

2002

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## Recommended Citation

Theo S. Liebmann, *Confidentiality, Consulation, And The Child Client*, 75 Temp. L. Rev. 821 (2002)

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# CONFIDENTIALITY, CONSULTATION, AND THE CHILD CLIENT

*Theo S. Liebmann\**

## INTRODUCTION

Forty years have passed since child abuse was first formally understood to involve issues of mental health.<sup>1</sup> Today, practitioners and scholars in the field of child maltreatment<sup>2</sup> recognize both that children's lawyers<sup>3</sup> hold unique responsibilities which require abilities and skills more commonly ascribed to mental health professionals, and that competent representation by children's lawyers consequently requires interdisciplinary consultation.<sup>4</sup> The unique

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1. See C.H. Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17, 18-19, 23-24 (1962) (asserting, among other things, that problem of abused children has mental health implications both for abused children and their abusers); David Finkelhor, *Introduction* to THE APSAC HANDBOOK ON CHILD MALTREATMENT, at xii (John E.B. Myers et al. eds., 2d ed. 2002) [hereinafter APSAC HANDBOOK].

2. "Maltreatment" cases are also called dependency cases, or abuse and neglect cases, and involve allegations brought by a state agency against parents that they have neglected or abused their children.

3. This Article focuses on lawyers who represent children pursuant to the definition of "The Child's Attorney" in the STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES § A-1 (1996) [hereinafter STANDARDS], available at <http://www.abanet.org/child.childrep.html>, which describes such a lawyer as one "who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." *Id.* While the Standards express a clear preference for the appointment of lawyers who fall under this definition, see *id.*, lawyers are often appointed as a "Guardian Ad Litem" who must protect the child's interests as an officer of the court, or some combination of lawyer and guardian ad litem. *Id.* § A-2. Most jurisdictions are frustratingly unclear as to which role a lawyer should adopt, and on what it means to represent a child's "best interests." For a thorough survey of the "chaos" in role definition, see JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS §§ 2-3(a) to 2-3(b), at 24-33 (1997) [hereinafter REPRESENTING CHILDREN]. The analysis in this Article only applies to lawyers who are assigned a role consistent with the Standards' definition of "Child's Attorney."

4. See, e.g., REPRESENTING CHILDREN, *supra* note 3, §§ 5-4(a), 6-3 to 6-6, at 131-40, 153-91 (advising children's lawyers on importance of, and proper technique for, interdisciplinary collaboration); Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955, 1971 (1996) (proposing

responsibilities which children's lawyers must fulfill come in the form of ethical mandates,<sup>5</sup> statutory requirements,<sup>6</sup> and practice guidelines,<sup>7</sup> and range from the implicit duty to communicate with a client in a developmentally appropriate manner,<sup>8</sup> to the practice standard of advocating for appropriate social services on behalf of a client,<sup>9</sup> to the explicit obligation to determine a client's best interests.<sup>10</sup> Many of these unique responsibilities have interdisciplinary aspects which require an expertise in the areas of social work, psychology, or psychiatry.

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multidisciplinary representation model for very young children); Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617, 618-21 (1994) (analyzing importance of multidisciplinary representation of children); Jean Koh Peters, *Concrete Strategies For Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, 1 KY. CHILD. RTS. J. 15, 16 (1991) [hereinafter *Concrete Strategies*] (discussing the importance for children's lawyers of working with consulting social workers); Andrew Schepard, *Law School Programs Set to Improve Representation of Children*, N.Y. L.J., Nov. 1, 2001, at 3 (describing programs at several law schools which engage in interdisciplinary representation of children); Deborah Weimer, *Ethical Judgment and Interdisciplinary Collaboration in Custody and Child Welfare Cases*, 68 TENN. L. REV. 881, 882 (2001) (discussing rejection of traditional adversarial litigation in custody disputes). In fact, the benefits of interdisciplinary collaboration and consultation are steadily gaining recognition among lawyers in a wide variety of practices. See, e.g., AMERICAN BAR ASSOCIATION COMMISSION ON MULTIDISCIPLINARY PRACTICE REPORT TO THE HOUSE OF DELEGATES (2000) (proposing ethical standards for lawyers engaged in multidisciplinary practices), available at [http://www.abanet.org/litigation/issues/mdp/aba\\_recommendation.pdf](http://www.abanet.org/litigation/issues/mdp/aba_recommendation.pdf); Jeffrey Selbin & Mark Del Monte, *A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender-Specific Legal Services to Women with HIV*, 5 DUKE J. GENDER L. & POL'Y 103, 126 (1998) (describing system where legal advice is one facet of comprehensive service program for HIV-infected women); Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227, 229 (2000) (discussing the benefits and challenges of multidisciplinary collaboration for lawyers and agencies providing services to low and moderate income clients).

5. The Model Code of Professional Responsibility, for example, provides: "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." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-12 (1983) [hereinafter MODEL CODE]. See *infra* Part I.A for a discussion of ethical mandates of children's lawyers that require consultation with mental health professionals.

6. For example, the statutes of thirty-six states, Puerto Rico, and the District of Columbia explicitly link the role of the representative for the child to the child's "best interests" or "interest." REPRESENTING CHILDREN, *supra* note 3, § 2-3(b), at 30-31. See generally Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings* 64 FORDHAM L. REV. 1507 (1996) [hereinafter *Roles and Content*] (describing prevalence of best interests standard in the representation of children, and exploring proper role of that standard). See *infra* Part I.B for a discussion of statutory requirements of children's lawyers that require consultation with mental health professionals.

7. See, e.g., STANDARDS, *supra* note 3, § B-5 cmt. (pointing out that child's lawyer must determine the position to be advocated independently of the client). See *infra* Part I.C for a discussion of practice guidelines for children's lawyers that require consultation with mental health professionals.

8. See MODEL CODE, *supra* note 5, EC 7-12 (requiring lawyer for client under disability such as age, experience, or intelligence to "obtain from him all possible aid," thus implicitly requiring that lawyer to be able to communicate with client in manner most developmentally appropriate); see also STANDARDS, *supra* note 3, § A-3 (directing child's attorney to structure all communications to account for child's age, level of education, cultural context, and degree of language acquisition).

