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"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles

Cover Page Footnote

Deputy Director, Juvenile Law Center, B.A., 1982, J.D., 1986, Yale University. My thanks to Eleanor Bush, William Buss, Jacqueline Duby, Theresa Glennon, Kate Greenwood, Kurt Fischer, Susan Mangold, Elaine Meyer Lee, Katherine Meyer Reimer, Robert Schwartz, Judith Silver, Laurence Steinberg, and Merle Weiner for their helpful comments and direction.

“YOU’RE MY WHAT?” THE PROBLEM OF CHILDREN’S MISPERCEPTIONS OF THEIR LAWYERS’ ROLES

*Emily Buss**

A lawyer representing seven-year-old James discussed James’ options with him at considerable length. She explained to him that he had a number of choices about where he would live, some with family, some in foster care, and she took pains to discuss the likely consequences of each of his choices. James participated actively in the conversation, and had no trouble following the substance of the discussion. At the end of their conversation, the lawyer asked James what option he would like her to pursue. His direction to counsel: “I think I’d like to live with you.”¹

INTRODUCTION

ANY thinking lawyer who represents children has struggled with the question of what role to assume in that representation, a struggle that classically comes down to a choice between “best interest” and “expressed interest” representation. Most of us end up passionately committed to one model of representation or another, and try to live out that model in practice. In my practice, I have assumed the expressed interest, or “traditional attorney” role, and have sought to take direction from my clients about which objectives to pursue. In soliciting their direction, I repeatedly explain to my clients that they are in charge, that I will fight for what they want, as long as they tell me what to fight for.

What I have found, however, is that, for many of my clients, even the teenagers among them, the message does not sink in. They continue to assume that I will take whatever action I think is right, and that I stand united with the public child welfare agency in controlling their fate. For many of my clients, despite my frequent protestations to the contrary, I am a part of the all-powerful “you all” that gives and takes away placements, visits, and services as we see fit.

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1. The stories in this Article are based on the actual experiences of lawyers, including myself, who represent children, and of children who have been represented by lawyers. Names have been changed to protect the clients’ privacy.

This role confusion plays out in a number of ways. A client may run away from a foster care placement without ever having called me to explain the problems he is having or to consult about his options. A client may withhold a critical piece of information under the false impression that I will support his position only if I agree with it. A child may simply not commit the time, energy, and heartache required for an effective client-lawyer consultation process.

At the same time, I observe the confusion running the opposite way for clients of lawyers who have assumed the "best interest" approach. There, too, I see children making false assumptions about their lawyers—this time assuming that they have advocates for their expressed positions when they do not; or assuming that information will be kept secret by their lawyers when it will not; or assuming that their lawyers are obligated to take action upon their request when they are not.

Under both of these scenarios of confusion, the role assumed is, at best, meaningless; at worst, fraudulent. Under both scenarios, we lawyers for children have failed to meet our most basic ethical obligations to the children we represent.

In this Article, I will explore the issue of a lawyer's duty to communicate her role to her child client.² I will begin, in part I, by briefly summarizing the role debate among lawyers representing children in dependency and custody proceedings. I will then go on, in part II, to discuss how and why children misperceive their lawyers' roles and, in part III, why this matters in both functional and ethical terms. My extensive discussion of the ethical issues implicated by children's role confusion in part III will rely heavily on an analysis of the Model Rules of Professional Conduct—the most current codification of a lawyer's professional obligations. In part IV, I will consider children's developing capacity for role comprehension, and finally, in part V, I will draw on my own experience and learning theory to suggest that children's role confusion can be reduced by ensuring their presence in court.

I. THE UNDERLYING DISPUTE ABOUT THE ROLE OF A CHILD'S LAWYER

There is much ongoing disagreement among academics and practitioners about the proper role for a lawyer to assume in representing children in abuse and neglect and custody proceedings.³ The debate

2. For purposes of clarity, I will use feminine pronouns in referring to the generic child's lawyer, and masculine pronouns in referring to the generic child throughout this Article.

3. Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. Mich. J.L. Ref. 341, 346-54 (1987) (noting lack of consensus about the role and responsibilities of a child's attorney in abuse and neglect proceedings); Linda D. Elrod, *Counsel for the Child in Custody Disputes: The Time is Now*, 26 Fam. L.Q.

generally divides people into two camps: those favoring a "traditional attorney's" role (representing what the child client wants, or the child's "expressed interests"),⁴ and those favoring a guardian *ad litem's* ("GAL") role (representing what the lawyer determines to be in the child's "best interest").⁵ There are, in addition, many who advo-

53, 57-59 (1992) (discussing the considerable confusion and disagreement about the role a lawyer should assume in representing children in custody matters); Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 Cal. L. Rev. 681, 688-93 (1987) (noting that an absence of definitive articulation of the appropriate role for a child's representative has left each attorney to make her own decision about what role to assume); Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision Making Capacity*, 17 Fam. L.Q. 287, 289-91 (1983) (noting the disagreement among scholars, and lack of guidance in case and statutory law about how to represent children in child protection proceedings); see also Ann M. Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases 2* (1993) (discussing the lack of uniformity in state law about what it means to be appointed to represent a child in the dependency and custody contexts).

This Article focuses on the representation of children in the dependency system and in the related context of termination of parental rights proceedings, and includes discussion of representation in the custody context only to the extent the same analysis applies. In my view, the heart of the argument applies equally well in both contexts. The analysis, however, is most compelling for children in the dependency system who generally come into the legal system from a harsher history, face worse options at the bar of the court, are less likely to share their parents' legal interests, and remain involved in the court process for considerably longer.

In contrast to the disagreement and confusion about the role children's attorneys should assume in dependency and custody proceedings, the role to be assumed by attorneys representing minors in juvenile justice proceedings (namely, the traditional attorney role) has been clearly established and widely accepted. See Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties Standard 3.1* (1979) [hereinafter IJA-ABA Standards]. For a general review of the history and reasoning leading up to the adoption of these standards, see the introduction to the IJA-ABA Standards.

4. See, e.g., Lyon, *supra* note 3, at 693-94 (arguing that an attorney's duty to advocate for her client's wishes is no less significant when that client is a child); Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard*, 16 J. Fam. L. 1, 16-17 (1977-78) (arguing that following a traditional attorney role "can best preserve the principles of minimal outside intervention into the private family sphere while protecting the child's right . . . to participate in legal matters affecting [his] life"); Shannan L. Wilber, *Independent Counsel for Children*, 27 Fam L.Q. 349, 349 (1993) (asserting that counsel should advocate the child client's interest if the child can articulate a preference); see generally Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76, 85-93 (1984) (endorsing child-directed representation where child is mature enough to be "deemed to be an autonomous individual"); see also *Proposed American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* 29 Fam. L.Q. 375, § B-4 (1995) [hereinafter Proposed ABA Standards] (directing the child's attorney to advocate the child's expressed preference unless she believes that the position would be "seriously injurious" to the child's interests).

5. See, e.g., U.S. Dep't of Health and Human Services, *Final Report on the Validation and Effectiveness Study of Legal Representation Through Guardian Ad Litem*, 5-2 (1995) [hereinafter HHS Study] (recommendations of Technical Expert Group consisting of attorneys, lay advocates, judges, and academicians calling for representation of child's best interests); Brian G. Fraser, *Independent Representation for the*

cate lawyers' assuming one form or another of hybrid role—somehow representing both positions to the court, or representing what the child wants unless the child's preference fails to meet some standard of reasonableness, or asking the court to appoint a separate GAL or attorney where client wishes and perceived interests divide.⁶ I consider these hybrid models to be essentially variations on the GAL model, because they all allow for substitution of the lawyer's judgment for that of the client, and a communication of this substituted judgment to the court. A third and smaller camp calls for the child's lawyer to serve as a neutral fact finder presenting all relevant information to the court to ensure a full and comprehensive consideration of the child's actual circumstances.⁷ But, again, because the fact finder's determination of what information is relevant to the court will inevitably be controlled by her sense of the truth, and what should happen in the case, and because this model focuses on the child's interests rather than the child's preferences, I view this model as another version of the GAL/best interest model.

Those who advocate the GAL approach argue that children lack the maturity of judgment, even the cognitive capacity for decision making, necessary to assess appropriately their own interests, particularly their long-term interests.⁸ Even to the extent children's judgment is no worse than that of adults, proponents of the GAL approach would argue that society has a greater obligation to protect children from their own bad judgments. Moreover, children are under tremendous

Abused and Neglected Child: The Guardian Ad Litem, 13 Cal. W. L. Rev. 16, 33-34 (1976) (championing GAL model whose role is to protect the needs and interests of the child). Through the Child Abuse Prevention and Treatment Act ("CAPTA"), Congress has tied certain federal funding to states for child abuse and neglect programs to the provision of "GALs" in all child abuse and neglect proceedings. 42 U.S.C. § 5106a(b)(6) (1988). The role of the GAL is defined in regulations to include "represent[ation] and protect[ion of] the rights and best interests of the child." 45 C.F.R. § 1340.14(g) (1994). Some advocates of the "best interest" model suggest that lay volunteers, rather than attorneys, should fill the GAL role. See Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327 (1993).

6. See, e.g., Ramsey, *supra* note 3, at 307, 336-47 (arguing that attorneys should represent a child's expressed interest where the child possesses the capacity to make a decision which has a reasonable possibility of being correct; otherwise attorneys should represent the child's best interests); Haralambie, *supra* note 3, at 37 (suggesting that a "hybrid role may be the best framework within which to advocate for children"); Duquette & Ramsey, *supra* note 3, at 352-53 (promoting the "flexible client-centered approach to representation" used in the authors' study); Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 Yale L.J. 1126, 1186-87 (1978) (listing principles to guide attorneys in child representation combining elements of both approaches); HHS Study, *supra* note 5, at 5-24, 5-25 (reporting the recommendation of the Technical Expert Group that the child's representative present both positions to the court, where expressed interests and best interests diverge).

7. See, e.g., Fraser, *supra* note 5, at 33-34 (calling for the GAL to serve both as fact finder and as the child's best interest advocate).

8. See Haralambie, *supra* note 3, at 6.

pressure to misidentify and/or misarticulate their own interests—pressure from their families, from the court process, and from the circumstances leading to the court process.⁹ In part due to these pressures, proponents of the GAL model contend that asking children to take positions and make decisions about what should happen to them imposes too heavy a burden on them.¹⁰ And finally, the argument goes, the child protective system and the court process are so underfunded and poorly conducted that, unless the child's attorney ensures that all relevant information is presented to the judge (regardless of whether it serves the child's expressed interests), the judge will be in no position to make an appropriate best interest determination.¹¹

Those who advocate assuming the traditional attorney role, on the other hand, point out that it is the judge, and not the child's lawyer, who is responsible for determining the child's best interests. The judge bases her decision on the evidence elicited through an adver-

9. See Stanley S. Clawar, *Why Children Say What they Say*, Fam. Advoc., Fall 1983, at 25, 25, 45 (stating that among other factors, children are motivated by fear, guilt, desire to protect their parents, parental promises of change, and lack of experience with alternatives in determining what to say to lawyers, judges, and other professionals); Haralambie *supra* note 3, at 6 (noting that children's "wishes may be based on threats, bribes, and other questionable bases"); Nancy W. Perry & Larry L. Teply, *Interviewing, Counseling and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 Creighton L. Rev. 1369, 1375-86 (1984-85) (suggesting that children's communications with their lawyers are hampered by, among other things, their difficulty in dealing with the emotional and social pressures connected with the proceeding, their feelings of guilt, their difficulty understanding and framing responses to lawyers' questions, and their lack of understanding of the court process); Ramsey, *supra* note 3, at 318 (observing that the emotional nature of proceedings may interfere with children's decision-making capacity); see also Joseph Goldstein et al., In the Best Interests of the Child 32-33 (1986) (suggesting that, because " 'children of all ages have a natural tendency to deceive themselves about their motivations . . . [and] feelings, especially where conflicts of loyalty come into question,' " a child's lawyer may need to seek the assistance of a child development expert to distinguish between the child's expressed preferences and real preferences (quoting Anna Freud, *On the Difficulties of Communicating with Children*, in *The Family and the Law* (Joseph Goldstein & J. Katz eds., 1965))).

Children, particularly preadolescents, define their moral universe in large part by determining what pleases the important adults in their lives. See Thomas Lickona, *Raising Good Children: From Birth Through the Teenage Years* 160 (1983). In determining what is "right" to say, therefore, a child will often look to what statements will please his parents, rather than what is objectively true, or what he might independently want a lawyer or judge to hear. See Perry & Teply, *supra*, at 1374-75.

10. See Haralambie, *supra* note 3, at 6 (noting that the GAL role "serves to . . . buffer the child from responsibility for the decision ultimately made"); Mlyniec, *supra* note 4, at 13-14 (observing that asking children to choose between parents creates anxiety, which may, in turn, reduce the accuracy of what is said); Landsman & Minow, *supra* note 6, at 1165 (asserting that "[p]sychology and moral theory both warn the attorney not to force participation on the child" who may have good reasons for choosing not to get directly involved in choosing between parents); see also Gary B. Melton, *Decision Making by Children: Psychological Risks and Benefits*, in *Children's Competence to Consent* 21, 35 (Gary B. Melton et al. eds., 1983) (stating that the necessity of making choices can be anxiety-provoking for children).

11. See Ramsey, *supra* note 3, at 292.

serial process, and the child has a right, along with his parents and the state, to have his position zealously advocated to the judge.¹² Moreover, giving children a voice in the process that will determine their fate empowers children, the disempowered victims of the circumstances (whether abuse, neglect, or parental separation) leading to the court's involvement.¹³ Lawyers who practice under the traditional attorney model are inspired by the considerable wisdom of children,¹⁴ whose judgment about their best interests often proves at least as sound as that of the adults who have substituted their own judgment. They also acknowledge children's power, as the *subjects* of the deci-

12. Guggenheim, *supra* note 4, at 91-92 (noting that a child old enough to engage in meaningful decision making should be afforded the same rights as an adult to direct counsel and to make his views known to the court); *see also* Ramsey, *supra* note 3, at 297-98 (arguing that including the child's view in the adversarial process increases the chance of a good decision, not necessarily because the child's view is correct, but because it requires a response from the other parties).

13. Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 Fordham L. Rev. 1655, 1695 (1996) (suggesting that client empowerment should be a central value of the lawyering role assumed); Haralambie, *supra* note 3, at 33 (noting that a "child may benefit emotionally from being heard"); Mlyniec, *supra* note 4, at 16 (stating that by serving as a traditional attorney, the lawyer for a child in a custody proceeding protects the child's right to participate in matters affecting his life); Ramsey, *supra* note 3, at 295 (arguing that a child has an interest in being respected and included as an autonomous individual); *see also* Janet A. Chaplan, *Youth Perspectives on Lawyers' Ethics: A Report of Seven Interviews* 64 Fordham L. Rev. 1763, 1769 (1996) (quoting a statement by 18-year-old Jonah who grew up in foster care that if foster children were given more chance to make their own decisions, it would "make them feel strong inside, feel like they can be confident").

Some scholars suggest that this emphasis on client empowerment fails to take account of the disempowering, silencing effect the legal process, and particularly legal representation, can have on clients who are (as children are) less powerful than their lawyers. *See, e.g.*, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107, 2111 (1991) (describing how client narratives, and the messages communicated by those narratives, are displaced by "poverty lawyers' traditional interpretive practices of marginalization, subordination, and discipline"); Lucie E. White, *Seeking "... The Faces of otherness. . .": A Response to Professors Sarat, Felstiner and Cahn*, 77 Cornell L. Rev. 1499, 1507 (1992) (noting that "nam[ing] the feelings of [a] less powerful other[] . . . is also to silence her voice"); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 Brook. L. Rev. 861, 861 (1990) [hereinafter White, *The Paradox of Lawyering*] ("Because advocacy is a practice of speaking for—of presuming and thereby prescribing the silence of the other—the advocate . . . inevitably replays the drama of subordination in her own work."). These and other scholars raise important questions about how, under the traditional attorney model, a child's lawyer can effectively give her client her own voice in the legal proceedings. While a thorough consideration of these questions goes beyond the scope of this Article, it is important to note that this criticism of how lawyers represent less powerful clients stresses the need for greater client direction and control. *See, e.g., id.* at 887. Rather than arguing against the traditional attorney model's emphasis on client control, these scholars challenge lawyers assuming the traditional attorney role to be truer to this role.

14. *See* Ramsey, *supra* note 3, at 297; *see also* Douglas J. Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings*, 20 J. Fam. L. 217, 234 (1981-82) (noting that a child's view that an abuse case against a parent should be dismissed may be the "right" decision).

sions being made, to prevent decisions the children oppose from being effectively implemented.¹⁵ Finally, proponents of the traditional attorney model point to lawyers' complete lack of expertise and training in making nonlegal best interest judgments.¹⁶

Few attorneys adopt an absolutist position under either model. For most attorneys, the age of the child (and, for some, the issues at stake) will affect which role is assumed.¹⁷ Those advocating the traditional attorney approach necessarily exclude children too young to speak, and most require that the children be old enough to engage in a rational decision-making process about the particular issue in question.¹⁸ Those advocating the guardian *ad litem* role for most children, generally still concede that at some age—at least in the late teenage years—children should be able to direct their counsel, on some, if not all, issues.¹⁹

15. See Haralambie, *supra* note 3, at 32; Perry & Teply, *supra* note 9, at 1425 (observing that decisions made by children are more likely to be stable and long-lasting).

16. See Guggenheim, *supra* note 4, at 99 (commenting that "it is unlikely that the attorney will be able to resolve effectively the often complex and value-laden issue of what is best for the child"); see also Haralambie, *supra* note 3, at 6, 29 (noting that lawyers gain no special expertise about what is in children's best interest through their legal training or experience).

17. See Haralambie, *supra* note 3, at 31-32 (suggesting that the age of the child should be a relevant factor in determining how involved the child should be in the decision-making process); Lyon, *supra* note 3, at 699 (noting that child's decision-making competency may vary with the issue); Ramsey, *supra* note 3, at 310 (same).

18. See, e.g., Guggenheim, *supra* note 4, at 93-94 (stating that a child must have, not only the linguistic ability to direct his lawyer, but also the capacity to make considered and intelligent choices); Lyon, *supra* note 3, at 693 (advocating individualized assessment of capacity by the judge, focused on whether the child can "comprehend the circumstances of the case, the crucial issues, and the probable consequences of the available positions on those issues"); Wilber, *supra* note 4, at 349 (advocating individualized assessment of capacity by the lawyer, focused on whether the particular child is able to "articulate a reasoned preference").

Many advocates of this model draw the line at seven years of age as a crude measure of decision-making capacity. See Guggenheim, *supra* note 4, at 78 n.4 (suggesting seven as a possible dividing line between those who can direct their counsel and those who cannot); Ramsey, *supra* note 3, at 316, 320 (suggesting rebuttable presumption that children seven and older have the capacity to make reasoned decisions). By seven years of age, most children have acquired the capacity for rational thinking, or, in Piagetian terms, have reached the stage of "concrete operations." See Jean Piaget & Barbel Inhelder, *The Psychology of the Child* 92 (1969).

For children who fall below a designated age or developmental status, most lawyers favoring the traditional attorney model adopt some form of GAL approach. See, e.g., Wilber, *supra* note 4, at 349 (advocating "substituted judgment" approach); Lyon, *supra* note 3, at 701-05 (same). But see Guggenheim, *supra* note 4, at 78 (calling into question whether children who are too young to guide counsel intelligently should be appointed counsel at all).

