and vice versa; how specific decision points will be allocated between the attorney and the client; and how much nonlegal, moral counseling may be offered by the attorney. When the clients are children or adolescents, the paradigms might also differ in how much influence parents may have in the attorney-child relationship. Given the breadth and complexity of factors that must be considered in selecting an appropriate attorney-client framework in a delinquency

9 Emily Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1701–02 (1996) (stating that the best-interest model involves substitution of the lawyer's judgment for the child client's judgment); Elizabeth Laffitte, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 GEO. J. LEGAL ETHICS 313, 327 (2004) (stating that the best-interest model can result in "moral dilemma of wanting to enforce what the lawyer feels is in the best-interest of the client, even if it is opposed to the client's wishes").

10 MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2003) ("When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

case, it is clear that we can no longer examine the attorney-client dyad through the binary lens of best-interest versus traditional, expressed-interest advocacy.

This Article seeks to identify an attorney-child framework that will (1) give substantive meaning to the child's constitutional right to counsel in delinquency cases, (2) satisfy the ethical mandates of the Model Rules of Professional Conduct, (3) have the flexibility to accommodate cognitive limitations while enhancing the decisionmaking capacity of children and adolescents, and (4) engage parents in various aspects of the delinquency case without compromising the sanctity of the attorney-client relationship or sacrificing the fundamental rights, dignity, and autonomy of the child client.

In Part I of this Article, I will look briefly at the history of the right to counsel in delinquency cases, paying particular attention to the development of a professional consensus regarding the role of counsel in these proceedings. I will also examine the normative, systemic and practical barriers that prevent the professional consensus from reaching the masses of practitioners in juvenile courts.

In Parts II and III, I push away from the binary best-interest/expressed-interest analysis to explore the expanding range of attorney-client models that might be appropriate in a delinquency case. Part II will first consider the various best-interest and substituted judgment models of advocacy that seem to have evolved in direct response to concerns about the child's limited cognitive ability and poor value judgment. Specifically, Part II will examine ways in which attorneys, parents, and guardians in these models may usurp power over the attorney-client relationship, and ultimately concludes that none of the best-interest or surrogate decision models adequately safeguard the child's right to counsel or comport with the attorney's ethical obligations in the Model Rules of Professional Conduct.

Part III will then consider the continuum of "traditional" expressed-interest models of advocacy that appear hyper attorney-dominated on one end of the spectrum and hyper client-dominated on the other. Ultimately I am less concerned about the nomenclature identifying the various models, but instead attempt to identify features within each model that might best accommodate the competing, but not always incompatible, juvenile justice goals of client autonomy, fundamental fairness, and the rehabilitation of youth with often diminished cognitive and psychosocial capacities.

This Article concludes by urging scholars, commentators, and practitioners to abandon outdated stereotypes and presumptions about the cognitive capacity of children, and endorses a collaborative model of advocacy in which attorneys may educate children and ado-

lescents on the short- and long-term consequences of all potential case-related decisions; patiently lead youth through the pros and cons of each option; and enhance the youth's ever evolving decisionmaking skills and capacity. This Article recognizes that through collaboration, the lawyer may improve the child's rehabilitative prospects by earning acceptance and cooperation from the child and by engaging parents and other relevant persons in the decisionmaking process without undue deference to those adults. With a collaborative model as the default framework, best-interest and expressed-interest advocates should find a place of compromise and bring greater uniformity to the representation of accused children.

I. HISTORICAL OVERVIEW OF THE ROLE OF CHILD'S COUNSEL IN DELINQUENCY CASES

A. Gault's *Ambiguities and Early Debate over the Role of Counsel*

Before the nineteenth century, common law did not differentiate between adults and children charged with crime.[11] In the mid to late nineteenth century, reformers began to see children differently and came to believe that children could be steered away from crime through rehabilitation in lieu of punishment and retribution.[12] In 1899, Illinois reformers created the first independent juvenile court rooted in this new rehabilitative, paternalistic philosophy.[13] By 1914, juvenile courts had spread all over the country.[14] Prior to the Court's ruling in *In re Gault*, reformers deemed assistance of counsel unnecessary for the child since juvenile courts were not designed to punish

11 DEAN J. CHAMPION, THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING AND THE LAW 8–10 (1992) (explaining that in England and the United States, beyond the age of seven the law did not distinguish with regard to age or gender in assigning punishment, and adult and child offenders were housed in common quarters); Julian W. Mack, *The Chancery Procedure in the Juvenile Court*, *in* THE CHILD, THE CLINIC, AND THE COURT 310, 310 (1925); *see also* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders* (noting that although there were no categorical rules separating children from adults regarding culpability, sometimes judges did consider infancy in proceedings and sometimes juveniles were kept separate in prisons), *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 73, 80 (Thomas Grisso & Robert G. Schwartz eds., 2000).

12 Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1402 (1973).

13 David Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 43 (Margaret K. Rosenheim et al. eds., 2002).

14 HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 24 (1927).

the offender.[15] Yet despite the purportedly benign intent of judges and other juvenile court officials, it became clear by the early 1960s that procedural regularities and even fundamental fairness were being sacrificed in favor of some nominal commitment to rehabilitation. *In re Gault* and its progeny thus sought to import fairness into juvenile proceedings by identifying a series of fundamental rights that must be guaranteed to children in a delinquency case.[16] The right to counsel was one of the most important rights conferred during this due process era of juvenile court history.

Although *Gault* clearly guaranteed children the right to counsel in delinquency cases, ambiguities in the language of the case led to confusion about the roles, responsibilities, and loyalties the child's lawyer would assume. In the decade after *Gault*, there was a flurry of scholarly commentary regarding the role of counsel at the various stages of the delinquency case.[17] Confusion seemed to emerge in three primary areas. First, commentators questioned whether the role of counsel in the adjudicatory (trial) phase of the delinquency case should mirror the supposed adversary role of counsel in adult criminal cases or instead conform to the paternalistic, best-interest-of-the-child philosophy of juvenile court.[18] Much of the early confusion arose out of the Court's desire to ensure necessary procedural safeguards without simultaneously stripping the juvenile justice system of its more benign elements.[19] The Court specifically declared that "constitutional domestication" was not meant to undo the rehabilitative

15 *See* Bonnie & Grisso, *supra* note 11, at 82–83; Kay & Segal, *supra* note 12, at 1403.

16 Breed v. Jones, 421 U.S. 519, 541 (1975) (stating that the Double Jeopardy Clause prohibits the prosecution of a juvenile in adult court where juvenile had already been adjudicated in juvenile court); *In re* Winship, 397 U.S. 358, 368 (1970) (stating that the Constitution requires that guilt must be proved beyond a reasonable doubt in delinquency proceedings); *In re* Gault, 387 U.S. 1, 33–36 (1967) (stating that the Constitution guarantees adequate notice of charges, right to counsel, privilege against self-incrimination, and rights of confrontation and cross-examination).

17 Elyce Z. Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375 (1971); Kay & Segal, *supra* note 12; Monrad G. Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527 (1968); Anthony Platt et al., *In Defense of Youth: A Case Study of the Public Defender in Juvenile Court*, 43 IND. L.J. 619 (1968); Daniel L. Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L.J. 558 (1968).

18 Ferster et al., *supra* note 17, at 384–85; Kay & Segal, *supra* note 12, at 1401.

19 *Gault*, 387 U.S. at 21 (discussing the Court's belief that "observance of due process standards" does not require states to abandon the "substantive benefits" of processing juveniles separately from adults); *see also* Kay & Segal, *supra* note 12, at 1409 (arguing that the *Gault* ambiguity was further confused by the Supreme Court's subsequent ruling in *McKeiver v. Pennsylvania*, 403 U.S. 528, 548–49 (1971), which

focus of the juvenile courts.[20] While the Court, on the one hand, saw no meaningful or substantive difference between adult criminal trials and juvenile adjudicatory hearings,[21] the Court, in a footnote, went on to declare that "[r]ecognition of the right to counsel involves no necessary interference with the special purposes of juvenile court procedures; indeed it seems that counsel can play an important role in the process of rehabilitation."[22] While some commentators argued that counsel's obligations to his client should be the same in adult and juvenile matters,[23] others argued that best-interest advocacy was justified by the inherent difference between the rehabilitative goals of juvenile court and the deterrent-retributive focus of criminal courts.[24] Other supporters of paternalistic advocacy questioned whether the child was even capable of determining his or her own interests and directing counsel.[25]

In a second area of confusion, early commentators questioned whether the role of counsel at the disposition (sentencing) phase of a delinquency case should differ from the role of counsel at the adjudicatory phase. In *Gault*, the Court explicitly limited its holding to adjudicatory hearings and chose not to rule on whether due process requirements must be observed at hearings to determine the disposition of the delinquent child.[26] In yet another footnote, the Court stated that "[t]he problems of pre-adjudication treatment of juveniles, and of post-adjudication disposition, are unique to the juvenile process; hence what we hold in this opinion with regard to the procedural requirements at the adjudicatory stage has no necessary applicability

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reaffirmed the state's right to deal with juveniles differently from the way it treated adults).

20 *Gault*, 387 U.S. at 22.

21 *Id.* at 35–36 (rejecting idea that probation officer or judge can adequately protect the interests of a child and noting that "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution").

22 *Id.* at 38 n.64.

23 Ferster et al., *supra* note 17, at 384–85; Kay & Segal, *supra* note 12, at 1404.

24 Jacob L. Issacs, *Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFF. L. REV. 501, 507 (1962); Kay & Segal, *supra* note 12, at 1403; Anthony Platt & Ruth Friedman, *Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1179 (1968); *see also* Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1161 (2001); Katherine R. Kruse, *Justice, Ethics, and Interdisciplinary Teaching and Practice: Lawyers Should Be Lawyers, but What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J.L. & POL'Y 49, 80 (2004) (providing a historical discussion).

25 Kay & Segal, *supra* note 12, at 1402, 1411.

26 387 U.S. at 13, 27.

to other steps of the juvenile process."[27] Although the Court explicitly acknowledged that a child needs the assistance of counsel in "every step in the delinquency proceeding against him,"[28] the footnoted language and the decision not to extend the holding beyond the adjudicatory phase left open the possibility that a child might not even have a right to counsel at the disposition stage.[29] Even if not constitutionally guaranteed,[30] the vast majority of the fifty states now guarantee an accused child a statutory right to counsel at the disposition stage.[31]

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27 *Id.* at 31 n.48.

28 *Id.* at 36.

29 Ironically, the Court then went on to discuss the New York Family Court Act as a model of the trend to appoint counsel. The selected excerpt from the New York Act explicitly states that "counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." *Id.* at 40.

30 Post-*Gault* rulings in the adult criminal context may provide greater support for a constitutional argument for the child's right to counsel in the disposition phase of a juvenile case. Specifically, the Supreme Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and a series of cases that followed, held that the right to counsel cannot be governed by the classification of the offense or by whether or not a jury trial is required and that no person may be deprived of his liberty without counsel unless and until that right is knowingly and intelligently waived. Debate in the juvenile context would likely focus on whether placement in a rehabilitative facility is sufficiently akin to "imprisonment" as to constitute a loss of liberty warranting due process protection.

31 *See, e.g.*, ALA. CODE § 12-15-63(a) (LexisNexis 1995) ("all stages"); ALASKA STAT. § 47.12.040 (2004) ("all stages"); ARIZ. REV. STAT. ANN. § 8-221 (Supp. 2004) ("in all proceedings involving offenses"); ARK. CODE ANN. § 9-27-316 (Supp. 2003) ("all stages"); CONN. GEN. STAT. ANN. § 46b-135 (West 2004) (at the commencement of any proceeding concerning the alleged delinquency of a child); D.C. CODE ANN. § 16-2304 (LexisNexis 2005) ("at all critical stages . . . including the time of admission or denial of allegations . . . and all subsequent stages"); FLA. STAT. ANN. § 985.203(1) (West Supp. 2005) ("all stages"); GA. CODE ANN. § 15-11-6(b) (2005) ("all stages"); 705 ILL. COMP. STAT. ANN. 405/1-5 (West Supp. 2005) ("all stages"); IOWA CODE ANN. § 232.11 (West 2000) (right to counsel guaranteed at the time of custody, during detention, at the waiver hearing, at the adjudicatory hearing, at the disposition hearing, and at "hearings to review and modify a dispositional order"); KAN. STAT. ANN. § 38-1606 (2000) ("every stage"); LA. CHILD. CODE ANN. art. 809 (2004) ("every stage"); ME. REV. STAT. ANN. tit. 15, § 3306 (2003) ("every stage"); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20 (LexisNexis 2003) ("every stage"); MASS. ANN. LAWS ch. 119, § 29 (LexisNexis 2004) ("at all hearings"); MICH. COMP. LAWS ANN. § 712a.17c (West 2004) ("at each stage of the proceedings"); MISS. CODE ANN. § 43-21-201 (West 2004) ("all stages"); MO. ANN. STAT. § 211.211 (West 2004) ("all proceedings"); MONT. CODE ANN. § 41-5-1413 (2003) ("all stages"); NEB. REV. STAT. § 43-272 (2003) ("all proceedings"); NEV. REV. STAT. ANN. § 62D.030 (LexisNexis 2004) ("all stages"); N.J. STAT. ANN. § 2A:4A-39 (West 1987) ("at every critical stage in the proceeding which, in the opinion of the court may result in the institutional commitment of the juvenile"); N.M. STAT. ANN. § 32A-2-14 (LexisNexis Supp. 2005) ("all stages"); N.C. GEN. STAT. § 7B-2000 (2003) ("all proceedings"); OHIO REV. CODE ANN. § 2151.352

These statutes, however, do not address whether the role of counsel might differ at the various stages of the delinquency proceeding.

While some early commentators argued that the adversary position was necessary at every stage of the case to protect the child's constitutional rights,[32] others supported an adversary role only at the adjudicatory phase and endorsed a best-interest model at other more rehabilitative phases such as disposition.[33] In an even more nuanced analysis, some commentators argued that the attorney's role should vary according to the adequacy of services and treatment being offered by the juvenile court.[34] That is, in cases or jurisdictions where rehabilitative services were clearly inadequate or even harmful to the child, the attorney should assume the role of zealous adversary fighting against the child's placement in the facilities. In jurisdictions where services were adequate and appropriate, the child's counsel should act as a member of the juvenile court team.

In a third area of confusion, commentators questioned the role parents should play in directing the child's counsel.[35] This additional concern arose out of the Court's discussion in *Gault* of the "parent's right to custody" of their child and suggestion that parents may have a due process interest in delinquency proceedings precisely because that right is in jeopardy.[36] Seemingly to protect the rights of parents, the Court concluded that notions of fundamental fairness and due process guarantee the child *and his parents* the right to notice of specific charges and allegations, notice of the child's right to be represented by counsel, and notice that counsel will be appointed for the

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(LexisNexis Supp. 2004) ("all stages"); 42 PA. CONS. STAT. ANN. § 6337 (West Supp. 2005) ("all stages"); TENN. CODE ANN. § 37-1-126 (2001) ("all stages"); TEX. FAM. CODE ANN. § 51.10 (Vernon 2004) ("every stage"); UTAH CODE ANN. § 78-3a-913 (Supp. 2005) ("every stage"); WASH. REV. CODE ANN. § 13.40.140 (West 2004) ("all critical stages"); W. VA. CODE ANN. § 49-5-9 (LexisNexis 2003) ("all stages"); WIS. STAT. ANN. § 938.23 (West Supp. 2003) ("all stages"); WYO. STAT. ANN. § 14-6-222 (2004) ("every stage"); A.A. v. State, 538 P.2d 1004, 1005 (Alaska 1975) (all stages); State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 412 (W. Va. 1980) ("dispositional stage"). Only a few of the right to counsel statutes make any effort to clarify the role counsel should assume at disposition or any other phase of the delinquency case. *See infra* Part I.C.2 for additional discussion of statutory and common law interpretations of the right to counsel in delinquency cases.

32 Kay & Segal, *supra* note 12, at 1418 (citing Jacob L. Isaacs, *The Lawyer in the Juvenile Court*, 10 CRIM. L.Q. 222, 235 (1968)).

33 Ferster et al., *supra* note 17, at 384–85; Kay & Segal, *supra* note 12, at 1404.

34 Kay & Segal, *supra* note 12, at 1414–15, 1420.

35 *Id.* at 1420–23; *see also* Ferster et al., *supra* note 17, at 382 (discussing potential conflicts between parents and child).

36 *In re* Gault, 387 U.S. 1, 34 (1967).

child if the child or his parents cannot afford one.[37] Since *Gault*, some states have even recognized the parent as a formal party to delinquency proceedings and have awarded parents an independent statutory right to counsel.[38] Interestingly, in one of their early appeals to the trial court's action, Gault's parents asserted that it was error for the juvenile court to remove their son from their custody without first finding them unsuitable.[39] The parents did not re-raise this issue on appeal to the Supreme Court and the Court expressly declined to address it and other issues that were not directly before it.[40] Thus, the Court did not hold in *Gault* and has never since held that parents must be found unfit before a child may be removed from the home in a delinquency proceeding. Nonetheless, the language in *Gault* led some early commentators to reason that even when the child is appointed counsel, the parent retains significant authority over the case and the direction of the child's counsel.[41]

In their book, *Before the Best Interests of the Child*, Joseph Goldstein, Anna Freud, and Albert Solnit read *Gault*'s "right to custody" language as a ringing endorsement of the parents' right to make decisions about what their children need.[42] As they put it,

> [t]here is no hint in *Gault*, and it would run contrary to its tenor, that an attorney could independently represent the child over the parents' objection and prior to their disqualification as the exclusive representatives of his interests. Protection of the family, protection of the child from the state—not from his parents—is central to the holding in *Gault* . . . .[43]

Other early commentators recognized the potential for conflicts between the child and the parent and were not so quick to read the

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37 *Id.* at 41.

38 *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-221 (Supp. 2004); GA. CODE ANN. § 15-11-6 (2005) ("[A] party is entitled to representation by legal counsel at all stages of any proceedings alleging delinquency. . . . If the interests of two or more parties conflict, separate counsel shall be provided for each of them."); IDAHO CODE ANN. § 20-514 (2004); MASS. ANN. LAWS ch. 119, § 29 (LexisNexis 2004); MO. ANN. STAT. § 211.211 (West 2004); NEV. REV. STAT. ANN. § 62D.100 (LexisNexis Supp. 2004); OKLA. STAT. ANN. tit. 10, § 24 (West 2004); S.C. CODE ANN. § 20-7-110 (Supp. 2004); Sanchez v. Walker County Dep't of Family and Children Servs., 299 S.E.2d 66, 69–70 (Ga. 1976) (recognizing that parent is a party to proceedings involving his child under Georgia statute, now codified at GA. CODE ANN. § 15-11-6).

39 *Gault*, 387 U.S. at 10.

40 *Id.* at 10–11.

41 *See* JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 128–29 (1979); *see also* discussion *infra* Part II.B.

42 GOLDSTEIN ET AL., *supra* note 41, at 128.

43 *Id.* at 129.

right to counsel as a right of the parent over the child.[44] These commentators recognized that conflicts are particularly common in cases where a parent is the party instituting the proceedings against a child or where, in the course of defending a child, defense counsel will have to use information that might lead to criminal or civil charges against the parent for neglect or contributing to the delinquency of a minor.[45]

Ultimately, the confusion generated by the conflicting agenda of the Court in *Gault* left juvenile judges, child advocates, and legal scholars in debate over the role of defense counsel. The tug of war between discretionary paternalism and the adversary due process model in the pre-*Gault* era was certainly not relieved, and was probably even exacerbated by the language in *Gault*.[46]

B. Consensus Among Legal Scholars and Professional Leaders

Notwithstanding the initial debate, by the early 1980s a consensus seems to have evolved among academic commentators and professional leaders in the juvenile justice community regarding the appropriate role of counsel in delinquency cases. The professional leadership as represented by the OJJDP, the ABA, and the Institute of Judicial Administration (IJA) issued a series of standards to govern the administration of justice for children charged with crimes.[47] These standards uniformly endorsed an expressed-interest, adversarial model of representation for children at all phases of the delinquency case.

The standards issued by the IJA and the ABA (IJA-ABA Standards) discuss the function of the child's counsel as follows:

> However engaged, the lawyer's principal duty is the representation of the client's legitimate interests.[48]
>
> In general, determination of the client's interests in the proceedings, and hence the plea to be entered, is ultimately the responsibility of the client after full consultation with the attorney.[49]
>
> Ordinarily, the lawyer should not make or agree to a specific dispositional recommendation without the client's consent.[50] . . . It is the

44 Kay & Segal, *supra* note 12, at 1420–23.

45 *Id.*

46 *Id.* at 1409.

47 STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 3.1(a) (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1979).

48 *Id.*

49 *Id.* 3.1 (b)(i).

50 *Id.* 9.3(a).

> lawyer's duty to insist that proper procedure be followed throughout the disposition stage and that orders entered be based on adequate reliable evidence.[51]

By the mid-1980s, a similar view was uniformly endorsed in the legal academy. Professor Martin Guggenheim's 1984 article on the legal representation of children marks a significant benchmark in commentary on this issue.[52] Guggenheim identifies the client's right to control his attorney as the principal means by which the client may exercise or waive substantive rights accorded to him.[53] He further argues that the role of counsel must vary according to the age of the child and the nature of the rights at stake in the proceeding.[54] Thus, in delinquency cases where children tend to be older and fundamental rights like those conferred in *Gault* are substantial, Guggenheim argues that client-directed advocacy is essential.[55]

Today, even where disagreement persists among scholars over the role of counsel in abuse and neglect and other child-related proceedings,[56] the weight of academic opinion now firmly supports the traditional expressed-interest, adversary model of advocacy in delinquency cases.[57] In 1996, a group of child advocates and scholars convened a

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51 *Id.* 9.4(a).

52 Guggenheim, *supra* note 8, at 86. Guggenheim's article must be considered a seminal work as it is cited widely not only by other scholars, but also by state and local ethics committees, appellate courts, and practitioners' writing practice manuals.

53 *Id.* at 80–81.

54 *Id.* at 86–88, 92–93.

55 *Id.* at 86–88.

56 For a representative sampling see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS § 3-2(b)(1), at 51 (1997); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 900–01 (1999); Donald N. Duquette, *Legal Representation for Children in Protection Proceedings: Two Distinct Lawyer Roles Are Required*, 34 FAM. L.Q. 441 (2000); David R. Katner, *Coming To Praise, Not To Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103 (2000); Jean Koh Peters, *The Roles and Content of Best-Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1507 (1996). *See also* Del. Comm. on Prof'l Ethics, Informal Op. 2001-1 (2001) (endorsing the best-interest advocacy in child protective cases despite criticism by Peters and others).

57 For a representative sampling, see Janet Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1129–30 (1991); Marrus, *supra* note 8, at 334; Mlyniec, *supra* note 8, at 109; Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 176 (2003); Robert E. Shepard & Sharon S. England, *"I Know the Child Is My Client, but Who Am I?,"* 64 FORDHAM L. REV. 1917, 1942 (1996); Stanger, *supra* note 8, at 1125 (manifesting cursory acceptance of zealous advocate model of advocacy).

symposium at Fordham Law School to discuss various aspects of the legal representation of children.[58] Symposium scholars developed a series of recommendations and expressly rejected the best-interest or guardian ad litem model of representation for children in every case in which such a model was not statutorily mandated by the relevant jurisdiction.[59] Much of the more recent commentary draws not only from Guggenheim's rights-based analysis, but also from the Model Rules of Professional Conduct which call upon attorneys to maintain a "normal" relationship with their clients as far as reasonably possible even when a client's decisionmaking capacity is diminished.[60]

Yet, despite any evidence of an academic consensus, it is clear that the expressed-interest, zealous advocate model is far from uniform in practice throughout the country.[61] The ABA, in partnership with other nonprofit juvenile justice agencies, has conducted a series of state assessments on the representation of indigent juveniles in delinquency cases.[62] In each state, expert consultants have evaluated the

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58 Bruce A. Green & Bernadine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1283–84 (1996).

