

LAWYERING FOR CHILDREN: CONFIDENTIALITY MEETS CONTEXT

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Lawyering for children does not lend itself to absolutes. Children of any age have significant deficits of cognition and experience that can make client-directed lawyering problematic. At the same time, a lawyer who disregards the expressed wishes of a juvenile client may unduly discount the child's knowledge, perspective, and need for voice.¹ Moreover, other legal players in the child welfare system, including child welfare workers, legislators, courts, parents, and attorneys themselves, also have deficits and blind spots. Too often, these blind spots reinforce inequalities of race,² culture,³ and class.⁴ The child's lawyer

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¹ The therapeutic jurisprudence literature stresses the relationship between the assertion of voice in legal proceedings and the self-actualization of clients. See Keri K. Gould & Michael L. Perlin, "Johnny's in the Basement/Mixing Up His Medicine": *Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339, 359–71 (2000) (describing the importance of therapeutic jurisprudence in the representation of people with disabilities); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 93–96, 103–11 (2002) (noting suppression of children's voices in criminal cases, even after Warren Court-era reforms).

² See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 205 (2005) (discussing racial and ethnic disparities in child protection cases); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE viii (2002) (discussing race); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1212–13 (1999) (discussing race and risks of foster care); Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 656–57 (2006) (discussing the racial dimension of child welfare policy).

³ Cf. Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 234–38 (2006) (discussing the effect of assumptions from dominant culture on criminal law).

⁴ See GUGGENHEIM, *supra* note 2, at 193–94 (discussing the role of poverty in child welfare determinations).

should acknowledge the local competence of all of the players, but also recognize the limits of that competence.

The debate about confidentiality in the representation of children follows this course.⁵ Some jurisdictions mandate the reporting of child abuse by lawyers.⁶ In contrast with this absolute, some commentators have argued that the lawyer's duty of confidentiality with respect to child clients should track the duty owed to adults.⁷ Here, too, however, context should trump rigid application of rules. This article, which focuses on representation of children in abuse and neglect proceedings, seeks to outline such a contextual model.

By stressing local competence, I hope to continue the project pioneered by commentators that rejects the binary pairing of an all-knowing, child-saving lawyer and a child client of questionable capacity.⁸ The traditional view of the lawyer for the child as advocating for the child's "best interests" embodies this binary view. Treating competence as global suggests that the lawyer is competent and the child is not. The good intentions exalted in this vision can encourage a trivialization of the child's views and obscure the role of race, culture, and class in child welfare decisionmaking. In contrast, taking a local view

⁵ See generally Theo S. Liebmann, *Confidentiality, Consultation, and the Child Client*, 75 TEMP. L. REV. 821, 827–31 (2002) (discussing issues of disclosure, including the possible need for disclosure to mental health professionals).

⁶ See Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125, 125–28 (2006).

⁷ See, e.g., Randi Mandelbaum, *Rules of Confidentiality When Representing Children: The Need for a "Bright Line" Test*, 64 FORDHAM L. REV. 2053, 2054–55 (1996).

⁸ See, e.g., JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 339–40 (2d ed. 2001); Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692, 704 (2006); Bernard P. Perlmutter, *George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 567 n.20 (2005); 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, 1508–09 (1996). For a comparable approach in delinquency cases, see Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 246–49 (2005). Self-aware critics of this model acknowledge that it is all too easy to fall into the binary opposition through the phenomenon of counter-transference, in which the professional (here, the lawyer) projects her own feelings onto the client. See Perlmutter, *supra*, at 613–14.

encourages humility on the part of the attorney, and a propensity for dialogue.

While the local competency view tempers the paternalism of the best interests model, it also rejects a glibly mechanical account of the lawyer's role. In this mechanical model, the lawyer for a child first determines competence, and then determines if any exceptions to the duty of confidentiality apply. While competence and confidentiality are useful doctrinal categories, maintaining a hermetic separation between the two is difficult, particularly in the representation of children.⁹ Both competence and confidentiality entail consideration of future harm. This is clearly true in the case of confidentiality, where lawyers can ethically disclose information to prevent death or substantial bodily harm to the client.¹⁰ Since children are often more vulnerable physically and psychologically, the threshold for intervention is lower in the case of a child than it would be in the case of an adult. Before a lawyer intervenes by disclosing information, however, she must also be reasonably certain that the intervention will produce alternatives to the status quo that are *less* harmful to the child.

Consideration of future harm should figure in the same nuanced way in the lawyer's assessment of the child client's competence. A lawyer should seek more evidence that the client has adequately weighed the consequences of nondisclosure when those consequences include substantial physical or emotional harm. Moreover, in jurisdictions that oblige lawyers to advocate for the child's best interests, the lawyer should always take the child's wishes into account. Finally, a lawyer in considering a child's capacity is entitled to consider that the child's perspective is continually evolving, and that issues that seem compelling to the child in the moment may seem far less important when the

⁹ See Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *FORDHAM L. REV.* 1473, 1494 (1996) [hereinafter Margulies, *The Lawyer as Caregiver*] (recognizing that a lawyer should consult with her child client before consulting with a diagnostician, which would involve divulging confidences). This is also true in the context of other vulnerable groups, such as the elderly, in which issues of capacity frequently arise. See Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L. REV.* 1073, 1093 (1994) (highlighting the importance for lawyers to obtain the consent of their elderly clients before consulting with diagnosticians).

¹⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002).

child attains adulthood. Here, as well as in other areas of the law, such as constitutional limits on the punishment imposed on children by the state and limits on parental ability to decline medical care for their children,¹¹ the lawyer should resist decisions that may prejudice the child's ability to become that more reflective adult. A thoughtful lawyer will acknowledge, however, that the facts in a given abuse and neglect case do not always generate one unambiguously superior course of action. In a context of sometimes tragic ambiguity, listening carefully to the child is imperative.

A local competence approach promotes this kind of reflective practice. Surveying the players in the child protective system will produce an appreciation of the strengths and limitations of each. For example, most of the institutional players, including the lawyer, the court, and the child protective agency, exhibit a trait that commentators sometimes identify only in the child: a short-term perspective. The child's current risk of harm from abuse or neglect drives the agenda, and concerns about the long-term costs of intervention¹² fade from view. This asymmetry between short-term and long-term perspectives also reflects the reward structure within organizations. Players receive few rewards for succeeding in keeping a family together, but receive an avalanche of condemnation for an effort at reunification that results in harm to the child. In an environment influenced by this asymmetry, consideration of race, culture, and class becomes a luxury that the players cannot afford. The lawyer for the child should dedicate herself to building partnerships that change this reward structure.

¹¹ See *Newmark v. Williams*, 588 A.2d 1108, 1109, 1116 (Del. 1991) (noting, in the context of considering whether the court should require a young child to receive medical care that the parents had rejected, that "the State can intervene in the parent-child relationship where the health and safety of the child and the public at large are in jeopardy"); cf. Peter Margulies, *Children, Parents, and Asylum*, 15 GEO. IMMIGR. L.J. 289, 294-98 (2001) (discussing the legal framework for decisions about medical care for children as a guide to decisions about children's asylum claims where a parent, as in the famous case of Elian Gonzalez, opposed assertion of such a claim); see also Margulies, *The Lawyer as Caregiver*, *supra* note 9, at 1475-76, 1504 (discussing a lawyer's need to both heed a child's voice and preserve a child's ability to reach maturity).

¹² See *Huntington*, *supra* note 2, at 661-62 (discussing risks of foster care, based on studies indicating that children emerging from foster care have higher incidence of Post Traumatic Stress Syndrome and depression, while noting that studies do not control for effects of prior abuse or neglect).

At the same time, the lawyer must appreciate the strengths and limits of local competencies for both children and parents. Children may understand the dynamics of their family life better than the lawyer. They may also suffer, however, from a short-term perspective, underestimating the risks of remaining in a potentially abusive situation because they cannot envision a different reality. Moreover, parents may reveal insight into their own behavior and a commitment to resisting influences that negatively affect their care of the child. Expressing insight on the day of a placement hearing is easier, however, than following through on a sometimes painful process over weeks, months, or years. In assessing the parent's situation, discerning a trend in behavior will usually be more helpful than drawing inferences based on isolated acts. Spotting a trend, however, may also become an exercise in applying stereotypes or jumping to conclusions.

Applying the local competence model, before making a disclosure to a third party that the child does not wish, the lawyer should look to three factors: the likelihood and gravity of future harm, the child's understanding of the consequences, and the availability of superior alternatives to the current placement. With respect to each factor, the attorney should acknowledge the limits of each player's competence, and the possible role of biases based on race, culture, and class.¹³ This kind of reflective inquiry will act as a safeguard against cavalier disregard of the client's wishes and against disclosures that stem from agendas that conflict with the child's.

This article is in three parts. Part I sets out the received wisdom on the lawyer's role in representing children, including the impact of the standards of the bar, the rulings of courts, and the analysis of commentators on the child's decisional capacity and the scope of the lawyer's duty of confidentiality. Part II discusses the local competencies of the various players in the

¹³ See Theresa Hughes, *The Neglect of Children and Culture: Responding to Child Maltreatment with Cultural Competence and a Review of Child Abuse and Culture: Working With Diverse Families*, 44 FAM. CT. REV. 501, 501 (2006) (reviewing LISA ARONSON FONTES, *CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES* (2005)). Viewed more broadly, child welfare law and policy is part of a broader canvas that depicts political, legal, and social efforts to reconcile individuality, culture, and community. Cf. ROSEMARY C. SALOMONE, *VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION* 10–41 (2000) (discussing education).

child welfare arena, including the lawyer, the child welfare agency, and the child. It concludes that flaws in cognitive and institutional dynamics encourage the separation of parents and children. Part III articulates the factors used in a local competency approach to determine the appropriateness of disclosure. To illustrate the contours of the approach, this Part analyzes three examples of possible disclosures: first, a physical altercation between parent and child or apparent recurrence of physical harm to the child; second, an episode of neglect involving leaving a younger child at home alone; and, third, a recurrence of parental substance abuse. This Part also addresses lawyers as mandatory reporters, disclosure to mental health professionals and parents, and the distinctive problems of child clients having children.