9. See STANDARDS, *supra* note 3, § C-4 (directing child's lawyer to seek appropriate services).

10. See *id.*, § B-5 (setting forth lawyer's duty to determine child client's legal interests).

A lawyer for a child in a maltreatment case may need to know, for example, what cognitive and psycho-social developmental factors she should consider in her interactions and communications with her client. She may need an awareness of which available social services might be most appropriate for her client's needs. In addition, she may need to understand the client's psychological and emotional well-being in order to factor it appropriately into her determination of her client's best interests. The interdisciplinary nature of these considerations means that consultation<sup>11</sup> with a mental health professional often will be necessary in order for a children's lawyer to meet her<sup>12</sup> ethical obligation to provide competent representation.<sup>13</sup>

As the use of interdisciplinary consultation becomes increasingly common, however, lawyers for children must recognize that they may not engage in unrestricted consultation with mental health professionals. A lawyer whose case indicates a need for interdisciplinary consultation must conscientiously consider how the consultation impacts her ethical duty to preserve the confidentiality of all information relating to the representation of her client.<sup>14</sup> On at least two levels, consultation poses serious risks that confidential information<sup>15</sup> will be exposed to third parties improperly. Not only does the consultation by its nature typically involve the disclosure of confidential information,<sup>16</sup> but the party being consulted may have a different confidentiality duty and different standards for

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11. For the purposes of this Article, the term "consultation" encompasses any discussion with a mental health professional related to the lawyer's representation of her client where advice is given or views are exchanged. See WEBSTER'S II NEW COLLEGE DICTIONARY 242 (1999) (defining "consultation" as "[a] conference at which advice is given or views are exchanged"). The term "mental health professional" will include social workers, psychologists, and psychiatrists who are performing court-assigned forensic duties, are providing ongoing counseling or therapeutic services to the client or his family, or are retained by the lawyer specifically as a consultant.

12. For purposes of clarity, this Article will use the feminine pronoun for lawyers, and the masculine pronoun for clients, unless a specific case is being described or analyzed.

13. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) [hereinafter MODEL RULES] ("A Lawyer shall provide competent representation to a client."); MODEL CODE, *supra* note 5, DR 6-101(A)(1) ("A lawyer shall not . . . [h]andle a matter which he knows or should know that he is not competent to handle . . .").

14. These duties are codified in both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. All but eight U.S. jurisdictions have adopted standards based on the Model Rules. MODEL RULES, *supra* note 13, preface. The Model Rules provide that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ." *Id.*, R. 1.6. The Model Code provides that "a lawyer shall not knowingly [r]eveal a confidence or secret of his client." MODEL CODE, *supra* note 5, DR 4-101(B)(1).

15. The Model Rules consider confidential all information "relating to the representation of a client." MODEL RULES, *supra* note 13, R. 1.6. The Model Code protects the client's "confidence or secret," MODEL CODE, *supra* note 5, DR 4-101(B)(1), defining "confidence" as "information protected by the attorney-client privilege under applicable law," *id.* DR 4-101(A), and "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client," *id.*

16. There are circumstances where disclosure of confidential information is not necessary for fruitful and effective consultation. See *infra* Part IV for a discussion of the importance of ensuring that confidential information is disclosed only when necessary.

any further disclosure of the information, thereby creating risks of even further exposure.<sup>17</sup>

For most clients, a lawyer can circumvent any violations of the confidentiality duty she owes to her client either by obtaining informed consent<sup>18</sup> prior to a consultation,<sup>19</sup> or through hiring an expert to do the consultation so that any ensuing communications would be protected from further disclosure by the attorney-client privilege or the work-product rule.<sup>20</sup> Neither obtaining informed consent nor hiring an expert, however, offers a lawyer a viable method for ethical consultation when the lawyer represents a child who does not have the capacity to provide informed consent.<sup>21</sup> Informed consent fails because, by definition, the child lacks the capacity to understand the disclosure question and the consequences of disclosure, and therefore is incapable of providing a knowledgeable and voluntary waiver of confidentiality.<sup>22</sup> In other words,

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17. Social workers, for example, should protect the confidentiality of all information obtained in the course of professional service, *except for compelling professional reasons*. The general expectation that social workers will keep information confidential does *not* apply when disclosure is necessary to prevent serious, foreseeable and imminent harm to a client or other identifiable person.

CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS § 1.07(c) (1999), *available at* <http://www.ssc.msu.edu/asw/ethics/nasweth.html#107> (emphasis added). Similarly, psychologists may disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose, such as (1) to provide needed professional services to the patient . . . , (2) to obtain appropriate professional consultations, (3) to protect the patient or client or others from harm, or (4) to obtain payment for services . . . .

ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 5.05 (1992), *available at* <http://www.apa.org/ethics/code1991.html#5.05>. Finally, psychiatrists “may release confidential information only with the authorization of the patient or under proper legal compulsion.” THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 4(2) (2001), *available at* [http://www.psych.org/apa\\_members/medicalethics2001\\_42001.cfm](http://www.psych.org/apa_members/medicalethics2001_42001.cfm). For a detailed discussion of the interplay of these various disclosure standards, see Glynn, *supra* note 4, at 629-33.

18. “Informed consent” means consent obtained after a disclosure to the client of the purpose, nature and potential consequences of divulging the confidential information. *See* MODEL RULES, *supra* note 13, R. 1.6(a) (requiring consultation between the client and lawyer before disclosure); MODEL CODE, *supra* note 5, EC 4-2 (requiring “full disclosure” to client for consent to be valid).

19. *See* MODEL CODE, *supra* note 5, DR 4-101(C)(1) (stating that a lawyer may reveal client confidences with the consent of the client after full disclosure).

20. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000) (governing attorney-client privilege); *id.* §§ 87-92 (governing lawyer work-product immunity).

21. The determination of this capacity, as well as the capacity to direct the representation in general, are extremely difficult issues which are not addressed in this Article. There are several insightful analyses of the challenges of such determinations, and the ramifications for the role of the lawyer. *See, e.g.,* REPRESENTING CHILDREN, *supra* note 3, § 3-2(b)(2), at 53 (suggesting that capacity is akin to “dimmer switch” rather than “on/off switch”, and should be analyzed accordingly); Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 79 (1984) (arguing for age cut-off for when children should be deemed incapacitated); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1903-14 (1996) (suggesting that child development theory should be guiding force in determining capacity).

22. *See* sources cited *supra* note 21.

because the client's level of sophistication makes it impossible to advise him fully of the pros and cons of disclosure,<sup>23</sup> informed consent cannot be obtained.