59 *Id.* at 1294; *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1302 (1996).

60 MODEL RULES OF PROF'L CONDUCT R. 1.14 (2003); *see, e.g.*, Samuel M. Davis, *The Role of the Attorney in Child Advocacy*, 32 U. LOUISVILLE J. FAM. L. 817 (1994); James D. Gallagher & Cara M. Kearney, *Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs To Go*, 16 GEO. J. LEGAL ETHICS 597 (2003); Laffitte, *supra* note 9.

61 Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1678–79 (1996) ("Attorneys have continued to identify with a nonadversarial role because of hostility from juvenile court judges and a general belief in the appropriateness of serving the child's best-interests."); *see also infra* notes 66–69.

62 For a discussion of the assessment methodology, see Susanne M. Bookser, Note, *Making* Gault *Meaningful: Access to Counsel and Quality of Representation in Delinquency Proceedings for Indigent Youth*, 3 WHITTIER J. CHILD & FAM. ADVOC. 297 (2004). Thus far, twelve state assessments have been published: ABA JUVENILE JUSTICE CTR. & S. CTR. FOR HUMAN RIGHTS, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2001) [hereinafter GEORGIA ASSESSMENT], *available at* http://www.njdc.info/pdf/georgia.pdf; ABA JUVENILE JUSTICE CTR. NAT'L JUV. DEFENDER CTR. ET AL., KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2002) [hereinafter KENTUCKY ASSESSMENT], *available at* http://www.njdc.info/pdf/kentucky_assessment.pdf; ABA CTR., THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA (2001) [hereinafter LOUISIANA ASSESSMENT], *available at* http://www.njdc.info/pdf/LAreport.pdf; MAINE ASSESSMENT, *supra* note 2; ABA JUVENILE JUSTICE CTR. & MID-ATL. JUVENILE DEFENDER CTR., MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS

quality of and access to representation by observing court proceedings, gathering statistical data and interviewing children, parents, judges, probation officers and other local juvenile justice stakeholders.[63] The reports from these assessments provide considerable evidence of a persistent culture of paternalism in the legal representation of children in the juvenile justice system.[64] Some as-

(2003) [hereinafter MARYLAND ASSESSMENT], *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/juvenile_indigent_defense_20031001/mdreport.pdf; ABA JUVENILE JUSTICE CTR., MONTANA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003) [hereinafter MONTANA ASSESSMENT], *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/juvenile_indigent_defense_20031001/mtreport.pdf; ABA JUVENILE JUSTICE CTR. & S. JUVENILE DEFENDER CTR., NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (Lynn Grindall ed., 2003) [hereinafter NORTH CAROLINA ASSESSMENT], *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/juvenile_indigent_defense_20031001/ncreport.pdf; ABA JUVENILE JUSTICE CTR. & CENT. JUVENILE DEFENDER CTR., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO (Kim Brooks & Darlene Kamine eds., 2003) [hereinafter OHIO ASSESSMENT], *available at* http://www.njdc.info/pdf/Ohio_Assessment.pdf; ABA JUVENILE JUSTICE CTR. & S. MID-ATL. JUVENILE DEFENDER CTR., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003) [hereinafter PENNSYLVANIA ASSESSMENT], *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/juvenile_indigent_defense_20031001/pareport.pdf; TEXAS ASSESSMENT, *supra* note 1; ABA JUVENILE JUSTICE CTR. & MID-ATL. JUVENILE DEFENDER CTR., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2002) [hereinafter VIRGINIA ASSESSMENT], *available at* http://www.njdc.info/pdf/Virginia%20Assessment.pdf; WASHINGTON ASSESSMENT, *supra* note 3.

63 Bookser, *supra* note 62, at 299.

64 *See, e.g.*, GEORGIA ASSESSMENT, *supra* note 62, at 30 ("The prevailing philosophy among many people who were interviewed is that delinquency proceedings should be informed by the 'best-interest of the child.'"); KENTUCKY ASSESSMENT, *supra* note 62, at 32 (finding an "overriding concern by everyone interviewed that their goal was to serve the best-interest of the children involved in the court system . . . and that the defense attorneys should be part of the 'team'"); MAINE ASSESSMENT, *supra* note 2, at 28 (noting confusion among juvenile defenders and other juvenile court officers as to whether defenders should be zealous advocates or whether they should be acting in "'the best-interest of the child'"); MARYLAND ASSESSMENT, *supra* note 62, at 32 (noting that "many public defenders did not appear to understand the critical role of defense counsel in providing zealous advocacy through an express interest model of representation"); MONTANA ASSESSMENT, *supra* note 62, at 40 ("Interviews with youth around the state revealed that defenders were often working for the 'best-interests of the child' and not advocating for the youth."); NORTH CAROLINA ASSESSMENT, *supra* note 62, at 39 (noting that defenders were "observed taking a 'best-interests' approach" by advocating for detention for their clients on the belief that it would be best for those children); OHIO ASSESSMENT, *supra* note 62, at 26 ("Just over 40% of attorneys re-

sessments show that defenders experience considerable internal conflict about what role they should play in the system.[65] Other assessments show that defenders confronted with negative attitudes of judges, prosecutors, and other juvenile court officers, feel compelled to conform to the best-interest model in order to function within the system.[66] Now almost forty years after *Gault*, twenty-five years after the IJA-ABA Standards, twenty years after Guggenheim's article, and ten years after the Fordham conference, best-interest advocacy remains standard practice in many juvenile courts.

C. *Reaching the Masses: Understanding the Disparity Between Local Practice and the Academic and Professional Leadership*

A variety of normative, systemic, and political factors appear to account for the persistence of best-interest advocacy in the face of a clear academic and professional consensus to the contrary. The paternalism that was the hallmark of the first juvenile court has impacted every aspect of the modern juvenile justice system. Post-*Gault* right-to-counsel statutes and modern rules of professional conduct have done little to abate the influence of paternalism on the role of defense counsel in juvenile proceedings. Moreover, even when counsel has little normative opposition to zealous, expressed-interest advocacy, real cognitive and psychosocial limitations among children and adolescents continue to frustrate the relationship between the attorney and his child client.

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sponding to the surveys viewed their role as representing the 'best-interest' of the youth rather than as the youth's advocate."); TEXAS ASSESSMENT, *supra* note 1, at 21 (noting that some stakeholders in the juvenile justice system believe that "the attorney's primary function is to argue what is in the child's best-interest, regardless of what the child wants"); VIRGINIA ASSESSMENT, *supra* note 62, at 31 ("Many professionals in juvenile court charged with working in the best-interest of the child believe that defense counsel's role is similar to their own."); WASHINGTON ASSESSMENT, *supra* note 3, at 24 ("It is also not uncommon for defenders to find themselves representing a child client who has no other caring adult in his or her life. It's easy to slip into the role of parent, even in a system that has rejected *parens patriae* as its guiding principle.").

65 MAINE ASSESSMENT, *supra* note 2, at 28 (noting "confus[ion]" of public defender as to his role as advocate or facilitator of a best-interest disposition); *see also* David A. Harris, *The Criminal Defense Lawyer in the Juvenile Justice System*, 26 U. TOL. L. REV. 751, 762 (1995); Shepard & England, *supra* note 57, at 1918 (noting that many attorneys are confused as to the role they are supposed to take in delinquency proceedings).

66 *See infra* note 72 and accompanying text.

1. Deeply Entrenched History of Paternalism in the Juvenile Justice System and Normative Objections to Ceding Authority to Children

Since the inception of the juvenile court movement, the legacy of paternalism has shaped and continues to shape the attitudes of many juvenile defenders who have a sincere desire to aid in the rehabilitation of children.[67] Because juvenile court is traditionally committed to rehabilitation and not to punishment, many advocates believe that children do not need the vigorous assistance of counsel and view best-interest advocacy as an essential tool in the rehabilitative process.[68] By advocating for what they believe to be the best-interest of the child, these attorneys—like other officials in the juvenile justice system—hope to divert the child from a life of crime and protect him from the consequences of his risky behavior. Attorneys face considerable difficulties as they seek to fulfill their ethical obligation to safeguard the child's procedural due process rights while fighting the paternalistic desire to assist the court in the rehabilitation of children they represent.[69]

In many jurisdictions, even those defenders who wish to honor their client's expressed-interests face tremendous systemic opposition from judges, prosecutors, and probation officers who expect defense counsel to participate as a part of the juvenile justice team.[70] Judges

67 Ainsworth, *supra* note 57, at 1129–30; Kay & Segal, *supra* note 12, at 1404.

68 *In re* Gault, 387 U.S. 1, 16–17 (1967); Ainsworth, *supra* note 57, at 1129–30; Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 586 (2002); Shepard & England, *supra* note 57, at 1919; Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 405 n.36 (1990); *see, e.g.*, GEORGIA ASSESSMENT, *supra* note 62, at 31; NORTH CAROLINA ASSESSMENT, *supra* note 62, at 39 (noting that some juvenile defenders, in taking a "'best-interests' approach," believed that detention might serve as an appropriate "'wake up call' for certain youth"); TEXAS ASSESSMENT, *supra* note 1, at 24; VIRGINIA ASSESSMENT, *supra* note 62, at 31 (quoting a defense attorney as saying, "[w]e don't need to be too adversarial because we get along well and work in the best-interest of the kids"); WASHINGTON ASSESSMENT, *supra* note 3, at 24 (quoting probation officer as saying, "[t]he defense attorneys fight pretty hard for the kids, but when they know a kid will get [access to addiction or mental health] treatment if he [doesn't get out of] detention [right away] the [attorney] might not fight as hard to get the kid out. The attorneys don't really [completely undermine a client's case and] cave on a client, but they do act in the best-interests of their client at times") (alterations in original).

69 Ainsworth, *supra* note 57, at 1129–30; Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 236 (1997); Harris, *supra* note 65, at 762; Shepard & England, *supra* note 57, at 1918.

70 Ainsworth, *supra* note 57, at 1128–29; KENTUCKY ASSESSMENT, *supra* note 62, at 32 (noting that the "[o]verriding concern by everyone interviewed that their goal was to serve the best-interest of the children involved in the court system . . . and that the

may even chastise attorneys for seeking to litigate legal issues or for challenging the factual allegations on the merits.[71] As one judge in Georgia stated in 2001, "'I expect my lawyers to act in the best-interest of the child. If they can get the child off but it is not in that child's best-interest, then they should not do it.'"[72] Some judges attempt to avoid attorney interference by encouraging children and/or their parents to waive counsel.[73] Some judges simply ignore defense counsel or insist that the attorneys be quiet.[74] Professor David Harris, a former defender, described the courts' treatment and perspective on defense counsel as a "hood ornament, a decorative accoutrement that served no real function, but that was required by legal convention."[75] In more than one jurisdiction, assessment investigators reported that "there was no perceived value in having an attorney represent the youth" because the "attorneys would have no impact upon the proceedings."[76]

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defense attorneys should be part of the 'team'"); MAINE ASSESSMENT, *supra* note 2, at 28 (noting that judges across the state expressed a clear belief that the first duty of juvenile defenders is the child's best-interests and "zealous advocacy on legal grounds is not favored"); MARYLAND ASSESSMENT, *supra* note 62, at 38 (noting that juvenile defenders "who zealously advocate for their child clients are seen as interfering with the 'best-interest' model"); MONTANA ASSESSMENT, *supra* note 62, at 41 ("Zealous advocacy seemed to be met with hostility and was negatively viewed as a means to get kids 'off.'"); TEXAS ASSESSMENT, *supra* note 1, at 21 (noting the "widespread belief that the primary purpose of advocacy is 'to get the child services,' regardless of guilt or innocence"); VIRGINIA ASSESSMENT, *supra* note 62, at 31 (reporting that many professionals in juvenile court believe that the role of defense counsel is to protect the child's best-interest); WASHINGTON ASSESSMENT, *supra* note 3, at 31 (noting that in some jurisdictions "defenders do not set trials, bring motions, or push for investigation funds because they fear 'rocking the boat' and being ostracized by the juvenile court community").

71 Ainsworth, *supra* note 57, at 1128–29; Harris, *supra* note 65, at 758–63.

72 GEORGIA ASSESSMENT, *supra* note 62, at 31.

73 Berkheiser, *supra* note 68, at 581; Marrus, *supra* note 7, at 318–19; *see also* Ainsworth, *supra* note 57, at 1127 (discussing evidence that judges may display conscious or unconscious antagonism toward the idea of attorneys in juvenile court and take their hostility out on the represented clients).

74 *See, e.g.*, Harris, *supra* note 65, at 757 (narrative essay on personal experience).

75 *Id.* at 763.

76 OHIO ASSESSMENT, *supra* note 62, at 27; *see also* LOUISIANA ASSESSMENT, *supra* note 62, at 67 ("'[W]hat is missing is someone whose job it is to challenge the best-interest perspective and to present to the court evidence of factual or actual innocence.'") (quoting a juvenile court observer); MARYLAND ASSESSMENT, *supra* note 62, at 38 (noting that the "best-interest" culture that pervades the juvenile court often serves to "relegate[ ] defense counsel to little more than a decorative ornament in a process that often results in unfair outcomes").

Like the judges, some prosecutors view defenders as "partners" who share in a common goal of redirecting the child and deciding what is in the child's best-interest.[77] Other prosecutors resent defense attorneys who seek to vindicate their client's legal rights and interfere with the child's potential rehabilitation.[78] Attorneys confronted with these systemic barriers are bound to experience feelings of frustration and futility in fulfilling their role as counsel for the child in delinquency cases.[79] Even the most well intentioned advocate finds that living up to the goal of client-directed advocacy is virtually impossible when the culture of the system is geared towards finding children delinquent in order to obtain services. Attorneys not only fear that they will lose future case appointments if they do not buy into the paternalism of the court,[80] but many also fear that they will do the child more harm than good by insisting on a zealous advocacy model that is so resented in the system.[81]

Paternalistic advocacy persists in juvenile courts not only through efforts to rehabilitate children, but also through broader normative objections to the transfer of authority from adults to children. Opposition to adolescent decisionmaking autonomy is well documented in laws that use age to grant or deny certain rights or privileges to young people. For example, state statutes that require students to attend school, that prevent children from suing or being sued on their own, or that deny children the right to contract, marry, vote, drive, or purchase alcohol, tobacco, or pornographic material may reflect a societal presumption that children by nature generally lack the capacity to make decisions about these issues on their own.[82] On the other hand, legislative and judicial determinations that allow these same children to accept or refuse medical treatment, assert a constitutional right to abortion, exercise other substantive rights of privacy and free speech, and to waive constitutional rights such as the right to counsel and the right against self-incrimination without the guidance of an adult, apparently presume children competent to decide in these ar-

77 GEORGIA ASSESSMENT, *supra* note 62, at 30–31.

78 *Id.* at 30.

79 *See, e.g., id.* at 30; Harris, *supra* note 65, at 762–64.

80 Ainsworth, *supra* note 57, at 1129–30; Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1843 (1996).

81 GEORGIA ASSESSMENT, *supra* note 62, at 29.

82 *See* 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, 437–39 (1992); Wallace J. Mlyniec, *supra* note 8, at 109; Moore, *supra* note 80, at 1828–29; Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547, 557–58 (2000).

eas.[83] Considering the seemingly irrational inconsistencies between many of these legislative and common law presumptions, the presumptions probably say less about a child's true decisionmaking capacity and more about societal norms that ultimately shape the rules of decisional autonomy. Societal norms affecting the allocation of decisionmaking authority between children and adults are necessarily concerned with balancing competing interests such as respect for parental autonomy to raise children as they wish, the desire to ensure that children have a healthy and productive future, the need to protect society from the consequences of immature and unwise decisions of children, and the state's obligation to protect certain constitutional rights of the child.[84] In delinquency cases, best-interest advocacy may be supported by social norms that suggest that important legal decisions should be left to adults who are purportedly better equipped to ensure both the safety of the community and the welfare of the child.

2. Inadequacy of State Statutes and Judicial Opinion Implementing and Interpreting the Right to Counsel

Paternalistic judges and best-interest advocates also remain unswayed by right-to-counsel statutes that, at least nominally, attempt to clarify the role of child's counsel. Possibly in some initial effort to differentiate between the potential roles of appointed advocates, several state legislatures adopted the contrasting language of "guardian ad litem" and "counsel/attorney for the child" in right-to-counsel statutes. Statutes in these states might require the court to appoint "counsel" for the child in a delinquency or person in need of supervision proceeding, but require the court to appoint a "guardian ad li-

83 *See* Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1422 (1996); Guggenheim, *supra* note 8, at 84; Moore, *supra* note 80, at 1849.

84 *See* Hafen, *supra* note 82, at 456 (arguing that Rule 1.14 of the Model Rules of Professional Conduct should be interpreted in a subject matter by subject matter approach); Scott, *supra* note 82, at 557–58 (providing detailed analysis of allocation of children's rights based on a myriad of socio-political factors). The influence of politics and norms in the regulation of children's decisional autonomy is probably most starkly evident in the seemingly irrational contrast of the legislative presumption of decisional competence of sixteen and seventeen year-olds in criminal death penalty cases and the legislative presumption in some states of decisional incompetence of these same youth to refuse life-sustaining medical treatment. *See* Berkheiser, *supra* note 68, at 625. The Supreme Court has also chosen to allocate children's rights on a case-by-case approach and has recognized the diversity of circumstances in which children are involved. *Compare* Belotti v. Baird, 443 U.S. 622 (1979) (striking down parental consent for abortion), *with* Ginsberg v. New York, 390 U.S. 629, 639–43 (1968) (upholding ban on sale of sex-related materials to minors).

tem" in a neglect or dependency proceeding.[85] In other states, statutes might permit the court to appoint both a "guardian ad litem" and an "attorney for the child" in a delinquency case.[86] The contrast-

85 *See* ARIZ. REV. STAT. ANN. § 8-221 (Supp. 2004) (right to counsel in juvenile proceedings and appointment of a guardian ad litem in abuse and neglect proceedings); D.C. CODE ANN. § 16-2304 (LexisNexis 2001) (appointment of counsel in delinquency proceedings and guardian ad litem in neglect proceedings). *Compare* ARK. CODE ANN. § 9-27-316(a)(1) (2003), *with id.* § 9-27-316(f)(1); FLA. STAT. ANN. § 985.203 (West 2003 & Supp. 2005) (right to counsel in delinquency cases), *with id.* § 39.822 (West 2003) (appointment of guardian ad litem in abuse, abandonment, and neglect proceedings); 705 ILL. COMP. STAT. ANN. 405/1-5 (West 1999) (right to counsel in delinquency cases), *with id.* 405/2-17 (West 2000) (appointment of guardian ad litem in abuse and neglect cases); IOWA CODE ANN. § 232.11 (West 2000) (right to counsel in delinquency cases), *with id.* § 232.89 (West 2000 & Supp. 2005) (appointment of guardian ad litem in child-in-need-of-assistance proceedings); KY. REV. STAT. ANN. § 610.290 (West 2005) (right to counsel in delinquency cases), *with id.* § 620.100 (West 2005 & Supp. 2005) (appointment of "court-appointed special advocate volunteer" in dependency, neglect, and abuse cases); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-20 (LexisNexis 2002 & Supp. 2004) (right to counsel in delinquency cases), *with id.* § 3-813 (LexisNexis 2002) (appointment of a "Court-Appointed Special Advocate" in child-in-need-of-assistance proceedings); N.H. REV. STAT. ANN. § 169-B:12 (LexisNexis 2001) (right to counsel in delinquency cases), *with id.* § 169-C:10, *invalidated in part by In re* Shelby R., 804 A.2d 435 (N.H. 2002) (declaring unconstitutional N.H. REV. STAT. ANN. § 169-C:10(II)(a)) (appointment of guardian ad litem in abuse and neglect cases); N.C. GEN. STAT. § 7B-2000 (2003) (right to counsel in delinquency cases), *with id.* § 7B-601 (appointment of guardian ad litem in abuse and neglect cases); OR. REV. STAT. § 419C.245 (2003) (right to counsel in delinquency cases), *with id.* § 419A.170 (appointment of "court appointed special advocate" in dependency cases); 42 PA. STAT. ANN. § 6337 (West 2000 & Supp. 2005) (right to counsel in all juvenile proceedings), *with id.* § 6311 (West Supp. 2005) (appointment of guardian ad litem in dependency cases); S.C. CODE ANN. § 20-7-7415 (1985 & Supp. 2004) (right to counsel in all juvenile proceedings), *with id.* § 20-7-110 (appointment of guardian ad litem in abuse and neglect proceedings); S.D. CODIFIED LAWS § 26-7A-30 (1999) (right to counsel in all juvenile proceedings), *with id.* § 26-8A-18 (appointment of guardian ad litem in abuse and neglect cases); WASH. REV. CODE ANN. § 13.40.140 (West 2004) (right to counsel in delinquency cases), *with id.* § 13.34.100 (appointment of guardian ad litem in dependency cases).

86 *See* ALA. CODE § 12-15-63 (LexisNexis 1995) (right to counsel), *and id.* § 12-15-8 (appointment of guardian ad litem if the child "has no parent or guardian or custodian appearing on his behalf or their interests conflict with those of the child"); ALASKA STAT. § 47.12.090 (2004) (appointment of guardian ad litem in addition to counsel "[w]henever in the course of proceedings . . . it appears to the court that the welfare of a minor will be promoted"); ARK. CODE ANN. § 9-27-316 (appointment of "an attorney ad litem to represent the best-interests of a juvenile involved in any case before the court" in addition to counsel); COLO. REV. STAT. ANN. § 19-1-105 (West 2005) ("If the court finds that it is in the best-interest and welfare of the child, the court may appoint both counsel and a guardian ad litem."); GA. CODE ANN. § 15-11-6 (2002) (right to counsel), *and id.* § 15-11-9 (appointment of guardian ad litem in all juvenile proceedings "if the child has no parent, guardian, or custodian appearing on

ing language in these statutes clearly suggests, first, that the roles of appointed advocate might vary according to the type of proceeding at issue and, second, that the role of "counsel" must be distinguished from that of "guardian ad litem" unless the selection of terms was superfluous.