I. THE SCOPE OF DISCRETION: CAPACITY, CONFIDENTIALITY,
AND THE LAWYER'S OBJECTIVES

For most lawyers, the obligation to keep confidential the information relating to the case is paramount. The structure of the duty of confidentiality makes secrecy the rule, and disclosure an exception. For lawyers for child-clients, however, the situation is far more complex.¹⁴ Many, perhaps most, children's lawyers have an obligation under state law to advocate for their clients' best interests, which may entail disclosure of information that the client wished to keep confidential. Even when lawyers for children supposedly take direction from the child client, the client's capacity to make decisions on her own behalf may be questionable. Client incapacity tosses discretion back into the lawyer's court. Finally, even when the lawyer takes direction from a competent client, the duty of confidentiality often creates exceptions for disclosing the risk of serious physical harm.

To allow lawyers to act to avoid harm, courts have construed this exception broadly. In the context of child abuse and neglect, the lawyer may encounter possible risks regularly, particularly given children's vulnerability. The result is a framework that, particularly for younger children, gives the attorney substantial discretion to determine when to disclose. Developing best

¹⁴ See 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, 123 (2000).

practices to cabin that discretion is a healthy trend. Before one can formulate best practices, however, a working knowledge of the extent of the lawyer's discretion is crucial. So is an understanding of how the lawyer's objectives, capacity, and confidentiality interact.

A. *The Objectives of the Child's Lawyer*

One initial inquiry is the role of the attorney. Here, attorneys for children are an anomaly in the master narrative of the attorney being directed by the client.¹⁵ Historically, courts and legislatures have believed that minor children, especially younger ones, cannot advocate for themselves or decide about matters relating to their position in a child welfare case that may result in a change in placement or a termination of parental rights. As a result, attorneys have been charged as guardians ad litem with the goal of representing the "best interests" of the child. The two largest jurisdictions, New York and California, still follow this rule for counsel appointed by the court to represent children in abuse and neglect proceedings.¹⁶ Under a best interests approach, the lawyer may advocate for a position different from the one taken by the child, if the lawyer believes that the child's position would lead to an outcome prejudicial to her best interests. Jurisdictions that adopt a best interests approach appear to also give the lawyer authority to make disclosures that serve the child's best interests, even when the child wishes not to make such disclosures.¹⁷

¹⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002) (discussing allocation of responsibilities between lawyer and client).

¹⁶ See *County of L.A. v. Superior Court*, 111 Cal. Rptr. 2d 471, 477 (Cal. Ct. App. 2001); *Akkiko M. v. Superior Court*, 209 Cal. Rptr. 568, 570 (Cal. Ct. App. 1985); *Carballeira v. Shumway*, 273 A.D.2d 753, 754–55, 710 N.Y.S.2d 149, 151–52 (3d Dep't 2000).

¹⁷ See *In re Christina W.*, 639 S.E.2d 770, 775–77 (W. Va. 2006) (discussing duty of guardian ad litem to keep court informed). A recent model statute by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") continues this historical trend by permitting a court to appoint a "best interests attorney" who will take a position consistent with the attorney's view of the child's best interests. See UNIF. REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND CUSTODY PROCEEDINGS ACT § 7 (2006), available at http://www.abanet.org/legalservices/probono/nccusl_act_rep_children.pdf; cf. Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 HAMLIN J. PUB. L. & POL'Y 177, 190–92 (2006) (discussing NCCUSL proposal). But see Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6

Other jurisdictions embody the view, increasingly accepted by scholars and the organized bar, that children, if competent, should have the same authority as adults to make decisions.¹⁸ The traditional lawyer-client approach requires lawyers to conduct a conversation with the child, and to carefully explore the child's reasons and the child's knowledge of the context surrounding the case. A lawyer is also less likely to make a judgment based on racial, socio-economic, or cultural stereotypes. The lawyer can seek to counsel the child.¹⁹ The lawyer, however, must also remain open to being persuaded herself by the child's concrete reasons for a particular decision.²⁰

NEV. L.J. 1385, 1389 (2006) (criticizing the NCCUSL proposal as inconsistent with child clients' autonomy). Even where jurisdictions depart from the best interests approach, courts often either permit or require lawyers to disclose information relating to the child's safety. *See, e.g.*, *Div. of Youth & Family Servs. v. Robert M.*, 788 A.2d 888, 906 (N.J. Super. Ct. App. Div. 2002) (noting that lawyers for children "are obliged to . . . express any concerns regarding the child's safety or well-being").

¹⁸ *See* Emily Buss, "You're My What?": *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1704 (1996) (arguing that lawyers can empower child clients by engaging them in dialogue and subsequently heeding their wishes); Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 *FORDHAM L. REV.* 1281, 1294-95 (1996) (arguing that the traditional role of a lawyer is more consistent with ethical rules and principles than is the guardian ad litem role, in which the lawyer advocates for the child's best interests); Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. REV.* 76, 78, 84-86 (1984) (arguing for age-based test to determine a child client's capacity to direct her lawyer, under which children over age seven should be deemed to possess this capacity); Perlmutter, *supra* note 8, at 587 n.79 (2005) (citing sources arguing that lawyers should give their child clients the same representation that is due an adult client and advocate for their child clients' articulated wishes).

¹⁹ *See* Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOURO L. REV.* 745, 812 (2006).

²⁰ Courts have generally been more reluctant than lawyers and the organized bar to jettison the best-interests advocacy approach. This reluctance may stem from a failure to recognize the costs to autonomy imposed by best-interests advocacy. *See* Spinak, *supra* note 17, at 1388-89. Viewed in a more positive light, judicial reluctance may reflect the view that best-interests advocacy provides the court with more information. *See Christina W.*, 639 S.E.2d at 776 n.16. Even in jurisdictions whose courts apparently expect best-interests advocacy, advocates may view such a role as inappropriate. *See id.* at 773 n.10, 775 (discussing view of child's attorney, who is now a family court judge); Spinak, *supra* note 17, at 1389-91 (outlining views of the author, a law professor who has served as supervisor of the Juvenile Rights Division of New York's Legal Aid Society, a major provider of legal assistance to children).

B. Capacity

The movement by scholars and the organized bar away from “best interests” advocacy has dovetailed with refinements in the working definition of a person’s capacity to decide. The determination of capacity has seen enormous change in recent years. A century ago, capacity was status-based. The legal system viewed whole groups of people as lacking the capacity to decide for themselves or otherwise participate in legal matters. For example, people with mental disabilities were viewed as wholly lacking in capacity.²¹ The system viewed children in a similar light.

Current debate about capacity to decide reflects a consensus that capacity is *not* a global determination, with an all-or-nothing answer, but is instead a more textured, fluid inquiry.²² This view rejects the invidious status-based approaches that have dominated history. Rule 1.14 of the ABA Model Rules of Professional Conduct recognizes that lawyers cannot willy-nilly substitute their own decisions for those of their clients. Even when a client’s ability, because of external or internal factors, is diminished, the rule requires that the lawyer, “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”²³ The ABA also recognizes that, in

²¹ See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (justifying the forced sterilization of a poor and allegedly disabled young woman with Justice Holmes’s infamous aphorism, “[t]hree generations of imbeciles are enough”); see also Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 778–87 (2004) (discussing challenges of interviewing clients who appear to have impairments in capacity); Robert Rubinson, *Construction of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 134–37 (1999) (discussing stereotypes of the elderly); cf. David A. Green, “I’m OK—You’re OK”: *Educating Lawyers to “Maintain a Normal Client-Lawyer Relationship” with a Client with a Mental Disability*, J. LEGAL PROF., 2003-2004, at 65, 74–75 (discussing history of discrimination and paternalism regarding people with mental disabilities); Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 724–26 (2003) (discussing continuing problems with lawyers’ stereotypes about capacity).

²² See BARRY R. FURROW ET AL., *BIOETHICS: HEALTH CARE LAW AND ETHICS* 264–65 (4th ed. 2001) (describing turn from competence to capacity in bioethics decision-making, designed to avoid stigmatizing effects of “all-or-nothing” competency label, and promote more nuanced, pragmatic outcomes).

²³ MODEL RULES OF PROF’L CONDUCT R. 1.14(a) (2002). For example, a client may have significant incapacity issues, yet still have a view worthy of deference from both the lawyer and the court on an issue such as the choice of which parent to live with, when either choice would benefit the child and the choice is reversible. See *In re M.R.*, 638 A.2d 1274, 1277, 1281–85 (N.J. 1994) (holding that a lawyer

interpreting the rule, a lawyer should appreciate that children as young as five or six years of age have opinions that are “entitled to weight” in legal proceedings concerning their custody.²⁴ In issuing specialized standards for lawyers dealing with children, the ABA has recognized that the child’s ability to contribute to legal decisionmaking is “functional, depending upon the particular position and the circumstances prevailing at the time.”²⁵

While noting this obligation of the lawyer to engage with the client, instead of summarily acting on the lawyer’s own view of the client’s best interests, the ABA also recognizes the complex interaction between a client’s expressed wishes and the client’s autonomy. Some commentators have argued that autonomy requires that the lawyer heed the child client’s expressed wishes.²⁶ This view, however, embodies a thin view of autonomy.²⁷ Just as self-government in a republic entails the acceptance of constitutional restraints on the whim of the people or their rulers,²⁸ freedom for individuals involves consideration of the effects of a decision on self and others. Decisions made hastily or under the undue influence of others undermine autonomy. For this reason, the ABA notes that factors like ability to articulate reasons, variability of state of mind,

representing an adult with moderate mental retardation should have advocated for the client’s wish to reside with her father, who was more relaxed in his expectations, instead of her mother, who insisted on more structure).