19. See Donald N. Duquette, *Advocating for the Child in Protection Proceedings: A Handbook for Lawyers and Court Appointed Special Advocates* 32, 150 (1990) (proposing legislation that would require lawyers representing children ages 14 and above to advocate their expressed interests and would direct lawyers for children under 14 to make a case-by-case determination of actual decision-making capacity); cf. Stephen B. Billick, *Developmental Competence*, 14 Bull. Am. Acad. Psychiatry &

While both sides of the debate try to take some account of the child's generalized capacity, they disregard how the lawyer's role is interpreted by the individual child. Missing from the debate, and from the discussion of the role of children's lawyers generally, is any consideration of children's perceptions of their lawyers' roles, and how these perceptions should shape the role assumed.²⁰ Put simply, it is the thesis of this Article that children routinely misperceive their lawyers' roles, and that this misperception not only makes a mockery of the entire role debate, but also raises serious ethical problems for lawyers representing children. In my view, it is this role confusion, as much as anything, that distinguishes representing children from representing adults, and that makes the ethical and coherent representation of children so difficult.

II. CHILDREN'S MISPERCEPTIONS OF THEIR LAWYERS' ROLES

A colleague went to talk to her client at his foster home to discuss what position she should take on his behalf at the next court hearing. She explained to him that she would be seeing the judge soon, and that she wanted to tell the judge how he felt about his placement and whether he wanted to be adopted. After a lengthy discussion, she said her good-byes and joined her husband, who was waiting in the living room to give her a ride home. The client put two and two together and asked, "Is that the judge?"

Imagine how the appointment of counsel appears through the eyes of the child client. In many jurisdictions, children do not go to court for their own dependency or custody cases.²¹ Even where they do attend court regularly, they will rarely be involved in any significant way in the decision to appoint counsel for them. A child's first introduction to his lawyer might be in his home, in a foster home, at school, or

L. 301, 306-07 (1986) (concluding that by age 14, children have developmental competence to take positions on their own behalf in legal proceedings, and suggesting a sliding scale of involvement for children between the ages of seven and 14).

20. One exception is Perry and Teply's article, *supra* note 9, at 1376 (acknowledging children's difficulty understanding their lawyer's role, and the effect this difficulty has on a lawyer's ability to communicate with her child clients); *id.* at 1378 (citing Thomas Grisso & Thomas Lovinguth, *Lawyers and Child Clients: A Call for Research, in The Rights of Children: Legal and Psychological Perspectives* 215, 216 (J. Henning ed., 1982)).

21. A recent survey of children's representatives (attorneys and lay volunteers) in 23 counties throughout the United States revealed that their clients rarely spoke in court. While the survey data does not indicate whether the children, who did not speak, were nevertheless present, it does suggest the limited involvement these children have in their own court proceedings. HHS Study, *supra* note 5, at 5-26. Cf. National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* 33-35 (1995) [hereinafter *NCJFCJ Resource Guidelines*] (listing parents, attorneys, relatives with custodial interests, and court personnel among those "who should always be present" at court hearings; but listing children, for most hearings, only among those "whose presence may also be needed").

at the offices of an involved agency. A strange adult appears (in itself an intimidating experience for a child) and says "Hi, I'm your lawyer."²²

A lawyer is not a normal figure in a child's life. Children are familiar with teachers, with doctors and nurses, and sometimes other professionals, like social workers and therapists, who are involved in their families' lives. But lawyers are not a part of the lexicon. None of their friends have lawyers, at least as far as they know, nor do they think of themselves as in need of lawyers—lawyers are for adults,²³ and particularly for those accused of crimes.²⁴ Moreover, to the extent children have a sense of lawyers, through television, or through the experience of a family member, they know that lawyers are people who go with you to court. They don't just show up at your school.²⁵

22. Many commentators advise children's attorneys to consult with them in a child-friendly setting. See, e.g., Haralambie, *supra* note 3, at 68 (urging lawyers to take their clients for ice cream rather than speaking to them in their offices). While these settings may serve the important function of putting the child at ease, they will, if anything, make it harder for the child to discern the lawyer's role. By distancing the client from the relevant context, the ice cream-buying lawyer may make it harder for the child to understand what *else* (other than treating him to ice cream) the lawyer does on his behalf.

23. See Chaplan, *supra* note 13, at 1771 (discussing an interview with a child who admitted that, when she first met her lawyer at the age of ten, she assumed the lawyer represented her mother).

24. The child's lack of context and relevant knowledge that could be brought to bear in interpreting the appointment of counsel in a dependency or custody proceeding contrasts starkly with the information available to a child appointed counsel in the juvenile justice system. In that system, children are much more aware of the court process, both because they tend to be older, and because they are expected to appear at court proceedings. Moreover, if a child is charged with a crime, and brought before a tribunal that functions, in many respects, like an adult criminal court, see *In re Gault*, 387 U.S. 1 (1967), counsel for the accused is a widely familiar figure whose role is frequently reinforced in movies and on television. And, unlike children's attorneys in custody and dependency proceedings, the attorney's role in the juvenile justice system—that of defending the child client as zealously as if he were an adult—is well defined and understood. See *supra* note 3. This is not to say that children in the delinquency system are never confused about their lawyers' roles. In a study conducted by Thomas Grisso in 1981, children were found to be roughly three times as likely as adults to believe that their lawyer would stop advocating on their behalf if they admitted their guilt to the lawyer. See Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, in *Children's Competence to Consent* 131, 143 (Gary B. Melton et al. eds., 1983).

25. Cf. Perry & Teply, *supra* note 9, at 1375-76 (attributing children's reluctance to communicate effectively with their lawyers, in part, to the fact that children are involuntary participants in the legal process). Children are not only involuntary participants in the judicial system generally, but also in their relationship with their particular lawyer, who is assigned to them, and usually cannot be changed. This contrasts with adults' selection of their lawyers. Even where lawyers are appointed by the court, adults generally can, under certain circumstances, request a different appointment.

Conscientious lawyers for children in the dependency and custody context will try to allay children's confusion by explaining their role.²⁶ But, as I will discuss in part V, learning theory suggests that children are unlikely to learn, through verbal explanations, information that runs counter to, or simply lacks support in, their own experience. Moreover, the lawyer's explanation requires reference to the most painful, private details of the child's life—abuse by a parent, placement in foster care, a parent's mental health or drug problems, or parental discord. If the child learns anything from his lawyer's explanations, it is that the lawyer knows a lot of embarrassing things about his family, and that she has the power to get this information without talking to him first. This realization estranges the child from his lawyer; it reinforces the child's perception that the lawyer operates in an entirely different power class from the child, in pursuit of no one's interests but her own.

To bridge this gap, the conscientious lawyer will describe what she intends to do for the child. If the lawyer assumes the GAL role, she will explain that she is there to help the child and to help the judge determine what is best for the child. This limited explanation may be comforting to some children, but it will not distinguish the lawyer's role in any meaningful way from that of a parent, teacher, doctor, or counselor. Without a good sense of the court process, most children will have no idea what kind of help the GAL is providing.

To communicate the GAL role effectively, the lawyer must convey not only a picture of the court process, but also the message that her role in the process is to tell the judge what she thinks is best for the child. She needs to convey that she will do this even if the child disagrees with the position she is taking before the court, and even if, to be persuasive, she must tell the judge things the child does not wish to share.

Lawyers acting as GALs, however, understandably do not want to begin their relationships with children by warning off their trust. Instead, they seek to foster a trusting relationship with general promises of help, and silence on the details of what that help might actually entail.²⁷ If anything, that quest for trust and the desire to give some

26. Needless to say, if lawyers are not conscientious, the problem of role confusion will be even worse. In its recent study, HHS found that children's representatives had no contact with their clients in 16.4% of the cases where they represented children ages 5-12, and in 11.5% of the cases where they represented teenagers. HHS Study, *supra* note 5, at 5-6; see also Chaplan, *supra* note 13, at 1775-77 (discussing an interview with a young adult who could not remember his dependency lawyer at all, although he remembered, with dissatisfaction, the lawyer who represented him in the juvenile justice system).

27. See Roy T. Stuckey, *Guardians Ad Litem As Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 Fordham L. Rev. 1785, 1792 (1996) (noting that it is "natural and probably necessary for guardians *ad litem* to encourage children to confide in them," but "doubtful . . . that many guardians *ad litem* warn their wards that their secrets might be disclosed") — .

professional shape to an otherwise shapeless role will incline the GAL to oversell the lawyerly part of the role, suggesting that she will be the one who "speaks for" the client in court.²⁸

For very different reasons, the lawyer assuming the traditional lawyer role will have at least as much difficulty communicating her role to her client. An attorney assuming this role will explain that it is her job to make sure that the judge knows what the child thinks about the issues before the court, and that she will press for what the child wants, whether or not she agrees with the child's position. To a younger child, who has little understanding of the court system, particularly as it applies to his situation, the described lawyer-judge conversation may make no sense.²⁹ And although an older child is in a better position to comprehend the lawyer's explanation, his greater sophistication will also inspire a healthy skepticism: He will be likely to disbelieve an adult professional's representation that she will cede control to a child.

Unlike the GAL, whose role comports with children's general sense of how adults act, the traditional attorney assumes a role that is entirely foreign to the child. At least as significant, the traditional attorney model requires the *child*, himself, to assume an unfamiliar role.³⁰

28. Written materials discussing the best interest model demonstrate this phenomena. For example, the HHS Study, *supra* note 5, at 5-1, 5-2, 5-16, advocates the use of a best interest model, but describes representation under this model in the following terms: "The GAL is the child's voice in the court room, giving air to the interests and concerns of the child and protecting the child's rights throughout the court proceedings." *Id.* at 5-16. For another example, see the brochure produced by The National Court Appointed Special Advocate Association (on file with *Fordham Law Review*), which promotes a best interest model of lay representation under the heading "Speak Up for a Child," and under the motto "A Child's Voice in Court."

29. The story of the child who mistook his lawyer's husband, sitting in his living room, for the judge who would hear his case, illustrates the point.

30. Gerald P. Koocher explains that a significant part of children's socialization is learning to do what older, bigger, and more powerful people tell them to do: "Many children quite literally regard their rights as those entitlements that adults permit them to exercise." Gerald P. Koocher, *Children Under the Law: The Paradigm of Consent, in Reforming the Law: Impact of Child Development Research* 3, 10 (Gary B. Melton ed., 1987) (citation omitted). In an earlier publication, Koocher wrote that "[c]hildren are not socialized to think in terms of their own rights. Generally, they are unlikely to perceive themselves as having decision-making authority, regardless of . . . 'objective reality.'" Gerald P. Koocher, *Competence to Consent: Psychotherapy, in Children's Competence to Consent* 111, 112-13 (Gary B. Melton et al. eds., 1983); see Thomas Grisso & Linda Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, Prof. Psychol. 412, 419 (1978) (children under the ages of 12 or 13 have been shown to be significantly more prone to perceive the locus of control over their lives as external, which creates a tendency to resign themselves passively to their fate); Melton, *supra* note 10, at 36 (noting that a sense of autonomy is not easily engendered in children when they have experienced very little opportunity to make choices).

Children's perceptions of their powerlessness are likely to be exacerbated by issues of race and class. In a study of elementary school-aged children who were given the authority to make certain health care decisions for themselves, Charles Lewis found that upper-middle class, white students were more likely to perceive the shift, in

While the traditional attorney does not share the GAL's reluctance to convey the full implications of her role to her client,³¹ words may not be enough to overcome her client's incredulity.³²

Clues the child picks up in the context of his contacts with his lawyer will add to his confusion about the traditional attorney role. Already bewildered about why and how he has a lawyer in the first place, a child is often introduced to his lawyer (or debriefed after speaking to his lawyer) by an adult, such as a foster mother, social worker, therapist, or peer, who, herself, misperceives the lawyer's role. Moreover, no matter how hard a lawyer strives to maintain the traditional attorney-client relationship, there will be times when a child's "childish" behavior forces the lawyer to place her authority as a supervising adult ahead of her deference to client autonomy.³³

The traditional attorney's explanation of her obligation to keep client confidences will also be hard for a child to swallow. While all clients—adults and children alike—may be somewhat skeptical of their attorneys' commitment to keeping secrets,³⁴ children have a

decision-making authority than their low-income, minority counterparts, whose life experiences may have made them less inclined to believe that professed power shifts were, in fact, real. See Charles E. Lewis, *Decision Making Related to Health: When Could/Should Children Act Responsibly?*, in *Children's Competence to Consent* 75, 84 (Gary B. Melton et al. eds., 1983).

Perry and Teply point out that not only do children have difficulty assuming an "active 'client' role" (instead of remaining in the "natural 'child' role") but also their lawyers have difficulty abandoning the "parent" role for that of counselor. Perry & Teply *supra* note 9, at 1379. As a result of these two combined tendencies, children remain passive, "listen[ing] and obey[ing] rather than retaining their independence, viewing the attorney as one who works for them, and considering themselves as 'equals,' as would an adult." *Id.* (footnote omitted).

31. I have found that most (though by no means all) of my clients have welcomed the idea of being "the boss." Moreover, as discussed in part III, below, lawyers assuming the traditional attorney model cannot represent their child clients effectively absent the child's understanding of that role.

32. In my experience, children often signal their incredulity by relating to their lawyers in a manner clearly designed to affect the lawyers' best interest judgments or by explicitly attributing to their lawyers a best interest agenda. On occasion, a child will more directly attempt to call the lawyer's bluff. One ten-year-old client of a colleague, upon being told that he was my colleague's boss, told her to close her eyes while he left the room. He also helped himself to a cup of coffee to try to provoke in her an unlawyerly reaction.

33. On one occasion, a nine-year-old client repeatedly grabbed the steering wheel and gear shift of my car while I was driving. While taking control of my car and getting my client back and buckled in his seat was clearly the right choice for traffic safety, it did not help to instill in him a sense of his decision-making authority in our relationship.

34. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 383 (1989) (citing a study suggesting that even clients who believe that their lawyers are obligated to keep their confidences frequently disbelieve that the obligation will be fulfilled in practice); cf. Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 Geo. L.J. 1015 (1981) (discussing unacknowledged prevalence of distrust between clients and their lawyers and the failure of professional standards to address the problem).

strong foundation in experience for their skepticism: In general, confidentiality protections apply to everyone but them. The records of their school performance, mental health evaluations, and medical examinations are all routinely shared with their parents, who are free to disseminate the information as they please.³⁵ More specifically, children who have told secrets to therapists, doctors, or teachers about parental abuse and neglect have often already seen those secrets divulged, first to the protective service agency (through mandatory reporting mechanisms) and then to the court and the very people they "betrayed."³⁶ Finally, their very introduction to their lawyers, who come armed with considerable "secret" information, alerts children to the lawyers' willingness and ability to access and divulge information without their knowledge or consent.

Moreover, for children whose lives are entrenched in the child welfare system, convincing them of the independence of their lawyer's role—whether as a GAL or a traditional attorney—is extremely difficult. To do so, the lawyer must overcome children's assumption that any strange adult who appears to discuss child welfare matters is just a part of that system. I have had many clients refer to the child welfare agency and myself as "you all," despite frequent explanations, and actions, making it clear that we had distinct roles, and that I would oppose the agency's action whenever so directed by my clients. In the starkest incident of this nature, a nine-year-old client once asked me, "When are you all going to let my mother out of jail?"

Taken together, the lack of context and relevant experience with the dependency or custody court process and lawyers in that process, the misinformation provided by other participants in the system, the tremendous power disparity between adults and children, and the invasion of privacy inherent in the lawyer's appointment and knowledge of the case, all serve to confuse the child about the lawyer's role, particularly the traditional attorney role. While the GAL's role is more comprehensible in that it more closely parallels other adult roles known to children, its distinction from these other "helping adult" roles will only be clear to the child client if he has a basic sense of the court process and, more important, understands how "helping" plays out in the lawyer-client context.

35. See discussion *infra* at notes 95-98 and accompanying text.

36. Sandra, one of the young adults interviewed by Janet Chaplan, explains: I felt that I wanted to tell my lawyer certain stuff . . . but I just felt that I would get in trouble, you know. Maybe that's just being in the system . . . someone [the lawyer] says "I'm not going to tell anyone" but you still have that feeling, because your trust has been broken so much before . . .

Chaplan, *supra* note 13, at 1771.

III. THE IMPORTANCE OF CORRECT PERCEPTIONS

So why does this matter? Who cares how well a child understands his lawyer's role, so long as the lawyer does her job?

A. *Effective Representation*

For attorneys assuming the traditional attorney role, there are strong pragmatic reasons for ensuring that the child understands the role. Without that understanding, a traditional attorney cannot effectively represent her client. Unless the child client understands that his lawyer will zealously advocate his positions, he will have no incentive to invest the time in client-lawyer consultations necessary for good, informed decision making, let alone the incentive to turn to his lawyer for advice, including advice involving confidential matters.³⁷ And in order to empower the child client—again, one of the objectives of this model of representation—surely the child must understand what the model is, for no child can be said to be empowered if he does not know what power he has.

But for all the same pragmatic reasons, a GAL's ability to identify and advocate a client's best interests may be enhanced by cultivating a child's misperception that the GAL is functioning more like a traditional attorney. A child may be more candid and show a greater commitment to and trust in the client-lawyer relationship if he does not understand that the GAL may take positions opposed to those of the child, and may use statements the child has made, or other confidential information shared, against the child's view of his interests. Indeed, as I noted in my discussion of the causes of children's misperceptions, the potential value to the GAL of her client's misperceiving the GAL's loyalties creates a motive for encouraging that misperception.

1. Fostering the Client-Lawyer Relationship

The role debate concerning the representation of children often seems to rest on an assumption that "what a child wants" (and what he knows) is a prepackaged set of information ready to be delivered to whomever asks (so long as the asker uses age-appropriate language in a child-friendly setting). In fact, however, the shape and size of the

37. See Grisso, *supra* note 24, at 142 (noting that juveniles' attitudes and expectations about their lawyers may influence the degree to which children will avail themselves of the protections and advice lawyers can provide); Perry & Teply, *supra* note 9, at 1379 (stating that where a child fails to retain his independence in his relationship with his lawyer, the child will not be motivated to participate, and the lawyer will make bad, lawyer-driven decisions); see also Kurt W. Fischer & Helen H. Hand et al., *Putting the Child Into Socialization: The Development of Social Categories in Preschool Children*, in 5 *Current Topics in Early Childhood Education* 27 (Lilian G. Katz et al. eds., 1984) (noting that "[w]ithout an understanding of social categories and rules, children cannot act competently as members of their society").

package delivered, not to mention how frequently and aggressively the child will make deliveries, will be heavily influenced by the child's perception of who is asking, and what that person intends to do with the goods.

As with adults, a child's willingness to develop a relationship and share information within that relationship will depend largely on his understanding of the relationship and how the information will be used. As adults, we develop very different and distinct relationships with our grocer, our close friends, our therapist, and our divorce attorney. Our sense of these relationships determines how much time we spend in each, under what circumstances. Similarly, our sense of the relationships will dictate the scope of our conversations. That we do not share much information with the grocer, or focus only on particular family members during therapy, does not mean that we are lying to these questioners. We are simply choosing to limit the information we share to fit the relationship. Conversely, we may choose to be particularly expansive with our divorce attorney about spousal wrongdoing, giving details we would not even share with our close friends, in hopes of achieving a desired outcome in a custody proceeding.

Children, too, assess their relationships when determining what they want to say, when, and to whom about matters close to their hearts. If a child understands nothing about his lawyer to distinguish her from the grocer, he will be, most appropriately and understandably, reticent. He will want to put a good face on a bad situation, and get out of the conversation as quickly as possible. If, as is common, the child confuses his lawyer with the agency responsible for separating him from his family or sending his mother to jail, he will likely choose to emphasize information that will change those outcomes (such as information about the good things his mother does), or he will focus his discussion on important matters he understands to be within the lawyer's expertise. ("When are you all going to let my mother out of jail?")