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the child's behalf or if the interests of the parent, guardian, or custodian appearing on the child's behalf conflict with the child's interests or in any other case in which the interests of the child require a guardian"); HAW. REV. STAT. ANN. § 802-1 (LexisNexis 2003) (right to counsel), *and id.* § 571-87 (LexisNexis 2005) (appointment of guardian ad litem in all cases before family court); KAN. STAT. ANN. § 38-1606 (2000) (right to counsel), *and id.* § 38-1606a (appointment of "court-appointed special advocate for the child . . . whose primary duties shall be to advocate the best-interests of the child" in any juvenile proceeding); MINN. STAT. ANN. § 260B.163 (West 2003) (right to counsel and appointment of a guardian ad litem where "it appears, at any stage of the proceedings, that the minor is without parent or guardian, or that the minor's parent is a minor or incompetent, or that the parent or guardian is indifferent or hostile to the minor's interests" or where "the court feels that such an appointment is desirable"); MONT. CODE ANN. § 41-5-1413 (2003) (right to counsel), *and id.* § 41-5-1411 (appointment of guardian ad litem "if the youth has no parent or guardian appearing in his behalf or if their interests conflict with those of the youth"); NEB. REV. STAT. § 43-272 (2004) (appointment of guardian ad litem in addition to counsel where "the juvenile has no parent or guardian of his or her person or if the parent or guardian of the juvenile cannot be located or cannot be brought before the court," where "the parent or guardian of the juvenile is excused from participation in all or any part of the proceedings," where "the parent is a juvenile or an incompetent," or where "the parent is indifferent to the interests of the juvenile"); N.J. STAT. ANN. § 2A:4A-39 (West 1987) (right to counsel and appointment of guardian ad litem); N.M. STAT. ANN. § 32A-2-14 (LexisNexis 1999 & Supp. 2003) (appointment of guardian ad litem in addition to counsel where "the child has no parent, guardian or custodian appearing on behalf of the child or if the parent's, guardian's or custodian's interests conflict with those of the child"); N.Y. JUD. CT. ACTS LAW § 320.3 (McKinney 1999) (right to counsel and appointment of a "Law Guardian"); N.D. CENT. CODE § 27-20-26 (1991 & Supp. 2003) (right to counsel), *and id.* § 27-20-48 (1991) (appointment of guardian ad litem where child "has no parent, guardian, or custodian appearing on his behalf or their interests conflict with his or in any other case in which the interest of the child require a guardian"); OHIO REV. CODE ANN. § 2151.352 (LexisNexis 2002) (right to counsel), *and id.* § 2151.281 (appointment of guardian ad litem in any proceeding where "[t]he child has no parent, guardian, or legal custodian" or where "the court finds that there is a conflict of interest between the child and the child's parent, guardian, or legal custodian"); TENN. CODE ANN. § 37-1-126 (2004) (right to counsel), *and id.* § 37-1-149 (Supp. 2004) (appointment of guardian ad litem "if such child has no parent, guardian or custodian appearing on such child's behalf or such parent's, guardian's or custodian's interests conflict with the child's or in any other case in which the interests of the child require a guardian"); UTAH CODE ANN. § 78-3a-913 (2002 & Supp. 2005) (right to counsel), *and id.* § 78-3a-912 (appointment of guardian ad litem in "any case before the court"); WIS. STAT. ANN. § 938.23 (West 2000) (appointment of guardian ad litem instead of counsel for juveniles under twelve years of age).

Traditionally, while a "guardian ad litem" will be viewed as an arm of the court who will advocate in the best-interest of the child,[87] "counsel" for the child will generally have a duty of undivided loyalty and confidentiality to the child.[88] Unfortunately, although several statutes define the term "guardian ad litem," very few define the term "counsel."[89] As a result, courts and practitioners often ignore or conflate the distinction between a guardian ad litem and counsel and construe the role of counsel as they deem appropriate. In Ohio, for example, judges routinely appoint advocates to serve in delinquency cases as "attorney/guardian ad litem," notwithstanding statutes that require appointment of "counsel" in those proceedings.[90] In Vermont, the statute itself conflates the distinction between the guardian

87 William A. Kell, *Voices Lost and Found: Training Ethical Lawyers for Children*, 73 IND. L.J. 635, 651 (1998); Moore, *supra* note 80, at 1823; *see also* WIS. STAT. ANN. § 938.235(3)(a) (requiring guardian ad litem to advocate for the best-interest of the client regardless of the client's wishes); State *ex rel.* Bird v. Weinstock, 864 S.W.2d 376, 384 (Mo. Ct. App. 1993).

88 STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 1–2, 3 (1996), *available at* http://www.afccnet.org/pdfs/AbuseNeglect Standards.pdf; Moore, *supra* note 80, at 1842; PETERS, *supra* note 56, §§ 2-1 to -4.

89 For statutes that define the duties of the guardian ad litem, see ALASKA STAT. § 25.24.310 (2004) (guardian ad litem represents child's best-interests, to be distinguished from preferences, where it would serve the welfare of the child); ARIZ. REV. STAT. ANN. § 8-221 (in abuse and neglect cases guardian ad litem appointed to protect the juvenile's best-interests); ARK. CODE ANN. § 9-27-316 (attorney ad litem to represent the best-interests of a juvenile); COLO. REV. STAT. ANN. § 19-1-103(59) ("'Guardian ad litem' means a person appointed by a court to act in the best-interests of a person."); CONN. GEN. STAT. ANN. § 46b-129a (West 2004) (guardian ad litem shall speak on behalf of the best-interest of the child); KAN. STAT. ANN. § 38-1606a (primary duties of court-appointed special advocate shall be to advocate the best-interests of the child); MINN. STAT. ANN. § 260B.163(6) (guardian ad litem shall conduct an independent investigation to determine the facts relevant to the situation of the child and the family, advocate for the child's best-interests and advocate for appropriate community services when necessary); NEB. REV. STAT. ANN. § 43-272 (LexisNexis 2004) (guardian ad litem shall have the duty to protect the interests of the juvenile); N.M. STAT. ANN. § 32A-1-7 (LexisNexis 1999) (guardian ad litem shall zealously represent the child's best-interests); 42 PA. STAT. ANN. § 6311 (guardian ad litem is charged with representing the child's best-interests at every stage of the proceedings); UTAH CODE ANN. § 78-3a-912 (guardian ad litem shall represent the child's best-interests); WIS. STAT. ANN. § 938.235(3)(a) (guardian ad litem will advocate for the best-interest of the client regardless of the clients wishes). For statute that defines role of counsel see WIS. STAT. ANN. § 938.23(6) (West 2002) (defining "counsel" to mean "an attorney acting as adversary counsel who shall advance and protect the legal rights of the party represented, and who may not act as guardian ad litem for any party in the same proceeding").

90 *Compare* OHIO ASSESSMENT, *supra* note 62, at 26, *with* OHIO REV. CODE ANN. § 2151.352, *and In re* Christopher, 376 N.E.2d 603, 607 (Ohio Ct. App. 1977).

ad litem and counsel by permitting the appointment of *either* a guardian ad litem or counsel for a child who is a party to the delinquency proceeding.[91] Similarly, in Wyoming, although the relevant statutes require appointment of "counsel" for the child in a delinquency case,[92] the delinquency provisions confuse the role of counsel by stating first, that counsel for the child may also be the guardian ad litem and second, that counsel "shall consider among other things what is in the best-interest of the child."[93] Still other state statutes confuse the role of counsel by collapsing the child's right to counsel in multiple types of family matters into one statute. For example, a single statute might grant a minor the right to counsel in termination of parental rights, custody, and delinquency proceedings.[94] These statutes fail to indicate whether the role of child's counsel might be different in one type of family proceeding versus another.[95]

A final area of confusion arises in the statutory references to the rights of parents. While many statutes recognize the potential for conflicts between the parent and the child and require appointment of separate counsel for each,[96] just as many ignore the potential for con-

91 VT. STAT. ANN. tit. 33, § 5525 (2001); *cf.* MINN. STAT. ANN. § 260B.163(4)(d) (explicitly stating that "[c]ounsel for the child shall not also act as the child's guardian *ad litem*").

92 WYO. STAT. ANN. § 14-6-222(b) (2005).

93 *Id.*

94 *See, e.g.*, MASS. ANN. LAWS ch. 119, § 29 (LexisNexis 2002); MISS. CODE ANN. § 43-21-201 (West 1999); MO. ANN. STAT. § 211.211 (West 2004); R.I. GEN. LAWS § 14-1-31 (2002); W. VA. CODE ANN. § 49-5-9 (LexisNexis 2004).

95 Moore, *supra* note 80, at 1819–20 (recognizing diversity of family, child-related litigation). In some cases, the child will be a party to the proceeding (delinquency); in some, the child will have some legal interest that is directly affected (contract or property dispute); and in others, the child will only be affected indirectly by the resolution of the proceeding (custody).

96 *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-221E (Supp. 2004) ("If a juvenile is entitled to counsel and there appears to be a conflict of interest between a juvenile and the juvenile's parent or guardian . . . the juvenile court may appoint an attorney for the juvenile in addition to the attorney appointed for the parent or guardian or employed by the parent or guardian."); GA. CODE ANN. § 15-11-6(b) (2002) ("If the interests of two or more parties conflict, separate counsel shall be provided for each of them."), *and* Sanchez v. Walker County Dep't of Family & Children Servs., 229 S.E.2d 66, 69 (Ga. 1976) (recognizing that parent is a party to proceedings involving his child under the statute that is now GA. CODE ANN. § 15-11-6); IDAHO CODE ANN. § 20-514 (2004) (stating that the "court shall appoint counsel to represent the juvenile and his parents or guardian . . . in the event the court shall find that there is a conflict of interest between the interests of the juvenile and his parents or guardian, then the court shall appoint separate counsel for the juvenile"); MASS. ANN. LAWS ch. 119, § 29 (parent, guardian or custodian of child shall have the right to appointed counsel at all hearings); MO. ANN. STAT. § 211.211(7) (where a conflict exists between the child

flicts and appear to appoint one counsel to represent the interests of both the parent and the child.[97] Ambiguities in the language of some statutes even seem to suggest that the child may be represented by his parent, guardian, or custodian instead of counsel.[98]

Statutory ambiguities regarding the role of counsel are rarely clarified in state appellate courts. Few appellate opinions address the role of counsel in delinquency cases because counsel rarely take appeals from juvenile court cases in general and respondents are often ill-equipped to recognize and raise the issues themselves.[99] Illinois, West Virginia, and New Mexico are among the few states with any significant appellate activity on the appropriate role of juvenile counsel and the courts in these jurisdictions have reached widely diverging

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and his custodian, the court "shall order that the child and his custodian be represented by separate counsel, and it shall appoint counsel if required"); NEV. REV. STAT. ANN. § 62D.100 (LexisNexis Supp. 2003) ("A parent or guardian of a child who is alleged to be delinquent or in need of supervision may be represented by an attorney at all stages of the proceedings."); OKLA. STAT. ANN. tit. 10, § 24(A)(2) (West 2004) ("In any case in which it appears to the court that there is such a conflict of interest between a parent or legal guardian and a child so that one attorney could not properly represent both, the court may appoint counsel, in addition to counsel already employed by a parent or guardian or appointed by the court to represent the minor or parent or legal guardian.").

97 *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-135(a) (West 2004) ("At the commencement of any proceeding concerning the alleged delinquency of a child, the parent or parents or guardian and the child shall have the right to counsel and be so informed by the judge, and that if they are unable to afford counsel that counsel will be provided for them."); 705 ILL. COMP. STAT. ANN. 405/1-5(1) (West 1999) ("[T]he minor . . . and his parents, guardian, legal custodian or responsible relative who are parties respondent have . . . the right to be represented by counsel."); MINN. STAT. ANN. § 260B.163(4)(a) (West 2003) ("The child, parent, guardian or custodian has a right to effective assistance of counsel in connection with a proceeding in juvenile court."); S.C. CODE ANN. § 20-7-7415 (Supp. 2004) ("The child or the child's parent or guardian also must be advised . . . of their right to be represented by counsel and that, if they are unable to employ counsel, counsel will be appointed to represent them."); S.D. CODIFED LAWS § 26-7A-30 (1999) ("The court shall advise the child and the child's parents, guardian or custodian involved in any action or proceedings under this chapter . . . including the right to be represented by an attorney."); UTAH CODE ANN. § 78-3a-913 (2002 & Supp. 2005) ("The parents, guardian, custodian, and the minor, if competent, shall be informed that they have the right to be represented by counsel."); WYO. STAT. ANN. § 14-6-222 ("At their first appearance before the court, the child and his parents, guardian or custodian shall be advised by the court of their right to be represented by counsel and to employ counsel of their own choice.").

98 *See, e.g.*, GA. CODE ANN. § 15-11-6 ("Counsel must be provided for a child not represented by the child's parent, guardian, or custodian."); *accord* N.D. CENT. CODE § 27-20-26 (2003); OHIO REV. CODE ANN. § 2151.352 (LexisNexis 2004); TENN. CODE ANN. § 37-1-126 (2004).

99 Berkheiser, *supra* note 68, at 633.

conclusions. In a series of cases spanning from 1984 to 1995, the Appellate and Supreme Courts of Illinois explicitly held that an attorney for the child has a duty to advocate for the best-interests of the child, even when that interest conflicts with the expressed-interest or wishes of the child.[100] While each of the Illinois cases was decided in, and thus limited to, the context of disposition (sentencing), the Illinois courts draw from the United States Supreme Court's language in *Gault* regarding the non-adversarial nature of delinquency proceedings in general.[101] In *In re R.D.*, the First District of the Appellate Court of Illinois stated:

> The responsibility of the court-appointed juvenile counsel . . . is different than that of other court-appointed counsel. The juvenile counsel must not only protect the juvenile's legal rights but he must also recognize and recommend a disposition in the juvenile's best-interest, even when the juvenile himself does not recognize those interests. As our supreme court stated in *In re Beasley* . . . : "Although such proceeding [under the Juvenile Court Act] retains certain adversary characteristics, it is not in the usual sense an adversary proceeding, but it is one to be administered in a spirit of humane concern for and to promote the welfare of the minor as well as to serve the best-interests of the community."[102]

Moreover, in at least two of the Illinois cases, the courts held that the appointment of one public defender to serve as both a guardian ad litem and attorney for the child does not create an inherent conflict of interest.[103] In rejecting the minor's claim that his attorney's duty to zealously advocate his wishes was in conflict with a guardian ad litem's obligation to advocate in his best-interest, the court in *In re R.D.* stated that "[w]e believe that the juvenile counsel and the guardian ad litem have essentially the same obligations to the minor and to society."[104]

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100 *In re* W.C., 657 N.E.2d 908, 918 (Ill. 1995); *In re* R.D., 499 N.E.2d 478, 481–82 (Ill. App. Ct. 1986); *In re* K.M.B., 462 N.E.2d 1271, 1272–73 (Ill. App. Ct. 1984).

101 The Court of Appeals quoted the following footnote from *Gault*: "'Recognition of the right to counsel involves no necessary interference with the special purposes of juvenile court procedures; indeed, it seems that counsel can play an important role in the process of rehabilitation.'" *K.M.B.*, 462 N.E.2d at 1273 (quoting *In re* Gault, 387 U.S. 1, 38 n.64 (1967)); *see also W.C.*, 657 N.E.2d at 918 (noting that the process "for the most part is nonadversarial").

102 *R.D.*, 499 N.E.2d at 481–82 (citation omitted); *see also K.M.B.*, 462 N.E.2d at 1273 (relying on same quoted expert from Illinois Supreme Court in *In re* Beasley, 362 N.E.2d 1024, 1026 (Ill. 1977)).

103 *R.D.*, 499 N.E.2d at 481–82; *K.M.B.*, 462 N.E.2d at 1272–73.

104 *R.D.*, 499 N.E.2d at 482.

The appellate decisions in West Virginia have endorsed a radically different role for counsel in delinquency cases. In the key West Virginia case, the state supreme court held that counsel for the child has an affirmative duty to provide active and vigorous representation at both the adjudicatory and disposition stages of a delinquency case.[105] The court reprimanded the trial court for interfering with the attorney's "energetic advocacy" at the disposition phase and concluded that the court must accommodate an adversarial proceeding and allow counsel to make a record at all stages of the proceedings.[106]

In New Mexico, the state supreme court placed itself somewhere between the rulings in Illinois and West Virginia. In June 2004, the New Mexico supreme court was asked to decide whether defense counsel rendered ineffective assistance when he served as both guardian ad litem during the child's abuse and neglect case and then as defense attorney for the child during delinquency proceedings.[107] Despite the child's argument that the dual roles presented an inherent and irreconcilable conflict, the court found no "actual, active" conflict and denied the ineffectiveness claim.[108] Although the court explicitly acknowledged the "heightened" potential for conflicts and provided a rather lengthy analysis of the differences between the loyalties and obligations of defense counsel and guardian ad litem, the court was unwilling to adopt a per se rule barring dual appointments absent evidence of an actual conflict.[109]

The rulings in West Virginia, Illinois, and New Mexico represent the disparity in common law interpretations of the role of counsel in delinquency cases. The absence of appellate insight in other jurisdictions may further explain the lack of uniformity in juvenile practice across the country.

3. Practical Difficulties Caused by Cognitive Limitations of Children

In discussing normative and systemic barriers to traditional expressed-interest advocacy, it would be a mistake to ignore the real impact a child's cognitive and developmental limitations may have on the attorney-client relationship. Zealous advocacy of the client's ex-

105 State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 412 (W. Va. 1980).

106 *Id.* at 413 (noting that the court of appeals reprimanded the trial judge for holding the child's counsel in contempt and removing him from the appointed representation when the attorney attempted to arrange for alternative placements).

107 State v. Joanna V., 94 P.3d 783, 784 (N.M. 2004).

108 *Id.* at 787.

109 *Id.*

pressed-interests depends not only on the attorney's willingness to defer to the child's decisions, but also on the child's ability to make and communicate those decisions.[110] The attorney may face real challenges in allocating decisions to children who generally have a limited fund of information, sometimes lack the capacity to engage in effective cognitive reasoning, often exercise poor and/or short-sighted value judgments, and frequently err in predicting future outcomes.

Psychologists studying common cognitive and psychosocial features of adolescence have recently questioned adolescents' abilities to participate effectively as trial defendants.[111] The literature emerging from these studies has begun to influence the debate on the appropriate role of counsel in the juvenile justice system.[112] Research seems to indicate that even a child who has the cognitive capacity to meet the legal criteria for competence to stand trial may still have certain developmental limitations that impair his effective participation in the attorney-client relationship.[113] Although it appears that by the age of fifteen a child is able to engage in the same communication and cognitive reasoning process as an adult,[114] the capacity to engage in cognitive reasoning is not the sole determinant in decisionmaking.[115] Some youth simply lack the knowledge and experience needed to conceive of and weigh all of the short- and long-range consequences that should be considered in any given decision.[116] Developmental research also suggests that risk perception, risk preference, and time perspective often differ between adolescents and adults and generally affect how cognitive capacities will be used in decisionmaking.[117] Adolescents, for example, often engage in more risk-taking behavior be-

110 Schmidt et al., *supra* note 57, at 176.

111 *Id.* at 191; Jennifer L. Woolard & N. Dickon Reppucci, *Researching Juveniles' Capacities as Defendants, in* YOUTH ON TRIAL, *supra* note 11, at 173, 176–79.

112 *See, e.g.*, Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants, in* YOUTH ON TRIAL, *supra* note 11, at 243, *passim*; Schmidt et al., *supra* note 57, *passim*; Scott, *supra* note 82, *passim*; Woolard & Reppucci, *supra* note 111, *passim.*

113 Schmidt et al., *supra* note 57, at 176–77; *see also* Buss, *supra* note 112, at 243.

114 Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 17–18 (1997); Scott, *supra* note 82, at 555–56.

115 *See* Schmidt et al., *supra* note 57, at 176–77; *see also* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 505 (2003); William A. Kell, *Ties That Bind? Children's Attorneys, Children's Agency, and the Dilemma of Parental Affiliation*, 29 LOY. U. CHI. L.J. 353, 362–63 (1998); Woolard & Reppucci, *supra* note 111, at 176.

116 Schmidt et al., *supra* note 57, at 177; *see also* Buss, *supra* note 112, at 243; Scott, *supra* note 82, at 555–56, 591 (inexperience and immature judgments may lead to poor choices).

117 Schmidt et al., *supra* note 57, at 180; Scott, *supra* note 82, at 591–92.

cause they think with a more immediate rather than future orientation and thus perceive risks differently.[118] Because children and adolescents tend to focus on immediate gains and fail to consider the long-term, future consequences of a given choice, their decisions may be based on a temporary set of beliefs, and values that are likely to change over time.[119] As adolescents mature, they gain a greater appreciation of the future, adopt new values and beliefs and often become more risk averse.[120] These adolescents may also come to regret decisions they made in earlier years.

Decisionmaking is also shaped by context and environment. People who make decisions in stressful situations often make bad decisions or avoid decisions altogether by shifting responsibility to another person or by settling for the status quo.[121] Research suggests that youth rely on their cognitive reasoning skills with even less dependability and uniformity than adults in stressful settings.[122] When the child's attorney lacks training in adolescent development and does not have or take the time to confront and resolve the anxiety that any child is likely to experience in a delinquency case, the child may never effectively engage in the decisionmaking process.

Likewise, the child's decisionmaking capacity may be inhibited when the attorney fails to earn his client's trust.[123] A few studies have raised concerns about the difficulties children have in developing a trusting relationship with an attorney and in understanding the concepts of confidentiality and client loyalty.[124] Some children mistak-

118 Bonnie & Grisso, *supra* note 11, at 88; Buss, *supra* note 112, at 249; J. Shoshanna Ehrlich, *Shifting Boundaries: Abortion, Criminal Culpability and the Indeterminative Legal Status of Adolescents*, 18 WIS. WOMEN'S L.J. 77, 112 (2003); Schmidt et al., *supra* note 57, at 180; Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, *in* YOUTH ON TRIAL, *supra* note 11, at 9, 23–28.

119 Bonnie & Grisso, *supra* note 11, at 91 (noting that youth tend to favor immediate benefits "such as looking 'cool' in the eyes of peers"); Feld, *supra* note 115, at 506–07; Schmidt et al., *supra* note 57, at 179–80.

120 Bonnie & Grisso, *supra* note 11, at 88; Schmidt et al., *supra* note 57, at 179.

121 *See* ROBERT F. COCHRAN, JR. ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING § 8-4, at 141, § 8-4(c), at 146 (1999); Woolard & Reppucci, *supra* note 111, at 183.

122 Buss, *supra* note 112, at 918–19; Schmidt et al., *supra* note 57, at 179; Woolard & Reppucci, *supra* note 111, at 183.

123 *See* Buss, *supra* note 9, at 1712–14 (noting that a lawyer's failure to earn a child's trust and explain the lawyer's role can impair the child's ability to make decisions in the traditional client context).

124 Schmidt et al., *supra* note 57, 177–78; *see also* Grisso, *supra* note 114, at 15–16 (discussing results of several studies); Tamara Wong, Comment, *Adolescent Minds, Adult Crimes: Assessing a Juvenile's Mental Health and Capacity To Stand Trial*, 6 U.C. DAVIS J. JUV. L. & POL'Y 163, 180–81 (2002) (citing Deborah Cooper, *Juveniles' Under-*

enly believe that lawyers are responsible for deciding issues of guilt and punishment, that lawyers are required to report a child's admission of guilt to the court, or that a lawyer will not advocate the client's interests if the child admits involvement in the offense.[125] It is also fair to assume that few children fully understand their right to assert a directive role in the attorney-client relationship. Even when there is no confusion regarding the attorney's loyalty, children are generally socialized to expect adults to make decisions for them and may defer to the lawyer by default.[126]

The cognitive and psychosocial variables identified here may impact the attorney-client relationship in any number of ways. Most obviously, a child who is unpersuaded by his attorney's loyalty may simply withhold information from the attorney, depriving both the attorney and the child of an opportunity to exchange important insights in the case.[127] An adolescent who lacks future orientation may also withhold information from his attorney in order to feel the immediate benefit of not fully incriminating himself, but fail to recognize the long-term costs of compromising his own defense.[128] Youth may also make plea and trial decisions based on what their current peers think, failing to recognize that peer groups change and the long-term consequences of their choices may not comport with future values. In other encounters with the attorney, the youth may neglect to share information with the attorney simply because he or she miscalculates its importance to the case or does not fully understand the legal rights at stake.[129]

The attorney-client relationship is often further complicated by the prevalence of mental health issues among youth in the juvenile

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standing of Trial Related Information: Are They Competent Defendants?, 15 BEHAV. SCI. & L. 167 (1997)) (discussing a survey of 112 juveniles in South Carolina system which showed that generally, juveniles did not understand the role of defense counsel).