The attorney-client privilege<sup>24</sup> and the work-product rule<sup>25</sup> also fail to resolve the disclosure problem because the mental health professionals with whom lawyers will consult are under a statutory duty to report information about abuse or neglect.<sup>26</sup> A mental health professional would therefore be required to report to the appropriate child protective services agency any information received during a consultation about ongoing or new allegations of abuse or neglect, thus compromising the protection from disclosure that information normally retains under the work-product rule.<sup>27</sup> Lawyers in maltreatment cases who represent diminished capacity<sup>28</sup> children do not have the benefit of either informed consent or the attorney-client privilege and work-product protections in resolving the potential friction between confidentiality and consultation. These attorneys thus confront a tension between observing their responsibility to protect confidential information faithfully and engaging in interdisciplinary consultation to ensure that their unique duties are performed diligently.

Part I of this Article uses several examples from actual cases to illustrate that many of the statutes,<sup>29</sup> ethical mandates,<sup>30</sup> and representational standards<sup>31</sup>

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23. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 THE LAW OF LAWYERING § 9-16, at 9-57 to 9-58 (3d ed. 2001) (defining informed consent as consent obtained after client has been "advised about the pros and cons of permitting the disclosure, in language appropriate to the client's level of sophistication").

24. Generally speaking, the attorney-client privilege protects all communications between "privileged persons," which normally includes the client, the lawyer, and "agents" of the lawyer who facilitated the representation. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-70 (defining scope of privilege).

25. The work-product rule protects from disclosure all material prepared in anticipation of litigation by a lawyer, or by any "agent" associated with her, such as a consulting mental health professional. See FED. R. CIV. P. 26(b)(3) (2002) (protecting materials prepared by party's attorney or consultant); *Hickman v. Taylor*, 329 U.S. 495, 509 (1947) (holding that neither Rule 26 nor any other rule of discovery contemplated production of material prepared in anticipation of litigation); HAZARD & HODES, *supra* note 23, § 9.14, at 9-47 to 9-48 (stating that this protection extends to expert consultants, such as mental health professionals, retained by lawyer).

26. See Glynn, *supra* note 4, at 639-41 (discussing mandatory reporting laws); Gail L. Zellman & C. Christine Fair, *Preventing and Reporting Abuse*, in APSAC HANDBOOK, *supra* note 1, 449, 451 (noting that almost every state's reporting laws cover mental health professionals). See *infra* Part IV for a discussion of how this duty impacts disclosure decisions by lawyers for children.

27. In addition, note that in many jurisdictions no psychologist-patient, social worker-client, or physician-patient privilege exists in maltreatment cases. See, e.g., N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney Supp. 2002) (stating that any mental health professional called as witness in maltreatment case will be compelled to testify regardless of patient's wishes).

28. For the purposes of this Article, the term "diminished capacity child" or "diminished capacity client" means those child clients who do not possess full capacity to provide informed consent.

29. See *infra* Part I.A for a discussion of ethical mandates of children's lawyers that require consultation with mental health professionals.

30. See *infra* Part I.B for a discussion of statutory requirements of children's lawyers that require consultation with mental health professionals.

31. See *infra* Part I.C for a discussion of practice guidelines for children's lawyers that require

which govern the actions of lawyers for children often implicitly require an expertise in mental health that can be obtained only through consultation with mental health professionals. Part II examines what confidentiality duty lawyers for diminished capacity children owe their clients, and under what conditions ethical rules might permit the disclosure of confidential information by such lawyers to consulting mental health professionals.<sup>32</sup> Part II concludes that the disclosure of confidential information to a mental health consultant is ethical if it is necessary to meet an explicit representational responsibility of the lawyer, and if it is done in a manner which respects to the maximum degree possible the client's developing interest in maintaining the confidentiality of the information. Part III assesses the ethical viability of allowing lawyers for diminished capacity children to disclose information to consulting mental health professionals when a lawyer feels such disclosure would serve the best interests of her client.<sup>33</sup> This Part revisits some of the case examples from Part I to illustrate the deficits of this "best interests" standard when applied to confidentiality and to highlight how the standard fails to follow the conditions discussed in Part II.<sup>34</sup> Finally, Part IV proposes a new standard to ensure that lawyers for diminished capacity children make their disclosure decisions on ethically acceptable grounds and carry forth those disclosures in an ethically responsible manner, pursuant to the conditions arrived at in Part II.<sup>35</sup>

### I. THE DUTIES AND RESPONSIBILITIES OF LAWYERS FOR CHILDREN IN MALTREATMENT CASES WHICH REQUIRE CONSULTATION WITH MENTAL HEALTH PROFESSIONALS

Many ethical mandates, statutory requirements, and practice standards related to the representation of children in maltreatment cases exert pressures on lawyers to consult with mental health professionals in order to fulfill their professional responsibilities. This Part of the Article identifies the mandates,<sup>36</sup> requirements,<sup>37</sup> and standards<sup>38</sup> which exert those pressures, and uses case examples<sup>39</sup> to illustrate how they implicitly require an expertise in mental health

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consultation with mental health professionals.

32. See *infra* Part II.A for a discussion of the rationale for the duty of confidentiality, its exceptions, and how the duty applies in the representation of children.

33. See *infra* Part III for a discussion of the best interests standard for disclosure.

34. See *infra* notes 162-80 and accompanying text for an analysis of these examples under the best interests standard for disclosure.

35. See *infra* Part IV for a detailed presentation of the new standard.

36. See *infra* Part I.A for a discussion of ethical mandates of children's lawyers that require consultation with mental health professionals.

37. See *infra* Part I.B for a discussion of statutory requirements of children's lawyers that require consultation with mental health professionals.

38. See *infra* Part I.C for a discussion of practice guidelines for children's lawyers that require consultation with mental health professionals.

39. The examples are all drawn from the author's experience representing children in maltreatment cases as a staff attorney at the Legal Aid Society's Juvenile Rights Division in New York City, and as Director of the Hofstra University Child Advocacy Clinic. All identifying information has

which frequently can be obtained only through interdisciplinary consultation.<sup>40</sup>

### A. Ethical Mandates

Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct dictate special ethical responsibilities for attorneys for clients with a diminished capacity to make decisions for themselves. Ethical Consideration 7-11 of the Code states that “[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client . . . .”<sup>41</sup> Ethical Consideration 7-12 elaborates on these responsibilities:

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. . . . 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.<sup>42</sup>

Model Rule 1.14(a) further addresses the duties of lawyers for clients with diminished capacity:

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.<sup>43</sup>

These ethical mandates implicitly require consultation with mental health professionals on at least three levels. First and foremost, lawyers for clients with diminished capacity must determine whether the client’s “disability” renders him incapable of making a “considered judgement on his own behalf,”<sup>44</sup> or impairs his ability to make “adequately considered decisions in connection with the representation.”<sup>45</sup> The assessment of this capacity is not one which a lawyer competently can make without evaluating the client’s developmental, intellectual, and emotional functioning. Often, only a mental health professional will have the training to perform the level of evaluation needed to make an

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been changed.