If the child client understands (rightly or wrongly) that his lawyer's role is to represent his best interests as the lawyer perceives them, he may choose to be quite strategic about when he speaks to his lawyer and what information he shares, in an attempt to shape his lawyer's view to fit his own view of his best interests.³⁸ Alternatively, he may

38. For example, teenage clients who have had considerable trouble in their living situations or school programs often present a rosy picture of their circumstances to their lawyers in the belief that they will increase the lawyers' commitment to gaining them privileges (such as a less restrictive living environment or an opportunity to participate in desired a program) if they do not mention the problems they have been having. They choose to withhold information about their dispute with fellow residents or failing grades, not because they care, generally, about keeping the information secret, but because they think their lawyers will judge their interests differently if they learn this information. Neil, one of the young adults interviewed by Chaplan, corroborates children's tendency to withhold information strategically, suggesting that

deliberately "tell all" in the hope that his lawyer will figure out how to rescue him from a terrible situation he has lost the power or desire to control.³⁹ In the absence of that desire for rescue, he may simply seek to have as little as possible to do with his lawyer, out of a view that he has nothing to gain from the relationship.⁴⁰

If, on the other hand, the child understands (again, rightly or wrongly) that the lawyer is acting in the traditional attorney role, he may choose to be considerably more candid, and less strategic, in the hope that the lawyer will assist him in developing a strategy, and with the understanding that the lawyer will not use any of the information he provides in a manner contrary to his stated interests.⁴¹ He will be more likely to invest time and attention in the client-lawyer relationship, for he will see a connection between his investment and his desired results. A child's perception of his lawyer as a powerful ally will also inspire him to seek out his counsel for advice about important matters as they arise, to share new information, or to raise new concerns, rather than simply responding passively to his lawyer's inquiries.

2. Keeping Secrets

An important piece of the child's assessment of context is his understanding of how much control he will have over information once he shares it with his lawyer.⁴² Children involved in dependency and cus-

children who understand that their lawyers will report abuse and neglect will take this information into account in deciding what to tell their lawyers. *See* Chaplan, *supra* note 13, at 1773.

39. Jonah, also interviewed by Chaplan, suggests that when a child demonstrates his trust in his lawyer by confiding in him about a bad situation, he is signaling that he wants help escaping the situation. *See id.* at 1768-69.

40. In my observation, it is not uncommon for children to refuse to speak to their lawyers at all. And in my own experience, I have often struggled to undo the effects of caseworkers' berating commands to children to "talk to your lawyer, because she came all this way, and its her job to decide what you need."

41. Several years ago, I was appointed to represent a 12-year-old girl who was struggling with what to tell me about her long history of sexual abuse by her father. While, clearly, part of her concern was a straightforward confidentiality concern (would I keep what she told me a secret?), at least as big a concern was whether I would use the information she told me to seek objectives that she favored. Her biggest fear was that I would use the horrifying and extensive details of her history to argue that she should be placed in foster care where she had been badly mistreated in the past. Only after I assured her that I would press for her placement with a school employee (which required me to obtain a court order against the state agency's wishes) did she agree to share the history with me.

42. Children's concerns about keeping secrets, discussed in this section, can be distinguished from concerns about how information will be used as discussed in the previous section. *See supra* section III.A.1. As stated above, children may avoid sharing information, even information they do not consider secret, for fear that the lawyer will use the information to achieve ends that they oppose. Conversely, children will sometimes insist on keeping secrets (out of, for example, an interest in protecting the honor, privacy, or liberty of a family member) even if they would otherwise want the information to be used to help them. While the previous section focuses on the

tody proceedings are often guarding many relevant secrets—secrets about how their parents⁴³ have behaved (Did they beat their children? How often? Are they still drinking? Do they really use their income for food?), how they feel about their parents (Do they trust them? Fear them? Want to live with them? To visit them?), and why they want what they want out of the court process (Do they want to live with their grandmother because their mother is abusive? In hopes of seeing their father? Because the grandmother has threatened them?). They may also be guarding personal secrets—such as secrets about their sexual or drug history—against discovery by their parents or the court.

Children's reasons for keeping secrets relevant to legal proceedings differ somewhat from adults'. Unlike adults, who tend to be concerned with revealing information that might implicate themselves in wrongdoing, children are more often concerned with keeping secrets to protect *others* (such as parents).⁴⁴ This is particularly true in the context of abuse and neglect proceedings, where the focus is on the adults' behavior. In addition to fearing the legal consequences of the potential revelation (such as the arrest of their parents, their placement in foster care or their separation from siblings), children fear the emotional consequences as well. They fear that they may disappoint, anger, or lose the love of the most important people in their lives.⁴⁵

While children's reasons for secrecy may differ from adults', the value they attach to preserving their secrets is nevertheless strong. Their willingness to speak candidly to their lawyers about the matters in question will therefore be affected by their sense of whether secrets will be kept.⁴⁶ When a child is convinced (rightly or wrongly) that his secrets are safe with his lawyer, he is likely to share information more candidly, and this greater candor, in turn, will enhance his lawyer's ability to assess the merits of his case, provide good legal advice, and

broader interest a child has in controlling the actions a lawyer takes on his behalf, this section focuses on the more narrow interest of preventing publication of information. As I will discuss in section III.B.1.b.i.(f), below, both of these concerns are protected when confidentiality rules apply.

43. For the sake of simplicity, this Article refers only to parents, rather than to other caregivers. The discussion applies equally well to any caregivers with whom the child has a significant relationship, and whose conduct might be at issue in a dependency or custody proceeding.

44. This distinction, while real, can easily be overstated. Adults, too, sometimes keep secrets to protect others, and children, particularly in the delinquency setting, are often guarding secrets about their own misdeeds.

45. See Clawar, *supra* note 9, at 25.

46. See, e.g., Chaplan, *supra* note 13, at 1780 (describing the view of one of the youths interviewed that what a child tells his lawyer will be affected by whether the lawyer will share information with others). While the connection between the lawyer's commitment to keeping confidences and the client's willingness to share confidences with his lawyer serves as the primary justification for the attorney-client privilege and other confidentiality protections, some commentators have questioned the strength of the connection. See *infra* note 85.

advocate effectively on his behalf. On the other hand, when the child client believes (rightly or wrongly) that his lawyer is prepared to share his secrets at will, the child may take care to reveal only information he is willing to share with the world at large.

A lawyer is likely to get different information from her client about events and about the client's viewpoints depending upon the child's perceptions of his lawyer's role. And the more fully and freely the information flows, the better the lawyer can advocate under either model. An attorney assuming the traditional role cannot do her job at all if she does not get an accurate picture of what her client really wants. Similarly, an attorney assuming the GAL role can do a better job of assessing and advocating the child's best interests with full and candid information from her client. If our sole focus is on lawyer effectiveness, we might advise the traditional attorney to take pains to communicate her role, and the GAL to leave much unsaid. As I will discuss in the next section, however, ethical principles counsel against the GAL's concealing her role.

B. *Ethical Representation*

For the lawyer serving in the traditional attorney role, the interests in accuracy and ethics merge. Unless a child client understands that his lawyer is serving as his spokesperson in court and is duty bound to keep client confidences,⁴⁷ the child may not share the information the lawyer needs to advocate his *true* wishes zealously.⁴⁸ Under this model, the attorney's ethical obligation is to represent the client's true viewpoint well and to take her direction from the client. The ethical problem presented to the lawyer assuming the traditional role, therefore, is determining how to communicate her role effectively to the client so that the client understands, and can benefit from, the relationship.

But for the attorney serving as a GAL, the interests in accuracy and ethics threaten to diverge. If a child client understands the GAL role—which includes a willingness to advocate a position different from her client's and to disclose confidences if perceived to be in the child's interest⁴⁹—the child may seek to withhold information, or even misrepresent information to his lawyer. Although misleading the client into misunderstanding (or exploiting the child's misconceptions of) the lawyer's role may facilitate good decision making about and advocacy of the child's best interests by the lawyer, it raises seri-

47. For a discussion of a lawyer's confidentiality obligations under the traditional attorney model, see *infra* section III.B.1.a.iii.

48. See Goldstein et al., *supra* note 9, at 32-33 (discussing the distinction between "real preferences" and "expressed preferences").

49. For a discussion of a lawyer's confidentiality obligations under the GAL model, see *infra* sections III.B.1.b.i.(f), III.B.1.b.ii.(d).

ous ethical problems. Lawyers who assume the GAL model may be forced, therefore, to choose between honesty and effectiveness.

In my view, under either model, a lawyer is ethically compelled to put honesty before effectiveness. As I will discuss at the end of this part,⁵⁰ a broader view of what makes a GAL effective suggests that honesty and effectiveness will not always be in tension under this model. But I do not premise my conclusion about what is ethically required on this opportunity to downplay the conflict. Rather, my conclusion is based on a conviction, borne of experience, that honesty is the ethical minimum that we lawyers owe to other parties in our professional relationships, particularly to those, such as children, from whom we demand involuntary participation in those relationships. We owe our greatest duty of honesty to those we force to act and speak in reliance upon their perceptions of who we are.

The importance of lawyers dealing honestly with children is in no way lessened by their diminished decision-making capacity. Indeed, the very limits of children's understanding, and the limits on their ability to take action independent of the lawyer-client relationship, elevate the importance of honest dealings and fair play within the relationship.

In support of my thesis, I turn to the Model Rules of Professional Conduct.⁵¹ The Rules reflect current consensus,⁵² grounded in a long historical tradition, on matters of legal ethics applicable to the full range of a lawyer's professional relationships. As such, they offer a set of principles against which to test my contention that a lawyer has an ethical obligation to ensure that her role is understood by her child client, regardless of which role is assumed. After a brief consideration of the Rules' specific treatment of the representation of children, I will go on to consider what the broader structure of the Rules tells us about the importance of role understanding under both models of representation.

50. See *infra* text accompanying notes 152-155.

51. Model Rules of Professional Conduct (1983) [hereinafter Model Rules].

52. While the Model Rules have been adopted, as of 1994, in 37 states, the Model Code of Professional Responsibility (1981) [hereinafter Model Code] still governs legal conduct in a significant minority of states. See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § AP4:107, at 1269-70 (2d ed. 1990). Because of the Model Rules' preeminence today, and the intention of the Rules' drafters to give clearer guidance than that provided by the Model Code, my discussion of the specific principles governing the representation of children, and the general principles applying to all lawyers, will focus on the Rules, and will address the Code only to the extent it suggests an additional or significantly different approach to the problems at issue. See 1 *id.* at xlvi (describing the Rules as the "new center of gravity of the law of lawyering").

1. Seeking Guidance from the Rules of Professional Conduct

The Model Rules of Professional Conduct do not give special attention to the representation of children,⁵³ but rather include that representation within their discussion of the representation of disabled clients. Rule 1.14 directs:

When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.⁵⁴

The Rule goes on to direct that an attorney should seek appointment of a separate guardian, or take "other protective action . . . only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."⁵⁵

For attorneys seeking guidance about what role to assume in representing children, Rule 1.14 raises more questions than it answers: What is an "adequately considered decision"? When and how is a

53. Two sets of standards more specifically addressing the representation of children, and particularly children who are the subjects of dependency proceedings, have also been proposed. The first of these, the IJA-ABA Juvenile Justice Standards, included a section on the representation of children in child protective proceedings, which was never adopted. See IJA-ABA Standards, *supra* note 3, Standard 3.1(b)(ii)[b] & [c]. The second of these standards, the Proposed American Bar Association Standards of Practice for Representing a Child in Abuse and Neglect Cases, were published in Volume twenty-nine of the Family Law Quarterly and were adopted by the ABA in February, 1996. See Proposed American Bar Association Standards of Practice for Representing a Child in Abuse and Neglect Cases, 29 Fam. L.Q. 375 (1995). These ABA standards focus more narrowly on the question of what role should be assumed by the child's lawyer, but do not address the lawyer's obligation to communicate the role to the child. I will therefore focus my attention on the Rules, which address lawyers' ethical obligations more broadly.

54. Model Rules, *supra* note 51, Rule 1.14(a).

55. *Id.* Rule 1.14(b). The Model Code addresses representation of disabled clients in EC 7-12:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

Model Code, *supra* note 52, EC 7-12.

child's decision-making capacity "impaired" by minority? When is a normal client-lawyer relationship "reasonably possible"? What does it mean for a child "adequately to act in his own interest"? How and by whom should his interests be measured? And what is the relationship between the client's ability to act in his own interest, and the lawyer's ability to maintain a normal client-lawyer relationship?

In answering these questions, each lawyer will bring her own predilections to bear—predilections about children's needs and abilities, about the legal process, and about the lawyer's place in the process. And it is these predilections, rather than the Rule itself, that will determine what model of representation the lawyer will assume.⁵⁶ A lawyer predisposed to depart from the normal client-lawyer relationship in the representation of children will conclude that the differences in children's developmental and life experience make such a relationship impossible. A lawyer predisposed, on the other hand, to maintain the normal client-lawyer relationship in her representation of children will conclude that, despite some differences in children's development and experience, the relationship can nevertheless reasonably be maintained. Similarly, a lawyer predisposed to depart from the normal client-lawyer relationship will judge a child's ability to act in his own interest by assessing the quality of the decisions the child makes; whereas a lawyer predisposed to maintain the normal client-lawyer relationship will equate a child's ability to act in his own interest with an ability to engage in the process and to articulate *some* view of his own interests.

While Rule 1.14 does not tell a lawyer which role to assume, it does suggest a framework for analyzing a lawyer's ethical duties once a role is chosen. The Rule focuses the inquiry on the nature of the relationship between the lawyer and the child, and it is from this relationship that a lawyer's ethical obligations flow. Once the nature of the lawyer-child relationship is identified—whether it be the relationship created under the traditional attorney model or the GAL model—we can turn to the full body of the Rules to determine what ethical obligations are associated with that relationship. In assessing a lawyer's ethical obligation to communicate her role to her child client under each model, I will therefore begin by examining that model's interpretation of the relationship.

a. *Ethical Obligations under the Traditional Attorney Model*

i. *Defining the Relationship*

In essence, the assumption of the traditional attorney role reflects a lawyer's determination that maintaining a normal client-lawyer rela-

56. See Haralambie, *supra* note 3, at 25-26 (concluding that because Rule 1.14 provides no real guidance to lawyers about how to represent children, lawyers are left to establish their own subjective criteria).

tionship is "reasonably possible" with the particular client in question.⁵⁷ While the language, "reasonably possible" suggests that there are limits to when such a relationship should and can be maintained (limits a GAL would construe more broadly than a traditional attorney⁵⁸), the phrase also invites accommodation within those limits to compensate for the impairment of minority. Where accommodations can be made reasonably, Rule 1.14 directs us to make them where needed to maintain a normal client-lawyer relationship. Paradoxically, it is the attorney's obligation to depart from her traditional activities to the extent necessary to create and maintain the normal relationship. While somewhat artificial, the distinction between the attorney's *actions* and the client-lawyer *relationship* is a useful one: Lawyers can and should act very differently from the norm of lawyering where necessary to establish the normal relationship with their clients.

This emphasis on relationships, as opposed to actions, is consistent with the general tenor of the Rules, which call for lawyer flexibility and responsiveness to ensure meaningful client participation in the decision-making process.⁵⁹ Read in this spirit, the phrase "as far as reasonably possible" directs lawyers to make "reasonably possible" accommodations of action to normalize the client-lawyer relationship.⁶⁰ So long as an accommodation can be said to enhance rather than displace the normal client-lawyer relationship, it can and should be embraced by a child's attorney assuming the traditional role.

57. Model Rules, *supra* note 51, Rule 1.14(a).

58. Under the traditional attorney model, the only circumstances under which a normal client-lawyer relationship would be deemed to be impossible would be where a child is entirely incapable of engaging in communication or rational decision making. See *supra* note 17 and accompanying text.

59. See, e.g., Model Rules, *supra* note 51, Rule 1.4(b) (requiring communication of information adequate to ensure informed client decision making); 1 Hazard & Hodes, *supra* note 52, § 1.4:201, at 85 (noting that the communication required by the Rules necessarily depends on the context of representation and the parties involved); cf. Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 Cath. U. L. Rev. 441, 475-76 (1990) (arguing that basing a determination about what information should be shared with the client on an assessment of what the client would consider relevant to his decision making rather than on a rigid means/ends dichotomy "helps to assure that the lawyer treats her client as another human being engaged in a cooperative endeavor . . . rather than simply as a means by which to exercise her professional skill").

60. Another reading of the "reasonably possible" language would be that, rather than requiring reasonable accommodation to *maintain* the normal client-lawyer relationship, it *allows* accommodations which *depart* from the normal client-lawyer relationship. This reading would suggest that the normal client-lawyer relationship consists of a prescribed set of actions and any departure from those actions would mark the end of what was reasonably possible within that relationship. Such a conflation of conduct and relationship, however, rests on false assumptions about the monolithic nature of the representation of "normal" adult clients, and is inconsistent with the Rules' emphasis on achieving meaningful client participation.

In representing children, lawyers automatically make some accommodations to establish a normal relationship with their clients: They do not correspond with children who cannot read, for example, and they adjust their language in an attempt to enhance children's understanding of the matters under discussion.⁶¹ Moreover, conscientious lawyers make considerable efforts to put their child clients at ease (by talking to them about sports, or walking with them to the water fountain). But lawyers for children do little, if anything, to accommodate their clients' limitations in understanding their lawyers' role. To assess whether a client's accurate understanding of his lawyer's role is part of a normal client-lawyer relationship and, more particularly, whether a lawyer is ethically obligated to make every effort to facilitate her client's understanding of that role, I turn to the full body of the Rules.

ii. Ethical Principles Applicable to the Traditional Attorney Role

One of the lawyer's core ethical duties to her client is her duty of communication.⁶² The Rules place great importance on a lawyer's obligation to give her clients full and comprehensible information about matters relating to the representation. The Preamble to the Rules calls for lawyers to provide their clients with "informed understanding," and the definitional section explains that an attorney's consulting obligations, which are implicated throughout the rules,⁶³ impose a duty to share information "sufficient to permit the client to appreciate the significance of the matter in question."⁶⁴ Most centrally, the Rules, unlike the Model Code of Professional Responsibility that preceded them, include a rule expressly devoted to the communication obligation.⁶⁵

The Rule governing communications breaks the obligation into two parts. First, a lawyer has an obligation under Rule 1.4(a) to keep her client "informed about the status of a matter" and promptly to furnish

61. In its recent study of lawyers who represent children, HHS found that a considerable majority of these lawyers received some amount of training about how to interview and communicate with children and their families. HHS Study, *supra* note 5, at tbl. 4.3-5.

62. See Charles W. Wolfram, *Modern Legal Ethics* § 4.5, at 163-64 (1986) ("Nothing lends more vitality to the client-lawyer relationship than effective communications between lawyer and client."); 1 Hazard & Hodes, *supra* note 52, § 1.1:101, at 1 (listing "communication" among four core duties owed to a client).

63. See, e.g., Model Rules, *supra* note 51, Rule 1.2(a), (c) (requiring consultation over trial tactics and before limiting the objectives of representation); *id.* Rule 1.6(a) (requiring consultation regarding client confidences); *id.* Rules 1.7-1.9 (requiring consultation regarding conflict of interest issues); *id.* Rule 2.2 (requiring consultation before a lawyer can act as an intermediary).

64. *Id.* pmbl.