125 Grisso, *supra* note 114, at 19–20.

126 Marrus, *supra* note 8, at 342 ("Children naturally look to authority figures to make decisions for them.").

127 Buss, *supra* note 112, at 248; Schmidt et al., *supra* note 57, at 177, 186 (showing that juveniles were less likely than adults to recommend that clients talk to the attorney and be honest with attorney); Ann Tobey et al., *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, *in* YOUTH ON TRIAL, *supra* note 11, at 225, 232–34; Wong, *supra* note 124, at 181.

128 Schmidt et al., *supra* note 57, at 180.

129 Berkheiser, *supra* note 68, at 629–30 (citing studies by Thomas Grisso finding juveniles unlikely to understand either the rights they are being asked to waive or the consequences of waiving them).

justice system.[130] Studies suggest that the percentage of incarcerated youth with mental health disorders is much higher than that of the general juvenile population.[131] The disorders most prevalent among incarcerated youth include conduct disorder, depression, attention deficit/hyperactivity disorder, learning disabilities, post-traumatic stress disorder, and developmental disabilities.[132] For children, attention deficit/hyperactivity disorder and some learning disabilities can make already difficult tasks like remembering and communicating events practically impossible.[133] Depression and post-traumatic stress disorder may render the child unmotivated to assist counsel or help himself.

Because best-interest advocacy does not depend on the child's cognitive capacity, decisionmaking skills or ability to communicate with counsel, the model continues to thrive in the juvenile justice system. Unless real and perceived cognitive and psychosocial limitations among children and adolescents can be corrected or accommodated in the delinquency context, attorneys will have difficulty maintaining a traditional attorney-client relationship with the child.[134]

4. Failure of Model Rules of Professional Conduct to Provide Adequate Guidance for Attorneys Who Represent Children

When the role of counsel is framed in terms of the client's capacity to direct or engage with the advocate, the attorney may look to standards of professional ethics for guidance. Unfortunately, ambiguities in the Model Rules of Professional Conduct are comparable to those in the language of *Gault* and do little to clarify the role of child's counsel in delinquency cases. The natural starting point for any discussion of the lawyer's ethical obligations on behalf of children is

130 *See* Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths* ("An examination of decision-making abilities among delinquent youths must take into consideration the fact that, as a group, these youths have a much higher rate of mental disorders than do adolescents in general."), *in* YOUTH ON TRIAL, *supra* note 11, at 33, 34; Wong, *supra* note 124, at 183 (reporting that "a high percentage of mentally retarded or borderline mentally retarded young people in the juvenile justice system contribute[s] to the inability of juvenile clients to assist counsel").

131 *See* National Mental Health Ass'n, *Children with Emotional Disorders in the Juvenile Justice System*, http://www.nmha.org/children/justjuv/index.cfm (last visited Sept. 23, 2005) (recognizing that the percentage may be as high as sixty to seventy-five percent).

132 *See id.*

133 *See* Wong, *supra* note 124, at 182.

134 See *infra* Part III for discussion of how attorneys might enhance child's evolving decisionmaking capacities.

Model Rule 1.14, which instructs the attorney to maintain a "normal" relationship with his client, as far as reasonably possible, even when a client's decisionmaking capacity is diminished by youth.[135] Although Rule 1.14 endorses a presumptively normal attorney-client relationship, the rule also excuses an attorney from that norm when the client risks substantial physical, financial, or other harm and cannot adequately protect his own interests.[136] Thus counsel's interpretation of his or her role turns on the presumptions he makes about the child's capacity to act in his own interest.

The disparity in role assumption among juvenile defense counsel across the country suggests that Rule 1.14 has failed one of its primary objectives—that of developing uniformity in practice.[137] Prior to 2002, attorneys across all subject matters and with opposing views on the role of counsel almost uniformly agreed that Rule 1.14 had been useless in providing any meaningful guidance to attorneys who represent minors or other persons of potentially diminished capacity. Advocates for mentally disabled clients complained that Rule 1.14 offered very little guidance for the lawyer attempting to make a threshold determination of whether the client is impaired.[138] Elder advocates complained that the rule failed to provide or recommend any tools the advocate might use to measure the client's capacity to make case-related decisions.[139] Child's advocates found the rule both unrealistic and unhelpful in encouraging the lawyer to develop and maintain a normal attorney-client relationship with the child;[140] and parents-rights advocates argued that the absence of guidance in the

135 MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2003).

136 *Id.* R. 1.14(b).

137 E. Norman Veasey, Commission on the Evaluation of the Model Rules of Professional Conduct ("Ethics 2000"): Chair's Introduction (Feb. 2000) ("One of the primary reasons behind the decision to revisit the Model Rules was the growing disparity in state ethics codes."), *available at* http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html.

138 *See, e.g.*, Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM. L.Q. 329, 333 (1999).

139 *See, e.g.*, Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney To Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1138 (1994) (complaining that "[t]he rule does not state which of the many tests and medical models for determining competency the lawyer should use in exercising this judgment. It offers no clue about how to determine task-specific, partial, or intermittent incapacity, nor does it acknowledge what an unrealistic expectation it places on lawyers.").

140 *See, e.g.*, Guggenheim, *supra* note 83, at 1401 (discussing the interests of the child advocate).

rules gave attorneys complete discretion in deciding whether or not to follow the child's wishes at all.[141]

In 1997, the ABA convened the Ethics 2000 Commission to rewrite the Model Rules of Professional Conduct[142] and specifically address issues of client capacity.[143] Although there were significant changes to Rule 1.14 by February 2002, it is not at all clear that the revised rule will generate any more uniformity than it has in the past.[144] Rule 1.14 was included in the Ethics 2000 Proposed Workplan specifically at the behest of child advocates who complained that the rule offered virtually no guidance for lawyers representing children.[145] Thereafter, the Commission held a series of public meetings and solicited input from the legal community regarding the proposed revisions. For some reason, after the initial Ethics 2000 Proposed Workplan, child advocates disappeared from the Commission process and advocates from the elder bar assumed a leadership role in efforts to revise Rule 1.14.[146] This shift in leadership was significant given

141 *See, e.g.*, Hafen, *supra* note 82, at 451 (discussing the interests of the parents-rights advocate).

142 Veasey, *supra* note 137, at xv (stating that in determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client).

143 *See* CTR. FOR PROF'L RESPONSIBILITY, ABA, ETHICS 2000 PROPOSED WORK PLAN: ISSUES TO BE CONSIDERED [hereinafter ETHICS 2000 PROPOSED WORK PLAN], *available at* http://abanet.org/cpr/wkpliss.html (last visited Sept. 23, 2005) (examining Rule 1.14).

144 *Compare* Michael D. Drews & Pamela Halprin, Note, *Determining the Effective Representation of a Child in Our Legal System: Do Current Standards Accomplish the Goal?*, 40 FAM. CT. REV. 383, 386 (2002) (contending that "Rule 1.14, as it currently exists, lacks the specificity necessary to regulate representatives of children"), *and* Richard Miller, *Secret Keeper or Tattletale: Incursions Upon the Attorney-Client Privilege*, ORANGE COUNTY LAW., Feb. 2002, at 4, 4 (2002) (expressing some dissatisfaction with the rule revisions), *with* Edward Spurgeon & Mary Jane Ciccarello, *Lawyer Acting as Guardians: Policy and Ethical Considerations*, 31 STETSON L. REV. 791, 822 (2002) (suggesting that new rule provides more guidance), *and* A. Frank Johns & Charles P. Sabatino, *Wingspan—The Second National Guardianship Conference*, 31 STETSON L. REV. 573, 587 (2002) (expressing consensus among elder advocates that revisions provide greater guidance).

145 *See* ETHICS 2000 PROPOSED WORK PLAN, *supra* note 143.

146 The Minutes from the meetings of the Ethics 2000 Commission show extensive participation by the National Academy of Elder Law Attorneys (NAELA), and some lesser participation by the Commission on Legal Problems for the Elderly (CLPE) and Legal Services for the Elderly between 1997 and 2002. The president of NAELA, A. Frank Johns, testified before the Commission. *See* Ethics 2000 Comm'n, Ctr. for

that elder advocates tend to favor greater lawyer decisionmaking,[147] while child advocacy scholars tend to reject paternalistic, best-interest advocacy in favor of traditional client-directed advocacy.[148]

Recent commentary among elder advocates reveals a growing concern about the possible negative impact of individual client autonomy in the resolution of common legal issues. In particular, commentators have suggested that it may be unfair to honor an elder's decision when that decision may be self-destructive or burden the elder's family with responsibilities of increased emotional and physical support.[149] Elder advocates who testified before the Ethics 2000 Commission actively encouraged the Commission to move away from the "morality of individualism" and to adopt a more communitarian construct of representation.[150] Advocates also lobbied for revisions that would allow greater flexibility in assessing client capacity for purposes of Rule 1.14 and for new language in Rules 1.7 and 1.14 that would permit and even encourage "joint, multiple and family entity repre-

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Prof'l Responsibility, Minutes of Meeting in Atlanta, Ga. (Aug. 6–8, 1999), *available at* http://www.abanet.org/cpr/080699mtg.html. In addition, Johns issued written remarks discussing NAELA's position. *See* A. Frank Johns, President, NAELA, Written Remarks to Ethics 2000 Comm'n (May 19, 2000), *available at* http://www.abanet.org/cpr/naela600.html; A. Frank Johns, President, NAELA, Written Remarks to Ethics 2000 Comm'n (Feb. 8, 2000), *available at* http://www.abanet.org/cpr/naela2.html; A. Frank Johns, President, NAELA, Written Remarks to Ethics 2000 Comm'n (July 12, 1999), *available at* http://www.abanet.org/cpr/naela899.html.

147 Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073 (1994); Nancy M. Maurer & Patricia W. Johnson, *Ethical Conflicts in Representing People with Questionable Capacity* (114 PLI/NY, 3d ed. 2002), *in* REPRESENTING PEOPLE WITH DISABILITIES, 1-1, at 1-8, 1-23; *see also* Rein, *supra* note 139, at 1160–62.

148 Drews & Halprin, *supra* note 144, at 383; Peters, *supra* note 56, at ch. 2 (criticizing best-interest model as unduly paternalistic and failing to give due regard to child's wishes); *see also supra* note 57 and accompanying text (showing a sampling of opinions in support of the traditional adversary model of advocacy).

149 *See, e.g.*, Rein, *supra* note 139, at 1132. Professor Jan Rein, for example, strongly criticizes the "staunch and unfettered" individualism of the Western legal world and argues that attorneys should serve as "gatekeepers" for the community. *Id.* at 1103–05, 1146. While she does recognize the value of individual autonomy, Professor Rein calls for a balancing of that autonomy with the legitimately competing family and social interests and for better mechanisms for attorneys who must deal with the destructive and anti-social choices of their clients. *Id.* at 1102–04, 1116–17.

150 *See* A. Frank Johns, President, NAELA, Written Remarks to Ethics 2000 Comm'n (July 12, 1999), *available at* http://www.abanet.org/cpr/naela2.html (discussing amendments to Rule 1.7).

sentation" and facilitate greater attorney communication or consultation with the client's relatives and other interested persons.[151]

Although the Ethics 2000 Commission did not explicitly adopt a communitarian, family unit construct of representation, the revisions did respond to and accommodate many of the elder bar concerns. Most significantly, the Commission honored the elder bar's request for greater flexibility in assessing capacity and revised language throughout Rule 1.14 to reflect that theme. Specifically, the Commission changed the "disability" nomenclature to "capacity," thereby moving away from the binary construct of disabled and nondisabled to consider capacity along a continuum that gives attorneys more leeway to determine that a client lacks the capacity to make certain decisions.[152] The addition of new Commentary also responded to the elder bar's request for more leeway in talking to relatives of the clients.[153] The Commentary now allows the client to include family members and other persons in discussions with the lawyer and suggests that the attorney-client privilege might extend when a client of some diminished capacity needs and seeks the inclusion.[154]

Yet, notwithstanding the move towards greater flexibility in the capacity assessment, nothing in the Ethics 2000 revisions dismantles the presumption of and preference for a normal attorney-client relationship. Even where the client's capacity is diminished, "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[155] New Commentary added by the Ethics 2000 Commission reiterates that the client's interests must remain foremost and that the attorney should intrude on the client's decision-

151 *Id.*; *see also* Johns & Sabatino, *supra* note 144, at 587–89 (discussing the proposals of the Second National Guardianship Conference); Minutes from the ABA Ctr. for Prof'l Responsibility Comm'n on Evaluation of the Rules of Prof'l Conduct (Aug. 6–8, 1999) [hereinafter CPR Comm'n], *available at* http://www.abanet.org/cpr/080699mtg.html.

152 *See* Johns & Sabatino, *supra* note 144, at 587–89; CPR Comm'n, *supra* note 151 (indicating presence of NAELA and CLPE, each of whom indicated that their agencies preferred more flexibility).

153 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2003); *see also* CTR. FOR PROF'L RESPONSIBILITY, ABA, ETHICS 2000 COMMISSION REPORT R. 1.14 cmt. 3 [hereinafter ETHICS 2000 COMM'N REPORT], *available at* http://www.abanet.org/cpr/e2k-rule114.html (comparing the 2000 revised rules with the former rules).

154 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3; *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmt. 3 (comparing the 2000 revised rules with the former rules).

155 MODEL RULES OF PROF'L CONDUCT R. 1.14(a); *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14(a) (comparing the 2000 revised rules with the former rules).

making to the least extent possible.[156] Even when the attorney is given flexibility to consult with the client's family members, the attorney must look to the client, and not to a family member to make decisions on the client's behalf.[157]

The capacity assessment also clearly remains at the threshold of any deviation from the norm. Unless the client lacks sufficient capacity to communicate or make adequately considered decisions on his own, the attorney must abide by all of the dictates of the normal attorney-client relationship.[158] Unfortunately, the rule's continued ambiguity lies yet again in its failure to define terms like capacity and its failure to guide attorneys in deciding when capacity is so diminished that it warrants intervention or deviation from the traditional advocate model. Although the new commentary does identify some factors the attorney should consider in evaluating the client's capacity,[159] the attorney is left with considerable discretion to apply the factors in any given context. In child advocacy, normative preferences and broad philosophical differences among those interpreting Rule 1.14 may preempt any real individualized assessment of the client's cognitive and decisional capacity.[160] By adopting bright-line or rebuttable age presumptions regarding capacity,[161] commentators and practitioners

156 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3; *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmt. 3 (comparing the 2000 revised rules with the former rules).

157 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3; *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmt. 3 (comparing the 2000 revised rules with the former rules).

158 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 5; *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmt. 5 (comparing the 2000 revised rules with the former rules).

159 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6; *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmt. 6 (comparing the 2000 revised rules with the former rules) ("In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.").

160 *See supra* notes 82–84 and accompanying text.

161 For examples of bright-line generalizations about children's capacity, see STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS 2.2 (Am. Acad. of Matrimonial Law 1994) (presuming capacity at age 12); Joan-Margaret Kun, *Rejecting the Adage "Children Should Be Seen and Not Heard"—The Mature Minor Doctrine*, 16 PACE L. REV. 423, 431 (1996) (discussing the decisionmaking capacity of children in the medical treatment context, noting the common law "Rule of Sevens," which creates a rebuttable presumption of lack of capacity for children between the ages of seven and fourteen, and a rebuttable presumption of capacity for children older than fourteen); Laffitte, *supra* note 9, at 331 (discussing the decision-

who support best-interest advocacy might categorically excuse the attorney from a normal attorney-client relationship when representing any child below a specified age and argue for the transfer of decision-making authority from the child to an adult such as the attorney or the parent.[162]

II. BEST-INTEREST AND SUBSTITUTED JUDGMENT MODELS IN DELINQUENCY CASES

Considering real and perceived limitations in a child's decision-making capacity, combined with normative and systemic barriers to child and adolescent autonomy, it is unlikely that the attorney-client relationship in delinquency cases will ever completely mirror that in adult criminal cases. However, current impediments to a normal attorney-child relationship may not be so insurmountable as to require or justify a model of advocacy that differs so radically from the representation of adults. In delinquency cases, like criminal cases, the attorney-client paradigm must give substantive meaning to the child's constitutional right to counsel, comport with notions of fundamental fairness and due process, and satisfy the Model Rules' at least nominal preference for client loyalty and autonomy.[163] To the greatest extent possible, the juvenile paradigm should also accommodate and enhance the child's cognitive, emotional, and psychosocial development and not impede the successful rehabilitation of children in the juvenile justice system.

The remainder of this Article looks to see which, if any, of the existing attorney-client frameworks might best accommodate the goals and objectives of juvenile court. Parts II and III move beyond the binary best-interest/expressed-interest dichotomy for a more nuanced examination of the continuum of possible attorney-client paradigms.

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making capacity of children in the context of Rule 1.14, noting arguments that "the age seven is more likely than not the age at which a child can handle decisions, but that the age of seven should not be determinative in all cases").

162 *See, e.g.*, Hafen, *supra* note 82. Hafen is a parental rights advocate who accepts presumption of incapacity because children are incapable of exercising reasoned judgment, but does not cite any social science research regarding the cognitive and/or psychosocial capacity of children.

163 The Model Rules' commitment to client loyalty and autonomy are evident in a number of the rules. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2 (allocating decisions regarding the objectives of the case to the client); *id.* R. 1.6 (requiring the lawyer to maintain the client's confidences and secrets); *id.* R. 1.7 (instructing the lawyer to avoid conflicts of interest between himself and his client); *id.* R. 1.14 (requiring the lawyer to strive for a normal attorney-client relationship even when the client is of diminished capacity).

Part II looks first at the range of best-interest and substituted judgment models, paying particular attention to attorney-directed advocacy, parent-directed advocacy, and the substituted judgment doctrine. While I acknowledge the rationale that might support the transfer of decisionmaking authority from the child to an adult in the best-interest model, I conclude that best-interest advocacy overcompensates for differences between children and adults, makes no effort to enhance or develop the evolving cognitive capacity of children, and ultimately denies children fundamental due process within the juvenile justice system. Part II also questions whether either an attorney or a parent can ever adequately determine the best-interest of the child without the child's input and concludes that best-interest advocacy may actually hinder rehabilitative goals by alienating the child at best and engendering the child's hostility at worst.

A. Attorney-Guided, Best-Interest of the Child Model

1. Rationale/Justification

When we consider legitimate concerns about ceding authority to children who often have limited cognitive ability and immature, shortsighted value systems, it is not surprising that best-interest advocacy has thrived so long after the adoption of the IJA-ABA Standards. The best-interest model actually appears to have grown directly out of a belief that children are not able to recognize or act in accord with their own best-interests.[164] Thus some more experienced, rational adult must be given authority to make important decisions in the child's life.

Transferring decisionmaking from an accused juvenile to an attorney who will act in the child's best-interest may make sense if we assume that children and adolescents are incapable of reasoned and thoughtful judgment regarding the myriad of decisions that must be made in the course of litigation. The objective but concerned advocate will draw from the wisdom he has gained in his own life experiences and make decisions with the child's long-term interests in mind. Presumably, at each decision point in the case, the attorney will identify a wider range of options than the child, recognize more of the possible outcomes and consequences, and better weigh the advantages and disadvantages of each option. Even if the lawyer's decisions do not satisfy the immediate and temporary values of the child, the

164 Davis, *supra* note 60, at 826–27; *see* Jan C. Costello, *Ethical Issues in Representing Juvenile Clients: A Review of the IJA-ABA Standards on Representing Private Parties*, 10 N.M. L. REV. 255, 258 (1980).

decisions should be acceptable to the child upon reflection as a mature adult.

The best-interest model may also respond to concerns that children are poor information providers.[165] A best-interest advocate, like a guardian ad litem, generally does not consider himself bound by the strict requirements of the attorney-client privilege and confidentiality.[166] With greater freedom to communicate outside of the attorney-client relationship, the attorney may gather and exchange information with the court and the child's relatives, school officials, and neighbors. Because the attorney no longer depends on the child for information, inherent distrust between the child and his lawyer will arguably be less detrimental in the case.

The best-interest model is also very much in keeping with the historical agenda of the juvenile court—to rehabilitate children. In the rehabilitative court, the advocate acting in the best-interest of his client joins a team of court officials who will develop a plan to turn the child from a life of crime and prepare him to be a productive member of society. If the team is genuinely committed to serving the child's best-interest, then the advocate may feel comfortable assisting in the team's efforts and be less concerned about due process. By advocating in the child's best-interests, the attorney may also appease the impatient judge and secure a better outcome for his or her client. Given the ambiguities in *Gault*, state right-to-counsel statutes, and the Model Rules of Professional Conduct, many advocates find little that formally or definitively prohibits them from assuming this paternalistic role in advocacy.

2. Limitations of the Best-Interest Model

While the best-interest model does appear to compensate for many of the difficulties encountered between children and adults in the traditional attorney-client relationship, the model appears to

165 *See* Buss, *supra* note 56, at 927–28 (discussing the difficulties faced by attorneys in communicating with their child clients); Federle, *supra* note 61, at 1689 (noting that a child's "limited liguistic and cognitive capabilities" may result in the child being unable to clearly express herself); Tobey et al., *supra* note 127, at 232–33 (describing youths' difficulties in expressing themselves in court and to their attorneys, due to reasons such as emotional issues, frustration, and lack of familiarity with counsel).

166 *See* Buss, *supra* note 9, at 1743–44 (lawyer zealously advocating for client's best-interests not bound to keep information secret); Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 533–34 (1998) (best-interest model of counsel in delinquency proceedings may lead counsel to reveal privileged information to the court if counsel believes it is in the child's best-interest).

overcompensate for those difficulties by accepting without testing broad trends and generalizations about children and adolescents and by neglecting to account for individual differences among children along the developmental continuum.[167] The model also ignores remedial efforts that might enhance the decisionmaking capacity of youth and makes no effort to accommodate for differences between children and adults. Even more important, the best-interest model remains at odds with certain fundamental rights and principles of American jurisprudence, including the long-standing commitment to personal autonomy, respect for individual decisionmaking, and the guarantee of due process when liberty interests are at stake.[168]

a. Best-Interest Model Makes No Effort To Accommodate Differences Between Children and Adults and May Hinder Rehabilitation of Children in Juvenile Justice System

Attorneys all too often accept without testing the presumption that children and adolescents lack the capacity to reason through decisions presented to them. Practitioners remain bound to formulaic determinations of competence versus incompetence and fail to recognize that cognitive capacity varies widely among children and adolescents.[169] Even worse, the concept of adolescence is often lost in the binary construct of children versus adults.[170] This "loss" of adolescence is particularly detrimental in juvenile courts where delinquency is most common between the ages of thirteen and sixteen, with the

167 *See* Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles Be Treated as Adults?*, 63 FED. PROBATION 52, 53 (1999).

168 Guggenheim, *supra* note 8, at 82; *see also* Guggenheim, *supra* note 83, at 1405–06 (arguing that individual autonomy is central principle from which all issues regarding the role of counsel should be discussed); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 353 (1993) (arguing that our emphasis on individual rights and personal autonomy are furthered by a role of attorney which enables litigants to pursue and protect their legal rights); Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes*, 64 FORDHAM L. REV. 2075, 2076 (1996) (arguing that control over the decisionmaking process lies at the heart of the American legal system when personal legal rights are at stake). *But see* Bellotti v. Baird, 443 U.S. 622, 638–39 (1979) (noting that the "tradition of parental authority is not inconsistent with our tradition of individual liberty"); Hafen, *supra* note 82, at 423.