40. See *infra* Part IV for an analysis of why training on mental health issues for children’s lawyers, while providing some expertise, and while crucial to improving the quality of representation, does not obviate the need for consultation with a trained mental health professional.

41. MODEL CODE, *supra* note 5, EC 7-11 (emphasis added).

42. MODEL CODE, *supra* note 5, EC 7-12.

43. MODEL RULES, *supra* note 13, R. 1.14(a) (emphasis added).

44. MODEL CODE, *supra* note 5, EC 7-12.

45. MODEL RULES, *supra* note 13, R. 1.14(a).



informed assessment.<sup>46</sup>

Second, a lawyer for an incapacitated client must "obtain from [her client] all possible aid."<sup>47</sup> The most common way to obtain that aid is through verbal communication. Children at different developmental levels, however, have widely different abilities to understand certain types of questions.<sup>48</sup> Thus, when a client is a young or developmentally delayed child, a lawyer often will require the assistance of a mental health professional trained in child development to frame questions in a manner which will effectively elicit critical information and opinions.

Finally, when making decisions on behalf of an incapacitated client, the lawyer should "consider all circumstances then prevailing"<sup>49</sup> before deciding what course of action is in the client's best interests.<sup>50</sup> In the realm of child abuse and neglect, those circumstances will almost certainly include an assessment of the psychological, emotional, and developmental ramifications of the decision at issue.<sup>51</sup> For example, when deciding whether to support a mentally ill parent's application to have a child returned to her care, a lawyer will need an understanding of, among other things: the parent's current emotional and psychological state; the parent's prognosis; the impact of the mental illness on the ability to parent; and, the child's bonds with his parent and with his current custodian.<sup>52</sup> Consulting with a mental health professional will be crucial for the lawyer to consider intelligently how issues like these should impact the position she will take on behalf of her client.

The following example illustrates how these ethical responsibilities can come to bear in an actual case:

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46. There will, of course, be situations where no training will be necessary to perform that assessment. When a client is an infant, for example, the capacity of the client to make any decision related to the case will be obvious. See *infra* note 57 and accompanying text for a discussion of the providing of direction even by the infant.

47. MODEL CODE, *supra* note 5, EC 7-12.

48. See Nancy E. Walker & Matthew Nguyen, *Interviewing the Child Witness: The Do's and the Don't's, The How's and the Why's*, 29 CREIGHTON L. REV. 1587, 1591-92 (1996) (discussing importance of developmentally appropriate language during interviews of children).

49. MODEL CODE, *supra* note 5, EC 7-12.

50. For one proposal of what circumstances to consider in making best interests decisions, and how to consider those circumstances, see *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children: Recommendations of the Conference*, 64 FORDHAM L. REV. 1301, 1310-11 (1996) [hereinafter *Recommendations of the Conference*]. The 1996 Fordham Conference gathered a large number of the leading scholars and practitioners from around the United States to discuss many of the ethical issues unique to the representation of children. The Conference working groups made numerous recommendations which have had wide-ranging impact on the representation of children. The Conference was, and continues to be, a truly galvanizing event in the progression of the study of the ethical issues relevant to the practice of lawyers of children.

51. See *Concrete Strategies*, *supra* note 4, at 16 (describing circumstances lawyers usually consider in child abuse and neglect decisions).

52. See *Recommendations of the Conference*, *supra* note 50, at 1311 (recommending that lawyers consult experts for guidance when case involving child's interests becomes too complex).

*The Case of Tara G.*

Tara is a fifteen year-old girl who has been placed in foster care pursuant to allegations that her father and mother beat her regularly.<sup>53</sup> According to the petition filed against the parents, Tara has the mental capacity of a five-year-old child. The case originally came to the attention of the department of social services when Tara went to her special educational school with severe bruising around her eyes. When her teacher asked how she got the bruises, Tara said that her father punched her while her mother held her down. Tara said she had only been punched two or three times before, but that she was beaten with a belt a lot. A caseworker later discovered evidence of old belt buckle marks around Tara's torso and legs. Tara told the caseworker that she was beaten whenever she was "bad." When asked, Tara explained that she was "bad" whenever she did not do her chores quickly enough. Since being placed in foster care six weeks ago, Tara has been visiting with her parents every week at the department of social services offices under the supervision of a caseworker. According to the caseworker, the visits go well. After initial awkwardness at each visit, both parents talk and play with Tara. They seem very patient with Tara. Both Tara and her parents cry whenever the visits end and they have to say goodbye. Tara's foster family is located in a new school district and has received special training in meeting Tara's special needs. Because they are the only available foster family which has received such training, Tara could not be placed anywhere else closer to her school. She has been enrolled in special educational classes at a different school which are similar to the classes she attended at her old school. When Tara's lawyer meets with her, she immediately notices that Tara speaks very slowly and has trouble enunciating. Tara says that she wants to go back and live with her parents and return to her old school. She says she misses her parents and her old teachers a lot, and that she is teased all the time at her new school. When the lawyer asks Tara about the foster family, Tara smiles and rocks back and forth while hugging herself. The lawyer has to go to court in a week for a conference on the issue of whether Tara should remain in foster care pending the resolution of the case. The judge will expect Tara's lawyer to have a position on the issue of temporary placement pending case resolution.

First, Tara's lawyer must determine whether or not Tara is, in fact, incapacitated.<sup>54</sup> If Tara is not incapacitated, then the lawyer must abide by the regular ethical provisions relating to decision-making authority.<sup>55</sup> In some cases, this determination may be obvious and no consultation is required.<sup>56</sup> When representing a newborn infant, for example, no lawyer would need assistance to

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53. For a survey of studies concerning the prevalence, significance, treatment, and mental health implications of physical abuse, see David J. Kolko, *Child Physical Abuse*, in APSAC HANDBOOK, *supra* note 1, 21, 21.

54. See *Recommendations of the Conference*, *supra* note 50, at 1312 ("[A] lawyer must engage in additional fact finding to determine whether the child has or may develop the capacity to direct the lawyer's action.").