²⁴ MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 1.

²⁵ Am. Bar Ass’n, *American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases*, 37 FAM. L.Q. 131, 141–44 (2003).

²⁶ See Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 1011–15 (1993) (arguing for expressed wishes test of competence).

²⁷ See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER’S ETHICS* (1998) (outlining richer view of autonomy that recognizes individuals’ bonds to community welfare); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005) (same); cf. Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993) (noting the importance of considering community needs in decisions about client representation).

²⁸ See JON ELSTER, *Social Institutions, in NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 147, 150 (1989) (discussing salutary effects of constitutional provisions that check whim of majority); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 193 (2000) (noting challenge for republics of reconciling “the dilemma of political change with constitutional permanence”); Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988) (arguing that judicial review fosters sober second thoughts that temper hasty reactions to the exigencies of the moment).

understanding of consequences, and consistency of a decision with the client's long-term commitments and values are significant signposts for a lawyer counseling a client of questionable capacity.²⁹

Under Rule 1.14, an evaluation of a child's capacity interacts with the lawyer's role in preventing harm. When capacity is at issue, the lawyer has permission under the rule to prevent a range of harms, including physical and financial damage.³⁰ The lawyer's efforts, however, here should not become a license for the lawyer to second-guess client decisions, or assume control over the client's life, usurping the role of parents, judges, and the state.

Courts have looked at the question of competence in a fashion that gives the attorney even more leeway in the abuse and neglect setting. For example, Massachusetts has cited legal standards and codes that generally expect the lawyer to defer to the wishes of a child who can make a "considered judgment on her own behalf."³¹ When the client cannot make such a judgment, the lawyer should resort to a substituted judgment test, and apply the attorney's "reasonable view" of the client's goals if the client *could* make an "adequately considered" decision.³² For children, a substituted judgment test is more difficult to apply than it would be for an adult who has a track record of commitments, obligations, and purposeful affiliations. Since it is more difficult to apply, the lawyer has greater flexibility to substitute her own preferences. One can read, however, at least one recent court decision as suggesting that the lawyer should strongly considering advocating for the unification of the family if other factors are in equipoise.³³

²⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6; cf. FURROW ET AL., *supra* note 22, at 266–68 (citing Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279 (1977)).

³⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.14(b); cf. Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 577–83 (arguing that lawyers can use persuasion in counseling to help clients appreciate the risks of particular decisions, even though the use of persuasion departs from "neutral" counseling approach that would avoid any influence on the client).

³¹ See *In re Georgette*, 785 N.E.2d 356, 364–65 (Mass. 2003).

³² See *id.* at 366 (citing RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 24 (2000)).

³³ See *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

Courts do not have a magic age at which a child should be considered to be competent, although one court has recognized that capacity might not extend to an 11 year-old with some psychological issues, including Tourettes Syndrome, OCD, and ADHD, who was also found by an expert to be less mature than his age and “easily manipulated by adults.”³⁴ Moreover, many courts say that the lawyer should express the child client’s preferences to the court, even when the lawyer ultimately articulates a different position.³⁵ A court’s view of competency, however, usually assumes that the lawyer will disclose information indicating danger to the child.³⁶

Some courts also say that a child has the right to select her own attorney.³⁷ Courts may allow a child client to retain a new attorney if the relationship with appointed counsel is irretrievably broken.³⁸ In a divorce case, however, the court will also consider whether counsel proposed by the child has inappropriate ties to a parent that will conflict with the lawyer’s duty of loyalty to the child, and will decline to permit such counsel to appear.³⁹ Indeed, in some of the cases mentioning the child’s right to choose counsel, the lawyer rejected by the client took a position that could have exposed the child to physical or psychological harm.⁴⁰

C. Confidentiality

Even when a client has the capacity to direct the representation, a lawyer will have discretion to disclose in particular circumstances suggesting a risk of harm to the child. While the duty of confidentiality requires that the lawyer generally decline to disclose any information relating to the representation of a client,⁴¹ that duty is not absolute. Indeed,

³⁴ See *Carballeira v. Shumway*, 273 A.D.2d 753, 755–56, 710 N.Y.S.2d 149, 152 (3d Dep’t 2000).

³⁵ See *Georgette*, 785 N.E.2d at 365.

³⁶ See *infra* notes 41–52 and accompanying text.

³⁷ See *Sobie*, *supra* note 19, at 770–71.

³⁸ See *Fagnoli v. Faber*, 105 A.D.2d 523, 524–25, 481 N.Y.S.2d 784, 786–87 (3d Dep’t 1984); *cf. In re Elianne M.*, 196 A.D.2d 439, 440, 601 N.Y.S.2d 481, 482 (1st Dep’t 1993) (permitting Law Guardian to withdraw when both Law Guardian and child client agree that representation is no longer productive).

³⁹ See *Fagnoli*, 105 A.D.2d at 524–25, 481 N.Y.S.2d at 786–87.

⁴⁰ See *Albanese v. Lee*, 272 A.D.2d 81, 81, 707 N.Y.S.2d 171, 172 (1st Dep’t 2000).

⁴¹ See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002).

case law suggests that a court may grant the lawyer a great deal of flexibility in making disclosures intended to prevent physical harm. The ubiquity of these concerns in representing children suggest the need, addressed in the following section of this Article, to cabin the lawyer's disclosures through an understanding of best practices.

The organized bar's understanding of confidentiality emerges from Rule 1.6 of the Model Rules of Professional Conduct. Under the ABA Rules of Professional Conduct, a lawyer has discretion to disclose confidential information in order to prevent "reasonably certain" death or substantial bodily harm.⁴² These consequences can include harm to the client herself, as well as to third parties.⁴³

The Model Code of Professional Responsibility, an older codification of lawyer's ethics still followed in many jurisdictions, including New York, also gives the lawyer significant flexibility to disclose. The Code seemingly forbids a lawyer who is not a mandatory reporter from disclosing information to prevent harm to a child whom the lawyer represents, when this information would otherwise constitute a "confidence or secret of . . . [the] client."⁴⁴ Scholars and bar opinions, however, recognize that lawyers in Code jurisdictions can disclose information to prevent a client from being "killed or maimed," including cases of possible suicide and severe child abuse.⁴⁵ Moreover, the Code also provides the lawyer with latitude when the client has a disability or some other impairment of judgment. Under the Code, a lawyer in this situation should "consider all the circumstances then prevailing and act with care to safeguard and advance the interests of his client."⁴⁶ As scholars have long noted, the use of the term "interests" here, as in the phrase "best interests of the

⁴² *Id.* R 1.6(b)(1).

⁴³ *Cf.* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 66(1) (2000) (permitting a lawyer to disclose information "to prevent reasonably certain death or serious bodily harm to a person").

⁴⁴ MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(B)(1) (1980). The lawyer may disclose otherwise confidential information to prevent a client from committing a crime, or to comply with a law, including a statute that makes a lawyer a mandatory reporter of child abuse. *Id.* DR 4-101(C)(2)–(3).

⁴⁵ *See* N.Y. City Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 1997-2 (1997) (discussing the confidentiality of child abuse information).

⁴⁶ *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-12 (1980).

child," suggests that the lawyer may, if necessary, act against the expressed wishes of the client.⁴⁷

Although jurisdictions such as Massachusetts have adopted the traditional advocate model, they also tend to recognize the special fragility of the child with relaxed confidentiality rules. Courts have required that lawyers for children disclose to the court information that would indicate that the child is at risk of substantial harm.⁴⁸ Disclosures of this kind pose a particular tension with a child client's ability to direct the representation. Lawyers will opt for declining to disclose the risk of harm to a competent adult client when the client so directs, out of concern for the client's autonomy. Since society views children as being more fragile and requiring protection until they reach an age when they can make decisions on their own, however, disclosures will be more common in this context.

Courts will also be receptive to lawyers who disclose when either the gravity or probability of harm is significant. For example, in *McClure v. Thompson*,⁴⁹ the court found that a lawyer had acted consistently with professional norms in disclosing that the lawyer's client, an adult criminal defendant, had tied up two persons a couple of weeks before and left them to die.⁵⁰ The lawyer did not ask his client whether these victims were still alive. Moreover, the information available to the lawyer strongly suggested that they were dead. Viewed in this light, the lawyer lacked a reasonable belief that his action was necessary to prevent substantial bodily harm or death. The lawyer's action resembled disclosure of evidence of a past crime with no plausible prospect of prevention or rectification, which the duty of confidentiality clearly forbids.⁵¹ The *McClure* court, however, chose to read the probability requirement out of the rule, and embrace even the scant possibility that the lawyer's

⁴⁷ Moreover, in many Code states, including New York, a lawyer serving pursuant to statute or court appointment as "Law Guardian" for the child has an obligation to argue for the best interests of the child, presumably including disclosures that support those arguments. *See supra* notes 16–17 and accompanying text.

⁴⁸ *See In re Georgette*, 785 N.E.2d 356, 364–65 (Mass. 2003); *Div. of Youth & Family Servs. v. Robert M.*, 788 A.2d 888, 906 (N.J. Super. Ct. App. Div. 2002).

⁴⁹ 323 F.3d 1233 (9th Cir. 2003).

⁵⁰ *See id.* at 1235, 1247.