65. Wolfram, *supra* note 62, § 4.5, at 164 (contrasting the Model Code's "offhand" treatment of the communication obligation, with the Model Rules which "explicitly require a lawyer to maintain communications with a client"); 1 Hazard & Hodes, *supra* note 52, § 1.4:101, at 82 (noting that no express duty of communication exists in the Model Code).

requested information.⁶⁶ Second, a lawyer has an obligation under Rule 1.4(b) to "explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation."⁶⁷ The comment to Rule 1.4 further notes that communication must be sufficient to ensure "intelligent participation" by the client.⁶⁸

The comment to Rule 1.4 also expressly qualifies a lawyer's obligation to communicate where the client is disabled, noting that while the normal standard for determining what information is to be provided is that "appropriate for a client who is a comprehending or responsible adult . . . fully informing the client according to this standard may be impracticable . . . where the client is a child or suffers from mental disability."⁶⁹ Presumably, this limitation merely intends to clarify that the Rules do not bind lawyers to do the impossible, to communicate at a level above that which their clients can comprehend.⁷⁰ Far from suggesting that a lawyer's communication obligations are limited to those sufficient to educate a "comprehending and responsible adult," however, this comment, like the "reasonably possible" language of Rule 1.14, calls on lawyers to make "practicable" accommodations in the *substance* of their communications to ensure that client-lawyer communication is actually achieved.⁷¹ This reading is in keeping with the spirit of Rule 1.4, which ties the effectiveness of communication, not to any particular words or frequency of conversations, but to the achievement of informed client decision making.⁷²

66. Model Rules, *supra* note 51, Rule 1.4(a).

67. Model Rules, *supra* note 51, Rule 1.4(b) (emphasis added). Rule 1.4 provides in full:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Id. Rule 1.4.

68. *Id.* Rule 1.4 cmt.

69. *Id.*

70. Clearly where, as with an infant, the client has *no* ability to comprehend communications, the lawyer is freed from any obligation to communicate.

71. 1 Hazard & Hodes, *supra* note 52, § 1.4:103, at 84, explain that, "What is required to keep a client 'reasonably informed' will differ from client to client. If the client is a child or under other disability, the burden of communication is obviously heightened."

The comment to Rule 1.14 also makes clear that a lawyer's communication obligations are not compromised when she represents a disabled client: "Even if the person does have a legal representative, [the comment directs] the lawyer should as far as possible accord the represented person the status of client, *particularly in maintaining communication.*" Model Rules, *supra* note 51, Rule 1.14 cmt. (emphasis added).

72. As Wolfram explains:

The subjects covered in the consultative communication cannot be cataloged in advance. In part, the scope of the conversation depends on the existing state of knowledge and sophistication of the client, the stage of the representation at which the conversation occurs, the importance of the subject to the client's objectives in the case. . . .

Under the traditional attorney model, a lawyer's duty to communicate to her child client clearly obligates her, at a minimum, to tailor her communications to ensure that the child understands the issues at hand so that he can make clear his views about these issues and how they should be resolved. But, as discussed above, *issue* discussion alone may not be enough to put a child in a position to understand how the views he articulates will translate into attorney action. Indeed, the hardest concept for the child to understand will not be that his lawyer wants to hear his views, but that these views amount to a *direction* of that lawyer's actions. Unless the lawyer's communications also explain why and how the views expressed by the child will affect what the lawyer does, the child cannot be said to be "participating," let alone intelligently.

More telling than the obligation to communicate set out in Rule 1.4 and elsewhere, which focuses on information sharing about the *subject* of, rather than the *nature* of, the representation,⁷³ is the assumption upon which all the rules are built—that clients hire lawyers to do their bidding within the limits of the law.⁷⁴ Because children do not get their lawyers in the "normal way," they do not bring to the client-lawyer relationship an understanding of what the "normal" relationship is about. Only by ensuring that a child understands what a normal client-lawyer relationship *is* (and how it applies to him) can a lawyer make the normal relationship possible.

This understanding is necessary to make any of a lawyer's ethical obligations to her client make sense in the context of representing children. Put simply, every ethical obligation between a lawyer and her client is premised on the concept of client control within the limits of lawful behavior. Without a clear understanding of this premise, a

Wolfram, *supra* note 62, § 4.5, at 165; *see also* Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of the Rules in Structuring the Lawyer-Client Dialogue*, 1980 Am. B. Found. Res. J. 1003, 1011 (noting that meaningful decision making between lawyer and client requires not just "exchange of paper or words going from lawyer to client" but an exchange that ensures "participation and involvement that enable the client to genuinely understand the decision to be made"); *cf.* *George v. Caton*, 600 P.2d 822, 827 (N.M. Ct. App.) (directing that where potential client spoke in Navajo language through an interpreter, lawyer had duty to adapt communications to address difficulties of translation), *cert. denied*, 598 P.2d 215 (N.M. 1979).

73. One exception to this generalization, of course, is the communication obligation created by potential conflicts of interest. *See* Model Rules, *supra* note 51, Rules 1.7-1.9.

74. *See* 1 Hazard & Hodes, *supra* note 52, § 1.2:201, at 28 (explaining that the lawyer is to abide by the client's lawful objectives because "realization of those objectives is the very reason the lawyer was hired in the first place"); Spiegel, *supra* note 72, at 1003 (noting that the ideological basis of our adversary system is a "strong commitment to client control"); *see also* Model Rules, *supra* note 51, Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation.").

child client will not and cannot take control.⁷⁵ In order for a lawyer to ensure that she can function as a traditional attorney for a child client, and meet all of her ethical obligations flowing from that relationship, she must first *create* the relationship by ensuring that the child in fact knows to assume control.

Where the child lacks this understanding, the lawyer's representation is incoherent. At best, she may have an informed consultant, but not an engaged decision-making client. At worst, she will have an inattentive subject—confused about the purpose of their conversations, angry about being called upon to recite, once again, his private thoughts, or simply uninvested in the client-lawyer relationship and the judicial process.⁷⁶ Moreover, unless the child understands that he controls decision making, his lawyer can easily manipulate their discussions to glean whatever "direction" she wants from the client.⁷⁷

75. Cf. Spiegel, *supra* note 72, at 1005 (noting that giving a lay person decision-making authority "without placing a corresponding duty of communicating information on the professional results in many instances in undermining the strength of the right to make decisions").

76. The client who asked me when I was going to let his mother out of jail, and his older brother, both have demonstrated this mix of confusion, resentment, and lack of investment in the lawyer-client consultative process. In part because of the slow pace of court proceedings in their case (tangible evidence of the limits of my powers and the powers of the court system in general), both boys, in their own ways, signaled their uncertainty about what role I played. The older boy interpreted my questions about his feelings about adoption, not as opportunities to control his fate (to others he frequently expressed his desire to be adopted), but as challenges to his loyalty to his imprisoned mother. To him, I was not someone who could help him work through what he wanted and make it happen, but rather a strange adult who was asking him how much he loved his mother. His brother, much less of a brooder, became neither defensive nor sad in response to my questions. He simply shrugged, and turned to more comfortable subjects of conversation, like sports and toys. Neither of these boys were too young to form or articulate positions, nor were they reluctant to do so. They just didn't know what to do with me. I, in turn, had no clear direction about how to represent them.

Another very different sort of example of a child's failure to invest in the lawyer-client relationship is offered by a colleague: She represented a 17-year-old girl who was having trouble fitting in at her group home. Despite my colleagues' efforts to explain her role and offer her assistance, she later learned from authorities that her client had run away. The child had not seen my colleague as a resource for improving or changing her circumstances. As a result, my colleague was powerless to represent her.

77. Children may, in general, be more suggestible than adults. See Perry & Teply, *supra* note 9, at 1393. Such tendencies are exacerbated by a lack of understanding about the purpose of the lawyer's questioning. Imagine if the man we thought was our grocer turned out to be our divorce attorney. Our nods to his friendly pleasantries about our family could lead to the dismissal of our divorce petition or alarming misreadings about our view of custody issues. Similarly, a child's conversation with his lawyer about how he likes a foster home, or school, or his mother's boyfriend, can easily turn into a lawyer led discussion, where the child must directly contradict his lawyer in order to take over "direction" of the representation. The lawyer will leave the conversation convinced that the child's position is in accord with her own, when, in fact, the child was unaware of taking any position at all. All he thought he was doing was politely hearing the lawyer out.

While tying the creation of the client-lawyer relationship to a client's understanding of that relationship may feel circular, the analysis is really quite straightforward. Client control (the basis of the traditional attorney model) demands client awareness of that control, and therefore ethical lawyering under this model includes the obligation to create the awareness. For the lawyer assuming the traditional attorney role, the difficulty lies not in parsing the ethical duty to communicate her role to her client, but in effectively *gaining* the client's understanding of that role in practice.⁷⁸

iii. The Special Question of Confidentiality

To a great extent, once (and if) a child's understanding of the lawyer's role is achieved, the application of an attorney's ethical obligations falls neatly into place as the obligations flowing from any "normal" client-lawyer relationship. One of the most controversial obligations, however, the obligation to keep information confidential, bears specific consideration because of its centrality to the client-lawyer relationship and the child's understanding of that relationship.⁷⁹

Model Rule 1.6 significantly expanded the reach of an attorney's obligation to maintain client confidences beyond the obligation imposed by the Code. Unlike the Code, which limits the confidentiality protection to information "gained in" the professional relationship that "the client has requested be held inviolate or the disclosure of

Cf. Id. at 1397 (suggesting that the more insecure and anxious a child is, the more likely he will be to agree with whatever his lawyer says, particularly because "children in our culture are taught to view adults as authority figures—persons to be obeyed and appeased"); *see also* Ramsey, *supra* note 3, at 321 (discussing the ease with which lawyers can manipulate clients by slanting information provided, or pressuring clients to take certain positions); Wolfram, *supra* note 62, § 4.5, at 164 (observing that restricting the information flow to a client can be used by lawyers to manipulate client decision making).

78. For a modest proposal about how the client's understanding can be enhanced, see *infra* part V.

79. *See* 1 Hazard & Hodes, *supra* note 52, § 1.6:105, at 155 (asserting that a lawyer's two most fundamental duties to his client are the duties of confidentiality and loyalty). The scope of an attorney's obligation to maintain the confidences of her clients has been and continues to be fiercely debated. *Id.* § 1.6:102, at 130.2. The confidentiality protection articulated in Model Rule 1.6, which obligates an attorney to keep confidential all matters "relating to representation of a client" sparked the most controversy during the drafting and adoption of the Model Rules. *Id.* at 127.

Interestingly, the primary objection to the confidentiality principle—that it only protects guilty people, for the innocent have no need of its protections—doesn't apply to children, whose darkest secrets are not about themselves, but about others, usually their parents. Children's disregard of their own interests in determining if and when to keep secrets has not, however, inspired support for a more expansive construction of the confidentiality principles as applied to children. To the contrary, many lawyers representing children have advocated for the application of a more restrictive confidentiality protection to that representation out of concern that secret keeping detached from self-interest may put or keep children at serious risk of harm. *See Report of the Working Group on Confidentiality*, 64 Fordham L. Rev. 1367, 1367-77 (1996).

which would be embarrassing or would be likely to be detrimental to the client,"⁸⁰ Rule 1.6 prevents an attorney from disclosing *any* information "relating to representation," absent the client's informed consent.⁸¹ The confidentiality principles articulated in the Code and the Rules are, of course, limited by other legal requirements that mandate the disclosure of certain information.⁸²

Where a lawyer assumes the traditional attorney role in representing a child, the duty of confidentiality that is so central to the "normal client-lawyer relationship" surely applies.⁸³ This means that, except to the extent other laws require disclosure, everything a child tells his lawyer about his own history of abuse or other parental misdeeds, as well as all information gained from other sources, cannot be revealed unless the child client has consented, after a full discussion of the risks, to the disclosure.⁸⁴

As discussed earlier, however, children generally have no reason to expect that adults will keep their secrets. Indeed, many children have become involved in the court system precisely *because* they shared secret information about their parents' misdeeds with doctors, teachers, or social workers who passed on that information to courts, other social workers, and their parents themselves. Given this life experience, children will be slow to understand (and, more importantly, *believe*) this dimension of their lawyers' role. Without that understanding, they will be disinclined to trust their lawyers enough to share information as freely as is contemplated in the normal client-lawyer relationship; that is, as freely as necessary to ensure high quality representation and effective client-lawyer consultation.⁸⁵

80. Model Code, *supra* note 52, DR 4-101(A).

81. Model Rules, *supra* note 51, Rule 1.6(a).

82. *See* 1 Hazard & Hodes, *supra* note 52, § 1.6:105, at 158.1 (explaining that a lawyer cannot keep information confidential where required by "other law" to disclose).

83. *Cf.*, *In re Maraziti*, 559 A.2d 447, 450 (N.J. Super. Ct. App. Div. 1989) (holding that communication between a minor and his attorney in a dependency case was entitled to attorney-client privilege); *see also* Haralambie, *supra* note 3, at 35 ("Where the attorney is appointed as legal counsel, communication should remain privileged."). While case law focuses on the more narrow protection of the attorney-client privilege, the analysis supporting inclusion of children within this protection is equally applicable in the broader context of the confidentiality protection afforded by Rule 1.6.

84. *See* Wolfram, *supra* note 62, at 306 (noting that a lawyer is prevented by the confidentiality obligation from revealing information gained from the client unless the client gives knowing and intelligent consent after being warned by his lawyer of the risks of disclosure).

85. Hazard and Hodes note that while there is "little empirical evidence of the precise degree to which clients rely on the principle of confidentiality" in determining what to say to their lawyers, "it is intuitively obvious that lawyers operating under a binding requirement of confidentiality will have at least some greater ability to gain the trust of at least some clients." 1 Hazard & Hodes, *supra* note 52, § 1.6:101, at 128; *see also* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (noting that the purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in

But the importance of a child's understanding of the confidentiality obligation goes well beyond the traditional connection between the client's understanding and his willingness to talk freely with his lawyer. A child's understanding of his lawyer's duty to keep his secrets is key to his true understanding of the lawyer's entire role. By pledging to maintain a child client's secrets, a lawyer sends the child the most powerful, comprehensible message about client control.⁸⁶

As discussed above, one of the central reasons children have such difficulty understanding and accepting the traditional attorney's role is that, despite what they are told, their experience tells them to disbelieve and to distrust. Informing children that you, their adult attorney, are required as part of your job to keep all their secrets will strike them as extraordinary. In my experience, this information causes children to sit up and take notice in a way that the time-worn "I'm here to help you," or "to tell the judge what you want" never will. This is, in part, because a pledge of secrecy is unusually comprehensible to a child. Unlike general discussions of client control, the specifics of the confidentiality obligation can easily be put into language a child can understand.⁸⁷ Children understand the *concept* of keeping secrets very well, and the concept of a lawyer "getting in trouble" if she tells

the observance of law and administration of justice"). *But see* Zacharias, *supra* note 34, at 352-56 (discussing a study of lawyers and laymen that suggests that there is some link between confidentiality protection and the use of and candor with lawyers, but that the link is not as strong as might be expected); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 *Yale L.J.* 1226, 1262 (1962) (stating that of 108 lay people surveyed, 55 said they would be less likely to make free disclosure to a lawyer if there were no attorney-client privilege, 37 said they would *not* be less likely to disclose, and 16 said they did not know how the absence of the privilege would affect their willingness to disclose).

86. *See* Wolfram, *supra* note 62, at 300 (noting that keeping client confidences signals a lawyer's loyalty to her client and inspires client trust); Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 *Duke L.J.* 203, 266 (1992) (arguing that maintaining client confidences honors client autonomy "by maintaining client control over private information"); Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 *U. Colo. L. Rev.* 349, 351-52 (1981) (asserting that the attorney-client privilege plays a central role in promoting a client's sense that our legal system is fair and that someone is on his side). Alschuler also points out that, in the absence of the privilege's protection, a client is forced to determine, for himself, what he should and should not share with his lawyer. Once the client must engage in this calculation, the lawyer becomes part of the system against which the client struggles, and control, as the client sees it, rests firmly with the lawyer. *Id.* at 352.

87. I am indebted to Gayle Hafner of the Maryland Legal Aid Bureau for this insight. It was through watching her speak with her new child clients in the simple language of keeping and telling secrets that I learned the power of this method of creating lawyer-client intimacy, and conveying the message of client control.

secrets, for these concepts are part of the ordinary social world of a child.⁸⁸

What makes the message extraordinary is not the concepts, themselves, but their application to the child's relationship with the strange, important adult. In pledging to keep secrets, the lawyer promises to follow the rules that children ordinarily can only impose on one another. In making the pledge, she signals her willingness to cross the power line between child and adult.

Far more important to a child's appreciation of his lawyer's role than the pledge of secrecy is the honoring of that pledge. When a lawyer demonstrates that she will keep her client's secrets, even the darkest family secrets, she will earn her client's trust and convince her client, if anything can, that he is, in fact, in control.⁸⁹ In part V, below, I will briefly discuss how a lawyer can demonstrate that commitment to keeping secrets to her child clients.

The more clear-cut and absolute the duty of confidentiality, the greater a child's ability to understand that duty and, consequently, the lawyer's role as a whole. Muddying the waters, however, are a number of qualifiers that exist only for children. First, state reporting laws mandate the reporting of child abuse by a broad range of professionals working with children. While lawyers are not, in most states, expressly included among the list of mandated reporters, many states' laws can be construed to include them in their more generic language describing the circumstances under which reporting is mandatory.⁹⁰ Where lawyers construe the law to require them to report abuse and neglect, the message to children will be more confusing than comforting. An explanation that says, "I am required to keep everything you tell me secret, except things you say that make me think that you are in danger," tells a child what he will already expect, namely that if he tells his secrets to his lawyer, he will lose control over them.⁹¹ While

88. See Janet W. Astington, *The Child's Discovery of the Mind* 180 (1993) (summarizing studies that suggest that, by five years of age, children are capable of keeping secrets); Lickona, *supra* note 9, at 114, 119 (noting that whether conduct gets the actor in trouble serves as one of children's first means of determining moral culpability).

89. See 1 Hazard & Hodes, *supra* note 52, § 1.6:101, at 130.1 (stating that "lawyers demonstrate the moral values of trust and loyalty when they say they will keep quiet and then do so, even when there are compelling reasons to speak out" (citation omitted)).

90. See Mosteller, *supra* note 86, at 208; cf. Haralambie, *supra* note 3, at 36 (noting that unless a state's child abuse statute expressly abrogates the attorney-client privilege, the privilege remains, though it is not clear whether it applies to an attorney assuming the GAL role).

91. See Wolfram, *supra* note 62, at 245 (observing that one of the purposes of confidentiality protections is to assure clients that they can maintain control over their own private information). In his essay on the confidentiality protection, Professor Alschuler points to another potential problem with explaining the limits of the protection to the client—namely, that it carries a veiled warning to the client *not* to say precisely those things that the lawyer would be required to disclose. Alschuler, *supra*

the client will gain something by having the duty and the limitation explained,⁹² the information is unlikely to foster the relationship of trust intended by the confidentiality principle,⁹³ particularly in the early phase of the proceedings when parental mistreatment is most relevant.⁹⁴

Even in states where lawyers are not mandated reporters, the significance of the confidentiality duty is undermined by the fact that, lawyer aside, the child is not in control of his own private information. In most cases, parents, even those whose children have been removed from their care, have a right to access a child's mental health records,⁹⁵ school reports,⁹⁶ and child welfare records⁹⁷ (which may in-

note 86, at 353. In our context, the concern would be that a child, informed of his lawyer's obligation to report abuse, would carefully avoid any discussion of matters that would suggest he might be in danger.

92. See, for example, the comments of Chaplan's interviewee, Neil, who suggests that lawyers should warn child clients of the lawyer's reporting obligation before children reveal the relevant information so that children can decide what to tell their lawyers with a full understanding of the consequences. Chaplan, *supra* note 13, at 1780.

93. Alschuler, *supra* note 86, at 353 & n.10 (stating that "giving each client [a] list of exceptions to the obligation of confidentiality before asking for his story [] would almost certainly destroy any significant sense of confidentiality within the attorney-client relationship," if such a list is even understood by the client). *But see* W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. Miami L. Rev. 739, 786, 813 (1981) (warning a client about the limits of the confidentiality protection may inspire the "fullest flowering of the trusting relationship, rather than its death knell"); Pizzimenti, *supra* note 59, at 476-81 (suggesting that disclosing the limits of the confidentiality protection enhances client autonomy and the client's trust in the client-lawyer relationship).