169 *See* Janet E. Ainsworth, *Juvenile Justice: Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 939–40 (1995); Scott, *supra* note 82, at 549, 559–60.

170 *See* Scott, *supra* note 82, at 548, 557.

greatest concentration around age sixteen.[171] Often the law treats adolescents like children, rendering them presumptively dependent and incompetent.[172]

The best-interest advocate also fails to recognize reasoned decisionmaking as an acquired skill that varies according to context, experience, and instruction.[173] The advocate considers any evidence of diminished capacity as proof of the child's incompetence to assist counsel or participate in trial. Yet, instead of raising a potentially legitimate competency issue with the court,[174] the best-interest advocate simply ignores the client's wishes and substitutes his own view of what is best for the child. Unfortunately, attorneys who neglect to talk with their clients miss a valuable opportunity to enhance the child's decisionmaking capacity. These attorneys fail to recognize that a child who is well counseled in the trusting and safe environment of his lawyer's office may render thoughtful, well reasoned case-related decisions even if he is likely to exercise poor judgment and make bad choices on the street or in peer-to-peer interactions.[175]

Moreover, even accepting that many youth and adolescents will have cognitive and psychosocial limitations that affect judgment, the risk of harm from such limitations is significantly reduced in the delinquency context because the child is rarely the final decisionmaker on

171 *Id.* at 593–94 ("Criminal behavior is rare in early adolescence; it increases through age sixteen, and decreases sharply from age seventeen onward.").

172 *Id.* at 548, 557. However, modern legislative initiatives suggest that law and order politicians are shifting older juveniles from the status of children to that of adult so that they may be transferred and tried in adult courts when they are charged with crime. *See, e.g.*, FLA. STAT. ANN. § 985.227 (West 2005) (allowing for discretionary and mandatory charging in adult court for children between ages of fourteen and seventeen meeting specified criteria).

173 COCHRAN ET AL., *supra* note 121, § 1-4, at 8–9. A child's sense of morality also grows/changes with trial and error in practice. *Id.* § 9-2(a), at 170.

174 In *Dusky v. United States*, 362 U.S. 402 (1960), the Supreme Court outlined a two-part legal standard for determining whether a defendant was competent to stand trial. A defendant will be deemed competent if he has "a rational as well as factual understanding of the proceedings against him" and "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Id.* at 402. Competency standards have been applied to juvenile proceedings in many jurisdictions. *See, e.g.*, Golden v. State, 21 S.W.3d 801, 803 (Ark. 2000); *In re* W.A.F., 573 A.2d 1264, 1267 (D.C. 1990); *In re* S.H., 469 S.E.2d 810, 811 (Ga. Ct. App. 1996); *In re* Carey, 615 N.W.2d 742, 746–47 (Mich. Ct. App. 2000); *In re* Williams, 687 N.E.2d 507, 510 (Ohio Ct. App. 1997). *See generally* Grisso, *supra* note 114 (discussing competency assessment to include understanding of legal process, appreciation of significance of legal circumstances for their defense, ability to communicate information to counsel, and reasoning and judgment in making decisions as defendants).

175 *See* Buss, *supra* note 56, at 918–19.

any issue.[176] Because delinquency cases are adversarial hearings in which the judge makes the final decision about issues such as detention, guilt, innocence, and disposition, the attorney may give the child authority to guide the procedural direction of the case but cannot permit the child to avoid any rehabilitative services the judge or probation officer ultimately deems necessary. Thus, even where the child wisely or unwisely instructs his attorney to advocate for his release from detention back to the community, the judge will ultimately decide whether that release is appropriate. Likewise, although the child may instruct his attorney to litigate Fourth Amendment issues that might result in dismissal of the charges and loss of treatment for the child, final decisions about suppression of evidence and dismissal of cases remain for the judge to decide based on fundamental constitutional principles. Ultimately, issues of public safety and the welfare of the child should be protected through the judicial process, not by manipulating the attorney-client relationship or limiting the child's participation in his own case.

In fact, a model of advocacy that denies the child a meaningful voice in the attorney-client relationship, and thus in the juvenile justice system as a whole, may actually hinder the rehabilitative and public safety objectives of the court.[177] The client who is excluded from the process will be less likely to disclose important information, less likely to follow through on necessary steps in the case and less likely to comply with orders issued by a judge who has never heard or considered the child's views.[178] Without critical insight from the child, the diagnostic team assigned to develop the child's disposition plan is likely to rely on an inaccurate or incomplete picture of the child's needs. In addition, the child who perceives the best-interest model to be unfair[179] and resents the exclusion of his voice from the proceedings may also rebel against the court's treatment plan and refuse to follow through with counseling, probation meetings, curfew, and

176 *See id.* at 905.

177 *See* Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation*, 71 U. CIN. L. REV. 89, 93–96 (2002) (arguing that the more a juvenile feels like he or she had a voice in the proceedings, the more likely he or she is to initiate healing and improve future behavior).

178 *See* COCHRAN ET AL., *supra* note 121, § 7-3(a), at 115.

179 MAINE ASSESSMENT, *supra* note 2, at 27 (quoting a juvenile as saying, "The attorney is the buddy of the probation officer. I feel like I don't have anyone to defend me."); WASHINGTON ASSESSMENT, *supra* note 3, at 51 ("I think [the attorneys] will do whatever they want. It's important to listen. They do not really understand me. They are all set on what THEY are going to say and do—instead of just listening to me") (alteration in original); *see also supra* note 3 and accompanying text.

other treatment requirements.[180] In this way, the best-interest model ultimately deprives the child of a sense of justice and impedes efforts to make the child a responsible member of society.[181] In the end, the risks and consequences of excluding the child's voice from the process may warrant deference to the child in the attorney-client relationship even when the child is not fully mature or lacks optimal cognitive capacity.

b. Best-Interest Advocacy Does Not Comport with Model Rules of Professional Conduct

Although the Model Rules are often ambiguous in defining the role of child's counsel, the best-interest model of advocacy may not comport with fundamental principles, such as client autonomy, embedded within the rules. Most significantly, the Model Rules explicitly recognize that very young or very old clients may have reasoned opinions that are due fair weight in legal proceedings. As recognized in the Commentary to Rule 1.14, often "children as young as five or six, and certainly those of ten or twelve" have the "ability to understand, deliberate upon, and reach conclusions about matters affecting [their] own well-being."[182] If the client has identifiable values and goals, understands the consequences of her choices, and can provide reasons for selecting among competing options, then the client is sufficiently capable of directing the attorney and the client's decision should be honored.[183] Unfortunately, best-interest advocates all too

180 *See* Juan Ramirez Jr. & Amy D. Ronner, *Voiceless* Billy Budd*: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 120–21 (2004) (individuals who perceive the justice system as unfair "are less likely to accept judicial decisions"); *cf.* COCHRAN ET AL., *supra* note 121, § 7-3(a), at 115 (stating that attorneys who build personal relationships with clients may enjoy greater success in counseling clients than those who employ coercive tactics); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1330–31 (2000) ("[I]n civil commitment context, evidence suggests that allowing an adolescent to direct his or her own care enhances the effect of therapy . . . ."); Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 685 (1987) (quoting Guggenheim, *supra* note 8, at 78) (arguing that it is unfair to obligate a child to take responsibility for his actions while at the same time deprive him of the ability to direct counsel in his own defense).

181 Lyon, *supra* note 180, at 686; Ronner, *supra* note 177, at 93.

182 *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (2003) (identifying factors attorney should consider in evaluating client's capacity).

183 *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996); Bray & Ensley, *supra* note 138, at 336; David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 455–57; Maurer & Johnson, *supra* note 147, at 1-14 (stating that attorneys should "[u]se a non-circular method to assess capacity. It is not enough to consider whether the client's decisions are unwise but, rather, whether the client can

often rely on circular, self-serving reasoning to find a client impaired simply because he or she disagrees with or finds a client's decision unreasonable or unwise.[184] Instead of looking for evidence of reasoned or considered judgment by the client, the advocate uses the capacity construct as a means by which he can end-run around the preference for a normal attorney-client relationship.[185]

Recent revisions to the commentary of Rule 1.14 also suggest that an attorney should take protective action on behalf of the client only in limited circumstances and should pursue any protective action with a preference for the least intrusive alternative. The Ethics 2000 Commission, for example, placed an additional limitation on attorney interference by limiting protective action to those circumstances in which the client is "at risk of substantial physical, financial or other harm."[186] Considering that the judge will retain control over all final decisions in a delinquency case after hearing from the prosecutor and the probation officer, the risk of substantial harm to the best-interests of the child is not significantly increased by allowing the child to direct the course of his legal representation. The Commission also indicated that an attorney should refrain from the "extreme measure" of seeking appointment of a guardian ad litem unless and until other less restrictive measures, such as consulting with family members and delaying action to give the client a period of reconsideration, have failed.[187] The revisions also removed language that previously suggested that an attorney might serve as a "de facto guardian" for the

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give reasons for specific decisions and understand the consequences."); Rein, *supra* note 139, at 1141.

184 *See* Maurer & Johnson, *supra* note 147, at 1-14 (advising lawyers to avoid "usurp[ing] the client's decision-making authority" by *coercing* the client to acquiesce in the lawyer's decisions); *cf.* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Jud. Ethics, Formal Op. 1997-2 (1997) (holding that lawyer may make disclosure without child client's consent if client is unable to make a reasoned decision); Bray & Ensley, *supra* note 138, at 333 n.20 (1999) (noting that "highly irrational acts" of adverse adult clients in a divorce case do not mean that the litigants are incompetent); Luban, *supra* note 183, at 466 (arguing that attorneys should not use self-justifying, circular logic when determining that a person is unable to make rational decisions).

185 *See* Rein, *supra* note 139, at 1118 (arguing that it would be more humanizing for an attorney to advise a client that she cannot do something because it will hurt others, than to allow the attorney to declare a client incompetent to achieve the same goal).

186 MODEL RULES OF PROF'L CONDUCT R. 1.14(b) and cmt. 5; *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmt. 5 (stating that in taking protective action, a lawyer should consider the wishes and values of the client and avoid intruding into a client's autonomy to the extent feasible).

187 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmts. 5, 7; *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmts. 5, 7 (stating that a lawyer should con-

client and now implicitly acknowledge important distinctions between the attorney for the child and the guardian ad litem.[188] In the new commentary, it is the guardian ad litem—and not the attorney—who should serve as surrogate decisionmaker when the client's capacity is so diminished as to warrant intervention.[189] The rule never considers it appropriate for the lawyer to abandon his loyalty to the client and assume the role of best-interest guardian.

c. Best-Interest Model Fails To Protect Fundamental Rights of Juvenile at Adjudicatory and Disposition Phases

The paternalism of best-interest advocacy is probably most disturbing when it denies children fundamental rights guaranteed by the Constitution. As revealed in a number of the state assessments on the access to and quality of juvenile counsel, attorneys who adhere to the best-interest model often give very little attention to challenging the government's case, conduct little or no investigation, and frequently rely on probation officers as the primary source of information about the client and the charges.[190] An attorney who believes that juvenile court intervention is best for the child may refuse to fight or be lackadaisical in fighting allegations of delinquency—even if he or she

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sider the consistency of a decision with the known commitments and values of the client).

188 *See* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmts. 5, 7 (comparing the 2000 revised rules with the former rules). Rule 1.14 comment 7 recognizes that appointment of a guardian is often expensive and traumatic for the client and encourages the attorney to weigh competing financial and emotional costs against the need for the guardian.

189 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 4 (stating that the lawyer should look to the client's legal representative or guardian for decisions on behalf of the client); *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmt. 4 (comparing the 2000 revised rules with the former rules).

190 *See* KENTUCKY ASSESSMENT, *supra* note 62, at 32 (noting that, due to a "best-interests" approach taken by many juvenile defenders in one jurisdiction, there is very little motion practice or trial preparation, and very few trials are held); MONTANA ASSESSMENT, *supra* note 62, at 40 (stating that in adopting a "best-interests" approach, juvenile defenders revealed their reliance on probation officers to "help the kids," as well as a belief by others in the system that to protect a child's best-interests, a defender should "get along with everyone"); OHIO ASSESSMENT, *supra* note 62, at 26 ("best-interests" approach taken by juvenile defender resulted in the defender reiterating the negative comments by a probation officer about the juvenile during a hearing, and the defender advocating that the juvenile be "incarcerated for treatment purposes"); TEXAS ASSESSMENT, *supra* note 1, at 14 (at the disposition stage, very few defenders present additional evidence, relying on the recommendations of the probation officers, partly because the defenders believe that the probation officers know best what is appropriate for the child).

knows the client is innocent.[191] The best-interest advocate may also freely disregard the attorney-client privilege and/or ignore the child's right against self-incrimination in order to ensure that the child gets the treatment the attorney thinks he needs.[192] In some cases, the attorney may actually help the government try their case against the child, choose not to object at trial to otherwise excludable evidence,[193] and render the child's right to proof beyond a reasonable doubt virtually meaningless.[194] In negotiating pleas, defense attorneys might also ignore clear Fourth and Fifth Amendment violations.[195] At disposition, the attorney might defer to the judge and probation officer for a determination of what is in the client's best-interest,[196] or in some instances, actually request more restrictive or longer periods of confinement when they believe such penalties are appropriate.[197]

The best-interest model is difficult to justify in the face of substantive and procedural due process guaranteed to children in the juvenile justice system. Despite its many ambiguities and continued endorsement of the benefits of juvenile court, the Supreme Court made clear that rehabilitation would not be offered at the expense of due process.[198] Not only did the Court guarantee the accused child the right to counsel, but the Court also guaranteed the child the right to confront and cross-examine witnesses, the right against self-incrimination, and the right to notice of charges against him.[199] These rights would be meaningless if the child were denied the power to direct the course of his representation and his rights were asserted or waived at the whim of an attorney.[200] Although the judge retains the ultimate responsibility to protect and enforce the rights of children, if the attorney decides on his own not to litigate those rights, then the sub-

191 *See* Kay & Segal, *supra* note 12, at 1411.

192 Ferster et al., *supra* note 17, at 388–89 (nonadversary lawyer may want to reveal his or her belief in the client's guilt in order to assure the benefits of rehabilitation); Kay & Segal, *supra* note 12, at 1412.

193 Kay & Segal, *supra* note 12, at 1413; Platt & Friedman, *supra* note 24, at 1179.

194 *See* Guggenheim, *supra* note 8, at 81, 86–87.

195 Ferster et al., *supra* note 17, at 388 (discussing attorneys' practice of reporting any juvenile admission to the court); GEORGIA ASSESSMENT, *supra* note 62, at 24; *see also* Kay & Segal, *supra* note 12, at 1412–13 (discussing whether an attorney should use exclusionary tactics in juvenile justice).

196 GEORGIA ASSESSMENT, *supra* note 62, at 31 (quoting Georgia defense attorney as saying: "Disposition hearings are really conducted between probation and the judge. My input as the defense attorney is not required.").

197 *See* Ainsworth, *supra* note 57, at 1127.

198 *In re* Gault, 387 U.S. 1, 22–23 (1967).

199 *Id.* at 31–57.

200 Guggenheim, *supra* note 8, at 86.

stantive and procedural safeguards are waived without input from either the child or the judge.[201]

By allowing attorneys to advocate in the best-interest of the child, the system merely substitutes the unbridled discretion of the court for the unbridled discretion of counsel.[202] In *Gault*, the Court noted that the "unbridled discretion [of the court], however benevolently motivated, is frequently a poor substitute for principle and procedure."[203] As a number of commentators have noted, application of the best-interest standard by judges has been indeterminate at best and vulnerable to bias and abuse at worst.[204] Because attorneys are subject to the same racial, cultural, and class biases as judges, there is little reason to believe that attorneys will be in any better position than judges to assess the best-interest of the child.[205] The unbridled discretion of counsel may be more troubling than that of the judge considering that the attorney's conduct in juvenile cases is rarely, if ever, subject to appellate review.[206]

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201 *Id.* at 86–87 (noting the argument that the best-interest standard usurps role of the judge).

202 *See id.* at 87; Maurer & Johnson, *supra* note 147, at 1-16.

203 387 U.S. at 18.

204 *See* Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 2 (2001) (criticizing the best-interests model as unpredictable and vulnerable to bias); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 53–56, 62–63 (1994) (arguing that inherent biases prevent judges from objectively or consistently applying the best-interest test); Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT'L L.J. 449, 463–64 ("[E]xperience shows that best-interests standard is indeterminate and very difficult to apply."); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2220–23 (1991) (quoting David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984)) (noting that critics of the best-interests standard as applied by judges find such an approach to be inherently indeterminate and can be "arbitrary or overreaching" as well).

205 *See* Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 326, 336 (Spring 2004) ("The notion that attorneys can objectively conclude what serves a child's best interests is preposterous. Attorneys are no more inherently objective than anyone else." Hoffman goes on to argue that the determination of what is in the best-interest of the child should be left to judges and challenged through the appellate process.); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 376–78 (1997) (arguing that clinical students' unconscious racial bias affects the attorney-client relationship).

206 Berkheiser, *supra* note 68, at 633; *see* Ed Kinkeade, *Appellate Juvenile Justice in Texas—It's a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 21 (1999) (noting that a review

Even where the Court in *Gault* continued to affirm differences between adult and juvenile proceedings and refused a wholesale incorporation of the Sixth Amendment and other Bill of Rights provisions into the juvenile case,[207] the Court remained unequivocal in its mandate that the hearings must measure up to the essentials of due process and fair treatment.[208] The Court's commitment to fundamental fairness suggests that an accused child has the same interest in fair and accurate fact-finding as the accused adult in a criminal case.[209] Because the adversarial model has been repeatedly recognized as an essential and indispensable feature of fair and accurate fact-finding,[210] a juvenile system that permits the child's advocate to forego his alliance with the client is troubling. As the Supreme Court indicated in the adult criminal context, society is better served when the lawyer is advancing the interests of the client, rather than joining together and acting in concert with society.[211] When a criminal case loses its char-

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of juvenile appeals by the Texas Court of Criminal appeals turned up only eight cases from 1980–1997).

207 387 U.S. at 22. Although the Court did find that due process necessarily requires some "degree of order and regularity" and some "elements of the adversary system," *id.* at 27, other more benign features such as the processing of juveniles separately from adults, decisions not to classify children as "criminals," decisions not to treat delinquency as a basis of civil disability and policies protecting the confidentiality of juvenile court proceedings do not implicate traditional notions of fundamental fairness and due process and can be granted or denied at the discretion of state legislators. *Id.* at 22–25.

208 *Id.* at 30.

209 *Id.* at 36; *see also* Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("The Court's concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult. For example, the Court has held that the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings."); Breed v. Jones, 421 U.S. 519, 530 (1975) (finding no material difference between adult criminal and juvenile delinquency proceedings when considering the child's need for assistance of counsel).

210 *See, e.g.*, Strickland v. Washington, 466 U.S. 668 (1984); *see also* Polk County v. Dodson, 454 U.S. 312 (1981) (holding that legal system requires public defenders to advance the best undivided interests of clients rather than acting on behalf of or in concert with the state).

211 *Polk County*, 454 U.S. at 318–19; *see also* United States v. Cronic, 466 U.S. 648, 655 (1984) ("'[P]artisan advocacy on both sides of the case best promotes the ultimate objectives that the guilty be convicted and the innocent go free.'") (quoting Herring v. New York, 422 U.S. 853, 862 (1975)).

acter as a confrontation between adversaries, the constitutional guarantee of a fair trial is violated.[212]

The Court in *Gault* also referenced key adult right to counsel cases in foreclosing any notion that a judge can represent or protect the interests of a juvenile defendant.[213] Because neither the probation officer nor the judge owes any undivided loyalty to the client, neither can fairly represent the views and interests of the minor.[214] The Court was particularly concerned about probation officers who may also serve as arresting officers, file and verify petitions of delinquency, and testify against the child.[215] The Court's language and reliance on key principles of criminal law and procedure suggest that a best-interest model that deviates so starkly from the adversarial model in adult cases cannot be the appropriate role of counsel in juvenile cases. When counsel acts in the best-interest of the child, counsel's function is barely distinguishable from that of the fact-finder, the probation officer and sometimes even the prosecutor. *Gault* seems oddly unnecessary if the right to counsel as articulated in that case was merely duplicative of protections that already existed when the case was decided.

Although arguments for best-interest advocacy generally remain strongest at the disposition hearing where the parties are particularly focused on treatment over punishment and retribution, there is little justification for a nonadversarial best-interest model in jurisdictions where treatment is a myth.[216] Considering the Court's concern as early as 1966, that children may not be getting the treatment promised them in the juvenile justice system,[217] along with current evi-

212 *Cronic*, 466 U.S. at 656–57.

213 387 U.S. at 36 (citing Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932)).

214 *Id.* at 35–36.

215 *Id.* (discussing the role of probation officers in Arizona where Gerald Gault was tried).

216 Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 892 (1988) (evaluating juvenile justice system since *Gault* and noting "the continuing gap between the rhetoric of rehabilitation and its punitive reality"); Kay & Segal, *supra* note 12, at 1414, 1416, 1420; Karen L. Michaelis, *School Violence: The Call for a Critical Theory of Juvenile Justice*, 2001 BYU EDUC. & L.J. 299, 311 (discussing the failure of the juvenile justice system to provide protection and rehabilitation to juvenile offenders); Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1364–65 (1995) (noting that the juvenile justice system's "official premise of rehabilitation is openly ridiculed in the media and in the discourse of professional politicians").

217 Kent v. United States, 383 U.S. 541, 556 (1966) ("There is evidence . . . that the child receives the worst of both worlds: that he gets neither the protections accorded

dence of the deplorable conditions in many detention and treatment facilities across the country,[218] traditional notions of liberty and fundamental fairness remain paramount at disposition. When the treatment facilities are inadequate and even harmful, disposition is the stage where the child's liberty is most significantly in jeopardy and becomes the most important phase in the entire process.[219]

Even where treatment is available and adequate, thorough and accurate fact-finding is no less important at the disposition phase than at other stages of the case. Not only are children entitled to a number of statutory procedural safeguards at disposition, but the child's constitutional rights to due process and fundamental fairness also persist at this stage. Children have a right to probe the accuracy, thoroughness, and reliability of probation reports prepared for disposition,[220] and in some states, children retain a statutory right to confront and cross-examine witnesses at the disposition hearing.[221] Thus even as rehabilitation remains the primary goal of disposition, the attorney has a continuing duty to consult with the client in the exercise or waiver of substantive rights conferred by legislatures and the courts.

Effective rehabilitation also requires individualized planning on behalf of each child.[222] Because the needs of every child will differ,

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to adults nor the solicitous care and regenerative treatment postulated for children.").

218 For a representative sample, Human Rights Watch has published reports documenting the poor conditions of juvenile detention facilities in Colorado, HUMAN RIGHTS WATCH, HIGH COUNTY LOCKUP: CHILDREN IN CONFINEMENT IN COLORADO (1997), *available at* http://www.hrw.org/reports/1997/usacol/, Georgia, HUMAN RIGHTS WATCH, MODERN CAPITAL OF HUMAN RIGHTS? ABUSES IN THE STATE OF GEORGIA (1996), *available at* http://www.hrw.org/reports/1996/Us.htm, and Maryland, HUMAN RIGHTS WATCH, NO MINOR MATTER: CHILDREN IN MARYLAND'S JAILS (1999), *available at* http://www.hrw.org/reports/1999/maryland/Maryland-03.htm/. Amnesty International has published a report about dangerousness and overcrowding in U.S. juvenile detention facilities. AMNESTY INT'L, BETRAYING THE YOUNG: HUMAN RIGHTS VIOLATIONS AGAINST CHILDREN IN THE US JUSTICE SYSTEM (1998), *available at* http://web.amnesty.org/library/pdf/AMR510601998ENGLISH/$File/AMR5106098.pdf.