⁵¹ *See People v. Belge*, 83 Misc. 2d 186, 190, 372 N.Y.S.2d 798, 802 (Onondaga County Ct. 1975).

action could have prevented grave harm.⁵² Courts following this logic in cases involving children will adopt a disjunctive standard, accepting either the probability *or* gravity of harm to a child as a basis for the lawyer's disclosure.⁵³

The result here is that representation of children under a traditional advocacy or best interests model is more of a hybrid than representation of adults.⁵⁴ "Traditional advocacy" for a child will typically allow both a greater attorney role in decisionmaking and broader disclosure than would be the case for other clients. In considering how to use this discretion, however, the attorney must be cognizant of the limitations of her knowledge, and of both the flaws and strengths of other participants in abuse and neglect cases.

II. LOCAL COMPETENCIES OF PLAYERS IN THE CHILD PROTECTION ARENA

As noted above, the model of the child-saver is a tempting trope for the lawyer. A lawyer who feels no pull in this direction may be a pillar of indifference unsuited to representing children. On the other hand, as the wisest judges have reminded us, addressing the issue of a child's placement in an abuse and neglect case requires not merely considering the harm to the child in the current placement, but also examining the available alternatives.⁵⁵ Properly assessing both of these factors requires a comprehensive understanding of the local competencies of the various players.

⁵² *But see* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (discussing application of a probability requirement).

⁵³ The tribunal could reason that the child's inability to protect himself makes grave injury more likely, or could reason in a fashion analogous to the *McClure* court that if injury to a small child was part of a pattern likely to recur, as in the case of repeated excessive corporal punishment, it could also become grave enough over time to constitute a threat of death or substantial bodily harm. This analysis may be less plausible for a child of twelve and older, who may be better able to protect himself. *See* Formal Op. 1997-2, *supra* note 45.

⁵⁴ *Cf.* Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183, 206-10 (2005) (discussing uncertainty within different models of lawyering for children, including client-directed model).

⁵⁵ *See* *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378-79, 820 N.E.2d 840, 852, 787 N.Y.S.2d 196, 208 (2004).

The notion of local competence parallels the rejection of a global view of competence.⁵⁶ As a parent, I am reminded every day that omniscience is in short supply in raising children. The uncertainties of the child protection arena highlight this dearth of easy solutions. A vision of local competencies starts with this premise. Fueled by this assumption, the attorney need not despair. Instead, the lawyer can embrace the plural nature of the possibilities uncovered. Engaging with this plurality of possibilities requires that the lawyer remain open to the unexpected,⁵⁷ including the most unexpected outcome—that the lawyer herself may turn out to be wrong. Engagement of this kind also stresses the need for both immersion in facts “on the ground” and cultivation of long-term perspective.⁵⁸ By appreciating multiple viewpoints,⁵⁹ the lawyer can sidestep the fallacy of omniscience that has clouded child protection efforts.

Any effort to dislodge the assumption of omniscience will of necessity stress the flaws in the respective points of view of the participants in the child protection system. These participants, who include lawyers, child protection agencies, courts, politicians, parents, and children, each have deficits in their understanding and action. These deficits are often cognitive or institutional. In the case of parents, issues of behavior and chemical dependence may interact with histories of victimization, subordination, and abuse. Each participant, however, also has strengths. Since the lawyer's disclosures may skew the case one way or another, understanding both strengths and weaknesses prior to disclosure is a central task for the lawyer pondering whether to disclose information gained from the representation of a child client.

⁵⁶ Cf. Nancy Cook, *Legal Fictions: Clinic Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41, 59 (1994) (discussing importance of narrative in understanding legal phenomena).

⁵⁷ See Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 697 (1994).

⁵⁸ See Susan Bryant, *The Five Habits: Building Cross-Cultural Competencies in Lawyers*, 8 CLINICAL L. REV. 33, 54–55 (2001) (noting the need for lawyers to develop knowledge of practices in different cultures).

⁵⁹ See Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2485–93 (1993) (discussing the importance of addressing multiple perspectives in lawyering).

A. *The Attorney*

Given the focus of this Article, starting with the attorney herself seems appropriate. The attorney's assessment of the child's competence and the appropriateness of disclosure should be tempered by a healthy skepticism about the limits of the attorney's competence. These limitations take three forms: first, cognitive limits on judgment triggered by perceptions of time and emotional salience in the attorney's deliberations; second, organizational pressures on the attorney; and third, gaps created by differences in race, culture, and class.

1. Cognitive Limitations

Let's first consider the role of time and salience in child welfare determinations. Human beings tend to sort both past events and predictions about the future into simple categories. Cognitive psychologists call these categories heuristics.⁶⁰ In many cases, heuristics help human beings see the world in a more efficient way. When more variables intrude, however, heuristics can often distort a person's sense of connections between events. Perceptions of time and emotional salience are central to these distortions.

Professionals, like other people, are prone to a number of flaws in decisionmaking based on the role of time.⁶¹ First, people generally suffer from what cognitive psychologists call "hindsight bias."⁶² People understand this bias, captured in the maxim,

⁶⁰ See Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 19, 20–21 (Thomas Gilovich et al. eds., 2002) (discussing dependence on schemas and short-hand strategies in place of analysis of evidence); see also Thomas Gilovich & Dale Griffin, *Heuristics and Biases: Then and Now, Introduction to HEURISTICS AND BIASES*, *supra*, at 1, 1–7; Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases, and Organizational Behavior*, 63 BROOK. L. REV. 629, 636–38 (1997) (discussing cognitive frames for interpreting events and reaching judgments); Lawrence M. Solan, *Cognitive Foundations of the Impulse to Blame*, 68 BROOK. L. REV. 1003, 1007–09 (2003) (discussing impact of "cognitive scenarios" stemming from intuitions regarding everyday environments).

⁶¹ See Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13, 46 (Cass R. Sunstein ed., 2000) (discussing tendency to discount future costs).

⁶² See Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in HEURISTICS AND BIASES, *supra* note 60, at 120, 134 (discussing tendency of those with knowledge of a given result to "exaggerate the chances that they would have predicted the outcome in advance,"

“Hindsight is 20/20.” Looking back on past events, people generally overestimate the possibility that dire events could be avoided.⁶³ In the child welfare setting, this hindsight bias magnifies the perception that measures taken by government can readily prevent tragedies such as the deaths of young children due to abuse. In reality, preventing such tragedies requires dealing with a large number of variables, and incurring substantial opportunity costs, such as taking children away from a substantial number of parents who may be fit.

Because the tragic deaths of children at the hands of abusive parents or step-parents are so salient and emotionally vivid,⁶⁴ these harms also make an impression on people in a fashion that opportunity costs such as wrongful transfers of custody by the state do not. These costs are borne by the families involved, but not usually experienced by the general population. The systemic nature of these problems eludes sound bites and quick fixes.

Similarly, child welfare cases reflect the workings of “presentism,” or an undue weighing of present harms above harms in the future.⁶⁵ People generally seek to avoid present harms, while underestimating the impact and scope of future harms. While some temporal discounting is rational, studies indicate that people generally discount more heavily than rationality would dictate. In the child welfare context, lawyers and courts tend to focus on preventing the possibility of abuse or neglect to the child. They are crisis-driven in their approach,

since knowledge of the outcome “draws attention to reasons why that outcome was predictable, but not reasons why alternative outcomes were predictable”).

⁶³ See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 61, at 95, 95 (“Events, especially tragedies, often feel as if they were predictable . . . [and] exaggerate[] one’s ability to know the future.”).

⁶⁴ Timur Kuran & Cass R. Sunstein, *Controlling Availability Cascades*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 61, at 374, 374 (noting that the availability heuristic links the “perceived likelihood of any given event . . . [to] the ease with which the occurrence can be brought to mind”); *cf.* Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS AND BIASES, *supra* note 60, at 397, 397–400 (discussing positive interaction between cognition, memory, and emotionally vivid information).

⁶⁵ See Jolls et al., *supra* note 61, at 37–38; David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 443–446 (1997) (arguing that people employ “commitment mechanisms” such as insurance policies to compensate for tendency to discount future costs); Ted O’Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103, 103–106 (1999) (analyzing “present-biased preferences”).

focusing on removing the cause of immediate harm. This approach may magnify the seriousness of immediate harm, and unduly discount the risks of possible remedies in an uncertain world. Players in the system may systematically underestimate the possibility of a bad outcome for a child who ends up separated from both parents and siblings in a poor foster-care placement or a group home. For example, child welfare officials may shuffle a child from one problematic placement to another.⁶⁶ Without a sense of stake or connection, the child may eventually elope, adding to the United States' substantial pool of run-away children.

Cognitive distortions of other kinds can also skew determinations of risk to children. For example, consider the phenomenon of "representativeness."⁶⁷ This heuristic leads people to see superficial similarities between events or things as reflecting greater commonalities. Representativeness helps explain racial profiling—law enforcement authorities looking out for risks of terrorism may focus on suspects who are Muslim, Arab, or South Asian, because the most prominent perpetrators of terrorism, such as the 9/11 hijackers, share these attributes.⁶⁸ In the child welfare context, representativeness can also skew predictions. For example, consider a parent who has hit a child in the past. The child is then removed, but is subsequently returned or visits with the parents. If the child is injured again while in the parent's care, the representativeness heuristic will prod a person examining this sequence of events to regard the parent as presumptively culpable, even if the injury resulted from another cause entirely, such as a fall or a household accident.

A related heuristic is the attribution fallacy. Humans tend to attribute events to intentional action on the part of others.⁶⁹

⁶⁶ Cf. Perlmutter, *supra* note 8, at 604 (noting that the foster child-client "attended over a dozen different secondary schools" in three years).

⁶⁷ See Tversky & Kahneman, *supra* note 60, at 19, 20–23 (discussing human beings' dependence on schemas and short-hand strategies in place of careful analysis of evidence and representativeness).