55. MODEL RULES, *supra* note 13, R. 1.2(a); MODEL CODE, *supra* note 5, DR 7-107(A)(1).

56. See *Recommendations of the Conference*, *supra* note 50, at 1313 (indicating that child's developmental stage is primary factor in assessing capacity).

determine the client's capacity to make adequately considered decisions.<sup>57</sup> Once the client can communicate with her lawyer, however, the decision becomes more difficult, until the point when the client clearly does possess the emotional and intellectual ability to make adequately considered decisions—for example, a bright seventeen-year-old who is deciding whether she wishes to reside with her mother or her father.<sup>58</sup> Tara's lawyer must determine where Tara falls along this "capacity spectrum" with respect to the decision about temporary placement.<sup>59</sup> Although the petition says that Tara has the capacity of a five-year-old, that might not be accurate.<sup>60</sup> Even if it is accurate, Tara's lawyer must still determine whether Tara has the capacity to make an "adequately considered decision" about her temporary placement. A mental health professional's analysis of psychological evaluations, school records, special education reports, and recorded observations of the visits between Tara and her parents will be invaluable to a thorough and accurate assessment of Tara's capacity by her lawyer.<sup>61</sup>

Second, the Code requires that attorneys for incapacitated clients analyze "all circumstances then prevailing and act with care to safeguard and advance the interests of his client."<sup>62</sup> This mandate implicitly requires that Tara's lawyer consult with a mental health professional. In order to analyze all circumstances relating to the issue of temporary placement, Tara's lawyer must look at, among other things: the potential emotional and psychological impact on Tara of further separation from her parents and school; the potential emotional and psychological impact on Tara of possible future beatings; whether the new school

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57. While such a client will obviously not be able to provide verbal direction on representational matters to the lawyer, it can still be invaluable to observe such clients. See REPRESENTING CHILDREN, *supra* note 3, § 3-2(b)(2), at 53 ("Even a newborn child evinces a personality, a level of health, physical characteristics, a gestation and birth history, and a family context and history which distinguishes her from the next newborn client."). In fact, visiting with child clients of any age is both explicitly and implicitly required by certain practice standards. See, e.g., STANDARDS, *supra* note 3, C-1 ("[I]rrespective of the child's age, the child's attorney should visit with the child . . ."); NEW YORK STATE BAR ASSOCIATION, LAW GUARDIAN REPRESENTATION STANDARDS § A-2 cmt. (1996) ("[T]he attorney may always observe his or her young client. The child's demeanor, possible health and the child's inter-action with the environment and with persons can thereby be evaluated."), available at [http://www.nysba.org/Content/NavigationMenu/Public\\_Resources/Programs\\_and\\_Resources/Guide\\_to\\_Representing\\_Children/Guide\\_to\\_Representing\\_Children.htm](http://www.nysba.org/Content/NavigationMenu/Public_Resources/Programs_and_Resources/Guide_to_Representing_Children/Guide_to_Representing_Children.htm).

58. See *Recommendations of the Conference*, *supra* note 50, at 1313 (listing factors to be considered in assessing capacity).

59. See REPRESENTING CHILDREN, *supra* note 3, § 3-2(b)(2), at 53-54 (suggesting that children's capacity to contribute to representation should be analyzed as spectrum of how much they can contribute, rather than assuming that lack of full ability to contribute means child client cannot contribute at all).

60. Children's lawyers are required to make independent assessments of the veracity of allegations by child protection agencies. See STANDARDS, *supra* note 3, at 9 ("[T]he child's attorney should conduct thorough, continuing, and independent investigations and discovery . . .").

61. See *Recommendations of the Conference*, *supra* note 50, at 1313 ("In making the decision regarding capacity, the lawyer should seek guidance from appropriate professionals . . .").

62. MODEL CODE, *supra* note 5, EC 7-12 (emphasis added). The protection of interests is also a statutory obligation in many states, and is analyzed in Part I.B, *infra*.

is sufficiently meeting Tara's special educational needs; and, if the new school is inadequate, what impact that might have on Tara's intellectual development. Like most lawyers, however, Tara's lawyer has not received any sort of specialized training that would provide her with the knowledge or expertise to analyze these issues, all of which are extremely significant "circumstances" that must be considered before acting on behalf of her client. In order truly to meet the admonition to "act with care," any analysis of these issues must include consultation with a mental health professional who does have that specialized training.<sup>63</sup>

Finally, Tara's attorney will have to consult with mental health professionals in order to meet the ethical obligation which requires her to obtain from Tara "all possible aid" if Tara is "capable of understanding the matter in question or of contributing to the advancement of [her] interests . . . ."<sup>64</sup> Generally, interviews are the primary vehicle for obtaining information from a client.<sup>65</sup> Incapacitated clients like Tara, however, frequently have a limited ability to communicate.<sup>66</sup> Especially when working with much younger or severely disabled clients, a lawyer for children may need a mental health professional's assistance in determining how best to elicit information from her client.<sup>67</sup> By requiring an attorney to obtain from the client all possible aid, the Rules implicitly require the attorney to seek that assistance. In Tara's case, her attorney may have particular trouble interpreting Tara's reactions when she is asked about her foster family. A mental health consultant could provide interpretations which would inform the attorney's decisions as she develops her position on temporary placement.

### *B. Statutory Requirements*

Thirty-six states, plus Puerto Rico and the District of Columbia, explicitly require lawyers for children in abuse and neglect cases to represent the child's interests or best interests in court.<sup>68</sup> In order to conduct a thorough and

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63. See *Recommendations of the Conference*, *supra* note 50, at 1311 ("There will be cases in which the analysis becomes too complex and lawyers should consult experts for guidance. . . . [T]he retained consultant is sometimes the optimal, and only ethically acceptable, guide.").

64. MODEL CODE, *supra* note 5, EC 7-12.

65. See generally David A. Binder & Susan C. Price, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) (defining interviewing as lawyer interaction with client to identify client's problem and gather information about solution).

66. But see *Recommendations of the Conference*, *supra* note 50, at 1304 (recommending that even lawyers for nonverbal clients should meet with them and, where possible, see them in their living environment).

67. See *id.* (recommending use of social workers and psychologists in contacts with pre-verbal children); see also Karen J. Saywitz, *Developmental Underpinnings of Children's Testimony*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 3, 3-4 (Helen L. Westcott et al. eds., 2002) [hereinafter CHILDREN'S TESTIMONY] (describing how cognitive, social, and emotional skills of children are often poorly suited to needs of legal system).