219 *See* State *ex rel.* D.D.H. v. Dostert, 269 S.E.2d 401, 412 (W. Va. 1980); STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 3.1(a), 9.4(a) (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1979).

220 STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 9.4.

221 *E.g.*, ALASKA STAT. § 47.12.110(a) (2004); CONN. GEN. STAT. ANN. 46b-135(a) (West 2004); GA. CODE ANN. § 15-11-7 (2005); 705 ILL. COMP. STAT. ANN. 405/1-5(g) (West Supp. 2005); 42 PA. CONS. STAT. ANN. § 6338(a) (West 2000); TENN. CODE ANN. § 37-1-127(a) (2004); TEX. FAM. CODE ANN. § 54.03(b) (Vernon 2002); W. VA. CODE. ANN. § 49-5-2(i) (LexisNexis 2004); WIS. STAT. ANN. § 938.21(a) (West Supp. 2004).

222 Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 909 (1995).

not every treatment program will be appropriate for every child. Yet judges who are consciously and/or subconsciously influenced by budgetary constraints may reject a better treatment plan in favor of one that fits nicely into the existing state or local juvenile justice budget. Ultimately, the disposition decision is no less susceptible to the arbitrariness of the judge or probation officer than is the trial verdict or other evidentiary ruling. Where there is any risk of arbitrary decisionmaking, children need the protection of a diligent and loyal advocate who will insist upon substantive and procedural regularities, ensure accurate fact-finding and expand the range of treatment options the judge may consider. Because best-interest advocacy too often ignores the child's right to exercise or waive fundamental rights at adjudication or disposition, it does not appear to be a satisfactory option for the attorney-child paradigm in delinquency cases.

B. Parent-Directed Best-Interest Advocacy

1. Rationale/Justification

The value an advocate places on the rights and responsibilities of parents will factor heavily into how the attorney defines his or her role in the representation of children. Given the fairly strong legal and social history of parental control over almost every facet of a child's life,[223] along with traditional assumptions that parents are naturally inclined to act in the best-interest of their child, the law is generally reluctant to impede the rights of parents to raise and direct their children.[224] In some areas of the law, parents may even have a constitutional right to direct and decide for the child.[225] In turn, some objections to zealous, client-directed advocacy in delinquency cases may arise out of the advocate's endorsement of the parents' rights or deference to the parents' goals at the adjudicatory and disposition phases.

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223 Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 594 (2002) (the parental right to control one's child has been recognized by the Supreme Court "as part of the substantive due process rights of Americans."); Hafen, *supra* note 82, at 427; Kay & Segal, *supra* note 12, at 1422.

224 Guggenheim, *supra* note 223, at 593–94; Hafen, *supra* note 82, at 427; Kay & Segal, *supra* note 12, at 1422; Scott, *supra* note 82, at 551.

225 *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); *see also* John E. Coons, *Intellectual Liberty and the Schools*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 495, 502–03 (1985) (arguing that a child's nature necessitates that some "adult regime" will direct his or her life, whether it be parents, the state, or both); Hafen, *supra* note 82, at 439 (arguing that parents have a constitutional right to make decisions for their children, but this right falls to the state if the courts find the parents unfit).

The debate over the role of parents and children in delinquency cases must be seen as a subpart of the larger "competition" between the rights of children and the rights of parents in society.[226] On one side of the debate, "Children's Liberation" activists endorse greater decisionmaking autonomy for children, presume decisionmaking capacity of all verbal children and acknowledge the child's right to direct counsel in all types of legal proceedings.[227] On the other side of the debate, parents'-rights advocates reject both a best-interest model of advocacy that would allow the attorney to determine the course of the representation as well as a client-directed model that would allow the child to direct the representation.[228] According to these advocates, both models threaten the parents' constitutional right to raise their children absent any judicial or administrative finding that they are unfit.[229] Attorneys who identify with parents' rights activists may favor a parent-directed model of representation that seeks to preserve the authority of parents within the family.

The Supreme Court seemed to resurrect the old custodial view of children in 1984 and thereby refueled the early post-*Gault* confusion when it said in *Schall v. Martin*[230] that

> unlike adults, [children] are always in some form of custody. . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.[231]

Relying on this language some might now rationalize best-interest advocacy with an argument that the Supreme Court has never viewed children as legally competent and autonomous persons in delinquency cases.[232] That is, because the child is legally incompetent and always subject to the direction of a parent or other adult guardian, the child should never be allowed to direct the course of representation. Ironically, the Court's language in *Schall* appears to conflict with the Court's effort in *Gault* to abandon the antiquated *parens patriae* doctrine as an excuse to deprive an accused child of the essential ele-

226 *See* Moore, *supra* note 80, at 1826–27.

227 Hafen, *supra* note 82, at 433–35, 440–41.

228 *Id.* at 447, 458–61.

229 *Id.* at 447, 458–59. Hafen cites *Pierce* for the proposition that parents enjoy a constitutional right to raise children as they see fit so long as their conduct in relation to the child does not fall below a minimal threshold of unfitness. *Id.* at 445–46.

230 467 U.S. 253 (1984).

231 *Id.* at 265 (citations omitted) (discussing validity of a preventitive detention statute in New York).

232 *See* discussion in Mlyniec, *supra* note 8, at 107–08.

ments of fundamental fairness and due process in delinquency proceedings.[233] Nonetheless, the Supreme Court's language in *Schall*, as in *Gault*, may generate more confusion than clarity and provide support for arguments in favor of parent-directed advocacy on behalf of children.

Although never explicitly labeled in the literature, there appears to be a strand of best-interest advocacy that relies heavily on parental determinations of the child's best-interest.[234] Like the traditional best-interest model, a parent-directed model presumes the child is either incapable of making decisions regarding his case or unwise in making those decisions.[235] However, unlike the traditional best-interest model, the parent-directed model looks to the parent, not the attorney, as the alternative adult decisionmaker. Thus, the parent-directed model is particularly attractive to the attorney who questions his or her own ability to decide what's best for the child. The attorney communicates primarily with the parent, gathering information about the child's needs, providing information about options in the case, and advising the parent on a recommended course of action. Key decisions are then left to the parent who presumptively understands and appreciates the child's unique psychosocial makeup and context within his family, culture and community. Not only is the parent a rational decisionmaker who can identify and weigh all of the potential short- and long-term consequences of any given decision, but the parent also has special insight into the needs of the child and the family.

By communicating with the parent, the attorney also saves time and circumvents difficulties that may arise out of the child's poor communication skills, limited cognitive ability and lack of trust for adults. Presuming the child will have a better relationship with his parent than with the unknown attorney, the attorney is less concerned about establishing an independent relationship with the child and instead funnels information and questions through the parent.

Parent-directed advocacy also encourages the active participation of parents in the juvenile justice process and galvanizes the parents' support and commitment to the court's final rehabilitation alterna-

233 *See In re* Gault, 387 U.S. 1, 16–18 (1967).

234 Although Jonathan Hafen does not use the term "parent-directed advocacy," he does use the phrase "parental discretion model" and clearly advocates for an amendment to the Model Rules of Professional Conduct that would assure parents the right to direct the child's counsel in any legal matter unless the parent is determined to be unfit by a finding such as neglect, abuse or abandonment of the child. Hafen, *supra* note 82, at 440; *see* GOLDSTEIN ET AL., *supra* note 41, at 7.

235 Hafen, *supra* note 82, at 424, 438–39.

tive.[236] As the primary source of discipline and structure, the parents' input and cooperation will be necessary for the successful implementation of any disposition plan.[237] Parents who feel engaged in the process will be more likely to assist, while parents who feel excluded from the attorney-client relationship may refuse to help either the attorney, the child or the court in the rehabilitative process.[238] Parental involvement may also serve as a check on the competence and effectiveness of counsel.

2. Limitations of Parent-Directed Advocacy

Notwithstanding the benefits of parental involvement in the juvenile justice system, deference to parental goals may not always be appropriate in a delinquency case. The parent-directed model is rooted in a number of assumptions about the relationship between parents and children that simply may not hold true in the delinquency context. In particular, the model assumes that parents have a conflict-free desire to act in the child's best-interest; that parents are more competent than either the child or the child's attorney to determine the best-interests of the child in the legal context; and that parents have a sufficient understanding of the short- and long-term legal consequences of a selected course of action.

At the inception of the juvenile court movement, court innovators justified state interference in the sanctity of the family on a doctrine of *parens patriae*, which literally means "parent of the country."[239] Because parents of delinquent children were deemed derelict in their duty to discipline and supervise the child, they forfeited their right to make decisions on the child's behalf and thus consented by default to

236 *See id.* at 427 (arguing that "ensuring participation of deserving parents in the decision-making process of the attorney representing the child . . . will protect society's interest in familial stability").

237 *See* Gilbert et al., *supra* note 24, at 1155–56 (explaining importance of family in achieving juvenile justice goals); Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should Freedom of the Press Be Limited To Promote Rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897, 1904 (1995) (noting that a "strong family relationship is essential to successful rehabilitation").

238 *See* Hafen & Hafen, *supra* note 204, at 483–84 (discussing fear that denial of parental rights may "have the long-term effect of reducing parental commitment to childrearing"); Scott, *supra* note 82, at 551 (recognizing that parental rights and authority might be viewed as legal compensation for the burden of responsibility to provide food, shelter, health care, affection and education).

239 Tanenhaus, *supra* note 13, at 46; *see also* Wong, *supra* note 124, at 166 (noting that the doctrine of *parens patriae* gave the State the "power and responsibility" to watch over children whose parents were not providing "appropriate care or supervision").

the state's intervention.[240] Both historically and today, parents often directly or indirectly contribute to the child's delinquent conduct. Family conflict, domestic violence, the absence of parental attachment or ties, parents' mental instability, and the lack of parental supervision or discipline are all factors that contribute to delinquency.[241] In these circumstances, the parents may not be any better equipped than the attorney to make decisions regarding the needs and best-interests of the child.

Parental direction may be equally inappropriate when the interests of the parent conflict with the welfare of the child.[242] The Supreme Court's intended or unintended attention to the rights of parents in the dicta of *In re Gault* was offered in a factual context that presented no conflict of interest between Gerald Gault and his parents.[243] Unfortunately, juvenile advocates cannot always presume a conflict-free relationship in the delinquency case.[244] In some cases, a formal conflict may exist where the parent is either the cause of the delinquent conduct or the victim of the allegation.[245] In other cases, a parent may argue for the child's detention simply because he or she needs a break from parental custody and responsibility.[246] The parent may also be embarrassed by the child's conduct, resent losing time

240 Elizabeth S. Scott, *The Legal Construction of Childhood, in* A CENTURY OF JUVENILE JUSTICE, *supra* note 13, at 113, 116; Wong, *supra* note 124, at 166.

241 *See* Gilbert et al., *supra* note 24, at 1170, 1174; Marrus, *supra* note 8, at 323–24 (parents' conduct and mental health may be a factor in delinquency); George Bundy Smith & Gloria M. Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents*, 3 J.L. & POL'Y 347, 366–67 (1995).

242 Even parental rights advocates would agree that parental direction of the child's legal representation would be inappropriate when "interests of the parents conflict with those of the child." Hafen, *supra* note 82, at 461–62.

243 In *Gault*, both Gerald and his parents wanted Gerald to return home, as evidenced by the parents' appearances before the court and the effort by the parents on Gerald's behalf. *In re* Gault, 387 U.S. 1, 5–7 (1967).

244 *See* Janet Fink, *Who Decides: The Role of Parent or Guardian in Juvenile Delinquency Representation, in* ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 105, 123 (Rodney J. Uphoff ed., 1995). Children's Liberation activists have rejected a categorical presumption of shared interests between the parent and the child. *See* Hafen, *supra* note 82, at 440–41; David R. Katner, *Raising Mental Health Issues—Other than Insanity—In Juvenile Delinquency Defense*, 28 AM. J. CRIM. L. 73, 78 (2000) (discussing the potential for conflicts of interest between parents and children); *see also* United States v. Fowler, 476 F.2d 1091, 1093 (7th Cir. 1973) (father's concern was with whether his son's trouble would prevent the father from getting into the "Job Corps"); Anglin v. State, 259 So. 2d 752 (Fla. Dist. Ct. App. 1972) (juvenile defendant confessed after his mother told him to "tell the truth" or she would "clobber" him).

245 *See, e.g.*, K.E.S. v. State, 216 S.E.2d 670 (Ga. Ct. App. 1975); Kell, *supra* note 115, at 359–61; Moore, *supra* note 80, at 1851–52.

246 *See* Lyon, *supra* note 180, at 686.

from work to attend court-related proceedings, or fear the loss of public housing if the child is released back into the home.[247] The potential for conflicts of interest between the parent and the child is even greater in those jurisdictions where the parent may be held civilly, criminally, or financially liable for the child's delinquent conduct; where the parent may be held in contempt for the child's failure to comply with the conditions of probation; or where parental participation statutes compel the parent's cooperation and subject them to sanctions for their own noncompliance.[248] Although not every issue will rise to a formal conflict of interest, even subtle differences in perspective may lead to divergent goals between the accused child and his parent.[249]

Parental control over the child's attorney may also violate state statutes and common law that affirm the child's right to conflict-free representation. A number of state legislatures, for example, have recognized the potential for parent-child conflicts in right-to-counsel statutes. In states where parents have their own right to counsel in delinquency proceedings, relevant statutes often require the courts to appoint separate and independent counsel for both the child and the parent when there is any evidence of conflicting interest.[250] In addition, many statutes expressly require the court to appoint counsel for a child whose parents are deemed financially able to provide counsel, but who refuse to do so.[251] Several state courts have also held that a parent may not waive the child's right to counsel when the parent has

247 *See In re* Manuel R., 543 A.2d 719, 725–26 (Conn. 1988); Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 573–74 (2004); Fink, *supra* note 244, at 123; *see also* Stanley Z. Fisher, *Standards Relating to Pretrial Court Proceedings*, *in* JUVENILE JUSTICE STANDARDS ANNOTATED 243, § 5.3, at 254 (Robert E. Shepherd Jr. ed., 1996).

248 For a sampling of state statutes that subject parents to fines, incarceration, or other sanctions for the child's delinquent conduct or the child's failure to comply with conditions of the court, see ALA. CODE § 12-15-11.1 (LexisNexis Supp. 2004); GA. CODE ANN. § 15-11-5 (2005); TEX. FAM. CODE ANN. § 54.041 (Vernon 2002 & Supp. 2004–2005); WYO. STAT. ANN. § 14-6-244 (2005). For a sampling of state statutes that compel, with the threat of sanctions, parental attendance and participation in court hearings, counseling, and other juvenile justice services see ARIZ. REV. STAT. ANN. § 8-308 (2004); D.C. CODE ANN. § 16-2325.01 (LexisNexis 2005); IDAHO CODE ANN. § 20-520 (2004); IND. CODE ANN. § 31-37-9-4 (LexisNexis 2003); LA. CHILD. CODE ANN. art. 307 (2004); MONT. CODE ANN. § 41-5-1412 (2003).

249 *See* Moore, *supra* note 80, at 1840.

250 *See, e.g.*, GA. CODE ANN. § 15-11-6; IDAHO CODE ANN. § 20-514; 705 ILL. COMP. STAT. ANN. 405/5-610 (West 1999); IND. CODE ANN. § 31-32-4-2; IOWA CODE § 232.11 (2005); 42 PA. CONS. STAT. § 6337 (2004).

251 *See, e.g.*, ARK. CODE ANN. § 9-27-316 (2002); FLA. STAT. ANN. § 985.203 (West Supp. 2005); IDAHO CODE ANN. § 20-514; NEB. REV. STAT. § 43-272 (2004); TENN.

interests that conflict with that of the child.[252] Similarly, the fact that a child is accompanied by a parent in a delinquency proceeding may not relieve the court of its responsibility to inquire directly of the child and to determine whether the waiver of counsel is knowing, voluntary, and intelligent.[253]

The right to conflict-free representation in juvenile cases has been further endorsed by the ABA. As stated in the IJA-ABA Standards,

> [a]ll parties should be informed by the initial attorney that he or she is counsel for the juvenile, and that in the event of disagreement between a parent or guardian and the juvenile, the attorney is required to serve exclusively the interests of the accused juvenile.[254]
>
> The potential for conflict of interest between an accused juvenile and his or her parents should be clearly recognized and acknowledged. In every case, doubt as to a conflict should be resolved by the appointment of separate counsel for the child and by advising parents of their right to counsel . . . .[255]

Even where there is no conflict between the parent and the child, parents may not be the best decisionmakers in the delinquency context where they generally lack the legal knowledge and expertise to navigate the juvenile justice system. Parents' opinions, for example, are often based on a misguided and exaggerated view of what the juvenile justice system is able to accomplish.[256] The parents may force or encourage the child to plead guilty so he can get treatment and services without seeing the label "treatment facility" as a euphemism for juvenile jail. Likewise, the parent may support confession as good for the child's moral redemption, but fail to recognize the dangers of re-

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CODE ANN. § 37-1-126 (2004). In these states, the courts will generally appoint counsel and then hold the parent in contempt for failing to pay legal fees.

252 *See, e.g.*, United States v. Fowler, 476 F.2d 1091, 1093 (7th Cir. 1973); *Manuel R.*, 543 A.2d at 726; *In re* C.P.D, 367 A.2d 133, 134–35 (D.C. 1976); *see also* 42 PA. CONS. STAT. § 6337 ("[A] parent, guardian or custodian may not waive counsel for a child when their interest may be in conflict with the interest or interests of the child.").

253 *Manuel R.*, 543 A.2d at 725.

254 STANDARDS RELATING TO INTERIM STATUS 8.1 (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1979).

255 *Id.*

256 In my own experience as a juvenile defender in the District of Columbia over the last ten years, parents often seek police or court intervention to get mental health services, drug treatment, or general supervision for unruly children. These parents frequently report disappointment in their own loss of control over the direction of rehabilitation, the lack of services in the system, and the child's negative response to poorly planned treatment and intervention.

lying on the juvenile justice system as a forum through which to instill values and moral upbringing. Parents rarely understand that many juvenile institutions simply help children refine delinquent behavior and expose incarcerated youth to physical and/or mental abuse.[257]

In addition, attorneys who defer to the views of the parent without consulting with the child will miss critical insight about the child and the facts and circumstances of the charged offense. If the parent is excluded from the attorney-child relationship, the parent generally retains the right to address the court directly or indirectly through probation officers and other court officials.[258] By contrast, when the child is denied meaningful participation in the attorney-client relationship, his voice is essentially excluded from the juvenile justice system as a whole. An attorney-parent dyad that excludes the child may also deny the child's right to exercise or waive the fundamental rights conferred by *Gault* and is likely to engender the same resentment from the child as the traditional best-interest model. The child may very well rebel against a rehabilitation plan developed by the attorney, the parent, and the court without his input.[259]

Interpreting the right to counsel in a delinquency case as the parents' right or even as a parent-directed right may also run contrary to the dictates of the Model Rules of Professional Conduct. Collectively, the Model Rules envision a "normal" attorney-client relationship that is driven by prompt and reasonable communication with the client (Rules 1.4 and 2.1), the protection of client confidences (Rule 1.6), and freedom from conflicts of interest (Rules 1.7–.12).[260] Not only may parental control violate rules regarding conflicts, but parental participation in the attorney-child communication may also waive any attorney-client privilege and result in the parent being called as a witness for the state against the child.[261] The rules also do not permit

257 *See supra* note 218 and accompanying text.

258 In many jurisdictions, the parent will be recognized as a formal party to the delinquency case. *See supra* notes 38 and 248.

259 *See* Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 44–45 (1999) (claiming that the efficacy of court-ordered treatment may be impaired if the individual feels that his or her input is not being taken into consideration during legal proceedings).

260 MODEL RULES OF PROF'L CONDUCT R. 1.4, 1.6, 1.7–.12, 2.1 (2003); *see also, e.g.*, N.C. State Bar, 98 Formal Ethics Op. 18 (1999) (holding that attorney for minor in criminal case owes duty of confidentiality to the minor and may only disclose confidential information to the minor's parent with the consent of minor or if the parent is the legal guardian and disclosure is necessary to make a legally binding decision).

261 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a). But see the new Commentary for Model Rule 1.14 that suggests that the attorney-client privilege may survive if the client of diminished capacity asks the attorney to consult with his parents. Several

the best-interest advocate to consult with parents in lieu of the client. Rules 1.4 and 2.1 require the attorney to keep the client reasonably informed about the status of his or her case and to explain issues to the extent reasonably necessary to permit the client to make informed decisions. Even where the client's capacity is so diminished that a guardian is appointed, the attorney should continue to communicate with the client as far as reasonably possible.[262]

Interesting ethical questions also arise when the parent voluntarily hires an attorney for an accused child or when the court appoints an attorney but orders the parent to compensate the attorney for his services. Parents who pay for the attorney will generally expect to control or at least participate in decisions regarding the course of representation. Model Rule 1.8(f), however, explicitly addresses this situation and clearly prohibits third party interference in the attorney-client relationship.[263] Not only does the attorney owe continuing loyalty to the client and not the third party payee, but the attorney also may not violate client's confidences by communicating with the payee.[264]

The rejection of a parent-directed model of advocacy does not mean that parents cannot or should not assist in the attorney-child relationship. Parental involvement may serve as a check on attorney competence, help the child understand difficult legal issues and bridge trust between the child and the attorney. Unfortunately, too many advocates miss the distinction between parental control and parental assistance. When the advocate is overly deferential to the parents and careless about confidentiality constraints, he effectively

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states have formally extended the attorney-client privilege to include parents who are invited to assist the child. *See also, e.g.*, Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984) (noting attorney-client privilege is generally waived when a third party is present, but finding that parents' presence did not waive privilege when parent was there as advisor and parties intended communications to remain confidential); United States v. Bigos, 459 F.2d 639 (1st Cir. 1972) (same); State v. Sucharew, 66 P.3d 59 (Az. Ct. App. 2003) (same); *see also* WASH. REV. CODE ANN. § 5.60.060 (West 2005) ("[A] parent or guardian of a minor child arrested on a criminal charge may not be examined as to communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian."). However, even where the client of diminished capacity invites a family member to participate in discussions with the attorney, the lawyer must look to the client and not to family members to make decisions in the case. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3; *see also* ETHICS 2000 COMM'N REPORT, *supra* note 153, R. 1.14 cmt. 3 (stating that a lawyer must look to his client, and not family members, in making decisions on the client's behalf).

262 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 2.

263 *Id.* R. 1.8(f).

264 *See id.* R. 1.8(f)(3); Moore, *supra* note 80, at 1845–47.

denies the child's individual right to counsel and may impede the rehabilitative process by alienating the child and developing an incomplete picture of the child's needs.