Without addressing whether an explanation of the duty or intention to report child abuse would undermine their trust in their lawyers, the six children interviewed by Chaplan concluded that their lawyers should report suspected abuse and neglect, even when the confidentiality principles counseled otherwise. Chaplan, *supra* note 13, at 1778.

94. Reporting laws require only the reporting of information suggesting that a child has been abused or neglected, as defined by state law. Reporting obligations generally are most relevant in the early phases of dependency representation, particularly prior to the adjudicatory hearing, where the parent's conduct is directly at issue. Later in the proceedings, particularly when the child has been removed from the home, many other issues, including the appropriateness of a child's placement, the parents' compliance with the terms of case plan agreements, and the quality of visits, among other things, are more likely to be at issue. Children's confidences about their feelings toward adults, their objectives in the litigation, and their own conduct are not subject to reporting requirements. This does not mean, of course, that abuse and neglect issues cannot reemerge. The conduct of the child's new caretakers, as well as parental conduct during visits or once the child is returned to the home, can all reintroduce the issue of child maltreatment, and the lawyer's potential duty to report.

95. See, e.g., 55 Pa. Code § 5100.33(a) (1991) (giving parents control over the release of mental health records for children under 14 years of age).

96. See Federal Educational Rights and Privacy Act (the Buckley Amendment), 20 U.S.C. §§ 1232g, 1232i (1994) (requiring educational agencies and institutions to make school records accessible to parents and students as a condition of receipt of federal funds).

clude information about a child's fear of his parents, his desire to be adopted, or other private information only indirectly related to the court procedure, such as his drug use and sexual activity). Moreover, no confidentiality rule confines disclosure by the parents, so they are free to share this information, as well as any secrets told to them by their children, with anyone they please.⁹⁸

More frequently in the lawyer's control, however, is the lawyer's own access to confidential information such as medical, psychiatric, and educational reports. Statutes providing for the representation of children, and orders appointing counsel for children, generally authorize the lawyer to review all relevant information about the child, including health, mental health, and educational information, and to release this information to others, both without client consent.⁹⁹ Even the most committed "traditional" attorneys for children will be loathe to encumber their access to this information by ensuring that they have their client's consent before accessing each piece of information in question.

Although it is hard for any lawyer to put herself in a position of being less prepared by limiting her access to information, the traditional attorney role demands that the child client be treated as the adult client. It is essential to let the child control *at least* his lawyer's access to his private information that has not already been disclosed to other parties in the course of the litigation if the confidentiality principle, and, more fundamentally, the principle of client control are to mean anything to the child.¹⁰⁰ Until the child understands that his

97. See, e.g., 55 Pa. Code § 3680.35(b)(1)(i) (1987) (authorizing parent access to child welfare records of a child upon request).

98. Cf. *Riccardi v. Tampax, Inc.*, 493 N.Y.S.2d 798, 799 (App. Div. 1985) (illustrating parents' authority to waive the doctor-patient privilege on behalf of their child).

In rare instances, a lawyer can invoke the power of the court to block the release of private information to a parent. Such action sends a powerful message to the child about his strength in the process and the loyalty and respect shown to the child by his attorney. See, e.g., *Daniel C.H. v. Daniel O.H.*, 269 Cal. Rptr. 624, 630-31 (Ct. App. 1990) (holding that a parent accused of child molestation should not be entitled to have access to communications made by the child to a therapist as part of treatment for abuse).

99. See HHS Study, *supra* note 5, at 2-2 (citing statutes giving children's representatives "open access to various records and information concerning the child . . . including records from . . . public agencies, hospitals, . . . psychologists, . . . courts, law enforcement, social services, and schools"); see also Haralambie, *supra* note 3, at 7-9 (discussing a lawyer's authority, by statute or court order, to access and disclose confidential information). Although both sources speak in terms of "GALs," it appears that their discussions intend to encompass all lawyers charged under state law with the representation of children in dependency matters, and, in Haralambie's discussion, lawyers representing children in private custody disputes, as well.

100. The commentary accompanying the Proposed ABA Standards calls on lawyers of older children to obtain the child's consent before accessing the child's records, even if the consent is not required. In his letter to Linda Elrod commenting on this requirement, Professor John J. Sampson argues that requiring the child's consent to access materials that can be accessed by every other party in the litigation does little

lawyer comes, and must come, to him for direction concerning her actions in his case, the lawyer will remain, in the child client's eyes, just another adult controlling his life, in the name of helping him out.

There is, of course, a final, moral reservation to the application of the confidentiality principle to children: Keeping children's secrets may put them at risk of harm. With adult clients, fulfilling the duty of confidentiality generally threatens to harm (or leave unredressed old harms of) third parties.¹⁰¹ But with children, it is the lawyer's very own clients, notably *child* clients, who stand to be harmed by the lawyer's refusal to speak.¹⁰² The danger that children will mistakenly rely on their lawyers to publish their secrets where necessary to rescue and protect them can be prevented only by ensuring that children truly understand their lawyers' commitment to secrecy. But, again, children's difficulty comprehending and believing the traditional attorney role will make successfully communicating the confidentiality obligation a daunting task for the child's lawyer. And while lawyers who succeed in communicating their commitment to secrecy will have the satisfaction of knowing that their client understands who they are, and who they are not, this will strike many a thoughtful lawyer as a small satisfaction indeed. It is an ultimate commitment to protection over client control that drives many lawyers toward the GAL model.

b. *Ethical Obligations Under the GAL Model*

Whether directed by statute, court order, or their own judgment, lawyers' assumption of the GAL role in representing children is generally driven by a concern that children need to be protected from their own bad decision making, and from the bad actors in their lives, whom they may be unwilling to betray.¹⁰³ To ensure that their clients are adequately protected, GALs abandon the most fundamental as-

to protect the child's confidentiality, and "authorize[s] the child to direct his or her own lawyer to commit malpractice," by ensuring her that she is unaware of materials that may be "part and parcel of the litigation." See Letter from Professor John J. Sampson to Linda Elrod (Oct. 6, 1995) (on file with the *Fordham Law Review*). Because I agree that information already disclosed to other parties in the litigation should be reviewed as part of the representation of any client, I narrow my recommendation regarding when consent should be required to information not already disclosed.

101. 1 Hazard & Hodes, *supra* note 52, § 1.6:102, at 130.2 (suggesting that the confidentiality principle "often requires that victims of a client's misdeeds be forsaken"). But see *supra* note 44 (qualifying my distinction between the confidences of adults and children).

102. Some commentators have suggested that the ethical rules authorizing a breach of confidentiality to prevent the client from committing criminal acts likely to lead to the death or serious bodily harm of a third party should also be construed to authorize disclosures to prevent the *client* from being seriously harmed by the criminal acts of an abuser. See Haralambie, *supra* note 3, at 36.

103. See *id.* at 27 (criticizing the traditional attorney model for ignoring "the dramatic and often dangerous fact that the wishes of the child may be driven by irrational forces and may even be self-destructive").

pect of the client-lawyer relationship: They strip their clients of any decision-making control and assume responsibility for ascertaining the child's best interests. What, then, is left of the client-lawyer relationship, and, consequently, the ethical principles that govern a lawyer's conduct? More particularly, what ethical obligations, if any, does a lawyer acting as GAL have to ensure that her client understands that she will take whatever action she determines is in the child's best interest, regardless of what the child thinks of that action?

Returning to the framework of Rule 1.14, we can analyze the GAL's approach in two ways. First, the assumption of the GAL role may reflect a determination that the entire normal client-lawyer relationship is not "reasonably possible." Under this reading, the GAL role replaces the lawyer-client relationship with a new relationship in which the lawyer does not act as a lawyer, the client is not really a client, or, perhaps, some combination of both. Second, the assumption of the GAL role may reflect a determination that client-driven decision making is not reasonably possible, but that the rest of a normal client-lawyer relationship (and hence the lawyer's ethical obligations flowing from that relationship) remains the same as for adult clients. As the following discussion will establish, under both analyses, the GAL still has an ethical obligation to ensure that the child understands the GAL or "best interest" role, even if that understanding compromises the GAL's ability to assess and advocate for the child's best interests.

i. Constructing a New Relationship

(a) *The GAL As Nonlawyer*

If the GAL-child relationship is seen as a relationship entirely distinct from the "normal client-lawyer relationship," we must look to how it functions in order to define it. It is tempting to suggest that, once lawyers abandon the traditional client-lawyer relationship, they are, in fact, not acting as lawyers at all, and therefore the ethical obligations unique to lawyers (as opposed to those applicable to all citizens) are inapposite. Before addressing the limitations of this analysis, it is worth giving it its due. Analyzing the GAL as a nonlawyer does suggest a rudimentary minimum: Where lawyers assume a role entirely disconnected from their ethical obligations as lawyers, the basic moral values of honesty and fair play (and, perhaps, the legal prohibitions against fraud) dictate that the children they "represent" must at least be warned that their lawyers really are not acting as lawyers at all. Better yet, in such circumstances, the child, the court, and the other parties should never even be informed that the person appointed to represent the child is a lawyer, for that fact is no more relevant to what she will or must do than if she were assigned to take over the teaching of a second grade class. Indeed, to the extent the GAL role is interpreted to allow a wholesale abandonment of the law-

yer's professional role, there is no reason GALs should be lawyers at all. Social workers, psychologists, neighbors, and community leaders may all be better judges of a child's best interests than lawyers, who have neither formal nor experiential training in what is best for children.¹⁰⁴

Many states mandate, however, that the child's best interests be represented by none other than a lawyer, and lawyers assuming the GAL role still function in some contexts very much like lawyers. The GAL's conduct in court, and in relating to the other lawyers and parties in the case, is not appreciably altered by her best interest mission.¹⁰⁵ The assumption of the GAL role reflects a significant shift in her professional relationship with her client, but in no way signals an abandonment of her professional role in the system. To the extent she remains a player in that system, the relevant ethical rules of that system still apply.

(b) *The Child As Nonclient*

While a GAL lawyer maintains her professional obligations even outside the normal client-lawyer relationship, the child's role as client changes dramatically. Far from establishing the objectives of representation and controlling decision making, as contemplated by the Rules,¹⁰⁶ the child becomes an object whose interests are determined by the GAL, and whose views are taken as relevant, but not controlling. A child in this position is stripped of the status of client, and of the basic ethical protections that flow from that status.¹⁰⁷

A GAL's wholesale abandonment of the normal client-lawyer relationship presumably reflects her determination that the child "cannot adequately act in [his] own interest."¹⁰⁸ When such a determination is made, Rule 1.14(b) authorizes appointment of a guardian charged with identifying the named client's interests for the lawyer.¹⁰⁹ This

104. See Heartz, *supra* note 5, at 338-40.

105. In some states, the responsibilities of GALs for filing motions, issuing subpoenas, examining, and cross-examining witnesses, among other lawyerly functions, are expressly provided for by statute. See statutes cited in HHS Study, *supra* note 5, at 2-3 & nn.28-34.

106. See Model Rules, *supra* note 51, Rule 1.2(a); see also *supra* note 74 and accompanying text.

107. See 1 Hazard & Hodes, *supra* note 52, § 1.14:101, at 439 (positing that where a person's impairments are so great that a normal client-lawyer relationship is not reasonably possible, "assigning that person the role of 'client' is a mere formality").

108. Model Rules, *supra* note 51, Rule 1.14(b); see also 1 Hazard & Hodes, *supra* note 52, § 1.14:101, at 439 (suggesting that Rule 1.14(a) applies where a normal client-lawyer relationship is difficult, whereas Rule 1.14(b) applies where a normal client-lawyer relationship is impossible).

109. Model Rules, *supra* note 51, Rule 1.14(b).

guardian, then, takes over the client's role of directing the lawyer's actions.¹¹⁰

As the commentary to Rule 1.14(b) acknowledges, however, appointment of a *separate* guardian may prove "expensive or traumatic to the client."¹¹¹ In such cases, the lawyer is called upon to "act as de facto guardian."¹¹² Where a lawyer appointed to represent a child assumes the role of guardian for that child, she relies on her own views (as the guardian), rather than those of the child, to determine what interests to advocate (as the lawyer). In shifting decision making from the child to herself, the lawyer has, in effect, changed clients: Her ultimate client loyalty is owed, not to the child "in the flesh," but to the abstraction of the child's best interests.¹¹³ The GAL owes her duty of loyalty not to the child's view of his interests, but to her own.

(c) *Ethical Principles Applicable Where the Child is Viewed As a Nonclient*

Under the above analysis, children are divested of all the ethical protections owed to clients, most particularly the protections of loyalty and confidentiality, for they lack the status that entitles them to (indeed, justifies) those protections. Lacking the protections owed by attorneys to their clients, surely children are entitled, at a minimum, to the protections afforded to nonclients; for it seems the epitome of unfairness to deny the child the ethical protections due to the client and nonclient alike—all in the name of the child's best interests.

Lawyers owe nonclients with whom they come in contact in the course of representation basic duties of honesty,¹¹⁴ respect,¹¹⁵ and, most significant for our discussion, the duty to ensure that the nonclient does not misperceive the lawyer's role.¹¹⁶ The Rules make special mention of the lawyer's obligation to ensure that unrepresented

110. See *id.* Rule 1.14(b) cmt. 3 ("If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."); 1 Hazard & Hodes, *supra* note 52, § 1.14:102, at 440.1 (suggesting that a guardian appointed to represent the interests of a severely disabled person be viewed as the lawyer's primary client and the disabled person as the derivative client, or third party beneficiary); see also *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974) (noting that a GAL is an officer of the court with authority to "engage counsel, file suit, and to prosecute, control and direct the litigation").

111. Model Rules, *supra* note 51, Rule 1.14 cmt.

112. *Id.*

113. See 1 Hazard & Hodes, *supra* note 52, § 1.14:102, at 440 (suggesting that where the client is unable to communicate, the lawyer "does not really represent [the client] as such, but instead represents an abstraction: 'the best interests of that person'").

114. See Model Rules, *supra* note 51, Rule 4.1 ("Truthfulness in Statements to Others").

115. See *id.* Rule 4.4 ("Respect for Rights of Third Persons").

116. See *id.* Rule 4.3 ("Dealing with Unrepresented Persons"). Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented

individuals understand that the lawyer is not disinterested (that is, not free to assist the nonclient impartially) and to clarify the lawyer's loyalties if the nonclient appears to misunderstand. In short, it is the lawyer's responsibility to protect the nonclient from misplaced reliance on the lawyer, even if that reliance would aid the lawyer's service of her own client. Lawyers cannot exploit nonclients' inaccurate belief that communications will be kept confidential, or unbiased advice given, to serve the interests of their true clients. While lawyers do not owe a duty of loyalty to nonclients, they are certainly obligated to prevent nonclients from mistakenly acting upon the belief that the lawyer does, in fact, owe them that duty.¹¹⁷

The analogy to the best-interest representation of children is apparent: Where an attorney's true client is not the child, in the traditional sense, but the child's best interests as the GAL perceives them, at a minimum, the GAL must ensure that the child does not mistakenly conclude that the lawyer's duties are owed to him. In other words, the GAL must inform the child that she may urge the court to take a position contrary to the child's wishes, and is under no obligation to keep any information about the child or his family confidential.¹¹⁸ To fail to ensure that the child understands the limits of the GAL's representation is to set the child up to rely inappropriately on the GAL. To rely on the child's role confusion to extract family secrets or the child's private views is no less exploitive than relying on the misplaced confessions of the classic unrepresented party.

(d) *The Child As Entity Constituent*

Another approach to analyzing the GAL's obligation to ensure the child's understanding of her role is suggested by Hazard and Hodes in their treatise *The Law of Lawyering*. Hazard and Hodes suggest that a lawyer for a disabled client can be analogized to the lawyer for an entity (most classically a corporation) whose ethical obligation is to represent that entity's interests, even in the face of conflicts with that entity's constituents or agents.¹¹⁹ By analogy, the GAL's ultimate ethical duty is not to the child (the constituent) but to the entity equivalent—the child's best interests.

Just as entity lawyers will consult with entity constituents to shape the entity representation (and, indeed they will conduct their representation almost exclusively through these constituents) so, too, the GAL will consult with the child to help determine what will best serve

person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id. (emphasis added).

117. *Id.* Rule 4.3 cmt.

118. For a discussion of a lawyer's confidentiality obligations under this analysis, see *supra* section III.B.1(b)(i)(f).

119. 1 Hazard & Hodes, *supra* note 52, § 1.14:102, at 440.

the child's interests. And just like entity representation, absent a conflict, representation of the child's best interests will be indistinguishable from representation of the child in the traditional sense. But, in both contexts, the people are not the clients. In both contexts, the real clients, to which the lawyers owe their client-lawyer duties of loyalty and confidentiality, are the best interest abstractions.¹²⁰

Hazard and Hodes stop their analogy, however, at the point of role description. They do not take the next step: exploring what obligations the analogy suggests the lawyer owes the "constituent" child.

(e) *Ethical Principles Applicable Where Child is Viewed As Nonclient Entity Constituent*

Rule 1.13, which sets out an attorney's ethical obligations in the context of entity (or organizational) representation, specifically addresses the duty owed to nonclient constituents: "In dealing with an organization's directors, officers . . . or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."¹²¹

Particularly *because* constituents are likely to be confused about whom the lawyer represents, it is essential that entity lawyers protect constituents from their own confusion. Absent the clarifying information, the constituents, who routinely consult with the lawyer about the entity representation, and who are, themselves, charged with serving the entity's interests, will be inclined to assume, wrongly, of course, that any damaging communications they share with the lawyer will be kept confidential, and that the lawyer is an appropriate source of advice about the constituent's potential legal problems.¹²² As Hazard and Hodes put it, fairness dictates that the lawyer "explain exactly who he represents, when dealing with constituents who might otherwise be misled."¹²³

No other "constituent" is more vulnerable to being misled than a child whose lawyer talks about representing *him*, when in fact she owes him no duty of loyalty. Like the entity constituent, the child provides the lawyer with material guidance in the course of the representation. Like the entity constituent, the child sees himself as the safeguarder of the abstract interests at stake. And, as in the entity context, the lawyer has a strong motive to encourage the child's confusion. Unlike constituents in the classic entity relationship, however, children represented by GALs generally do not have the option of

120. *Id.*

121. Model Rules, *supra* note 51, Rule 1.13(d).

122. See 1 Hazard & Hodes, *supra* note 52, § 1.13:109, at 400.

123. *Id.* § 1.14:109, at 400 n.3.

retaining separate counsel.¹²⁴ This means that the *only* person in a position to warn the child about the limits of his protections in the legal system is the GAL herself.

In discussing entity representation, Hazard and Hodes note that this representation is very difficult in practice:

Lawyer-client communication about the representation is particularly tricky, because an entity is a legal fiction and cannot literally 'consult' a lawyer or give her directions. Instead, communication in both directions is of necessity accomplished through human actors—the very individuals who are *not* to be considered clients. The matter is further complicated by the fact that although these individuals are not themselves clients, they generally are the trusted agents of the entity client and are generally presumed to be acting in its best interests. Paradoxically, therefore, a lawyer for an organization normally serves his client—the entity—by suspending the fiction and consulting with the available human actors after all.¹²⁵

Hazard and Hodes go on to say that a lawyer best serves the entity by "keeping lines of communication open to those whose job it is to act for the entity, and being guided by their judgments, which she should normally assume are in the best interests of the entity."¹²⁶

Of course, GALs generally make no such assumptions about the correctness of the child's views and judgments. Indeed, rather than assuming that children's judgments are normally in their best interests, GALs start from the assumption that children are prone to making bad decisions on their own behalf. Unlike entity representation, which is guided by the judgment and actions of constituents absent strong legal indications to the contrary, the GAL has no such anchor to tie her representation of the abstraction down to earth.¹²⁷ Her liberty and willingness to detach her best interest judgments entirely from the judgments of the child suggest that her obligations to warn the child of her true allegiance are even greater than those of the entity representative.