68. REPRESENTING CHILDREN, *supra* note 3, § 2-3(b), at 30-31; see also 42 U.S.C. § 5106a(b)(2)(A)(ix)(II) (2000) (requiring appointment of guardian ad litem "to make recommendations to the court concerning the best interests of the child").

objective determination, assessment, and balancing of the various interests of an incapacitated child client which the lawyer might advance in court, lawyers may often be compelled to consult with mental health professionals.<sup>69</sup> Consider the following example:

*The Case of Roger M.*

An attorney is assigned to represent Roger, a four-year-old child who has allegedly been subjected to excessive corporal punishment.<sup>70</sup> Roger is temporarily placed in the custody of his maternal grandparents. His parents are permitted to visit him there so long as one of the grandparents is present. Roger's parents make an admission in court that they have hit Roger with an electrical cord on his legs and back to discipline him, and that the beatings have left marks which have lasted for days. The case is adjourned for a dispositional hearing to decide, among other things, Roger's placement over the course of the next year. In preparation for the hearing, the attorney arranges for Roger to be brought into her office for a second interview. Roger adamantly insists that he wants to go back to live with his parents as soon as possible. He says that if he cannot stay with them, he would be happy staying with his grandparents. Roger says he heard from a friend that bad kids are sent to foster care, and asks what foster care is. The attorney explains foster care, and Roger tells the attorney that he never, ever wants to go to foster care. When the attorney asks how the visits between him and his parents go, Roger says they go well most of the time, but that sometimes he does not like them. After the attorney asks for specifics on what he does not like, Roger reluctantly admits that his parents still hit him with an electric cord at the visits. Roger shows the attorney some marks on his legs. Roger tells the attorney she cannot tell anyone else about the new marks. He also says his grandparents already know about them. When the attorney speaks to the grandparents, they admit that they know about the continued beatings, but are intimidated by the parents and reluctant to interfere. Roger's lawyer now must determine her position on Roger's placement and the nature of his visitation with his parents before the next court date. Her assessment of Roger's interests will determine that position.

A thorough assessment of Roger's interests will be nearly impossible for a lawyer to make without consultation with a mental health professional. While the lawyer is aware of Roger's adamant statements against being placed in foster care, for example, she does not have the expertise to assess how psychologically damaging it truly would be for Roger to be placed away from his extended family. Similarly, while the lawyer knows that Roger would be at some risk of continued beatings if he remained with his grandparents, she does not have the expertise to assess the emotional toll continued beatings would take on Roger.

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69. In addition, even where a lawyer is advocating for the wishes of a child client, it will be important to assess the best interests of the client in order both to properly counsel the client, and to incorporate the assessment into their advocacy. See *Roles and Content*, *supra* note 6, at 1513-24 (describing importance of determining best interests even when child client is directing the representation).

70. For a survey of studies concerning the prevalence, significance, treatment, and mental health implications of physical abuse, see Kolko, *supra* note 53, at 21.

Consultation with a mental health professional might provide much, if not all, of that information.<sup>71</sup> At a minimum, the lawyer could explain the facts of Roger's case to a psychologist and gather information on how children Roger's age typically respond when contact with family is limited, and on the potential ramifications to Roger's emotional well-being if he were exposed to continued corporal punishment. If Roger had previously been evaluated or treated by a mental health professional, his lawyer could engage in an even more useful consultation by obtaining an assessment from that individual specific to Roger on the issues of removal from family and exposure to corporal punishment.<sup>72</sup>

### C. Practice Standards

The American Bar Association's *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* contemplate at least two other basic obligations of a child's attorney which require the expertise of a mental health professional: the duty of the lawyer to develop and present her position on all issues relevant to the representation;<sup>73</sup> and the identification, and appropriate pursuit, of services for her client.<sup>74</sup> The case examples of Lisa M. and Jason S. illustrate how these obligations implicitly require such expertise.

#### *The Case of Lisa M.*

*Lisa is a four-year-old child whose father allegedly sexually abused her.<sup>75</sup> Lisa's mother and father are divorced and live separately. Lisa spends weekends*

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71. In addition, without any consultation with experts, there exists the risk that a lawyer will rely solely on her own values and beliefs to determine what their client's interests are. See *Concrete Strategies*, *supra* note 4, at 16 (noting that "[w]ithout expert input, there is a substantial danger that attorneys might substitute their own personal values for a more educated determination of the child's welfare"). The *Standards of Practice for Lawyers Who Represent Children in Abuse & Neglect Cases* specifically caution against this problem:

A lawyer who is required to determine the child's interests is functioning in a nontraditional role by determining the position to be advocated independently of the client. The lawyer should base the position, however, on objective criteria concerning the child's needs and interests, and not merely on the lawyer's personal values, philosophies, and experiences. . . . The lawyer may seek the advice and consultation of experts and other knowledgeable people in both determining and weighing such needs and interests.

STANDARDS, *supra* note 3, § B-5 cmt. (citations omitted). There are of course, situations where consultation will hardly be necessary to determine a child's interests. Professor Peters gives the example of determining the best interests of a child who has been abandoned at birth and has lived in the same pre-adoptive home the child's whole life. *Concrete Strategies*, *supra* note 4, at 25 n.12.

72. See REPRESENTING CHILDREN, *supra* note 3, § 5-4(a)(2)(i), at 133-36 (describing benefits and limitations of consulting with expert already involved in therapeutic relationship with client).

73. See STANDARDS, *supra* note 3, § B-1(6) (requiring attorney to develop theory and strategy of case); *id.* § D-4 cmt. (requiring attorney to be prepared and participate fully on behalf of child in every hearing).

74. See *id.* § B-1(7) (requiring attorney to identify appropriate family and professional services for child); *id.* § C-4 (requiring attorney to seek appropriate services); *id.* § C-5 (requiring attorney to assure child with special needs receives appropriate services).