C. *Substituted Judgment Doctrine*

1. Rationale/Justification

Notwithstanding the Model Rules' preference for a normal attorney-client relationship and rejection of broad generalizations about the capacity of children, there are times when a client's capacity will be so diminished as to completely hinder communication and render a normal attorney-client relationship impossible. In those cases, the attorney will face a difficult challenge—that of maintaining loyalty to the client and of satisfying the very real goals of the legal representation. In some cases, the doctrine of substituted judgment may provide a viable solution to this challenge. Under this doctrine, an attorney will make decisions on behalf of an incompetent client based on what the client would decide if he or she *were* competent.[265]

The doctrine has a number of advantages over both the traditional and parent-directed best-interest models.[266] The substituted judgment doctrine differs from best-interest advocacy primarily in its attempt to honor client loyalty and dignity and in its efforts to replicate the child's wishes to the greatest extent possible.[267] Substituted judgment focuses the advocate's attention on the child's perspective and purports to be less vulnerable to the influence of the attorney's own personal and subjective opinion of what is best for the child.[268] The doctrine guides and limits the attorney's discretion by requiring the attorney to gather information about the client's pattern of choices in similar circumstances and/or to assess what other reasona-

265 Jessica Litman, *A Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1720, 1722–23 (1982).

266 The substituted judgment doctrine may also have advantages over the appointment of a guardian to serve as surrogate decisionmaker and direct counsel. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 7. While appointment of a guardian may preserve the appearance of attorney loyalty, that loyalty exists in name only when the attorney merely defers to the decisions of the guardian.

267 *See* Angela D. Lurie, *Representing the Child-Client: Kids Are People Too*, 11 N.Y.L. SCH. J. HUM. RTS. 205, 235 (1993) (noting that when implemented properly, substituted judgment model allows attorney to advocate what the child would want if mature); Lyon, *supra* note 180, at 702; Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers*, 32 LOY. U. CHI. L.J. 1, 65–67 (2000) (recognizing that substituted judgment model provides some help in leading lawyer to a more child-centered represention).

268 *See* Lyon, *supra* note 180, at 701; Mandelbaum, *supra* note 267, at 65–67.

ble children or other similarly situated persons have done or would do in like circumstances.[269] Even when a young child is involved, the child is always seen as the best source of information about his own values and preferences.[270] When information from the child is exhausted, the advocate may seek additional insight from adults who know the child well.[271] The attorney who honestly seeks to determine what the client would want if he were competent, may better satisfy the client's desires than would the best-interest advocate who simply advocates what he or she believes to be best.

Although the doctrine is most commonly applied in the contemplation of medical treatment and in the legal representation of the elderly,[272] at least one commentator has argued for its application in the delinquency context, at least on behalf of those children who are clearly incompetent.[273] Robyn-Marie Lyon makes an interesting argument for use of the doctrine of substituted judgment in place of a best-interest model.[274] As a preliminary matter, Lyon supports the idea that in most juvenile proceedings, the attorney should, to the extent possible, act as the child's voice, presenting the court with the child's own expressed-interests or desires.[275] However, recognizing that the child's age, maturity, and mental health status may sometimes prevent the child from clearly communicating his or her desires to the attorney,[276] Lyon concludes that the child's attorney may apply the doctrine of substituted judgment and approximate the decision the child would make if he were mature.[277] In juvenile proceedings, the attorney would consider evidence of what the immature child desires now; opinions of informed individuals concerning what the child would desire if competent; and evidence of what similarly situated mature people wish had been advocated on their behalf.[278]

2. Limitations of Doctrine

Despite its benefits, the doctrine of substituted judgment will have limited value in the delinquency context. Historically, the doc-

269 Lurie, *supra* note 267, at 235–36; Mandelbaum, *supra* note 267, at 65–67 (explaining application of substituted judgment by courts).
270 Lyon, *supra* note 180, at 703; Mandelbaum, *supra* note 267, at 66.
271 Mandelbaum, *supra* note 267, at 66.
272 *Id.* n.258.
273 Lyon, *supra* note 180, at 702.
274 *Id.* at 701.
275 *Id.* at 692.
276 *Id.* at 692–93.
277 *Id.* at 693.
278 *Id.* at 703.

trine was developed as a framework for the representation of clients who were once competent, but due to advanced age or illness, have become incompetent.[279] In cases where the client was previously competent, the attorney will generally have access to a record of the client's values and preferences and be in a better position to make the same decision the client would make if he were competent. Some commentators have explicitly rejected the use of the substituted judgment doctrine for minors and other individuals who have never been legally competent.[280] In the medical context, commentators argue that where an individual has never developed a personal value system, either because of youth or infirmity, application of the substituted judgment doctrine would undermine the client's right to self-determination because the decisionmaker will ultimately substitute his or her own values for those of the incompetent.[281] When the doctrine is applied on behalf of young children, it often deteriorates into a "reasonable child" test that does not adequately consider the individual and unique interests and desires of the child.[282]

Even when the child is older and there is a history of the client's values and preferences, the substituted judgment doctrine still involves a degree of speculation on the part of counsel since the client is not directly expressing his or her desires.[283] Because the doctrine gives the attorney considerable discretion to obtain and interpret information about the child's preferences, the doctrine is subject to arbitrariness and abuse.[284] The attorney who disagrees with the child's stated preferences may even hide behind substituted judgment as a mask for what he believes to be in the child's best-interest. In these

279 Cara Cheyette, *Organ Harvests from the Legally Incompetent: An Argument Against Compelled Altruism*, 41 B.C. L. REV. 465, 486 (2000) (noting that the doctrine first emerged in the property context).

280 Norman L. Cantor, *The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Person*, 13 ANNALS HEALTH L. 37, 42–43 (2004); Cheyette, *supra* note 279, at 492.

281 Cheyette, *supra* note 279, at 492; Guggenheim, *supra* note 83, at 1400 ("The crucial difference between most impaired adults, such as the elderly, and young children, is that those adults have lived a full life, during which their personalities, values, and preferences became knowable. Young children, in contrast, have not yet reached the point in life when their values have been revealed.").

282 Michael D. Grabo & Michael Sapoznikow, *The Ethical Dilemma of Involuntary Medication in Death Penalty Cases*, 15 GEO. J. LEGAL ETHICS 795, 805–06 (2002); Mandelbaum, *supra* note 267, at 67.

283 Rhonda Gay Hartman, *Coming of Age: Devising Legislation for Adolescent Medical Decision Making*, 28 AM. J.L. & MED. 409, 444 (2002).

284 Cantor, *supra* note 280, at 43; Lurie, *supra* note 267, at 235.

cases, the doctrine becomes illusory and becomes virtually indistinguishable from the best-interest model.[285]

Although the doctrine's articulated commitment to child-centered advocacy is preferable to the goals of traditional or parent-directed advocacy, the doctrine of substituted judgment is of limited value because it is difficult to apply on behalf of youth and remains vulnerable to the same abuses evident in best-interest advocacy. If the doctrine is to be applied in the delinquency context, it is only appropriate in those circumstances where the client's cognitive capacity is so diminished that the client cannot communicate with counsel or make adequately considered decisions on his own behalf.[286] And in those cases, it is not at all clear that the child would be competent to stand trial for alleged criminal or delinquent conduct.[287] Nonetheless, the doctrine may provide an appropriate alternative paradigm in some cases for older youth who are competent to stand trial, but have considerable difficulty in communicating their goals and desires to counsel.

III. CONTINUUM OF TRADITIONAL, EXPRESSED-INTEREST ADVOCACY

Within the debate on the role of child's counsel, opponents of the best-interest and substituted-judgment models champion what is often referred to as a "traditional" or "zealous" model of representation. The "traditional" and "zealous" nomenclature has been adopted by those who seek to require the same level of "zealous" advocacy on behalf of children as has been traditionally expected for adults in criminal cases.[288]

Unfortunately, reliance on terminology lifted from the adult criminal context may generate more confusion and opposition than necessary. The concept of "zealous advocacy" is detrimentally imprecise in the childlaw context because it focuses the inquiry on the zeal with which an attorney argues a particular position and ignores the core of the debate regarding the allocation of decisionmaking author-

285 Grabo & Sapoznikow, *supra* note 282, at 806 (suggesting that the best-interest and substituted judgment models often converge in practice).

286 MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 7 (2003) (permitting protective action in only these limited circumstances).

287 For a discussion of juvenile competency to stand trial, see *supra* note 174 and accompanying text.

288 *See, e.g.*, Hoffman, *supra* note 205, at 335 (contrasting the best-interests model with "traditional" client-directed advocacy); Michelle Markowitz, Note, *Is a Lawyer Who Represents the "Best-Interests" Really the Best for Pennsylvania's Children?*, 64 U. PITT. L. REV. 615, 618–20 (2003) (noting the difference between a "traditional advocate" and a guardian ad litem, who would represent the child's best-interests).

ity between the client and the lawyer. An attorney may "zealously" advocate what he believes to be in the best-interest of the child as "zealously" as he may advocate the articulated interests of the child. The term "zealous advocate" may also carry a negative connotation that opponents of the best-interest models do not intend to convey. Specifically, the term has often been used to imply that defense counsel should work single-mindedly—both within and outside the bounds of the law—to "get the client off."[289] Advocates who oppose this approach in criminal defense will categorically reject its application to the representation of children in delinquency cases. Thus, the "zealous" label may simply overstate the alternative to best-interest advocacy. Granting a child authority to make decisions regarding the direction of his case does not permit the attorney to act outside the law any more than the allocation of decisionmaking authority to an adult client.[290]

The label "traditional advocate" is no more precise than the label "zealous." Because there is no consensus on what an appropriate "traditional" attorney-client relationship should look like among adults, the term does not provide the child advocate with any meaningful guidance on how he or she should interact with a minor. At one extreme, the "traditional" lawyer representing an adult client will blindly follow the every direction of the client.[291] At the opposite extreme, the lawyer will follow the client's direction in name only, but will otherwise control the outcome of decisions by manipulating or withholding information from the client or by coercing the client to decide one way or the other.[292] In adult criminal cases, conventional wisdom suggests that the "traditional" attorney-client relationship is actually more attorney-driven than client-driven.[293] Viewed in this way, neither the "zealous model" nor the "traditional model" depicts a desirable alternative to best-interest advocacy.

Although I prefer the term "expressed-interest" advocacy in this Article, I do recognize that it too has its own limitations. While the

289 *See* Kay & Segal, *supra* note 12, at 1401, 1416; Marrus, *supra* note 8, at 326–27.

290 MODEL RULES OF PROF'L CONDUCT R. 1.2(d) and cmts. 9–13.

291 *See generally* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 15–29 (1994) (analyzing the experiences of one lawyer for the poor in the context of client control and client autonomy).

292 COCHRAN ET AL., *supra* note 121, § 7-2(b), at 111.

293 Attorneys often fail to consult with their clients, bully them into various decisions throughout the case, and/or force them to take pleas that are good for the system. *Id.* § 2-2, at 12, 14 (criticizing the traditional model as authoritarian and attorney-directed); *see* Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 766–67 (2000).

term probably most precisely captures the debate over the rights of competent children to direct their lawyer in the course of representation, the "expressed-interest" language still leaves room for variation in the degrees to which the attorney may control and manipulate the client. As a result, a fairly wide continuum of legal counseling models has emerged in the guise of "expressed-interest" advocacy. This Part looks to literature on client counseling theory for direction on how a "traditional" or "expressed-interest" model might be adopted in the representation of children in delinquency cases. For ease of discussion, this Part will consider only three basic variations of "traditional" client counseling: (1) the authoritarian (coercive, attorney-driven) model, (2) the client-centered model and (3) the collaborative model.[294] While each of these models technically allows the client to determine the "objectives" of the representation,[295] each model differs in how passively or coercively the attorney will guide the client's decisions. Counseling models that fall on the coercive end of the continuum differ very little from the best-interest models discussed in Part II and prove unsatisfactory for the representation of an accused juvenile. Counseling models in which the attorney remains neutral or highly deferential to the client may prove equally unsatisfactory as they would deprive the child of much-needed guidance and insight from a legal advisor. Ultimately, this author rejects the extreme variations of traditional expressed-interest advocacy and opts for a more collaborative relationship between the attorney and the child. Not only will the child find greater satisfaction in collaboration with his lawyer, but best-interest and expressed-interest advocates may find a place of compromise in a collaborative paradigm.

Successful attorney-client collaboration will not only preserve client autonomy and due process, but will also enhance the child's decisionmaking capacity and improve the child's judgment.[296] By increasing the child's fund of information and guiding the child through calculated reasoning, the lawyer who collaborates with his client may alleviate the concerns of those best-interest advocates who are reluctant to defer to the judgment of a minor. Likewise, by maximiz-

294 *See* COCHRAN ET AL., *supra* note 121, § 1-1, at 2; Joseph Allegretti, *The Role of a Lawyer's Morals and Religion When Counseling Clients in Bioethics*, 30 FORDHAM URB. L.J. 9, 12–18 (2002); Robert F. Cochran Jr., *Review Essay: The Rule of Law(yers): The Practice of Justice: A Theory of Lawyers' Ethics*, 65 MO. L. REV. 571, 588–96 (2000).

295 *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (requiring the lawyer to "abide by a client's decisions concerning the objectives of representation" and to consult with the client as to the means by which those objectives will be met).

296 The Model Rules support efforts to maximize the client's capacities. *See id.* R. 1.14 cmt. 5.

ing the child's participation in the relationship and giving true allegiance to the child's decisions after extensive and reasoned consultation, the collaborative lawyer may improve the child's prospects for successful rehabilitation.

A. Authoritarian Models

Of the three primary variations in traditional, expressed-interest advocacy, the authoritarian model is the most coercive and least deferential to clients. Although the authoritarian lawyer technically allows the client to determine the objectives of the representation, the lawyer assumes a very paternalistic, directive and sometimes coercive role in the attorney-client dyad.[297] Like the best-interest advocate, the authoritarian lawyer assumes that his client lacks the competence and wisdom to make the best choice in the case. Because he views the legal issue as a technical problem, the attorney also assumes that he will have the technical or legal expertise to make decisions on the client's behalf.[298] The lawyer then expects that his client will follow passively, either by choice or default.[299]

Coercion in the authoritarian model is not always intentional or aggressive. In some instances, the lawyer may not even be conscious of the influence or pressure he exerts over the client. Instead, the attorney may subtly usurp direction and authority in the relationship by manipulating information or controlling the content and sequence of meetings with the client.[300] Attorneys control content by interrupting the client, limiting topics of conversation, withholding information, or narrowing the alternatives from which the client may choose.[301] Attorneys may also influence client decisions by speaking in legalese, framing issues in a narrow and limiting fashion, or strategically arranging the list of options to exaggerate or emphasize negative

297 *See* COCHRAN ET AL., *supra* note 121, § 7-2(b), at 111.

298 *Id.* § 1-2, at 2; *see* Cochran, *supra* note 294, at 589; Rodney J. Uphoff, *Relations Between Lawyer and Client in Damages: Model, Typical, or Dysfunctional?*, 2004 J. DISP. RESOL. 145, 152.

299 *See* Allegretti, *supra* note 294, at 12 ("Clients are expected to be docile and passive. They should trust their lawyers to act in their best-interests. They should not ask too many questions or take too active a role on their own behalf."); *see also* COCHRAN ET AL., *supra* note 121, § 7-2(b), at 111; Uphoff, *supra* note 298, at 152.

300 COCHRAN ET AL., *supra* note 121, § 2-1, at 11, § 2-3, at 14–16.

301 *Id.* § 8-3(a)(2), at 137; Lynn Mather, *Fundamentals: What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1070 (2003) (discussing the malleability of legal language).

or positive outcomes.[302] Lawyers may also manipulate the client's trust through harsh critique of others in the legal system.[303]

The opportunity for coercion is particularly great when the client is a child. Differences in age and expertise combined with the child's natural inclination to defer to adults create inherent power dynamics between the child and the attorney. An attorney who seeks to turn his client into a good and responsible citizen may coerce the child to plead guilty to begin the rehabilitative process or otherwise coerce the child to pursue what the lawyer believes to be in the best-interest of the child or even in the best-interest of the child's family. The juvenile attorney who is concerned about the child's need for psychiatric or psychological treatment may manipulate the options available to the child in order to earn the child's consent to a residential treatment program despite the child's desire to remain at home.

The authoritarian lawyer may defend his paternalistic intervention through a broad reading of the ends/means allocation in Rule 1.2 of the Model Rules of Professional Conduct. Although the rule grants the client authority over the ultimate ends or objectives of the case, the rule also grants the attorney authority over the means by which those ends will be achieved. Because the ends/means distinction is a hollow and ambiguous one at best,[304] there is considerable room for the attorney to manipulate the line between strategy and objectives. The Supreme Court's fairly broad interpretation of effective assistance of counsel also gives the lawyer considerable control over the day-to-day tactics and strategies that must be resolved during the course of representation.[305]

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302 COCHRAN ET AL., *supra* note 121, § 8-3(a)(2), at 137; Mather, *supra* note 301, at 1070.

303 COCHRAN ET AL., *supra* note 121, § 2-4, at 18 (noting that when judges and opposing lawyers are portrayed as incompetent, clients are left with little alternative but to trust their own lawyer as an insider).

304 Robert P. Burns & Steven Lubet, *Division of Authority Between Attorney and Client: The Case of the Benevolent Otolaryngologist*, 2003 U. ILL. L. REV. 1275, 1294–96 (discussing the problems that arise because of the lack of a well defined boundary between ends and means).

305 *See, e.g.*, Florida v. Nixon, 125 S. Ct. 551 (2004) (finding no presumptive ineffective assistance of counsel when counsel failed to obtain defendant's express approval of trial strategy that conceded guilt to capital murder and focused on plea for leniency in penalty phase); Bell v. Cone, 535 U.S. 685 (2002) (holding that attorney's failure to present mitigating evidence and waiver of final argument were tactical decisions about which competent lawyers might disagree and thus not ineffective assistance of counsel); Taylor v. Illinois, 484 U.S. 400 (1988) (finding no ineffective assistance of counsel where defense counsel blatantly violated discovery rules to gain a tactical advantage).

1. Limitations of the Authoritarian Model

Viewing the attorney-client relationship through the authoritarian lens exposes the dangers of adopting a nominal or perfunctory commitment to some traditional, expressed-interest model of advocacy. Models that fall in the coercive range of client counseling differ from the best-interest model in name only. In the authoritarian model, the theoretical commitment to client autonomy and client direction is overwhelmed by the practice of manipulation and coercion. Ultimately, the authoritarian model raises all of the same concerns as best-interest advocacy including client dissatisfaction, the loss of critical insight and information from the client, and the compromise of due process.

Like best-interest advocacy, authoritarian counseling often produces a poor or unsatisfactory legal outcome by inhibiting a full exchange of information between the lawyer and the client.[306] The attorney who controls the client interview and limits free input from the client will misconstrue the client's goals and miss significant facts and circumstances surrounding the legal issues. The client who is stifled by the control of the authoritarian lawyer will often be dissatisfied with the legal process and unwilling to follow through with court orders and recommendations made by a judge who has never heard or considered his views.[307] When representing a child in the juvenile justice system, the authoritarian lawyer may impede rehabilitation by stifling the child's commitment to and cooperation with the disposition plan.

Since only the most knowledgeable, self-confident child is likely to overcome the coercive influence of the manipulative and learned counsel, the authoritarian approach will effectively deny most children the right to meaningfully assert or waive substantive rights such as the right to confront witnesses or avoid self-incrimination.[308] Like the best-interest model, the authoritarian model proves unsatisfactory as it merely substitutes one limit on the client's autonomy (the attorney) for another (the state).[309]

306 COCHRAN ET AL., *supra* note 121, § 1-2, at 3; Allegretti, *supra* note 294, at 13–14; Cochran, *supra* note 294, at 582–83.

307 COCHRAN ET AL., *supra* note 121, § 7-3(a), at 115; Allegretti, *supra* note 294, at 13 (noting that the authoritarian model produces less satisfaction for clients).

308 *See* COCHRAN ET AL., *supra* note 121, § 1-2, at 3.

309 *See id.*

B. Client-Centered Counseling

Many critics of the authoritarian, lawyer-dominated models have endorsed a client-centered alternative that recognizes individual autonomy and self-determination as a "cornerstone" of the American political system.[310] In stark contrast to the best-interest and authoritarian models, client-centered advocacy is nondirective, rejects lawyer paternalism and manipulation,[311] and operates with a strong respect for the autonomy and dignity of clients.[312] In early articulations of the model, client-centered advocates resisted giving the client any opinion as to what action the client should take.[313] Even in more recent and less extreme articulations of the model, the client-centered lawyer plays a limited role in client decisionmaking, limits the advice he offers and communicates neutrality to the greatest extent possible.[314] When the client actively seeks advice from the lawyer, the lawyer may provide information about several possible courses of action, but will urge the client to make decisions for himself and be careful not to tell clients what to do.[315] The lawyer may even introduce nonlegal and moral issues for the client's consideration so long as he does not seek to impose his own values.[316]

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310 Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 510–13 (1990); *see also* Cochran, *supra* note 294, at 590–91; Mather, *supra* note 301, at 1068.

311 Dinerstein, *supra* note 310, at 555; Jason J. Kilborn, *Who's in Charge Here? Putting Clients in Their Place*, 37 GA. L. REV. 1, 34 (2002).

312 COCHRAN ET AL., *supra* note 121, § 1-3, at 5, § 7-2(a), at 111; Cochran, *supra* note 294, at 590–91.

313 Dinerstein, *supra* note 310, at 509; *see* Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 121 (1999). When David A. Binder and Susan C. Price published *Legal Interviewing and Counseling: A Client-Centered Approach* in 1977, their "client-centered" approach quickly became the standard for interviewing and counseling. At the heart of Binder and Price's "client-centered" approach is the idea that a lawyer should refrain from influencing his client's decisions, and should instead facilitate client decisionmaking by providing the client with the full list of options, along with all consequences for each option. *See* John M.A. DiPippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81, 106 (2001).

314 *See* COCHRAN ET AL., *supra* note 121, § 1-3, at 5; Dinerstein, *supra* note 310, at 587.

315 COCHRAN ET AL., *supra* note 121, § 1-3, at 6, § 7-2(a), at 111; Dinerstein, *supra* note 310, at 508–09 (noting that attorneys develop a list of options, ask the client for additional options, discuss the positive and negative consequences of each option, offer predictions about the likelihood of each option and assist the client in weighing the consequences of each option).

316 Cochran, *supra* note 294, at 591; Dinerstein, *supra* note 310, at 563–65; Kilborn, *supra* note 311, at 45.

Proponents of client-centered advocacy believe that lawyers are rarely in the best position to determine which alternatives will provide the greatest satisfaction for the client.[317] Client-centered advocates also believe that a client is more likely to accept and comply with a decision he has made himself.[318] Even when a judge will be the ultimate decisionmaker, such as in a delinquency case, clients may be more likely to follow through with court-imposed obligations when they are allowed greater participation in the decisionmaking process.[319] Likewise, client participation in the attorney-client relationship appears to reduce the anxiety that often accompanies the client's passive or blind role in the legal process.[320] Client-centered lawyering also protects the client's substantive and due process rights by giving the client clear and unfettered authority to exercise or waive those rights.

1. Limitations of Client-Centered Model

On its face, the client-centered model may appeal to opponents of best-interest advocacy because it protects the client's substantive rights, encourages client buy-in, and satisfies ethical obligations that allocate decisionmaking authority to the client. However, the client-centered model has also been the subject of considerable criticism. Commentators, for example, often complain that the client-centered model actually denies client autonomy by encouraging the lawyer to withhold advice.[321] When the client asks the lawyer to make decisions for him, a rigid adherence to client-centeredness is clearly inconsistent with the client's desires and expectations.[322] Critics of the client-centered model argue that clients rarely come to the attorney-client relationship with a preconceived set of goals and interests, but instead shape and construct those goals through interaction with the law-

317 Dinerstein, *supra* note 310, at 509, 516; Kilborn, *supra* note 311, at 36.

318 Dinerstein, *supra* note 310, at 547–48; Kilborn, *supra* note 311, at 36.

319 Dinerstein, *supra* note 310, at 549 (studies show that "clients value the perceived fairness of the process through which their claims are adjudicated as well as the outcomes they receive"); *see also* Berkheiser, *supra* note 68, at 643 (noting that studies have shown that youthful offenders are more likely to respond positively to court intervention when they are active participants than when the process is imposed upon them).