⁶⁸ See generally Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L. SCH. L. REV. 675 (2002–2003) (discussing the use of racial profiling in response to risks of terrorism); Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621 (2004).

⁶⁹ See Daniel T. Gilbert, *Inferential Correction*, in HEURISTICS AND BIASES, *supra* note 60, at 167, 168–69 (warning against tendency to "attribute an effect to [another person's disposition] when another plausible causal agent (e.g., a

Correspondingly, humans generally discount the occurrence of routine accidents.⁷⁰ This asymmetry skews our perception of risks. For example, we tend to overestimate the risk of being killed in a terrorist attack,⁷¹ while underestimating the risk of death resulting from driving. Attribution can also skew perceptions in the child welfare arena. Once a parent has a “track record” of abuse, players in the system tend to attribute any future harm to the child to intention on the part of the parent, even when the harm is actually inadvertent or arising from an entirely separate cause.⁷² Moreover, humans persevere in these heuristics: Once an impression is formed, dispelling that impression is very difficult.⁷³ This accounts for some of the labeling of parents as “abusers,” even when abusive conduct was isolated or minor in nature.

2. Organizational Factors

Organizational pressures compound this problem with the problem regarding competency of children’s counsel. Children’s lawyers are penalized and rewarded asymmetrically. They are broadly condemned, and sometimes subject to professional sanctions, such as removal at the hands of the court, if they advocate too aggressively for returning a child to a parent.⁷⁴ They rarely receive praise of a public nature, however, when reunification is successful. Other organizational factors also affect the weight that courts give to the position taken by the child’s lawyer. Often lawyers for children, particularly those in organizations such as the Juvenile Rights Division of New York’s Legal Aid Society, have significant resources at their disposal, including social workers. In contrast, many parents’ lawyers are

situational force) is simultaneously present”).

⁷⁰ *Id.* at 169.

⁷¹ See Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 *YALE L.J.* 61, 100 (2002).

⁷² See, e.g., Boaz Keysar & Dale J. Barr, *Self-Anchoring in Conversation: Why Language Users Do Not Do What They “Should,”* in *HEURISTICS AND BIASES*, *supra* note 60, at 150, 164 (discussing difficulty of accurately classifying human intentions).

⁷³ See Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in *HEURISTICS AND BIASES*, *supra* note 60, at 185, 185–87 (discussing difficulty faced by individuals in detecting and correcting biases in cognition and judgment).

⁷⁴ See Martin Guggenheim, *How Children’s Lawyers Serve State Interests*, 6 *NEV. L.J.* 805, 819–21 (2006).

“panel” attorneys who take cases for a fixed low fee, and meet parents on the day of the court hearing.⁷⁵ These lawyers lack the resources to investigate a case, or follow up with officials at the state child welfare agency. As a result, attorneys for parents have less influence on state officials, or on judges, who can dismiss the position taken by parents’ attorneys in many cases as uninformed special pleading. This dynamic tends to magnify the perceived competence of children’s counsel, and impair the functioning of the adversary system in child welfare cases, leading to distorted results that disfavor parents.

Organizational pressures may undermine the lawyer’s competence in another fashion. To assemble a useful database for assessing a child’s expressed preference, the lawyer should spend the time necessary to get to know the child. Time, however, is in short supply for the harried lawyers who represent children. Spending time in conversation, including the small talk and focus on collateral concerns that clients require, is difficult when high caseloads make quick decisions and rapid dispositions crucial. A client may not feel comfortable enough in this setting to give the lawyer facts that the lawyer needs to know. The lawyer may be “flying blind” in the case, and not even know it.⁷⁶

3. Race, Culture, and Class

The lawyer’s competence may also be clouded by disparities in race and class. Lawyers may not understand the culture or means of expression of a child from a different socio-economic or ethnic background.⁷⁷ In some cases, a lawyer may need a translator, which also challenges communication. Lawyers from

⁷⁵ See *id.* at 814–15 (noting that New York State’s legislature recently raised rates for parents’ lawyers to \$75 per hour).

⁷⁶ Cf. Melissa M. Breger, Gina M. Calabrese & Theresa M. Hughes, *Teaching Professionalism in Context: Insights for Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 324–26 (2003) (discussing child clients’ view that their lawyers often do not devote adequate time to their concerns); Perlmutter, *supra* note 8, at 611–12 (describing the efforts of one law school clinic to connect with a juvenile client working through multiple issues); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1078–82 (2003) (offering psychological strategies for problem solving with clients).

⁷⁷ See Appell, *supra* note 8, at 703–04 (discussing racial and social disparities in child welfare law and policy); cf. *Recommendations of the UNLV Conference on Representing Children in Families: Children’s Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 593–94 (2006) [hereinafter *Recommendations*] (noting lawyers’ lack of knowledge of social and cultural milieu of child clients).

a comfortable background may react with dismay to conditions of children that reflect the pressures of poverty rather than concrete danger or parental depravity. Particularly in an era in which the federal government has imposed time limits on receipt of welfare benefits, parents may have a difficult time managing, and money may be tight. Housekeeping may not be a priority, and may be difficult without the support systems, such as cleaning services, that are available to middle-class professionals. Moreover, professionals may not stop to consider how their lives, which may be disorganized or untidy at home, would look to a government investigator charged with finding evidence of unfitness, and concerned with avoiding tomorrow's lurid newspaper headline about harm to children. In addition, the attorney may be unaware of the kinship networks that often collaborate in parenting in African-American families.⁷⁸ Similarly, informal arrangements with neighbors who check in periodically on children at home without close supervision may be more of a norm in poor or working class families.⁷⁹ Parental discipline also varies across cultures, with some cultures favoring practices that many Americans would view as harsh. Lawyers who react adversely to such conditions without ascertaining the extent of permanent harm to the child contribute to biases within the family law system.⁸⁰

B. Courts

Courts share many of the decisional flaws exhibited by attorneys. For example, judges subject to hindsight bias may view harm already sustained by the child as predictable. As a result, they may order a change of placement to minimize the risk of a recurrence.⁸¹ Judges, however, may not be as careful in

⁷⁸ Cf. Susan L. Brooks, *Representing Children in Families*, 6 NEV. L.J. 724, 726–28 (2006) (discussing importance of considering children's needs in family context); Bruce A. Green & Annette R. Appell, *Representing Children in Families—Foreword*, 6 NEV. L.J. 571, 578 (2006) (noting tension that can develop between heeding child's voice and considering interests of child's community).

⁷⁹ See LISA ARONSON FONTES, *CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES* 38 (2005).

⁸⁰ See ROBERTS, *supra* note 2, at 55–59; cf. Twila L. Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. THIRD WORLD L.J. 25, 30–32 (2006) (discussing influence of race on adoption policy).

⁸¹ Cf. Rachlinski, *supra* note 63, at 100–01 (arguing that hindsight bias can trigger socially unproductive efforts to avoid harm that produce substantial opportunity costs).

weighing the more diffuse possibility of harm arising from a change in placement, including disruption to the child and a feeling of rootlessness that may impede the child's ability to cope with the challenges of adolescence.

Judges also have institutional flaws that mirror the asymmetrical incentive structure of lawyers for children. Most state court judges are either elected or appointed for fixed terms. A tragedy that occurs after a judge returns a child to a parent who has been investigated by the child welfare agency will not augur well for the prospects of that jurist remaining on the bench. At the same time, judges get very little credit for shepherding family reunification. While some insightful judges are aware of this asymmetry and seek to rectify it,⁸² old habits are difficult to break.

Compounding this problem is the crushing volume of child welfare cases. Calendaring a motion to return a child to her parents can involve significant delays. In contrast, a child welfare agency usually has authority to summarily remove a child from the home. This asymmetry in remedies makes removal more likely, and the prospects of reunification more remote. In addition, when judges lack the time to look carefully at a particular case, they tend to opt for the risk-averse course of affirming the child welfare agency's removal decision.⁸³

Finally, judges are not necessarily better than attorneys in recognizing and correcting for blind spots based on race, culture, or class. Like children's lawyers, judges tend to be members of comparatively privileged groups. Most are white, and currently reside (whatever their background) in the middle and upper classes of society.⁸⁴ While judges can achieve a significant measure of empathy and insight despite these disparities, cultivating an appreciation for the diverse paths to successful parenting is a perennial challenge.

⁸² See *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378–80, 820 N.E.2d 840, 852, 787 N.Y.S.2d 196, 208 (2004).

⁸³ Cf. GUGGENHEIM, *supra* note 2, at 246 (arguing that “courts lack the expertise, time, and knowledge of human development to make the exquisitely individualized judgments about particular familial relationships” required in child welfare cases).

⁸⁴ See Appell, *supra* note 8, at 720.

C. Child Welfare Agencies

Child welfare agencies suffer from the same decisional deficits exhibited by both attorneys and courts. Moreover, as large bureaucracies, they suffer from distinctive flaws that impede sound approaches to child welfare policy and impair decisions in individual cases. Specifically, child welfare agencies can permit funding sources to drive policy and allow institutional momentum to influence questionable policy moves, such as the classification of domestic violence directed at a child's parent as a basis for removing the child. Child welfare agencies, however, also have learned valuable lessons over the past twenty years. Moreover, child welfare workers often have a commitment to their job and a concern for children that can provide significant benefits.

As scholars have noted, child welfare agencies have permitted their policy decisions to be driven by the availability of funding. Federal funding has been available over the last thirty years for foster care placements, with less funding readily available for family reunification efforts that provide intensive services to parents in need.⁸⁵ Predictably, state and local child welfare agencies have made foster care a priority, and have frequently devoted only half-hearted efforts to family reunification.