75. For a survey of studies concerning the prevalence, significance, treatment, and mental health implications of sexual abuse, see Lucy Berliner & Diana M. Elliott, *Sexual Abuse of Children*, in APSAC HANDBOOK, *supra* note 1, 55, 55.

with her father. The allegations came to light when Mrs. M. was bathing Lisa and noticed redness around Lisa's vaginal area. When Mrs. M. asked what happened, Lisa pointed to her groin and said "Daddy touched me there. It hurt, and he told me not to tell." Lisa has been seen by a doctor, who said that there was redness, but no definitive physical signs of sexual abuse. A few weeks after seeing the doctor, Lisa was interviewed by a caseworker. Lisa denied that her father had ever touched her vagina, except when he was giving her a bath. Lisa has also been seen by a psychologist with an expertise in identifying and treating child sexual abuse. The psychologist's report concluded that Lisa's statements and behaviors are consistent with those of a child who has been sexually abused. The father's attorney arranged for the father to be seen by a psychologist, as well. That psychologist stated to Lisa's attorney that the father exhibits none of the personality traits or behaviors that are normally associated with a parent who sexually abuses his child. He also stated that, based on his review of the first psychologist's report and his interview of the father, he believes that this case is an example of "parental alienation syndrome,"<sup>76</sup> where one parent influences the child to make untrue abuse allegations against the other parent. The trial is approaching in two weeks, and Lisa's attorney is preparing her summation and her cross examination questions for the doctor, caseworker, and psychologist.

Lisa's attorney, pursuant to the ABA guidelines, must develop and present a position at the upcoming trial.<sup>77</sup> Unlike a lawyer who represent clients with the capacity to direct the position taken by their representative, however, she must determine her position based not on the direction of her client, but based on an assessment of Lisa's interests.<sup>78</sup> Establishing Lisa's interest with respect to a finding of abuse against her father will hinge largely, if not entirely, on an assessment of the veracity of the allegations. A finding when the allegations are false could further cement Lisa's "memories" of allegations that are not true and could lead to long-term psychological problems;<sup>79</sup> a dismissal of the case if the

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76. See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 *passim* (2001) (discussing theoretical and practical problems with "parental alienation syndrome" and its alarmingly wide acceptance by lawyers and courts despite its lack of scientific foundations).

77. See STANDARDS, *supra* note 3, §§ B-1(6) (requiring attorney to develop theory and strategy of case), D-4 cmt. (requiring attorney to be prepared and participate fully on behalf of child in every hearing).

78. Any responsible assessment of Lisa's interests will, of course, depend at least in some part on her stated position. See DONALD N. DUQUETTE, *ADVOCATING FOR THE CHILD IN PROTECTION PROCEEDINGS: A HANDBOOK FOR LAWYERS AND COURT APPOINTED SPECIAL ADVOCATES* 32 (1990) (urging that "[i]n every case and at every age, the child's point of view should be considered by the advocate . . ."); ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND PROTECTION CASES* 28 (1993) (asserting that eliciting child's feelings, wishes, and beliefs is crucial step in representing children); REPRESENTING CHILDREN, *supra* note 3, § 3-2(b)(2), at 53-54 (suggesting that children's capacity to contribute to representation should be analyzed as spectrum of how much they can contribute, rather than assuming that lack of full ability to contribute means child client cannot contribute at all).

79. See generally Kathy Pezdek & Tiffany Hinz, *The Construction of False Events in Memory, in CHILDREN'S TESTIMONY*, *supra* note 67, 99 (describing six studies on implantation of false memories).

allegations are true, and the subsequent continuation of weekend visits with her father, could lead to further sexual abuse and long-term physical and psychological harm. Thus, in this case, as in many child maltreatment cases involving diminished capacity clients, the lawyer's theory development first and foremost will require a determination of the truth of the allegations.

The assessment of the veracity of the allegations here, as in many abuse and neglect cases, cannot competently be made by an attorney alone. The facts before Lisa's attorney present a complicated picture which may be nearly impossible to assess without the assistance of a mental health professional. Lisa has made and recanted statements alleging sexual abuse; as in many sexual abuse cases, there is no physical evidence to support the allegations, and psychologists have rendered opinions which appear to contradict each other. Consultation with a mental health professional will allow Lisa's attorney to perform an informed evaluation of these issues, and formulate a position on the veracity of the allegations. The consultant can provide guidance on the significance of Lisa's recantation;<sup>80</sup> on whether or not the first psychologist followed appropriate procedures before rendering her opinion;<sup>81</sup> and on the acceptance within the mental health community of "parental alienation syndrome" as a legitimate diagnosis.<sup>82</sup>

Once Lisa's lawyer has established her position, she must develop direct examination and cross examination questions, and prepare a summation, all of which support that position.<sup>83</sup> Consultation will prove invaluable in the development of "friendly" cross examination questions for the psychologist whose determination the attorney supports, and "hostile" cross examination questions which expose the weaknesses of the determination of the other psychologist.<sup>84</sup> While a lawyer may attempt to prepare these questions without the benefit of consultation—for example, based solely on her reading of materials in the area—this is an extremely risky strategy which presumes the lawyer on her own will develop a sufficiently sophisticated understanding of the mental health issues to develop an effective cross.<sup>85</sup>

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80. See Berliner & Elliott, *supra* note 75, at 59 (quoting studies that show that four percent to twenty-two percent of children recant true allegations of sexual abuse).

81. See Suzanne M. Sgroi et al., *Validation of Child Sexual Abuse*, in HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE 39-78 (Suzanne M. Sgroi ed., 1982) (describing proper procedures for assessing whether child's claims of sexual abuse are consistent with expected behavioral and verbal indicators).

82. See Bruch, *supra* note 76, *passim* (attacking that legitimacy).

83. See STANDARDS, *supra* note 3, § D-3 to D-11 (describing duties of child's attorney's at hearing); see also MODEL RULES, *supra* note 13, R. 1.1 (requiring thoroughness and preparation); MODEL CODE, *supra* note 5, Canon 6 (requiring competent representation).

84. See THOMAS A. MAUET, TRIAL TECHNIQUES 337 (4th ed. 1996) (indicating crucial importance of retaining one's own expert to be able to understand and properly cross another party's expert).

85. *Id.*; see also MODEL CODE EC 6-3 (noting that "[p]roper preparation and representation may require the association by the lawyer of professionals in other disciplines").