124. Most children lack the sophistication and resources (financial and otherwise) to seek out separate counsel. Even when they successfully do so, however, there is no guarantee that the court or the guardian will authorize retention or appointment of the separate counsel. For a particularly extreme example of a child's difficulty obtaining separate counsel of her choice to represent her own views in opposition to those represented by her GAL, see *In re A.W.*, 618 N.E. 2d 729 (Ill. App. Ct. 1993). In that case, the Public Guardian appealed, unsuccessfully, the juvenile court's allowance of the child's motion for substitution of counsel (which left his authority as GAL unchanged), leaving the matter unresolved for over one year. *Id.* at 733.

125. 1 Hazard & Hodes, *supra* note 52, § 1.13:102, at 388-89.

126. *Id.* § 1.13:109, at 400.

127. Where the lawyer detaches her best interest inquiry from the views of her client, she creates a considerable risk that she will impose her own values upon the client, rather than determining, more objectively, what the best result would be for the child. See *id.* § 1.14:301, at 447.

(f) *Confidentiality Obligations to the Nonclient Child*

The crux of the concern reflected in the rules governing obligations to nonclients is that these nonclients will reveal information to the lawyer under the false impression that the information will be kept confidential, or that it will only be used to serve the confider's interests. While, clearly, the lawyer owes the nonclient no duty of confidentiality,¹²⁸ she cannot exploit the misunderstanding for the benefit of her true client.

As Hazard and Hodes explain, again in the context of entity representation:

[Where entity and constituent interests diverge,] it might be said that the lawyer's duty of diligent representation requires him to discover as much information as he can from a [constituent] with interests potentially adverse to those of the entity, even if that person is severely disadvantaged. However, although the lawyer's [constituents] are not entitled to the full loyalty that a client deserves, they may have grown accustomed to treating the lawyer *as if* he owed full loyalty to them, and may not understand that he has served them *only* because they were serving a common master. Fairness therefore dictates that they not be lulled into confiding in someone who might become an *adversary's* lawyer. To learn confidences under false pretenses would be taking unfair advantage of nonclients, and must be avoided even if the information might be useful to the client.¹²⁹

To get a sense of how these misplaced confidences are inspired in children, it is worth briefly parsing the confidentiality protection. In its classical form, the confidentiality protection prevents the publication of client confidences, absent client consent. But a client's interest in confidentiality is often focused not specifically on avoiding publication, but on ensuring that the information in question is only used by the lawyer for the client's benefit. The confidentiality obligation, particularly when coupled with the interrelated obligation of loyalty, prevents a lawyer from using confidential information in a manner detrimental to the client's interests. In other words, the confidentiality protection allows a client not only to prevent the publication of information, but also to control for what ends the publication of information is used.

As discussed earlier, children are far less likely than adults to assume that their confidences will be protected.¹³⁰ To the extent chil-

128. *Id.* § 1.6:101, at 128-30 (noting that confidentiality protections apply only to clients, and therefore the threshold question in applying the confidentiality rule is whether the person in question is, in fact, a client).

129. *Id.* § 1.13:501, at 430; *see also* Alschuler, *supra* note 86, at 351 (concluding that it is unfair for a lawyer to "obtain information by implicit or explicit deception," even if such deception produces information valuable to the legal system's search for truth).

130. *See supra* section III.B.1.a.iii.

dren's perceptions counsel them to hold their tongues, however, GALs will have a strong motivation to foster a relationship that encourages children to speak freely. While scrupulous GALs will stop short of promising secrecy (the classic confidentiality protection) when they know they may not be able to honor that promise, they will find it easier to encourage children to believe that they are "on their side"—that they will use the information the child provides to help the child achieve his desired ends. As in the entity context, the child's confidences, gained under false pretenses, can prove invaluable to the GAL's assessment of, and advocacy for, the child's best interests. But the value of the information cannot outweigh the injustice done to the child by using professional smoke and mirrors to trick the child into trusting the GAL too much.

Under Rule 1.13, confidentiality protections prevent the entity lawyer from going *outside* the entity to disclose information, whether gained from the constituents or other sources, absent authorization from the designated constituents.¹³¹ This prohibition applies even where the lawyer believes such a disclosure would serve the entity's (her client's) interests. In such situations, the attorney is limited to sharing the information with the highest authority within the entity, and, if the problem cannot be remedied, the lawyer's only recourse is to resign.¹³²

For a child represented by a GAL, in contrast, there is no equivalent protection. The GAL, in service to her client (the child's best interests, as she sees them) will disclose every relevant detail about the child (whether gained through communications with the child or other sources) to the highest authority over the best interest abstraction—namely, the court.¹³³ While the court protects the confidentiality of the information from the world at large, due process protections require the information to be shared with adverse parties—the group from which the child will most wish to withhold the information. Again, what fairness mandates in the entity context is doubly mandated for the child, who is even less protected. The GAL must ensure that the child understands that everything the child shares with the GAL may be disclosed and used for whatever ends the GAL sees fit, regardless of the child's views about these ends.

131. Model Rules, *supra* note 51, Rule 1.13.

132. *Id.* Rule 1.13(b) & (c); *see also* 1 Hazard & Hodes, *supra* note 52, § 1.13:111, at 402 (noting that, although the drafters of the Rules proposed a provision authorizing limited "loyal disclosures" where the lawyer had exhausted internal review mechanisms and determined that disclosure outside the entity was necessary to protect the interests of the entity, the loyal disclosure provision was deleted from the Rules, as adopted).

133. In both dependency and custody matters, the court is commonly charged with making best interest assessments on behalf of children. *See, e.g., Ex parte Beasley*, 564 So. 2d 950, 954-55 (Ala. 1990) (noting that the state standard applied in custody determinations, whether or not the state is involved, is the best interest of the child standard).

ii. Maintaining Pieces of the Normal Client-Lawyer Relationship
 (a) *Defining the Modified Client-Lawyer Relationship*

In justifying a "best interest" approach to representation, a lawyer need not conclude that the *entire* normal client-lawyer relationship is not "reasonably possible." The departure from client control can also be read as a limited, albeit significant, departure from the normal client-lawyer relationship, which in other respects the lawyer is still obligated to preserve.¹³⁴ Under this analysis, the body of ethical principles governing the client-lawyer relationship (rather than the nonclient relationships, where the client-lawyer relationship is considered abandoned) still applies, to the extent these principles can be squared with the shift in decision-making authority.

(b) *Ethical Principles Applicable Where the Child is Viewed As a Client in a Modified Client-Lawyer Relationship*

Where a child is still conceived as the client, albeit a client represented very differently from a non-"disabled" client, he is entitled to *at least* as much information as the nonclient about the limitations of his representation and the risks associated with turning to his GAL for advice and the communication of confidences. Although Rules 4.3 and 1.13 speak only in terms of a lawyer's obligations to clarify her role to nonclients, this limited focus is premised on the assumption that the risks associated with relying inappropriately on the expectations of a client-lawyer relationship are limited to those who are, in fact, not in such a relationship. But for a child client, whose views will not be used to set the objectives of the representation, and whose secrets may be shared to the extent this is deemed to serve the child's best interests,¹³⁵ the risk is just as real.

An application of the specific rules governing the client-lawyer relationship to this context bears out the ethical obligation of full role disclosure. Rule 1.2(c) allows a lawyer to "limit the objectives" of her representation only "if the client consents after consultation."¹³⁶ A GAL's unwillingness to take any position that conflicts with her own view of the child's best interests reflects a clear and far-reaching limitation on the scope of her representation. While the GAL has taken the *decision* about how to limit representation away from the child

134. The commentary to Rule 1.14 seems to favor this reading, advising that "[e]ven if the person does have a [separate] legal representative, the lawyer should as far as possible accord the represented person the status of client." Model Rules, *supra* note 51, Rule 1.14 cmt.

135. For a discussion of a GAL's confidentiality obligations under this analysis, see *infra* section III.B.1.b.ii.(d).

136. Model Rules, *supra* note 51, Rule 1.2(c). Hazard and Hodes suggest that this provision obligates a lawyer to ensure that the "client will understand the risks inherent in contracting for limited legal services." 1 Hazard & Hodes, *supra* note 52, § 1.2:303, at 39.

client (as part of her general assumption of decision-making authority), the obligation to *explain* must remain, if the relationship is to be preserved to the fullest extent possible.

The structure of Rule 1.4, governing a lawyer's communication obligations, supports the severance of the lawyer's duty to inform from the client's authority to decide. Rule 1.4 divides the lawyer's communication obligation into two parts: Subsection (a) speaks broadly of a lawyer's general obligation to keep a client informed, while subsection (b) focuses more specifically on lawyer-client communication as a means of ensuring effective client decision making.¹³⁷ Although Rule 1.4(b)'s connection between effective communication and client decision making is necessarily severed by the GAL approach, the attorney's basic obligations set out in Rule 1.4(a) to "keep a client reasonably informed about the status of a matter"¹³⁸ can and therefore should remain. And, as already noted, the commentary to Rule 1.14 makes clear that, even where a separate legal representative has been appointed to make all legal decisions on behalf of an incompetent client, the lawyer has a continuing obligation, as far as possible, to keep the client informed.¹³⁹

In the context of this Article, the information to be conveyed to the client is information about the GAL's role. To the extent communication of the GAL's role remains "reasonably possible,"¹⁴⁰ my analysis circles back to my discussion of the obligations imposed on a child's attorney assuming the "traditional attorney" role: Although a child's minority will require his lawyer to communicate differently in order to communicate effectively, a lawyer should be expected to make such adjustments in order to achieve the purpose behind the communication obligation, namely a client who understands what his lawyer is doing.

137. Model Rules, *supra* note 51, Rule 1.4(a) & (b). Wolfram distinguishes between "reporting" communications (governed by Rule 1.4(a)), and "consultative" communications (governed by Rule 1.4(b)). Wolfram, *supra* note 62, at 164-65. Hazard and Hodes suggest that Rule 1.4(a) focuses on communication as a means of improving the client-lawyer relationship, whereas Rule 1.4(b) focuses on communication as a means of ensuring meaningful client participation. 1 Hazard & Hodes, *supra* note 52, § 1.4:102, at 83. For a full text of Rule 1.4, see *supra* note 67.

138. Model Rules, *supra* note 51, Rule 1.4(a).

139. *Id.* Rule 1.14 cmt. ("Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication." (emphasis added)).

140. *Id.* Rule 1.14(a). My discussion here focuses on the nature of the GAL's ethical obligations. Later, I will discuss the extent to which meeting these obligations is practically possible. Clearly, this division is somewhat artificial—few would contend that lawyers are ethically obligated to do the impossible. Considering the scope of the ethical obligations first, however, will focus the feasibility inquiry more precisely, and will prevent the feasibility inquiry from swallowing up the ethical analysis.

(c) *The Lawyer's Divided Loyalties*

Perceiving the GAL-child relationship as a limited client-lawyer relationship suggests another analogy that speaks to a GAL's obligation to ensure that her client understands her role. Like the analogy to entity representation, which suggests an analytical approach where the child is viewed as an involved nonclient, the ethical principles governing potential conflicts of interest can illuminate our analysis where the child is still viewed as a client, but a client whose lawyer's primary loyalty is owed to a second client—the child's best interests. Applying the conflict principles to this second GAL model supports my contention that a GAL is obligated to inform her child client about the limits of her loyalty and the limits of the child's control over the representation.

Growing out of a lawyer's duty of loyalty to her clients, and the associated duty of confidentiality,¹⁴¹ the conflict principles, set out in Rules 1.7, 1.8, and 1.9,¹⁴² prohibit a lawyer from taking on additional representation that threatens to undermine her representation of her original client, unless both the original client and the potential client consent to the new representation, after consultation.¹⁴³ Whether the child is viewed as the original or the potential additional client, he has a right to be informed of the lawyer's "other client," the best interest client who will undermine the lawyer's ability to serve the expressed interests of the child loyally. And if the analogy is played out, the child, whether viewed as the original or the additional client, would have authority to prevent the lawyer from undertaking the dual, conflicting representation. Viewing the child as the first client, and the representation of the best interests as the potentially adverse client, the child would have the authority, after consultation, to prevent his lawyer from taking on the best interest representation.¹⁴⁴ Viewed the

141. See 1 Hazard & Hodes, *supra* note 52, § 1.6:105, at 155 (arguing that the chief aspect of client loyalty implicated by the conflict of interest issues is the duty of confidentiality).

142. Rule 1.7 of the Model Rules sets out the general rule governing potential conflicts; Rule 1.8 of the Model Rules focuses on potential conflicts between the interests of the lawyer and of the client; and Rule 1.9 addresses potential conflicts between former and current clients.

143. Rule 1.7(a) provides:

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

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

Model Rules, *supra* note 51, Rule 1.7(a).

144. Moreover, regardless of client consent, Rule 1.7 prevents an attorney from undertaking the additional representation unless he "reasonably believes the representation will not adversely affect the relationship with the other [original] client." Where the child is considered a separate client from the best interest client, it could be argued that the best interest representation always has some adverse affect on the child, who is deprived of a zealous advocate. This result is particularly true if "ad-

other way (construing the best interest as the original client and the child as the potentially adverse additional client) the child would have the authority to reject the lawyer's representation, and seek separate counsel. While both of these approaches appear eminently fair (and both create the opportunity for securing separate representation for the expressed and best interests of the child without focusing the court's attention on the lawyer's disagreement with her client's position),¹⁴⁵ these proposals exceed the scope of my discussion here. It is asking far less of a lawyer, and surely only what is fair, to require her to ensure that her client *understands* her loyalty conflict. Lacking the power to control his lawyer's role or retain his own counsel, the child surely at least has the right to protect himself from some of the most harmful consequences of that divided loyalty.

(d) *Confidentiality Obligations within the Modified Client-Lawyer Relationship*

One of the primary risks associated with a lawyer's representation of two clients with potentially conflicting interests is the risk that the duty of loyalty to one client will undermine the lawyer's commitment to keeping the confidences of the other.¹⁴⁶ The centrality of the confidentiality obligation to the client-lawyer relationship requires us to explore whether this "piece" of the relationship should be maintained (and therefore what should be communicated to the child client) where the GAL role is viewed as limiting, but not eliminating, the client-lawyer relationship.

In theory, the GAL could still be duty-bound to keep confidences, and could therefore inform her clients that their secrets were safe with her. It is hard, however, to make much sense of this approach in the context of best-interest representation.¹⁴⁷ A lawyer charged with zealously advocating for her client's best interests can hardly be serving that mission by keeping secret information that directly bears on those interests. Indeed, it can be argued that revelations of confidences to the court are permitted under Rule 1.6(a) as "impliedly authorized in order to carry out the representation,"¹⁴⁸ where the terms of the representation are established by a statute or court order directing the

versely effecting" is read, as Hazard and Hodes suggest it should be, to include "a client's subjective feeling of betrayal." 1 Hazard & Hodes, *supra* note 52, § 1.7:207, at 236.3.

145. Unlike the options suggested in the text, which give the child the authority to protect his own interest in having a zealous advocate, the common practice of requiring the lawyer to request appointment of a separate GAL when she disagrees with her own client's position places the child's lawyer in the untenable position of signaling to the court her disagreement with the very position she is charged with advocating zealously.

146. See 1 Hazard & Hodes, *supra* note 52, § 1.6:406, at 218.1.

147. See, e.g., *Ross v. Gadwah*, 554 A.2d 1284, 1285 (N.H. 1988) (holding that the attorney-client privilege does not apply where the attorney is appointed as GAL).

148. Model Rules, *supra* note 51, Rule 1.6(a).

lawyer to advocate for her client's best interests. Most classically, a GAL would be hard pressed to keep quiet about a child's reports of abuse, particularly if those reports were the only or best source of the information.¹⁴⁹ A GAL attempting to serve the best interests of her client might even feel compelled to call her client to the stand, and to challenge "unfavorable" testimony by eliciting the client's prior inconsistent statements, if such actions were necessary to achieve the end she deemed best for the child.

But even if a GAL were able to walk the line between fulfilling the best interest mission and preserving the client's confidences, the confidentiality protection would remain a hollow one. While the GAL might commit herself not to repeat the *words* uttered by her client (or force her client to repeat the words in court), her position in court about the child's best interests would inevitably be affected by what her client has told her, regardless of the client's willingness to have the information shared. In many instances, this position taking has the effect of publishing the client's private communications, either because the only explanation of the GAL's unsupported position is that she must have gained relevant information from her client, or because the GAL explains in court, perhaps obliquely, that information provided by the child supports her otherwise unsupported position.¹⁵⁰

Even where the GAL's position does not, in itself, publish the client's communications (as to facts or to the client's feelings about the issues in the case), it may put the client in a position where the court or other parties force him to disclose information he intended to keep secret. In a typical example, a parent may call on the child in court to contradict the position taken by his GAL.

Finally, even if a GAL succeeds in avoiding direct and indirect *disclosure* of a client's secrets, she will certainly undermine the broader confidentiality interest discussed above,¹⁵¹ that is, the client's interest in ensuring that his otherwise secret statements are only used to further his desired ends. This broader confidentiality obligation, so central to representation by a lawyer with undivided loyalties, cannot be squared with the GAL approach. By definition, client statements to a

149. Of course, where state reporting laws mandate that the lawyer report abuse and neglect to state authorities, this mandate would trump any confidentiality duty set out in the Rules, regardless of the model of representation. *See supra* note 90 and accompanying text.

150. Sandra, one of the children interviewed by Janet Chaplan, captures this experience with the following description:

I only see you one time a year and it's like an hour before we go to court. And then the first thing [the lawyer says] is "Oh, I want to speak to Sandra alone." So then that makes my aunt feel like, "What's she telling them?" and in time it makes it bad for me. . . . It kind of puts you on the spot if you're in a bad situation. It's hard to open up because you're not sure. And then you can't go in the court room, so you're wondering.

Chaplan, *supra* note 13, at 1771-72.

151. *See supra* discussion in section III.B.1.b.i.(f).

GAL will be used to guide the GAL's assessment and representation of the child's best interests, regardless of whether this representation is consistent with what the child wants.

Whether his very words are repeated, or simply inspire the GAL to take particular action on his behalf, the child client loses control of the private information he shares with his GAL, and, therefore, he cannot be said to be protected by the confidentiality principle. Moreover, in the pursuit of the child's best interests, the GAL is surely obligated to uncover whatever confidential information she can from other sources. Unlike the traditional attorney, who must risk sacrificing thoroughness in the interest of preserving client control, the GAL is intended to sacrifice client control to ensure a thorough and accurate assessment of the child's best interests.

Despite retaining certain characteristics of a "normal client-lawyer relationship," the child client in this second GAL scenario, just as in the first (where the child is viewed as a nonclient), must be made to understand, not only that he cannot control his own legal position, but also that he cannot control the information he shares with his lawyer in discussing what that legal position should be. While this explanation may undermine the GAL's ability to ferret out and press for the child's best interests, the GAL cannot ethically withhold the explanation, or cultivate the child's misunderstandings, to induce the child to say things he would otherwise not say.

2. The Value of Ethical Representation to Children

Under the traditional attorney model, the value of ensuring that the child understands his lawyer's role is straightforward: Without the understanding, the child will make assumptions about this unknown adult that will undermine the lawyer's ability to consult freely with the child, identify the child's positions, and take direction from him. The better the child understands what it means to have a "real lawyer" acting on his behalf, the better the child can take advantage of that lawyer's services—by bringing issues to the lawyer's attention, discussing options, and sharing sensitive information. And without this understanding, the model will fail to have its intended empowering effect. No matter how much power a lawyer is prepared to cede to her child client, the child will not be empowered unless he understands what his lawyer is offering. Helping the child to understand that he has a champion, someone who will press his position no matter the odds, will help him discover and use his power in the system.