Moreover, child welfare agencies can sometimes engage in "group-think," in which rigid rules prevail over the exercise of judgment and proportion. Consider the common practice in New York City in the 1990's of removing children from the care of mothers who they themselves were victims of domestic violence.⁸⁶ As courts held, this monolithic policy did not display the nuanced decision-making⁸⁷ that child welfare determinations require. The

⁸⁵ See GUGGENHEIM, *supra* note 2, at 184–91.

⁸⁶ See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (finding that the New York City child protection agency acted arbitrarily in removing children from home where mother had been subjected to domestic violence, and that such arbitrary removal violated the Due Process Clause), *vacated sub nom. Nicholson v. Scoppetta*, 116 F. App'x 313, 315–16 (2d Cir. 2004) (remanding after the state court construed the New York statute to avoid federal constitutional question); *Scoppetta*, 3 N.Y.3d at 369–72, 820 N.E.2d at 844–45, 787 N.Y.S.2d at 200–01 (holding that the New York Family Court Act requires consideration of multiple factors in decisions about placement of the child, and that a presumption of abuse or neglect based solely on exposure to domestic violence against a parent is impermissible).

⁸⁷ See *Scoppetta*, 3 N.Y.3d at 378–79, 820 N.E.2d at 851–52, 787 N.Y.S.2d at

child welfare agency that implemented this policy did not engage in sufficient dialogue both internally and externally. Moreover, agencies, once they go down the wrong path, may be even more resistant to change than individuals, because of the complications created by size and scale.

Agencies, however, also have the ability to learn. For example, most child welfare agencies have substantially increased their efforts to supplement or replace the custody of biological parents with kinship foster care or adoption, involving a child's relatives. Child welfare agencies are generally aware of the importance of maintaining family and community ties.⁸⁸ The vision of a massive transfer of children from poor minority families to affluent Caucasian homes unduly discounts this awareness and distorts the priorities followed by most child welfare workers. Moreover, a number of states and agencies are now trying a "problem-solving" approach that uses community members to work with parents in solidifying reunification efforts.⁸⁹ In addition, child welfare workers will often know the families in "the system," including the children, better than the lawyer. Most lawyers who represent either children or parents have frequently received useful information from child welfare workers—sometimes admittedly conveyed with a healthy helping of "I told you so"—that has changed their view of a case.

D. Politicians

Politicians proclaim our basic priorities, and determine the funding received by all of the programs that affect children, including public assistance and child protective programs. Ultimately, progress in the area of child welfare depends on political will. Unfortunately, politicians suffer from a familiar collective action dynamic—the race to the bottom—which encourages policymaking that benefits their short-term political fortunes, while arguably benefiting society less in the long run.

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⁸⁸ See Perry, *supra* note 80, at 30 (observing that increased placement of African-American children with relatives has limited the pool of children available for adoption by others).

⁸⁹ See Huntington, *supra* note 2, at 687–88; cf. Michael S. Wald, *Where Do We Go from Here?: Using Knowledge to Improve Policy and Practice for Disconnected Kids*, 79 *TEMPLE L. REV.* 607, 612 (2006) (discussing importance of transforming policies for adolescents in child welfare, in light of disruption and barriers to development caused by foster care).

For example, investing in job programs, education, day care, and drug treatment is arguably more effective in the long term than prisons or foster care. However, politicians have to worry about campaign ads run by their next opponent, which could cast them as being insufficiently concerned with the welfare of children or “soft on crime.” Given these incentives, many politicians find that proclaiming their toughness on crime and child abuse is more expedient.⁹⁰ Developing support for programs that would provide services and employment to communities in need is more difficult politically, as is bolstering the support systems of parents struggling against the odds to care for their children.⁹¹ As a result, these efforts often receive short shrift.

E. Children

A lawyer for children should always assume that she can learn a great deal from interaction with the client, whatever the child's age or level of maturity. However, a lawyer must also appreciate the developmental obstacles to dialogue. Most children, including adolescents, experience particularly large deficits in their understanding of how consequences play out over time. In younger children, this deficit dovetails with a lack of understanding of self and role. For adolescents, this deficit may be exacerbated by a tendency to embrace risky behavior.

A lawyer should acknowledge that these deficits will influence a child's view about the appropriateness of disclosing information, including information revealing the risk of harm to the child. A lawyer, however, should also acknowledge the importance of permitting the child to learn from her own experience, including experiencing the effects of decisions that the lawyer deems unwise. Moreover, even when a child cannot

⁹⁰ Cf. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 759, 762–63 (1999) (noting expansion of prosecutorial power triggered by expansion of federal criminal law); Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1111–12 (2000) (observing that law enforcement agenda, which the author refers to as “governing through crime,” stifles discussion of alternative policy choices). See generally Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449 (2005) (discussing dynamics of prosecution in national security cases).

⁹¹ See GUGGENHEIM, *supra* note 2, at 195 (criticizing recent federal child welfare legislation).

adequately gauge the risk of harm from nondisclosure, the lawyer's understanding of the risk will be enhanced through dialogue with the child.

Cognitive and psycho-social deficits are most obvious in children below the age of ten. At this stage, children often have difficulty in conceptualizing a sense of self.⁹² Younger children typically view their experience as reflecting the influence of authority figures, including parents most prominently, but also surrogate authority figures such as teachers and doctors. While pre-adolescent children may defy authority in specific situations—as in the eight-year-old who protests her early bedtime—this defiance speaks more to an interest in immediate gratification that lingers (often to adulthood) from infancy, rather than to any conceptual challenge to the authority figures' hegemony.⁹³ Moreover, pre-adolescent children experience great difficulty in handling complexity and ambiguity.⁹⁴ For this reason, a child may founder in the nuanced weighing of risks and benefits that a reasoned discussion with her attorney requires.

Recent social scientific evidence has demonstrated that older children, including teenagers, also face significant limitations in cognition and perspective.⁹⁵ For example, adolescents lack impulse control, including the ability to fully assess the consequences of their decisions.⁹⁶ Adolescents also assess risk differently than adults. They are more risk-prone, and more likely to exaggerate the benefits of risky conduct, and underweigh the costs.⁹⁷ Moreover, adolescents have a short-term perspective that is even more pronounced than that of humans,

⁹² See Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 940–41 (1999).

⁹³ See *id.* at 931–32 (describing the child's tendency to define self through conceptual deference to the authority of others).

⁹⁴ *Id.* at 928.

⁹⁵ See Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 811–17 (2005) (analyzing many of the ways that adolescents' brains are not fully developed and how that affects their actions and understanding); see also Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMPLE L. REV. 357, 363–67 (2006) (discussing cognitive and social limits on adolescents' understanding); cf. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (citing research on cognitive limitations and psycho-social tendencies of teenagers to support holding that the Eighth Amendment prohibits imposing the death penalty for a crime that a person committed while a minor).

⁹⁶ Scott & Grisso, *supra* note 95, at 814.

⁹⁷ *Id.* at 815.

generally.⁹⁸ As a result, long-term consequences may not even appear on the adolescent's radar screen.⁹⁹ Difficulties also arise because adolescents—as their parents discover—tend to heavily discount the opinions of adults, and instead embrace the views of their peers.¹⁰⁰ This phenomenon compounds the problem of skewed cognition.

However, lawyers or other professionals should not invoke these concerns as an alibi for failing to engage with children. Even young children may well have insights that will materially advance the lawyer's understanding, and sometimes confound the lawyer's expectations. In addition to opinions, children have factual accounts that may be exceptionally helpful. For example, children know how much immediate physical pain they have experienced from interactions with allegedly unfit parents. They can also describe the level of fear that their parents inspire, and careful interviewing techniques will often facilitate obtaining this information.¹⁰¹ In addition, children can speak to how much fun they have with parents, and whether their parents spend time with them in a loving environment. Moreover, children can speak to other advantages and disadvantages of their current placement, including attachment to siblings, friends, and schoolmates, that a change can disrupt. Children of more advanced age can also discuss whether they are likely to cooperate with a change in placement, or instead, elope.

Insight on certain issues may be particularly difficult for children to attain. For example, children of all ages may lack the ability to estimate the damage over time stemming from chronic but relatively low-level abuse or neglect, which can precipitate trauma that imperils development and impedes the ability to form attachments with others. In addition, children below a certain age may not understand medical or physiological phenomena, such as the role that heavy drinking plays in making driving dangerous. Children who have seen this phenomenon at work with their parents may unduly discount the

⁹⁸ See Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 525 (2003).

⁹⁹ *Id.*

¹⁰⁰ See *Roper*, 543 U.S. at 569.

¹⁰¹ See Dinerstein et al., *supra* note 21, at 786; cf. Cohen & Mandelbaum, *supra* note 95, at 385–93 (discussing interviewing techniques that lawyers can use with adolescent clients).

risk of the behavior recurring. Teenagers will have greater intellectual understanding of these problems, but may have risk-preferences, often built up through interactions with peers, that produce similar discounting in practice.

The contingent and fluid nature of the child client's judgments and observations buttress the need for dialogue. An attorney for a child cannot predict in advance a child's level of insight. The child's age is hardly a comprehensive guide, since environmental and other factors combine to make each child different. Moreover, taking seriously children's normative and factual insights provides an important lesson to the child in how to conduct a dialogue. If we wish children to learn that dialogue is superior to the stark assertion of will, this engagement is crucial.

F. Parents and Competence

Before we become too harsh in our analysis of competence and attorneys for children, let's consider more closely the situation of parents and advocates for parents. Too many parents involved in the child welfare system are, as Martin Guggenheim, Dorothy Roberts, and others have observed, simply people struggling to make due in a system where juggling is a never-ending necessity, and difficult choices are a daily occurrence. These parents know more about their children than lawyers, judges, or social workers ever could. Honest advocates for parents, however, acknowledge that if the system were better at giving these parents the support they need, the child welfare system would still confront hard cases.