320 Dinerstein, *supra* note 310, at 548–49; Ronner, *supra* note 177, at 94.

321 *See, e.g.*, Dinerstein, *supra* note 310, at 567; Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 745–46 (1987).

322 COCHRAN ET AL., *supra* note 121, § 1-4, at 7; Dinerstein, *supra* note 310, at 574–75; *see also* DiPippa, *supra* note 313, at 108 (arguing that clients expect lawyers to provide substantive and procedureal advice and that a pure client-centered approach cannot be maintained).

yer.[323] These critics also see balanced persuasion as a necessary and acceptable part of any autonomous relationship[324] and worry that excessive deference to clients will deprive the client of important legal insight and produce unnecessarily poor decisions.[325]

Some critics also complain that client-centered advocacy encourages and facilitates self-centered decisionmaking by the client.[326] The client may even interpret the lawyer's neutrality in the face of the client's morally dubious action as an affirmation of the client's choice.[327] In a delinquency case or other family-related proceeding, a child may fail to consider the impact of his conduct and choices on other family members. By failing to account for the concerns and interests of a parent, the child may lose critical parental support he will need in the rehabilitative process.

The client-centered model, like many of the others, is also grounded in a number of critical underlying assumptions that may not hold true in the representation of children and adolescents. Most significantly, the model assumes that there is a competent client who has the capacity to make reasoned decisions based on articulated values that are not likely to change over time.[328] While children are not presumptively incompetent, cognitive and psychosocial limitations may diminish decisionmaking capacity and render uncounseled deference to the child unsatisfactory. Because children reason with a relatively small fund of general information and an even smaller fund of legal information, children need lawyers to help them understand the full range of options available to them in litigation. In a delinquency case, for example, the child may be asked to decide whether he will litigate pre-trial evidentiary issues; plead guilty or assert his right to trial; assert his right to cross-examine government witnesses; and testify on his own behalf. Children have limited experience in these contexts and need and want the assistance and advice of a knowledgeable adult and legal advisor. Ultimately, a client-centered model that en-

323 *See* Dinerstein, *supra* note 310, at 574–75.

324 *Id.* at 517 n.75 (drawing analogy from the medical model of informed consent).

325 *Id.* at 505; Ellmann, *supra* note 321, at 745.

326 Cochran, *supra* note 294, at 592.

327 *See* COCHRAN ET AL., *supra* note 121, § 9-3, at 175.

328 *See id.* § 7-2(a), at 111 (explaining that the model assumes that most clients are capable of thinking through the complexities of their problems); Dinerstein, *supra* note 310, at 510 n.38 (stating that even the original drafters of the client-centered model recognized that the model may not be appropriate for the client who is clearly incapable of making decisions); Federle, *supra* note 61, at 1676.

courages the lawyer to withhold advice may not be flexible enough to accommodate the needs of the juvenile defendant.

C. Collaborative Model

Critics of the client-centered model have proposed a number of modifications to the client-centered framework and in some instances have introduced new client counseling theories.[329] While critics continue to favor client loyalty and autonomy, they seek to increase attorney input and encourage greater collaboration between the attorney and the client.[330] In the collaborative counseling models, the client controls the decisions, but the lawyer offers advice and structures the counseling process in a way that is likely to foster good decisionmaking by the client.[331] Collaborative lawyers provide relevant information about available options, help clients clarify personal goals and objectives, and give clients emotional and social support for their decisions.[332] The lawyer is essentially "nondirective" as to the client's ultimate decision, but "directive" as to the process to be followed in reaching that decision.[333]

In many ways, the collaborative model of legal representation parallels the development of the informed consent doctrine in the medical field.[334] When there is informed consent in the medical context, the patient willingly accepts medical intervention after adequate disclosure by the physician of the risks and benefits associated with the proposed intervention and all of its possible alternatives.[335] The doctrine emphasizes the connection between informed consent and patient autonomy and focuses on shared decisionmaking between the physician and the patient.[336]

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329 Dinerstein, *supra* note 310, at 587 (proposing revision of the model to allow the lawyer to offer his advice).

330 DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d ed. 2004); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 93 (2000).

331 COCHRAN ET AL., *supra* note 121, § 1-4, at 6, § 7-1, at 110; *see* Robert F. Cochran, Jr. et al., *Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591, 598 (2003) ("The client makes the ultimate decision, but the lawyer is actively involved in the process.").

332 COCHRAN ET AL., *supra* note 121, § 7-2(d), at 113.

333 *Id.* § 8-1, at 131; Allegretti, *supra* note 294, at 16 (quoting COCHRAN ET AL., *supra* note 121, § 1-4, at 6).

334 Dinerstein, *supra* note 310, at 525.

335 *Id.* at 530 & n.132; *see* Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 364–65 (2002) (defining informed consent doctrine).

336 Dinerstein, *supra* note 310, at 530; Noah, *supra* note 335, at 364–65.

In the collaborative legal paradigm, advocates recognize that clients seek the assistance of lawyers precisely because they want the lawyer's advice, guidance, and wisdom.[337] Thus, the lawyer's responsibility is not just to passively or neutrally list alternatives, but to ensure that the client will consider and evaluate all of the available options and choose the best alternative.[338] To achieve these goals, the lawyer may appropriately advise and persuade the client in counseling.[339] Moreover, because the effective counselor wants to help his client avoid mistakes, the attorney may tell the client that he is choosing a patently bad alternative and explain why.[340] Although the collaborative lawyer must take sides with his client, he will also remain objective in offering a realistic appraisal of all of the legal and nonlegal advantages and disadvantages of a contemplated course of action.[341] By facilitating a meaningful attorney-client dialogue in which all of the available options and likely consequences are identified, collaboration may even empower politically disadvantaged clients such as the young and the poor who are often unsophisticated and lack knowledge about legal matters.[342]

Finally, proponents of the collaborative model caution against the binary terminology of lawyer domination versus client domination.[343] Because the model values flexibility and variability in the attorney-client relationship, the collaborative model also allows the parties to negotiate the terms of the relationship and allocate respon-

337 *See* COCHRAN ET AL., *supra* note 121, § 7-3(a), at 114, § 8-1, at 131. The Model Rules of Professional Conduct also admonish lawyers to render "independent professional judgment" and "candid advice." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

338 *See* COCHRAN ET AL., *supra* note 121, § 8-1, at 131–32. The neutral investigative model of advocacy has also been uniformly rejected by commentators and leaders in the juvenile defense community. Guggenheim, *supra* note 8, at 107–09; Mlyniec, *supra* note 8, at 116.

339 Dinerstein, *supra* note 310, at 517 (stating that some medical model informed consent theorists assert "that persuasion is not only an acceptable but a necessary part of an autonomous relationship").

340 COCHRAN ET AL., *supra* note 121, § 8-1, at 132, § 8-4, at 141; Allegretti, *supra* note 294, at 18–19 (noting that in the collaborative model, as between friends, the lawyer should advise the client when the lawyer believes the client is making a bad decision).

341 COCHRAN ET AL., *supra* note 121, § 8-3(a), at 135; Allegretti, *supra* note 294, at 18–19.

342 *See* Cochran et al., *supra* note 331, at 592; Dinerstein, *supra* note 310, at 519; Uphoff, *supra* note 298, at 157–58.

343 Dinerstein, *supra* note 310, at 524; *see also* Allegretti, *supra* note 294, at 17 ("The lawyer is not the client's boss, but neither is she the client's hired gun.").

sibility between them.[344] While some clients will need and desire the lawyer's opinion and advice, others will not.

1. Collaborating with Children in the Juvenile Justice System

Of all the models examined in this article, the collaborative model appears most likely to accommodate the needs of a child client. Although the collaborative model—like the client-centered model—presumes that the attorney will represent a competent client,[345] the collaborative model provides greater opportunity for the attorney to maximize and enhance the child's limited cognitive capacities and improve the child's judgment and insight.

Although research has shown that adolescents have certain cognitive and psychosocial limitations that might frustrate the client's effective participation in the attorney-client relationship, there is no magical age at which young people become capable of making good decisions.[346] In fact, each of us cultivates decisionmaking skills over time with growth, development, experience, and education.[347] The child will also develop his own code of personal morality and adopt virtues such as courage, truthfulness, faithfulness, and mercy through the trial and error of exercising moral judgment.[348] Allowing the child to collaborate with his attorney in a delinquency case gives the child an opportunity to apply and enhance newly acquired decisionmaking skills.

The collaborative model may offer a particularly useful framework for the attorney-child dyad because the collaborative lawyer understands that good decisionmaking is predicated on the lawyer's ability to create an appropriate environmental context for counseling and to develop a good relationship with the client.[349] For children who demonstrate better cognitive capacity in contexts that are famil-

344 COCHRAN ET AL., *supra* note 121, § 2-7, at 25–29; Mather, *supra* note 301, at 1069.

345 COCHRAN ET AL., *supra* note 121, § 2-7, at 27.

346 Even a child as young as five or six and certainly those of ten or twelve will often have the ability "to understand, deliberate upon, and reach conclusions about matters affecting [his] own well-being." MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 1 (2003). Also by early adolescence the fundamental abilities of communication are matured, further facilitating the attorney-client collaboration. Grisso, *supra* note 114, at 16.

347 *Cf.* COCHRAN ET AL., *supra* note 121, § 1-4, at 8–9 (explaining that a lawyer acquires good decisionmaking through "innate ability, habit, age, knowledge, breadth of experience, education, and character" (citation omitted)).

348 *See id.* § 9-2(b), at 170.

349 *Id.* § 7-3, at 113; Uphoff, *supra* note 298, at 155–57.

iar to them and devoid of stress,[350] the collaborative counselor will provide a comfortable physical and emotional environment and allocate sufficient time for thorough counseling.[351] The counselor will also build rapport with the child over time, engage the child in a one-on-one, age-appropriate dialogue, and repeat information as many times as the child needs to hear it.[352]

Research also suggests that other psychosocial aspects of decision-making—such as trust for adults, risk perception, and risk preference—are likely to improve as the attorney-client relationship improves.[353] Because youth tend to have a higher level of trust and satisfaction with attorneys who spend more time working with them,[354] the child is more likely to receive and accept input from the collaborative lawyer. The child will also be able to avoid hasty, short-sighted decisions when he has the assistance of a lawyer who will patiently help him identify and consider all of the long-term implications of any given decision.[355] When provided with all of the relevant information and given all of the appropriate environmental and emotional supports, a child may make well reasoned decisions and appropriately direct his counsel in the course of the representation.

The collaborative model also appears flexible enough to accommodate the rehabilitative goals of the juvenile justice system and adapt to differences between the disposition and adjudicatory phases of the delinquency case. When the attorney opts not to rely solely on the probation officer's assessment, but instead leads the child through an independent investigation of his own needs and desires,[356] the attor-

350 *See* Buss, *supra* note 56, at 918–19; Grisso, *supra* note 114, at 16–18. Studies suggest that adolescents are more prone to offer inaccurate information to persons in authority when they are pressured. *Id.* at 18. Even when adolescents' cognitive capacities are similar to those of adults, theory suggests that they will deploy those abilities with less dependability in new, ambiguous or stressful situations, because the abilities have been acquired more recently and are less well established. Emotions, mood and stress often have a negative influence on decisionmaking, causing a constriction in the range of options considered or consequences foreseen.

351 COCHRAN ET AL., *supra* note 121, § 8-5(a)(3), at 152–53.

352 *See* Dinerstein, *supra* note 310, at 556; Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity To Choose*, 64 FORDHAM L. REV. 1873, 1898 (1996).

353 Schmidt et al., *supra* note 57, at 180.

354 *Id.*

355 *See* COCHRAN ET AL., *supra* note 121, § 9-2(b), at 172.

356 As part of the independent investigation, the attorney may interview relatives, gather school records, and in some cases arrange for an independent mental health evaluation that will not automatically be shared with the court. The attorney might secure payment for the evaluation through the child's Medicaid provider, family insurance, or the public school system. In deciding whether to arrange an independent evaluation, the attorney will have to consult with the child to determine if the child is

ney and his client will be in a better position to develop an appropriate and reliable plan for rehabilitation. The collaborative lawyer might even improve the child's rehabilitative prospects by working with the child to investigate and identify creative, alternative solutions to incarceration[357] and to increase the child's buy-in and compliance with the ultimate disposition plan.[358] The collaborative model ultimately empowers the client to make a more thoughtful and well informed choice among the options and gives real meaning to the client's right to voice his opinion in the disposition hearing.

In some cases, the collaborative lawyer may also encourage the client to consider those options which relevant adults perceive as "best" for the child. Thus, in the delinquency context, the lawyer may appropriately advise the child to consider (1) the long-term benefits of treatment and rehabilitation, (2) the impact of his conduct and choices on his family, and (3) the moral implications of his alleged delinquent conduct on society. When the lawyer is not overbearing and delays advice until he has an appropriate rapport with the client, the child retains individual autonomy and is free to reject the lawyer's opinion.[359]

Finally, the collaborative model may also accommodate the unique interplay between lawyers, children, and their parents. Because the collaborative lawyer recognizes that effective decisionmakers use all of the resources available to them, the lawyer may encourage his client to talk to family members who may provide an alternative perspective and additional information before making important decisions.[360] Parental advice may be particularly helpful to a child who

willing to accept the further intrusion of an additional evaluation and will have to evaluate the risk that requesting additional evaluations will reveal negative factors about the client and result in a more restrictive disposition than the client wants.

357 *See* STANDARDS RELATING TO INTERIM STATUS 8.2 (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1979); STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 9.2(a)–(b) (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1979) (proffering standards requiring attorneys to be familiar with all community services and treatment alternatives available to the court and to investigate the source of any evidence introduced at a disposition hearing).

358 *See* COCHRAN ET AL., *supra* note 121, § 8-1, at 131.

359 For more concrete strategies to avoid undue coercion by the lawyer representing children, see infra notes 364–66 and accompanying text.

360 COCHRAN ET AL., *supra* note 121, § 8-5(b), at 155–56 (explaining that an attorney might direct the client by asking "[i]s there anyone else that you would like to talk to about this choice?"). Commentary to Model Rule 1.14 suggests that a client of diminished capacity may invite a third party into the attorney-client discussion without compromising the attorney-client privilege if the client needs the assistance of the third party. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt 3 (2003).

respects his parent's opinion and may help the child place decisions in the context of important family values. Collaboration with parents may also be useful to secure the parents' cooperation with the child's ultimate decisions and to assist in any rehabilitative plan the court orders. Unlike the exclusive parent-directed model and the potentially selfish client-directed model, the collaborative model should foster cooperation among all of the significant people in the child's life.

Although the collaborative model falls by design within the expressed-interest continuum of attorney-client paradigms, the collaborative model may also satisfy many of the normative concerns expressed by best-interest advocates. Practitioners who resort to best-interest advocacy because they believe that their clients are cognitively unable to guide counsel may be willing to try a more collaborative approach that is designed to enhance the cognitive ability of their clients and facilitate greater compliance by the child in the rehabilitative process. Even those advocates who favor parental deference or hold strong normative objections to children's autonomy may be willing to try a model that allows, and at times even encourages, the child to consult with his parents.

2. Limits of the Collaborative Model with Juveniles

Notwithstanding the practical utility of the framework, the collaborative model is not without its difficulties. Because the collaborative model is both costly and time consuming, it will likely be resisted by those lawyers who have high caseloads or work in resource-poor defender offices. The model must also withstand the systemic pressures of judges, probation officers, and other court officials who oppose any model of advocacy that would hinder temporal and fiscal economy. Yet, by increasing the child's participation and earning the child's cooperation, the model should improve the overall success of rehabilitation in juvenile court, increase public safety, and thereby justify the added time and cost.

Status differences between the attorney and the child may create additional difficulties for the collaborative lawyer. Because collaboration is generally most successful when the deliberating parties are equally dependent and of relatively equal status,[361] the lawyer who represents the younger, less experienced child will always have the challenge of achieving a delicate balance between legal advice and client autonomy within the relationship. Not only will the lawyer have greater expertise in the relevant area of law, but when the client is a

361 COCHRAN ET AL., *supra* note 121, § 1-4, at 7; *see* Cochran et al., *supra* note 331, at 601.

child, there will be additional disparities in age, life experience, and knowledge.[362] In the criminal and delinquency contexts, the attorney-client relationship is also likely to be further complicated by differences in race, class, education, and general status in society.[363]

To achieve the delicate balance between advice and client autonomy, the lawyer must understand how developmental factors may affect the attorney-client relationship and develop concrete methods to improve interviewing, counseling, and decisionmaking with young clients.[364] Effective client-centered and collaborative lawyers will engage in active listening, pay attention to physical cues from the client, build rapport, affirm the client, ask open-ended questions, and develop questions to build from broad issues to narrow details.[365] The lawyer might also vary the counseling dynamic throughout the course of the relationship. In the early interviewing stages of the relationship, the collaborative lawyer will be nonjudgmental and provide genuine, noncontingent acceptance and empathy.[366] After rapport is established in later counseling sessions, the lawyer may more appropriately offer advice and raise concerns about the client's decisions. As the attorney gets to know the child, the attorney will also be able to render advice in the context of the child's life experience.

Nonlegal variables such as remorse and moral responsibility may be more appropriately introduced in later stages of the case, such as disposition, when the client is more likely to trust the lawyer's insight and less likely to view the lawyer's advice as coercive. In earlier stages, the introduction of nonlegal variables may appear judgmental and imply that social and moral issues are more important than the child's substantive and procedural rights. For example, in a counseling session in which the child must decide whether to accept the government's plea offer, the client and the attorney will explore potential defenses, evaluate the likely success of any defense, and consider the risks associated with loss after trial. It may never be appropriate for the lawyer to tell his client that he has a moral responsibility to plead guilty because the child's parents are inconvenienced by having to

362 *See* COCHRAN ET AL., *supra* note 121, § 9-5, at 185.

363 *Id.*

364 Schmidt et al., *supra* note 57, at 193.

365 There are a number of excellent resources on client interviewing skills, etc. For a sample of general interview tips for adults and children, see COCHRAN ET AL., *supra* note 121, §§ 9-1 to -5, at 165–87. For a sampling of interviewing skill sets for juveniles, see ABA JUVENILE JUSTICE CTR. ET AL., TALKING TO TEENS IN THE JUSTICE SYSTEM: STRATEGIES FOR INTERVIEWING ADOLESCENT DEFENDANTS, WITNESSES, AND VICTIMS (Lourdes M. Rosado ed., 2000).

366 COCHRAN ET AL., *supra* note 121, § 7-3(a), at 114, § 9-3, at 175.

come to court or because the lawyer believes the client owes an apology or restitution to his victim. By contrast, it may be appropriate at the time of the disposition, for the lawyer to encourage the child to consider both the victims' interests and the benefits of treatment and rehabilitation.

This is not to suggest that the attorney should never introduce any nonlegal factors into the trial-related decision points. The child may actually care how much time his or her parents will have to spend in court. The attorney might even deal with issues of remorse in the plea or trial discussion if the client has introduced the topic or if the attorney legitimately believes that the judge will look favorably on the child's plea in determining an appropriate disposition for the child. By contrast, at the post-adjudication disposition phase issues of remorse and victim impact are inherently relevant and almost always affect the judge's ultimate resolution of the case.

Although the collaborative model does present some challenges for the child's lawyer, its benefits ultimately outweigh its difficulties. With adequate training, patience, and a willingness to educate children, in many cases the collaborative lawyer can enhance the child's capacities and effectively follow the child's direction in the delinquency case. The benefits and flexibility of the collaborative model also outweigh the benefits of best-interest advocacy and other surrogate decision models.

CONCLUSION

In the juvenile justice context, advocates must develop an attorney-client paradigm that will give substantive meaning to the child's constitutional right to counsel, satisfy fundamental due process and, to the greatest extent possible, support the successful rehabilitation of children in the juvenile justice system. The appropriate paradigm must also comport with the Model Rules' preference for client loyalty and autonomy, while simultaneously maximizing the child's mental, emotional, and educational development. This Article rejects the best-interest and parent-directed models as unsatisfactory on each of these variables. Not only do these models patently deny individual autonomy, but they also impede rehabilitation and undermine the child's constitutional right to counsel.

Although we cannot expect the attorney-child relationship to be an exact replica of the adult's attorney-client relationship, the paternalistic advocacy that is so common in juvenile representation today far exceeds that which is necessary to accommodate the child's inherent limitations. Despite a clear consensus among leaders and aca-

demic commentators in the juvenile justice community, professional standards like those prepared by the IJA-ABA have not been effective in bringing uniformity to the role of child's counsel in delinquency cases. It may be that best-interest advocacy persists simply because child advocates have polarized the issues in a way that is neither necessary, nor useful. Best-interest advocates who continue to reject "traditional," "zealous" advocacy may well envision a rigid paradigm in which the attorney works at all costs to get the client off or in which the client dominates the lawyer's conduct without the lawyer's input and advice. Zealous, expressed-interest advocates, on the other hand, probably fear that any discussion of the child's best-interest will impede client autonomy and invade fundamental rights. Framing the debate in this way is no longer useful in the complex world of juvenile court and the academy and professional leadership would do well to abandon outdated terminology and explore a more collaborative approach to the attorney-child relationship.

A collaborative model of advocacy would support many juvenile justice goals and offer a very practical default paradigm for the attorney-child relationship. Not only does the model remain loyal to the fundamental principles of client determination and informed autonomy, but the model is also flexible enough to accommodate the unique aspects of juvenile court, including the special interplay of parents, lawyers, and children and the court's commitment to rehabilitation. The model also acknowledges the continuum of cognitive and psychosocial limitations among youth without relying on overbroad, bright-line presumptions that strip juveniles of their constitutional right to counsel and gives the lawyer an opportunity to teach, guide, and even persuade children without losing the child's trust or usurping the parent's role of moral instructor. Finally, the model also gives parents a place in the child's decisionmaking process without transferring power to the parent, destroying the attorney-client nucleus, or abandoning client loyalty and confidentiality.

Assuming that not all cognitive and psychosocial limitations can be corrected or accommodated within the collaborative paradigm, the practitioner will need an alternative framework for those limited occasions when the child simply cannot communicate with his attorney or engage in even the most basic analysis or reasoning. The practitioner may (1) raise competency issues with the court and litigate the child's competency to stand trial, (2) ask the court to appoint a guardian to protect the client's interests while the advocate remains loyal to the client's goals to the extent possible, or (3) attempt to determine what the child would have done if he were competent and advocate pursuant to the substituted judgment doctrine. For older youth who were

at one time competent, the doctrine of substituted judgment may be an appropriate option as it seeks to honor client autonomy and requires the attorney to examine the child's pattern of preferences and values in deciding what position to advocate on the child's behalf. Unfortunately in those cases where the advocate has no basis upon which to ascertain what the child would do if competent or where the child is clearly incompetent to stand trial, substituted judgment is no more appropriate than best-interest advocacy. In the latter cases, the advocate should raise competency issues with the court and/or ask the court to appoint a guardian.