But what of the GAL model? Here the benefits to the child of full role disclosure are less clear. While honesty, forthrightness, and fair play are all admirable virtues, does the child really benefit from their exercise, if his GAL's effectiveness is diminished in the process? Put another way, once it is determined that a child needs an adult, a law-

yer, to protect him from his own bad judgments, shouldn't our reading of the lawyer's ethical obligations be adapted to serve that end?

If children's best interests were obvious and unambiguous, GALs might be justified in abandoning their traditional ethical obligations as lawyers to achieve those clearly best ends. But best interests are, in fact, extremely hard to define,¹⁵² and no honest GAL can deny that some of her best-interest judgments ultimately did not produce the best results for her clients. The limitations on the GAL's ability to identify best interests argue for full role disclosure to the child client for several reasons.

First, only where the child fully understands that his GAL will take whatever action she thinks is best, and more specifically, what particular actions the GAL is contemplating, will he be in a position to attempt to influence those actions. This opportunity to influence the GAL, in addition to offering the child a modicum of power in the process, is likely to improve the quality of the GAL's best interest judgments.¹⁵³ The child's greater expertise can refine and sometimes entirely alter the GAL's crude judgments about what is best. For example, a child having the benefit of understanding that his GAL plans to oppose his desire to remain with his mother will have an opportunity to convince the GAL that the alternative the GAL proposes, such as living with the grandmother, is also not appropriate; or at least that there is a *better* alternative (or an alternative the child will be more comfortable with); or even that, given the problems with the alternatives, remaining with the mother is not such a bad option for the child after all. Although the GAL model allows decisions about positions to rest ultimately with the GAL, requiring the GAL to share with her client her overall goals in the representation, and her specific views about how to achieve those goals, forces the GAL to hold those views up to the light of her client's opinions and expertise. Indeed, a best interest judgment made in the absence of this open conversation with the client should be viewed with considerable skepticism.

152. See Duquette & Ramsey, *supra* note 3, at 353-54; Joseph Goldstein et al., *Beyond the Best Interests of the Child* 49-64 (1973); see also Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. Davis L. Rev. 829, 835 & n.19 (1989) (discussing the indeterminacy of the best interests test due to various factors that must be balanced); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *Law & Contemp. Probs.*, Summer 1975, at 226, 255-62 (discussing "the inherent indeterminacy of the best-interests standard").

153. In her interview, Sandra made this point, which Chaplan summarizes as follows:

[E]ven if the lawyer makes a decision to take a position different from the child's preference, Sandra believes that if the child is involved in the decision-making process, the child is more likely to tell her lawyer what the problem really is. Client-centered interviewing makes the difference between whether a client will talk to her lawyer or not, and whether the lawyer can represent her effectively.

Chaplan, *supra* note 13, at 1772.

Recognizing the value to the GAL of this open conversation calls into question the assumption that a misled (and therefore overly trusting) client will provide more useful information to the GAL than will the well-informed (and therefore cautious and controlled) client. In fact, in attempting to assess her client's best interests, the GAL will inevitably face a trade-off between the value of the child's unguarded candor and the value of his well-informed discourse. It is impossible to determine, in the abstract, which type of participation will produce more, or better, information for the GAL.

Full role disclosure, however, provides additional benefits to children that go beyond the issue of GAL effectiveness. These benefits, too, stem, at least in part, from the elusiveness of the best interest inquiry. A second value to children of ensuring that they understand the GAL's role and engage in an open exchange about the GAL's positions is suggested by the workings of the juvenile and family courts. The courts' process of ascertaining best interest is flawed, not only because it often produces bad results, but also because it tramples children's dignity along the way. Children are made to feel irrelevant, and even worthless, by a court process that pays no attention to them,¹⁵⁴ and presumes that they have nothing valuable to say. If the end point of all these proceedings were the Taj Mahal for all children, the lack of respect they received along the way would still matter, but not as much. Given that the end result is so likely to be bleak, and very possibly not even the "best" of the possible bleak results, the injury of disrespect is unpardonable. A GAL can offer only a *chance* of helping the child through the positions she takes in court, but she can *guarantee* her client a relationship of respect by sharing her role and her positions openly with her client. In a world full of bad breaks for these children, that respect is a tremendous gift, and undoubtedly serves children's best interests.

Finally, the GAL has something to offer the child that the traditional attorney does not: The GAL offers the child the comfort of knowing that someone else has taken over the burden of decision making, and that some adult in the process is charged with safeguarding his interests against all the other, potentially destructive, forces at work. The GAL may not be able to pull off a good result for the child, either because she takes the wrong positions, or because the court

154. As noted above, children are often never seen by the judge. See HHS study, *supra* note 5, at 5-26 (reporting that children rarely speak in court). Proceedings themselves, which decide crucial matters such as where children will live, whether they will get to see their parents, what services they will receive, or whether they will be freed for adoption, often last for only minutes. See *NCJFCJ Resource Guidelines*, *supra* note 21, at 10 (noting that deficient resources, and increased caseloads, hearings and parties have "gravely" affected the quality of the hearings, which are "often rushed"); Philadelphia Citizens for Children and Youth, Report of the Dependency Court Watch Project 5 (1990) (reporting that of 529 cases observed, 36% lasted less than five minutes, and only .4% lasted over 45 minutes).

isn't persuaded by her arguments; but the child can know that the GAL is trying to get the best result, and that her only concern in the proceeding is the child's welfare. Like the traditional attorney benefits of empowerment and control, however, the GAL's commitment to relieving the child's burden and, in her own way, fighting against all odds for the child, has no value to the child unless he is aware of this commitment. While ensuring that children understand the GAL role will prove disempowering to some, it will prove liberating to others. Explaining the GAL role offers children the relief of knowing that they bear no responsibility for making the hard decisions with potentially terrible consequences for the people they love.¹⁵⁵

My own experience and prejudices suggest that from a fairly young age, most, but by no means all, children value having control in their relationships with lawyers more than they value being protected by their lawyers.¹⁵⁶ If the role being taken is, in fact, the protective role, however, children might as well at least have the benefit of knowing that they have a protector. Without that understanding, the child may confuse the GAL's conscientious assessment of the child's long term interests—leading to advocacy for a position contrary to the child's—with a careless indifference to the child's thoughts and feelings.

All discussions of ethics fall back, ultimately, on our sense of what is right. It is my strong sense, based on my experience representing children and my observations about how the system operates on behalf of these children, that the most important thing a lawyer under either model can do for her child client is to show him respect, by dealing with him in an honest, straightforward manner. My analysis does push the lawyer toward the traditional attorney model, because this model lends itself more easily to an open exchange about roles and positions.

155. See Mlyniec, *supra* note 4, at 13-14 (noting that asking a child to choose between parents in a custody proceeding can impose a heavy burden on the child); Landsman & Minow, *supra* note 6, at 1165 ("Studies of children of divorce indicate that there may be very good reasons for a child's decision not to become directly involved in the dispute over his custody . . .").

A lawyer assuming the traditional attorney role also may lessen the burden on the child by explaining that even though she will press the child's positions zealously in court, the judge will ultimately make the decisions. But many children can appreciate that if their position is relevant at all, it might change the judge's decision. And in some jurisdictions, lawyers report that courts tend to go along with whatever the child's attorney advocates. See *id.* at 1184. Moreover, simply taking a position in court and having that position known to their parents, can be burdensome enough for some children, regardless of whether the child's position carries any weight with the judge.

156. For discussions of children's resentment at being excluded from involvement in decision making in the context of divorce proceedings, see sources cited in Landsman & Minow, *supra* note 6, at 1164 n.184. But see Chaplan, *supra* note 13, at 1783 (concluding that while children wanted to be included in decision making, they preferred to think of their lawyers as protectors rather than as simple advocates).

I am convinced, however, that it matters far less which role is assumed than that the role is communicated to the child.¹⁵⁷

IV. CHECKING THE LAWYER'S ETHICAL OBLIGATIONS AGAINST THE CHILD'S CAPACITY TO UNDERSTAND THE LAWYER'S ROLE

A. *The Link Between Ethics and Capacity*

Children's frequent confusion about their lawyers' roles cannot be explained away simply as the product of inattentive lawyering. While a lawyer's failure to attend to her client's confusion will certainly exacerbate the problem, even a lawyer's most conscientious attempts to explain her role may fail to illuminate (or convince) the confused client. The very commonness of these misperceptions in my own experience, and in my observation of highly skilled lawyers, reflects just how difficult it is to communicate the roles effectively to children. As discussed in part II, children have every reason *not* to understand their lawyers' roles and the relationships they are expected to have with their lawyers. Children may be particularly resistant to understanding explanations about the traditional attorney role because it relies on the unlikely premise that an adult will cede authority to a child, but both roles are confusing for children, who lack the context and experience to make sense of these unusual relationships.¹⁵⁸

The difficulty even the most conscientious lawyers have in conveying their roles to their child clients raises the question whether such role communication is in fact possible. Ultimately, I must measure my ethical analysis against the reality of what can be done. This takes us back to Rule 1.14's "reasonably possible" inquiry, which recognizes

157. Howard Lesnick's comments, in a very different context, offer a fruitful comparison. In considering "whether an attorney had any legitimate independent interests in the way a case was to be handled on behalf of a client," Professor Lesnick writes:

I've come to a curious conclusion: I honestly do not think it matters which position the attorney takes—to leave the final decision with the client or insist on keeping it—so much as I think it matters whether the attorney makes either decision in a way that respects the concerns of both attorney and client, and treats the client as an understanding independent person, with interests and sensibilities separate from the attorney, and the ability and obligation to assume responsibility for his or her decisions.

Elizabeth Dvorkin et al., *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism* 200, 202 (1981).

158. As discussed above, children's misperceptions of the GAL's role can probably be attributed, in part, to the emotional and professional difficulties GALs have in totally "coming clean" about their role and about the details of the positions they are taking. But even if the GAL takes pains to clarify her role, the child is likely to remain confused, because, just like the child represented by the traditional attorney, the child has little sense of the context in which the GAL performs her representation.

that there are practical limitations to a lawyer's ethical obligations to her disabled clients.

Under my analysis, the GAL role is premised on the conclusion that, in whole or in part, the normal client-lawyer relationship is not reasonably possible. From this premise, one could argue that the same considerations that justify the GAL approach make effective role explanation to the child impossible, and therefore not ethically required, under the GAL model. But as a matter of ethical analysis, there is no reason to assume that the ability to maintain a normal client-lawyer relationship and the ability to achieve normal client-lawyer role understanding coincide. Indeed, the commentary to Rule 1.14 expressly counsels against equating the capacity to direct representation with the capacity to be informed, directing that: "Even if the [client] does have a legal representative," (reflecting someone's determination that the client cannot appropriately identify his own interests) "the lawyer should as far as possible accord the represented person the status of client, *particularly in maintaining communication*."¹⁵⁹ Although the comment concedes that communication will sometimes *not* be possible, it clearly disjoins that assessment from the lawyer's assessment of decision-making capacity.

B. *Children's Developmental Capacity to Understand Roles*

Assessing children's ability to comprehend roles requires a look at what we know about child development. Studies of children's acquisition of social role understanding suggest that children's role comprehension increases dramatically in sophistication between the ages of (roughly) three and eight.¹⁶⁰ Before the age of three, children generally have little comprehension of professional roles.¹⁶¹ At roughly three years of age, most children perceive the professionals with whom they are familiar as a cluster of behaviors and characteristics (for example, doctors are people who wear white coats and give shots).¹⁶² Children at this stage are still too young to comprehend

159. Model Rules, *supra* note 51, Rule 1.14 cmt. (emphasis added).

160. Although I know of no studies that have looked expressly at children's comprehension of the lawyer-client role, studies about role comprehension, generally, and about children's developing understanding of the doctor-patient roles, particularly, suggest a relatively consistent pattern of development during these years. See generally Malcolm W. Watson, *Development of Social Role Understanding*, 4 *Developmental Rev.* 192 (1984) (discussing "a systematic sequence of role understanding in children from one to thirteen years of age"); Fischer & Hand et al., *supra* note 37; see also Malcolm W. Watson & Kurt W. Fischer, *Structural Changes in Children's Understanding of Family Roles and Divorce, in The Development and Meaning of Psychological Distance* (R.R. Cocking & A. Renninger eds., forthcoming 1996) (reviewing children's developing ability to comprehend family roles) (draft on file with the *Fordham Law Review*).

161. Watson, *supra* note 160, at 200-201.

162. *Id.* at 205; Watson & Fischer, *supra* note 160, at 9-10; Fischer & Hand et al., *supra* note 37, at 40.

roles in relational or purposive terms, and they have difficulty comprehending that a single person can fill several roles in relation to different people (my father is also a husband to my mother and a doctor to his patients).¹⁶³ Between the ages of four and eight, however, children gradually acquire the ability to comprehend roles in terms of their purposes and their relationships (doctors help patients when they are sick).¹⁶⁴ It is during these years that children also begin to "de-center," or acquire the ability to adopt another's viewpoint, a skill needed to comprehend the roles of others.¹⁶⁵ While they will not appreciate some of the more abstract details of these roles for years to come,¹⁶⁶ most seven- or eight-year-olds are able to understand the professional roles with which they are familiar in relevant, if concrete, terms.¹⁶⁷

It is worth noting the distinction between the ability to understand, on the one hand, and the process of becoming familiar, on the other, as I am using them in the context of assessing children's role comprehension. Whereas the ability to understand is a developmental concept, the process of "becoming familiar" is an educational concept. Before children develop a certain cognitive capacity, they cannot understand professional roles in terms that are meaningful to my discussion, regardless of their education or experience.¹⁶⁸ Conversely, until children have an opportunity to learn about professional roles through some combination of instruction, observation, and experience, they

163. Watson, *supra* note 160, at 195.

164. *Id.* at 200-207; Watson & Fischer, *supra* note 160, at 10-11; Fischer & Hand, *supra* note 37, at 41-43, 59-63.

165. See Piaget & Inhelder, *supra* note 18, at 95; Robert L. Selman, *The Growth of Interpersonal Understanding: Developmental and Clinical Analyses* 38 (1980) (concluding that children gain the ability to see others as unique psychological beings with different thoughts and feelings between the ages of five and nine); Watson & Fischer, *supra* note 160, at 6-7 (describing the interrelationship between the ability to create psychological "distance" between self and others and the ability to comprehend roles); cf. Dorothy Flapan, *Children's Understanding of Social Interaction* 65 (1968) (reporting the results of her study of children's understanding of social interaction at ages six, nine, and twelve, which suggested that the greatest changes in children's ability to perceive the thinking and motivation of others occurred between the ages of six and nine).

166. See Watson, *supra* note 160, at 201.

167. For purposes of my discussion, the particular age at which children can comprehend professional roles is much less important (and much less within my expertise) than the recognition that, at some relatively young age, children acquire this capacity. My analysis is tied, not to a particular age, but to the presence or absence of the capacity for role understanding, whenever it occurs.

168. While there is considerable disagreement among developmental psychologists about the extent to which instruction may affect the rate at which children achieve cognitive capacity, see David Wood, *How Children Think and Learn* 24, 54 (1988) (comparing Piaget, who minimizes the role of instruction, to Vygotsky, who recognizes a central role for instruction in the stimulation of children's cognitive development), this disagreement does not unseat capacity as a necessary precursor of comprehension, but rather suggests that there is some (though certainly not unlimited) fluidity in how and when that capacity is achieved.

will not achieve a meaningful understanding of these roles, regardless of their cognitive capacity. In order for a child to achieve a true understanding of the lawyer-child relationship, the child must have both the capacity to understand the lawyer's role, and a familiarity with that role.¹⁶⁹ While only the child can supply the capacity, it is up to the lawyer to ensure that the role is familiar to the child.¹⁷⁰

C. *The Narrowness of the Incapacity Exception*

Where the child lacks the developmental capacity to understand his lawyer's role at any level, the lawyer is freed from her obligation to communicate that role, for such communication is, by definition, not "reasonably possible." And where the role cannot be communicated, it is probably inappropriate for the lawyer to assume the traditional attorney role, for the child who cannot understand his lawyer's role (or his own role in the relationship) will never be in a position truly to direct the representation.¹⁷¹ The permissible exception to the lawyer's duty to explain her role is therefore a narrow one: It only applies to lawyers serving as GAL's in their representation of very young children.

Where, on the other hand, the child *has* the capacity to understand his lawyer's role,¹⁷² the lawyer's ethical obligation to facilitate that understanding (to "familiarize" the child with the lawyer's role) comes into play. For lawyers assuming the traditional attorney role or the GAL role as a modified client-lawyer relationship, communicating the lawyer role becomes a "reasonably possible" aspect of the normal client-lawyer relationship. Where the GAL role is viewed as a relationship with a nonclient, the child's developmental capacity to understand the lawyer's role suggests that there is no justification for departing from the lawyer's ordinary obligation to explain her role to nonclients. In sum, at least by the time a child is seven or eight years old (and even, to a lesser extent, when children are considerably younger), the failure of children to understand their lawyers' role probably cannot be accounted for in developmental terms, and therefore cannot be excused as a matter of ethics.

169. See Watson & Fischer, *supra* note 160, at 12-13 (noting that children's performance in the area of role understanding varies widely, depending upon whether they are provided with a "supportive context"); Fischer & Hand, *supra* note 37, at 53, 66 (same).

170. This obligation may also fall to others interested in the lawyer-child relationship in the court process. The obligations of other parties and institutions to familiarize a child with his lawyer's role exceeds the scope of this Article.

171. See *supra* text accompanying notes 75-77.

172. As the preceding discussion about children's development suggests, children's ability to understand roles will become increasingly sophisticated over time. It is my contention that the lawyer has an obligation to communicate her role to all children who can comprehend the role at some level, even a rudimentary level. As the child's ability to understand the role increases in sophistication, so, too must the lawyer's communication of the role.

V. COMMUNICATING THE LAWYER'S ROLE TO THE CHILD

In order to meet their ethical obligation to the vast majority of the children they represent, lawyers (and the system that supports them) must develop a means of familiarizing children with their roles, even where conscientious explanations have failed. In addressing how this might be accomplished, I begin with a brief review of some of the relevant developmental and educational literature, particularly the thinking of three prominent developmental psychologists: Jean Piaget, Jerome Bruner, and Lev Vygotsky.

A. *Lessons from Developmental Psychology and Learning Theory*

Jean Piaget, to whom all heads turn in discussions of children's cognitive development, focused on the importance of children's activity, and thereby experience of the world, for any real intellectual advances.¹⁷³ Cognitive development, according to Piaget, is spurred when children encounter new information, or observe new events, that do not fit neatly with what they already know and understand. Children respond to these experiences of "disequilibrium" by some combination of "assimilation," (that is, adapting what they perceive to fit what they already know) and "accommodation" (adapting what they know to account for what they perceive).¹⁷⁴ Without interaction in the world giving rise to accommodation, significant cognitive development cannot occur.¹⁷⁵

In applying Piaget's conclusions to the classroom, educational theorists encourage teachers to minimize formal instruction and to facilitate student's independent play and exploration to allow them to encounter, and adapt to, experiences of disequilibrium. Indeed, in the view of these "discovery learning" theorists, teachers who claim to "teach" children, particularly young children, through verbal instruction are not teaching concepts. Rather, they are merely teaching procedures that children can follow, but which have no meaning to them.¹⁷⁶

173. Jean Piaget, *Piaget's Theory*, in 1 Handbook of Child Psychology: History, Theory and Methods 117-23 (P.H. Mussen & W. Kessen eds., 1983) [hereinafter *Piaget's Theory*]; see also Wood, *supra* note 168, at 5, 19 (summarizing Piaget's emphasis on propelling cognitive development through activity); Kathy Sylva & Ingrid Lunt, *Child Development, A First Course* 185 (1982) (same).