Consider the parent in the grip of serious substance abuse, who has no relatives or neighbors with the ability or commitment to assist in caring for her children. The parent committed to getting her life together faces a challenging path. As one thoughtful and committed parent's advocate acknowledges, this process may take a "reasonably long" time.¹⁰² This acknowledgment begs the question of how much time the parent will require in this often-frustrating journey. Since parent's advocates often criticize the federal Adoption and Safe Families Act for setting a one-year deadline, a "reasonably long" period has to be longer than the statutory mandate. A period of two or

¹⁰² See GUGGENHEIM, *supra* note 2, at 209.

three years, however, cannot be sufficient, either; a competent parent's advocate will surely contend that the parent is making progress, but just needs a year or two more. Only a churl would begrudge parents the time they need to "regain their own lives."¹⁰³ Tragically, parents on this path cannot say how long their children must wait for them to complete the process. To avoid holding children hostage to disappointed hopes, a child's lawyer confronting a parent's lack of material progress must consider permanency planning that involves other options.

III. APPLYING THE LOCAL COMPETENCE APPROACH TO CONFIDENTIALITY

The next step after the analysis of local competencies of each of the players in child welfare cases is identifying the factors the lawyer should consider before making a disclosure against the wishes of a child client. Often, this situation will involve parental "back-sliding"—recurrences of behaviors or choices that lead to the child's initial removal from the home. During dialogue with the child, the lawyer should explore three issues: (1) the likelihood and gravity of future harm, (2) the child's understanding of the consequences of the decision, and, (3) the availability of alternatives to the current placement. To maximize the value of this dialogue, the attorney should avoid formulating a rigid conception of the outcome. The lawyer should also acknowledge any "secret hope"¹⁰⁴ she has embraced regarding the child's position. Further, the attorney should recognize the limits on her own local competence. These precautions will help the lawyer shed the pretensions of the child-saver role, and counter the force of stereotypes.

The three factors noted here require a pragmatic inquiry into "facts on the ground." First, consider the likelihood and gravity of future harm. Generally, lawyers deliberating about the propriety of disclosure against a child client's wishes should view this as a conjunctive test, requiring a demonstration of both probability and gravity. For children under ten years of age, the lawyer should set a lower threshold for gravity, to account for the special vulnerability of such clients. In assessing the probability of harm, the lawyer may consider whether the parental back-

¹⁰³ *Id.*

¹⁰⁴ PETERS, *supra* note 8, at 350.

sliding was an isolated problem, unlikely to recur, or part of a pattern that the parent cannot control. The lawyer may wish to consider the parent's adherence to the range of elements in the family reunification plan as part of this query. If, as in the recent movie, "The Pursuit of Happyness,"¹⁰⁵ starring Will Smith, the parent has become homeless, but has a concrete plan for securing gainful employment, housing, or education, the lawyer may decide that disclosure is not necessary. Moreover, the lawyer should generally not disclose collateral harm to the child stemming, for example, from exposure to domestic violence against a parent, if the child objects. Aside from situations involving the risk of grave physical harm to the target of domestic violence, disclosure in such situations will often disrupt the child's life without tangible benefits for the parent.

Second, consider the child's reasoning about the consequences of a decision to disclose. One influential and insightful commentator depicts a clear boundary between second-guessing a child client's decision and assessing a child's reasoning process. This scholar warns about cases where a lawyer "disagrees" with a child's "well-counseled decision."¹⁰⁶ Although a lawyer's disagreement with the child's decision should never be the sole basis for a disclosure over the child's objections, the lawyer should recognize that substance and process will inevitably interact.

Suppose, for example, that the client wishes to take a position that has manifest risks, such as returning to a parent with a history of violence toward the child and refusing to disclose recent episodes of violence. The lawyer should look for a more careful weighing of consequences than if the client preferred placement with her grandmother, who has no such track record. The lawyer should not blithely accept either option, of course, but should conduct a conversation on the risks and benefits of the full array of options before the child. Where risks are manifest with one choice, however, the lawyer should require a higher level of justification. If the child's justification is that his mother will be angry with him if he chooses living with the grandmother, a lawyer can justifiably view this sentiment as

¹⁰⁵ THE PURSUIT OF HAPPYNESS (Columbia Pictures 2006).

¹⁰⁶ See PETERS, *supra* note 8, at 1509.

evidence of parental manipulation cutting against the child's capacity to make a decision on his own.

The lawyer's conversation with the child must also include consideration of the stability of the proposed alternative, as well as a close examination of the risks associated with return to the parent. In assessing whether to make a disclosure that will impede family reunification, the lawyer should examine other placements from the child's point of view. Consider a situation where a placement with a relative of the parent seems to promise more educational benefits for the child, but could also lead to the child's alienation because of the relative's strictness. Here, a child's preference for the less-demanding custodian may be a preference that the lawyer should view as healthy self-knowledge on the child's part, not an indication of lack of capacity.¹⁰⁷ After all, many adults settle for less than their true potential, and society generally allows adults to make these choices. Moreover, particularly if the child is twelve or older, putting the child in a placement that the child does not want may set the stage for the child to sabotage the placement, and set up the child to fail. This is not a recipe for stability, either. If the alternative is not placement with a relative, but placement in foster-care, the calculus shifts even more decisively toward deferring to the child's choice. Here, instability is virtually guaranteed, as a string of foster-care placements loom. A child's wish to return to the parent may be the most sensible choice. Absent evidence of grave abuse or neglect, the lawyer should not second-guess his client and disclose information that will prejudice this prospect.

Having laid out the elements of this pragmatic test for disclosure, more specific examples of the model's application may be helpful. The following subsection delves more deeply into specific scenarios.

A. *Parental Discipline*

In addressing a recurring instance of excessive parental discipline, the attorney should acknowledge that limits on cross-cultural understanding may undermine her ability to fully engage with the child's position. Practices regarding child discipline vary across cultures. In some countries and cultures, corporal punishment is permissible. When a child tells her

¹⁰⁷ See *id.* at 339.

attorney that she does not wish to have the attorney disclose that a parent has engaged in corporal punishment, an attorney should generally respect that wish, after appropriate inquiry about the nature, scope, and duration of the discipline imposed.¹⁰⁸ Even when the punishment seems to the attorney to cross the line, as when a parent punches a child,¹⁰⁹ the attorney needs to fully explore with the child the underlying circumstances that form the basis for the child's reluctance to disclose. For example, suppose that the child is fifteen years old, and the child confides that the punch occurred during an argument about the child's staying out late. The child also tells the lawyer that the behavior was isolated, and both parent and child have a better understanding of the "ground rules" for their relationship. Ordinarily, the lawyer should not disclose in this situation.¹¹⁰

¹⁰⁸ When corporal punishment does not involve a risk of substantial bodily harm, the attorney should not second-guess the child's wish. If the discipline involves such a risk, demonstrated by indicia such as facial or head bruising or broken bones, however, the treatment clearly goes beyond the range of corporal punishment that any culture legitimately views as acceptable. In rare cases, cultural beliefs may place a child at risk for substantial bodily harm, through practices such as female genital cutting. See Peter Margulies, *The Violence of Law and Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 179, 188 (1996). Because such practices can hamper human flourishing over a lifetime, and preclude a child from making her own decisions, and because such practices also subject the child to a higher risk of infection, the lawyer should disclose such information, despite the child's objections.

¹⁰⁹ For an example that raises these issues, see William A. Kell, *Voices Lost and Found: Training Ethical Lawyers for Children*, 73 IND. L.J. 635, 638–39 (1998).

¹¹⁰ For similar reasons, a lawyer would act appropriately in declining to disclose in a case involving possible inappropriate sexual contact between the child and an adult, such as in *In re Christina W.*, 639 S.E.2d 770 (W. Va. 2006). In *Christina W.*, the client was a fifteen-year-old girl who had sought to intervene in an assault on her mom by the mother's boyfriend by threatening to reveal that the boyfriend had "touch[ed]" her. *Id.* at 772. Based on authorities' concern about her exposure to domestic violence, Christina was subsequently removed from the home along with her siblings and placed in a shelter. *Id.*; see *supra* notes 82–84 and accompanying text (discussing problematic nature of removals based on child's exposure to domestic violence). State authorities subsequently approved weekly unsupervised visits between Christina, her mother, and the mother's boy-friend as part of a family reunification plan. After these visits started, Christina told her lawyer that her mother's boyfriend had in fact engaged in inappropriate sexual contact with her. *Christina W.*, 639 S.E.2d at 772–73. She shared this information only after seeking assurances from her lawyer that the lawyer would treat it as confidential. *Id.* at 773. Given the child's age, her reluctance to stay in the shelter, and the apparent absence of physical harm, a traditional lawyer (as opposed to a guardian ad litem) should not disclose in this situation.

On occasion, an attorney must think more strategically—but these considerations should also be part of the attorney-client dialogue. For example, suppose that a child welfare worker has a regularly scheduled home visit next week. If the child's facial bruise is still visible at that time, the worker may take action on her own. The lawyer should discuss this possibility with the child, and discuss the merits of disclosing the incident proactively to the worker. This conversation should include the attorney's assessment of the local competence of the worker, including consideration of how the worker has handled such incidents in the past. It should also include the attorney's assessment of the perspective of the judge. However, in discussing these elements with the child, the attorney should avoid giving in to her own secret hope for disclosure, and making the worker or the judge the "bad guy" in order to accomplish a result that the lawyer believes is appropriate or expedient. The lawyer needs to acknowledge that disclosing now may spare the attorney from recriminations from the worker, the judge, or the attorney's superiors. To demonstrate her own local competence and vindicate the importance of dialogue with the child, the attorney needs to be prepared to accept those risks.