174. *Piaget's Theory*, *supra* note 173, at 107; see also Wood, *supra* note 168, at 38-41 (describing Piaget's concepts of assimilation, accommodation, and equilibration); Sylva & Lunt, *supra* note 173, at 110-11 (same).

175. *Piaget's Theory*, *supra* note 173, at 106-09; see also Wood, *supra* note 168, at 39 (noting that, under Piaget's theory, "some accommodations require dramatic changes in the structure of the child's understanding of the world"); Sylva & Lunt, *supra* note 173, at 110-11 (noting that accommodation, unlike assimilation, requires a mental change in the child to solve problems that are otherwise too difficult for the child to solve).

176. Wood, *supra* note 168, at 24; see also Sylva & Lunt, *supra* note 173, at 184-85. In their summary of discovery learning, Sylva and Lunt explain:

Jerome Bruner departs from Piaget in his willingness to recognize a greater role for instruction in learning, but, like Piaget, he continues to emphasize the origin of learning in interaction. Bruner divides effective learning into three phases: the enactive (learning through activity), the iconic (learning through pictorial representations), and the symbolic (learning through language).¹⁷⁷ While Bruner notes that children generally progress through these phases and become increasingly able to learn through language (symbolic learning) as they grow,¹⁷⁸ he suggests that instruction in all areas should be sequential—moving from the concrete to the abstract, from the hands-on to the purely cerebral.¹⁷⁹ Educators applying his analysis contend that the teaching of all new subjects should progress through Bruner's three phases and that teachers encountering difficulties communicating concepts to students verbally should bring the learning back to a more interactive level.¹⁸⁰

Lev Vygotsky, too, emphasized the importance of interaction for learning, but he focused on a very different form of interaction. For Vygotsky, it is children's interaction with their social world, with their culture, that forms the basis of their cognitive development.¹⁸¹ By interacting with their adult role models (and through the active collaboration of these adults) children acquire social knowledge, which is ultimately converted to individual knowledge about the skills, facts,

Discovery learning is really opposed to the idea of teaching if by teaching is meant the traditional process of imparting information, or modifying behavior, or even filling up an empty vessel with knowledge. The idea is rather to provide the materials and the environment for the child to explore and let him do the rest almost by himself, motivated to learn by his own curiosity.

....

[The child] is involved in an active construction and reconstruction of his world view and his understanding of what goes on around him.

Id.

177. Jerome S. Bruner, *Toward a Theory of Instruction* 11, 44-45 (1966).

178. *Id.* at 12-14.

179. *Id.* at 21, 29-30, 49.

180. See *Educational Psychology* 128 (N.L. Gage & David C. Berliner eds., 4th ed. 1988).

181. See generally Lev S. Vygotsky, *Mind in Society: The Development of Higher Psychological Processes* (1978); Lev S. Vygotsky, *Thought and Language* (1986); see also Wood, *supra* note 168, at 25 (noting that, according to Vygotsky, "only through interaction with the living representatives of culture . . . can a child come to acquire, embody, and further develop [a society's] knowledge").

While Vygotsky's works were originally published in Russian in the early 20th Century, they received little attention from Western psychologists until recent years. See Wood, *supra* note 168, at 9. Today, Vygotsky's focus on the social and cultural context of learning is widely embraced. For a leading example of a contemporary developmental psychologist who has built upon Vygotsky's themes, see the writings of Barbara Rogoff, including *Apprenticeship in Thinking: Cognitive Development in Social Context* (1990) (stressing the importance of both guidance and participation in the process of cognitive development).

concepts, and attitudes that are relevant to their particular culture.¹⁸² Vygotsky's work helped focus educators on the social context of learning,¹⁸³ and the active collaborative role played by adults in furthering children's intellectual development. In Vygotsky's terms, the job of a teacher is to identify the "zone of proximal development"¹⁸⁴—the gap between what children can do and know on their own, and what they can do and know with the help of an adult—and to engage in cooperative activity and instruction within that zone.¹⁸⁵

While the theories of Piaget, Bruner, and Vygotsky differ significantly, they share a common focus on the importance of experience and interaction to the learning process.¹⁸⁶ As all three theories suggest, talking at children, particularly about matters divorced from their experience, is unlikely to advance children's understanding.

Developmental and educational theories addressing broad questions about the sources of children's intellectual growth do not translate neatly into directions about how to teach a child about his lawyer's role. They do, however, offer some powerful advice to lawyers: For children truly to understand what it means to have a lawyer, and what that lawyer does, they need to experience the process, as participants and as observers.

Lawyers cannot expect to convey their role effectively to most children by simply explaining things more clearly.¹⁸⁷ Children have no

182. Vygotsky, *Mind in Society*, *supra* note 181, at 56-57; *see also* Wood, *supra* note 168, at 19 (noting that Vygotsky theorized that "activity in . . . the external social plane is gradually 'internalized' by the child").

183. To recognize that learning occurs within a context is to recognize that learning is *shaped* by that context—that learning is context-specific. *See* Kurt W. Fischer et al., *The Development of Abstractions in Adolescence and Adulthood*, in *Beyond Formal Operations: Late Adolescent and Adult Cognitive Development* 45-46 (1984) (noting that "people always acquire specific skills tied to particular environmental circumstances" and that "context always plays an enormous role in developing behavior"). Without the contextual supports of experience and assistance, among other things, children's behavior is likely to be developmentally compromised. *See* Fischer & Hand et al., *supra* note 37, at 52-53 ("Changes in the amount of [contextual] support typically produce profound differences in the developmental level of behavior.").

184. Vygotsky, *Mind in Society*, *supra* note 181, at 84-91.

185. *See* Educational Psychology, *supra* note 180, at 126, 128. Rogoff, *supra* note 181, emphasizes the child's active, participatory role in this collaborative process of instruction which she characterizes as "apprenticeship."

186. *See* Wood, *supra* note 168, at 8, 19. Even the promoters of "programmed learning," whose emphasis on an externally controlled, highly structured learning process distinguishes them sharply from the psychologists discussed above, stress the need for active child involvement, and immediate experiential reinforcement of the concepts learned. While the programmed learning approach, inspired by the behaviorist B.F. Skinner, features learning propelled by preprogrammed external stimuli, its proponents reject learning through passive listening and suggest a student must be actively engaged in incremental problem-solving in order to learn. *See* Sylva & Lunt, *supra* note 173, at 191.

187. *See* Perry & Tepy, *supra* note 9, at 1382-83 (noting the difficulty children have in understanding lawyers' verbal explanations and calling for the use of visual aids whenever practical).

context, no relevant experience to make these explanations make sense. Indeed, attempts to create a context by description are more likely to mislead than illuminate, for they must rely on inapt comparisons (who is a lawyer like?), or confounding elaborations on the unpredictable and chaotic goings-on of juvenile or family court. In Piagetian terms, children are likely to respond to these perplexing explanations by *assimilating* what they hear to fit the world they already know (again, a world that knows no lawyers). Unless a child sees his lawyer in action and has an opportunity to engage in the process of representation as it occurs, he will lack the expertise to make the cognitive *accommodation* necessary to perceive the lawyer's role for the unique role that it is.

B. *Engaging Children in the Process*

The core of the lawyer's representation occurs, of course, in and around the courtroom. This setting represents the single best place, therefore, for a child to experience his lawyer's representation. Only in the courtroom can the child observe the constellation of participants, the decision-making process, and the role his lawyer plays in that process. And only in the halls outside the courtroom can the child observe the negotiation process that is often more key than any hearing in determining his fate. The value of coming to court to a child's understanding of his lawyer's role is great regardless of which model the lawyer assumes.

For the child being represented by the traditional attorney, nothing so overcomes the child's incredulity as seeing his lawyer in action. It is one thing for a lawyer to tell a child, at his school or in his living room, that she will go to court and tell the judge what the child wants (maybe she will, maybe she won't, and what difference, the child may wonder, does it make, anyway?). It is quite another matter for the child to sit in court and hear the lawyer press for what he told her he wants, do battle with opposing viewpoints before the judge, and even, perhaps, persuade the judge, against the recommendations of other parties, that what the child wants should happen. The live demonstration can also provide a proving ground for promises of client confidentiality, where the particular issues being pressed in the proceeding bring the lawyer's silence on the subject into sharp relief for the child.

Seeing his lawyer in action will also help the child represented by the GAL to understand that role. Unlike the client of the traditional attorney, who needs to be convinced that his lawyer will really advocate what he wants and keep his secrets, the child represented by the GAL needs to be reminded that his lawyer will not necessarily advocate what he wants and may share his secrets with the court and other parties. By observing the GAL in court, general statements about "doing what is best for the child" take on concreteness (both in con-

tent and context) that distinguishes the GAL's role from that of other helping adults.

As important for the child's education about the lawyer's role are his observations of the hallway negotiations that precede the hearing. In many cases, the bulk of decision making occurs in these informal negotiations.¹⁸⁸ By observing these negotiations, children can learn, in addition to the kinds of information they can gain in the courtroom, a great deal about how their lawyers interact with other adults involved in the case, including parents, care givers, agency social workers, and the lawyers for the various parties. These relationships, and particularly the content of the lawyers' conversations within these relationships, will tell children a great deal about their lawyers' role.

A child's presence in court not only allows the child to observe his lawyer's role, but it also puts pressure on the lawyer to be true to her role. Away from the watchful eye of the client, it is very easy for traditional attorneys, in particular, to modify the child client's position to one that it is easier for the lawyer to swallow.¹⁸⁹ Where, for example, the child has expressed a desire to go home, the lawyer may represent the child's position to the court (if the child is absent) as a desire to go home "as soon as appropriate," or "as soon as his mother completes drug treatment," even if such qualifications were never provided by the child. Indeed, in her discussion with her client outside of court, the lawyer may find it just as easy not to press for specifics when the child states he wants to go home, to try to buy some flexibility in the child's position when she later goes to court. If the child is sitting in the courtroom, however, the traditional attorney is under considerable, appropriate pressure to discover and remain faithful to the core of the child's position. The lawyer is much more likely to know, for example, that the child emphatically wants to go home that very day, regardless of his mother's condition, and much more likely to convey that position, without qualification, to the court.

In addition to offering an opportunity for first-hand *observation*, bringing children to court creates an opportunity for *participation* that cannot be duplicated outside the court setting. By attending court, children have an opportunity to meet with their lawyers at a time when the issues to be resolved among the parties or by the court are most sharply presented. In this context, children can develop and express their positions with the benefit of good information about the positions of other parties, which are frequently not articulated until

188. See William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. Miami L. Rev. 745, 795 (1994) (noting that most dependency cases are resolved informally).

189. In their study of lawyers for children in Connecticut, Kim Landsman and Martha Minow found that lawyers frequently took on responsibilities inconsistent with their own characterizations of their roles. Landsman & Minow, *supra* note 6, at 1145-46.

the day of the court hearing. They can hear their lawyers' assessment of the strength of the various arguments to be presented and the support that will be marshaled on their behalf. With a decision imminent, children discuss their views with an awareness that the positions they take, and what they say to support those positions, may have a direct effect on the outcome of the process. For the child represented by the traditional attorney, the persuasiveness of his positions translates into his lawyer's more persuasive arguments in negotiations or before the court. For the child represented by the GAL, the persuasiveness of his positions will determine whether or not the GAL pursues his objectives at all. Either way, the process of discussing options and viewpoints in the context of immediate representation leads to a clearer sense of the role relationships for the child, and, consequently, a better opportunity for the child to modify his own involvement in the relationship to reflect that clearer understanding.

Having represented children under the traditional attorney model in two jurisdictions, one where the children almost always come to court, and one where they generally do not, I have seen a significant difference in children's comprehension of my role, and, consequently, their willingness and ability to relate to me as a lawyer. In the first jurisdiction (where children generally attend court), I carried far too heavy a caseload (more than 400 clients per year), and therefore saw my clients almost exclusively on the days of their hearings, and only in court. In contrast, I now represent a small number of clients who I can see several times each year, in what are considered more natural and comfortable settings for children, such as schools, homes, and restaurants. These clients rarely come to court, in large part because the expectations of court personnel, judges, potential transporters, and the children themselves are all against their coming. While I see my clients more often now, with the obvious advantages for developing a relationship and providing thorough and competent representation, my sense is that my clients now tend to be more confused about my role than my previous clients who saw me less often, and only in the context of the court process. Like the teachers whom they saw only when they were being taught, and the doctors whom they saw only when they were receiving medical care, my previous clients saw me only in the process of representing them, where that representation was easiest to perceive.

As a result of their clearer perception, the quality of my conversations with my clients was much better. We tended to speak for a longer time, and our discussions were more consistently focused on the issues at hand. I was able to provide much more specific information about the positions of the other parties, as they would be articulated to the court. Our conversations could also be much more strategic because they occurred in court on the day of the hearing. We were able to discuss the comparative strength of tactical options, as

well as substantive positions, because of the relative clarity of others' positions and tactics, and because of the immediacy of the process. Overall, clients' better understanding of my role produced better conversations and, in turn, those better conversations reinforced my clients' understanding of my role.

Immediately following these conversations, my clients would watch me in hallway negotiations and in court. I could involve them in the negotiations as they progressed, and consult with them again as positions shifted, or new information was elicited. In court, they could watch me say what I said I was going to say (and not say what I said I would not) to the judge, and I could, again, ask for an additional opportunity to consult with them if unanticipated issues arose. At the end of the hearings, I could ask the judge to explain her rulings to my clients.

Children's presence in court also allowed me to speak to them immediately after the proceeding, to discuss their impressions and to answer their questions. It allowed me to help them anticipate the next steps in my representation (which, again, reinforced their understanding of what I did). Moreover, children's presence in court had a carry-over value to our out-of-court discussions, on those rare occasions when those discussions could occur. Once the judge had a face, and the issues and process had been brought to life, my client-lawyer communications in other contexts were enhanced.

There is considerable disagreement about the advisability of bringing children to court.¹⁹⁰ Most of the concern focuses on the potential harm to children, although there is also administrative resistance among child welfare agencies to the prospect of being responsible for the burdensome and time-consuming process of bringing children to court and taking them home afterwards. The fear for children is that they will be traumatized by the place and by the process. At court, children are forced to come face-to-face with their history of abuse or neglect and with the deep family tensions invoked by the proceeding. Moreover, children are often called upon to take sides, against one or both parents.

While coming to court can provoke considerable anxiety in children, we fool ourselves if we think that *avoiding* court protects children from those anxieties. Much of the anxiety is created by the *existence* of the court process (a process whereby a child's future is determined by a judge) and the issues underlying the court's involvement (the abuse, neglect, foster care placement, or divorce). Lawyers' conversations with their clients tend to fan those anxieties, whether or not the child appears in court, because these conversations inevitably (if grounded at all) focus on the court process and the decisions the

190. See HHS Study, *supra* note 5, §§ 5.2.4, 6.2.2.3.

judge will have to make. Realistically, a child is not shielded from the court process until the court dismisses his case.

The best argument against bringing children to court is that the process they observe is an abysmal and chaotic one. For the most part, children will not see a decorous or thoughtful adversarial process.¹⁹¹ They will see long waits in dreary, toyless waiting rooms, followed by brief hearings, at which hallway agreements are hastily presented. They will see families herded up to the bar of the court and sworn in *en masse*. They will see lawyers trying to out-yell each other to get the judge's attention, and judges making decisions with little or no reference to the governing legal standards. They may see their own lawyers derided for trying to force the court to follow a more formal legal process, or to articulate a clear legal basis for its rulings. They may even see the judge taking phone calls, or speaking with court personnel, while important evidence or argument is being presented.

Given how these overburdened, underfunded, and undervalued juvenile and family court processes tend to function, a good argument could be made that children's presence in court is at least a waste of their time, and perhaps affirmatively damaging. Moreover, the chaos that reigns in most of these courts may undermine children's ability to perceive with any clarity the role played by their lawyers.

Despite the power of this argument, I nevertheless contend that children's presence is more helpful than harmful to them for two reasons that closely parallel arguments already made. First, there is a certain value to children seeing precisely what *does* happen in court. An understanding of how the court functions is essential to a child's understanding of how his lawyer functions *in that system*, and how the system makes decisions on his behalf. This point is only a subtle variation on a primary thesis of this Article: A child's understanding of the true context of representation is an essential piece of a child's understanding of his lawyer's role.

Second, while the workings of the court process guarantee that coming to court will never be fun for most children, the trauma caused by observing a poorly run court process pales in comparison to the trauma caused by children's involvement in the child welfare system, generally, and the trauma caused by the circumstances leading up to the system's involvement. Like the concern about the trauma caused to children by their exposure to the *substance* of the case at court, the concern for the trauma caused by children's exposure to the court *pro-*

191. There are, of course, some well-run juvenile and family courts. My observation, and the information I have gathered from children's lawyers working in other jurisdictions, suggest that these well-run proceedings represent the exception rather than the rule. The particular problems I describe in this paragraph are all problems I have observed directly. The problems most jurisdictions have in conducting appropriate hearings in these cases are caused, in part, but not in whole, by the lack of resources provided to family and juvenile courts.

cess underestimates children's awareness of the process, and thereby overestimates the effect of seeing that process firsthand. Bringing children to court clearly has the benefit of enhancing their perception of, and participation in, a relationship with their legal representative. Against that, the speculative harm caused to children through their exposure to additional deficiencies in a system they already view as deficient is not, in my view, weighty enough to tip the scales against children's attendance.

Although bringing a child to court is surely not the only means, nor a perfect means, of educating him about his lawyer's role, it is one of the best means that seems readily achievable, and likely to at least help produce the desired ends. The same arguments can be made, to a large extent, about children's attendance at other decision-making events, such as case plan meetings, though the greater informality of these proceedings, and the lesser authority of the decision-making process, can make them less powerful teaching tools than the court proceedings themselves. The value of interactive learning can also probably be captured through modeling and role-playing exercises.¹⁹² Ultimately, we will need the assistance of those with greater expertise in how children learn to develop an effective curriculum to teach children what lawyers are doing on their behalf. Until such a curriculum is developed, however, there is no substitute for bringing children into the process and letting them experience it for themselves.

CONCLUSION

My thinking in this Article, which draws so heavily on my experience and observation, needs to be tested. In particular, it would be fruitful for lawyers, psychologists, and educators to combine resources to study the nature and extent of the problem of children's role misperceptions, and to consider the most effective means of clarifying lawyers' roles for children. To get a clear sense of the problem and its solutions would require a thorough examination, in cognitive as well as experiential terms, of how and when children come to understand roles, and to what extent the nature of the role in question effects children's mastery of role comprehension. A thorough examination of the issue also requires us to speak to children of all ages about their understanding of their lawyers' roles and how they derived those understandings.

A child's understanding of who his lawyer is, and what she is doing, is central to any coherent and fair system of representation for children. Establishing the scope of the problems and solutions should,

192. Cf. Kathleen G. Williams, *The Philadelphia Court School Project Training Manual* (1990) (describing a program of discussion, role playing, and touring the court used by the Philadelphia District Attorney's office to familiarize children with the court process in preparation for children's testimony at criminal child abuse proceedings) (on file with the *Fordham Law Review*).

therefore, be a central inquiry of attorneys seeking to serve their child clients ethically. As is so often true in the representation of children, children's powerlessness to complain—to file a malpractice or disciplinary action, or to take the matter up with the mayor—leaves enforcement of the child's lawyer's obligation to communicate her role entirely in the lawyer's own hands. Unless we confront our failure to communicate our roles to the children we represent and work to overcome this failure, we lawyers for children will continue to "assume" meaningless roles, and children will remain in the dark.