B. Recurrence of Neglect

The next issue concerns whether to disclose new facts that may demonstrate parental neglect. Here, the question should be whether the possible neglect is consistent with a reasonable life-plan formulated by the parent. Suppose, for example, that the parent leaves an eight-year-old child alone for a couple of hours in the afternoon once or twice a week, because the parent is still at work when the child returns home from school, or because the parent is taking classes to obtain a degree. Here, the parent's activities will ultimately provide greater resources and options for the family, and the parent will be an important role model for the child. Suppose further that the parent has asked a neighbor or relative to look in on the child periodically. The lawyer should not disclose such arrangements, although the lawyer may, after consultation with the child, recommend to the parent that she take reasonable efforts to obtain closer supervision of the child.

The lawyer may be more directive with the parent if the child injured herself during the time alone, for example, by scalding herself with hot water. Here, the attorney may also

wish after consultation with the child to ask the parent to investigate after-school programs, community day-care programs, or other alternatives. The attorney, however, should not disclose against the child's wishes.¹¹¹

C. *Recurrence of Parental Substance Abuse*

Finally, consider the issue of a recurrence of parental substance abuse. Suppose that the child visits the parent, and notices drug paraphernalia, or the parent or another adult in the home using drugs. Here, the attorney should carefully lay out both the risks and benefits of disclosure. These could include the suspension of visitation and initiation of proceedings to terminate parental rights. A more positive consequence might be a heightened opportunity for the parent to seek help. Generally, absent more concrete information demonstrating harm to the child, the lawyer should not disclose if the child objects.

The situation would be different if the child discloses that the parent has had a car accident as a result of alcohol abuse. Here, the risk to the child could involve death or substantial bodily harm. Moreover, even an older child may not be able to adequately weigh those risks. Particularly if the parent has had prior accidents due to drinking, the lawyer should disclose.

D. *Disclosure to a Mental Health Professional*

Disclosure to a mental health professional will often be enlightening for an attorney trying to overcome her lack of local competence. Appreciating the importance of collaboration among disciplines in child welfare cases is among the lawyer's most important tasks.¹¹² Disclosure, however, also has risks.

Consulting with a mental health professional on a particularly vexing case provides both a "fresh pair of eyes" and a depth of expertise not possessed by the attorney. In a case involving questions of excessive corporal punishment, for example, a psychologist may be able to clarify for the attorney how much such punishment may damage the development of the

¹¹¹ If the child is injured again because of a situation that appropriate supervision would have prevented, the lawyer should disclose.

¹¹² See, e.g., *Recommendations*, *supra* note 77, at 598 (discussing a lawyer's consultation with mental health professionals); cf. PETERS, *supra* note 8, at 377-81 (discussing importance of lawyer's participation in interdisciplinary meetings concerning the child).

child, even if the risk of serious physical harm is absent. A mental health professional may also be able to identify issues of reliability in the child's account. For example, a child may describe a bruise as the product of an accident. A psychologist with a background in working with children, however, may pick up behavioral cues or inconsistencies in the child's story that suggest that the bruise was really the product of abuse. Similarly, an older child may assert, despite evidence of some abuse, that he can "handle himself" with his possibly abusive parent. The psychologist, however, may more readily identify such claims as a child's denial of the extent of the problem, or cultivation of a "masculine" posture that is stoic in the face of injury.¹¹³ This analysis suggests that the lawyer may be underestimating the risk to the child, and should recalibrate her assessment accordingly.

On the other hand, a lawyer must recognize that bringing in a mental health professional can also have adverse consequences. Mental health professionals have a lessened duty of confidentiality and enhanced mandatory reporting duties. Because of these factors, a mental health professional may create a situation that Rule 1.14 warns against, one which spirals beyond the control of the client or the attorney, leading to punitive or restrictive results such as institutionalization of the child or premature termination of parental rights. Because of this concern, a lawyer seeking advice should only disclose information to a mental health professional who shares the attorney's overall perspective on child welfare matters.

E. Disclosure to a Parent

Disclosure to a parent or the parent's attorney raises even more difficult issues. On the one hand, a lawyer for children should avoid needlessly alienating the child's parent. On the other hand, disclosure to a parent may have significant adverse consequences for the child client.

A child's attorney often can provide continuity and institutional memory for the parent that the parent's own attorney cannot. This is particularly true where the parent's attorney has a high case load and rarely sees the parent between court appearances. When the child client expresses a strong and

¹¹³ I am indebted to Sandra Azar for this insight.

well-reasoned preference for reunification, the child's lawyer can help connect the parent with services that will enhance the parent's credibility with the child welfare agency and the Family Court.

On the other hand, a lawyer who develops a close relationship with the parent risks a dangerous level of role confusion. When a parent exhibits significant back-sliding toward the patterns of abuse and neglect that triggered a change in placement, the attorney for the child may have to disclose this information and argue against restoring custody to the parent.¹¹⁴ An unduly close relationship with the parent may impede performance of this professional duty.¹¹⁵ Moreover, as noted above, an attorney should be wary of disclosing to the parent or the parent's attorney information gained through conversations with the child client. Disclosure of unfavorable information may trigger parental retaliation—emotional or physical—against the child. When the child instructs the lawyer not to discuss a particular incident with the parent, an attorney should typically defer to this instruction.

F. Disclosure and "Children Having Children"

The next question concerns one of the more wrenching concerns faced in the child welfare system—the phenomenon of children in the system having children of their own.¹¹⁶ Here, the lawyer's obligations are to the client. If the client does not wish the attorney to disclose, the attorney should not do so. In some cases, the attorney should counsel the client regarding lifestyle issues that can give rise to liability. For example, drug use accompanying pregnancy can give rise to criminal liability for the expectant parent. In this situation, disclosing facts known to the lawyer through client communication can incriminate the client. In situations where risk is egregious, the attorney should withdraw from the relationship, and consider informing the authorities. Where risk is more manageable, however, the

¹¹⁴ Cf. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *CARDOZO L. REV.* 1747, 1753 (1993) (advocating for considering parents' rights from children's perspective).

¹¹⁵ See Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 *FORDHAM L. REV.* 1819, 1852–53 (1996).

¹¹⁶ See Emily Buss, *The Parental Rights of Minors*, 48 *BUFF. L. REV.* 785, 829–33 (2000) (discussing problems, particularly for younger children who become parents).

attorney should keep the confidence, while seeking to aggressively counsel the expectant parent to seek counseling and other treatment. In some cases the lawyer should also counsel the client to consider the possibility of adoption, or of placement of the child with responsible relatives.

G. *Mandatory Reporting*

Much of the careful deliberation discussed above goes out the window when state law mandates that the lawyer report child abuse. Lawyers should not be mandatory reporters.¹¹⁷ Imposing this role on lawyers frustrates lawyer-client dialogue, exacerbates racial and socio-economic disparities in the child welfare system, and may actually make children less safe.

Mandatory reporting gives the lawyer an alibi for failure to engage in dialogue. The child's reasons for preferring nondisclosure do not matter if the lawyer determines that abuse has taken place. In this fashion, mandatory reporting strengthens the model of the omniscient child-saver that commentators and the organized bar have recently criticized.

Mandatory reporting also exacerbates racial and socio-economic disparities in the child welfare system. Data has shown that teachers, social workers, physicians, and other mandatory reporters are more likely to report suspected abuse by low-income parents and parents of color.¹¹⁸ One reason may be that these parents come into contact with more government service providers who lack a long-term relationship with the family. A long-term relationship might temper the cognitive and organizational dynamics, such as hindsight bias, that prompt reporting in marginal cases.¹¹⁹ Moreover, government and other providers for low-income families lack the financial incentive often possessed by providers for middle or upper-income families to deliberate carefully before reporting.¹²⁰ This asymmetry in incentives disadvantages poor families of color.

¹¹⁷ See Lockie, *supra* note 6, at 125.

¹¹⁸ See ROBERTS, *supra* note 2, at 32–33; Andrew Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward Rebuttable Presumption in Favor of Family Reunification*, 3 CONN. PUB. INT. L.J. 269, 296–97 & n.101 (2004).

¹¹⁹ See *supra* notes 60–62 and accompanying text (discussing lawyers' local competence).

¹²⁰ See *supra* notes 60–62 and accompanying text (suggesting that government child welfare workers may be more likely to realize in hindsight that they should have deliberated more).

Finally, mandatory reporting for children's attorneys may actually lower reporting of significant child abuse. Arguably, at least where the attorney is otherwise bound to follow a client-directed rather than a best interests approach to representation, the attorney would have to disclose her mandatory reporter status to the child at the onset of representation.¹²¹ At least where a child is sufficiently mature to understand the attorney's warning, the warning may deter the child from confiding in the attorney, even in cases of serious abuse. Indeed, the attorney's warning may reinforce warnings from manipulative parents that the child should not betray the family by disclosing abuse.

CONCLUSION

The pitfalls of mandatory reporting illustrate the dangers of one absolutist approach to lawyering for children. An approach barring disclosure unless the child client consents, however, is similarly inadequate. A local competence approach recognizes the failure of absolutes, and the need for grappling with context.

The local competence approach considers the gaps and blind spots that afflict each player in the child welfare system. Once the lawyer appreciates these deficits, she can engage in a more productive dialogue with the child. She can also apply more pragmatic criteria for disclosure, centering on the likelihood and gravity of future harm, the child's understanding of the consequences of the decision, and the availability of alternatives.

A local competence approach will not resolve the dilemmas faced by lawyers for children. Those dilemmas are part and parcel of a difficult job. Focusing on local competence, however, can refine the goals of representation and remedy the lawyer's aspirations to omniscience. Children and families will gain through the lawyer's practice of these virtues.

¹²¹ See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002) (describing standards for lawyer-client communication).