*The Case of Jason S.*

Jason, a four-and-one-half-year-old boy, was recently removed from his parents' care and placed in non-kinship foster care. Jason was removed after his parents were charged with using drugs while responsible for caring for Jason,<sup>86</sup> and engaging in domestic violence in Jason's presence.<sup>87</sup> According to the child protective agency, Jason's parents engaged in fist fights, and threatened each other with knives, while Jason was in the room. They also have both admitted that they use cocaine about twice a week. Jason's seven-year-old brother, Sam, was removed from their parents at birth after he was born with a positive blood toxicology for cocaine. Sam subsequently has been adopted by his paternal aunt. The department of social services has referred both of Jason's parents to domestic violence counseling and an out-patient drug program. Jason's lawyer determined that the domestic violence program involves group counseling with a psychologist once a week, and the drug program involves weekly group counseling and weekly random drug tests. Jason has had trouble adjusting to his foster home, and has been seeing an agency psychologist who is evaluating both this difficulty and the effects on Jason of witnessing domestic violence. The case is due in court next week for a report on how the parents are progressing and for the formulation of a long-term plan for service provision to the parents.

Jason's lawyer has an obligation under the ABA Standards to advocate for the provision of appropriate social services for her client and her client's family.<sup>88</sup> A mental health consultant's input is crucial in order for Jason's lawyer to determine whether the services currently being offered to Jason and his family are appropriate, and what additional or different services, if any, should be sought. Is the parents' weekly domestic violence group counseling, without any individual therapy, sufficient for the level of violence reported between them? Should Jason and his family be engaging in family counseling? Is the agency psychologist providing the level of treatment that Jason requires? All of these questions are most appropriately answered with the input of a mental health professional.

## II. THE CONFIDENTIALITY DUTY OF LAWYERS FOR DIMINISHED CAPACITY CLIENTS

Consultation with mental health professionals, so important to the effective representation of child clients, unfortunately creates a tension with one of the foremost ethical duties of lawyers, the duty not to disclose confidential

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86. For a survey of studies concerning the prevalence, significance, treatment, and mental health implications of drug abuse by parents, see Susan J. Kelley, *Child Maltreatment in the Context of Substance Abuse*, in APSAC HANDBOOK, *supra* note 1, 105, 105.

87. See Sandra A. Graham-Bermann, *Child Abuse in the Context of Domestic Violence*, in APSAC HANDBOOK, *supra* note 1, 119, 119 (surveying studies concerning prevalence, significance, treatment, and mental health implications of domestic violence in families).

88. See STANDARDS, *supra* note 3, § C-4 (directing that "[c]onsistent with the child's wishes, the child's attorney should seek appropriate services . . . to protect the child's interests and to implement a service plan.").

information to other parties.<sup>89</sup> For a consultation with a mental health professional to be effective, some confidential information, broadly defined as any information relating to the representation of the client,<sup>90</sup> must nearly always be disclosed.<sup>91</sup> Furthermore, once the information is disclosed to the consultant, that professional's different standards for further disclosure to other persons<sup>92</sup> or agencies<sup>93</sup> come into play, thereby placing the information at risk of even greater exposure. The disclosure of confidential information to the consultant, therefore, as well as the possible ramifications of that disclosure, directly conflict with the confidentiality duty which lawyers owe to their clients.

Most lawyers can avoid this conflict by obtaining informed consent<sup>94</sup> from their clients to share information with a consultant.<sup>95</sup> Lawyers who represent children without the capacity to provide this consent, however, obviously cannot resolve the conflict this way. Therefore, if the confidentiality duty applies to these children's lawyers in the same manner that it applies to other attorneys, the lawyers face an intractable ethical quandary. Either they must faithfully observe the confidentiality duty at the expense of consultations crucial to meeting their representational responsibilities, or they must diligently consult with mental

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89. See MODEL RULES, *supra* note 13, R. 1.6 ("A lawyer shall not reveal information relating to representation of a client . . ."); MODEL CODE, *supra* note 5, DR 4-101(B)(1)("[A] lawyer shall not knowingly [r]eveal a confidence or secret of his client."). Both the confidentiality duty established in professional ethical mandates and the attorney-client privilege and work-product doctrine established under rules of evidence protect the confidentiality of information exchanged between lawyer and client. MODEL RULES, *supra* note 13, R. 1.6 cmt. 5. The attorney-client privilege and work-product doctrine, however, only apply where evidence is sought from the lawyer, as a witness or through the production of documents. *Id.*; see also Glynn, *supra* note 4, at 622 n.14 (providing details on prevalence of attorney-client privilege). Thus, while the privilege and the work-product doctrine limit the right of others to compel a lawyer to disclose information, the confidentiality duty more broadly limits the freedom of lawyers to disclose information without client consent.

90. MODEL RULES, *supra* note 13, R. 1.6(a). The Model Code protection covers "confidences," defined as information protected by the attorney-client privilege, as well as "secrets," defined as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." MODEL CODE, *supra* note 5, DR 4-101(A). Note that neither the Rules nor the Code limits protection to identifying information.

91. Consultation can, of course, sometimes be done on such general terms that no information relating to the representation is actually disclosed. Whenever possible, therefore, lawyers should limit the specificity of information disclosed. See *infra* Part IV for a discussion of the importance of limiting the amount of information disclosed during consultation to what is absolutely necessary.

92. See *supra* note 17 for the contents of those standards.

93. See 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, 212-17 & nn.36-40 (1992) (providing overview of statutes that require mental health professionals to report to child protection agencies any information they receive which causes them to suspect a child is being neglected or abused); N.Y. SOC. SERV. LAW § 413 (McKinney 2000) (exemplifying mandatory reporting statute which covers mental health professionals).

94. See *supra* note 18 for the definition of informed consent.

95. MODEL RULES, *supra* note 13, R. 1.6(a) ("A lawyer shall not reveal information relating to the representation of the client *unless the client consents after consultation . . .*") (emphasis added); MODEL CODE, *supra* note 5, DR 4-101(C)(1) ("A lawyer may reveal [c]onfidences or secrets with the consent of the client or clients affected, but only after full disclosure to them.").

health professionals to meet their representational responsibilities while breaching their confidentiality duty.

This Part of the Article analyzes the rationale behind the confidentiality duty and its exceptions generally, and the applicability of that rationale to lawyers for diminished capacity child clients.<sup>96</sup> This Part describes how the diminished capacity child client has a unique, constantly developing interest in confidentiality, and concludes that the disclosure of confidential information to a mental health consultant can be ethical if it is necessary to meet an explicit representational responsibility of the lawyer, and if it is done in a manner which respects to the maximum degree possible the child's developing interest in maintaining the confidentiality of the information.

#### *A. The Rationale for the Confidentiality Duty and Its Exceptions*

In order to analyze how the confidentiality duty applies to lawyers for diminished capacity clients, it is first useful to examine the rationale behind the duty. Both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility prohibit a lawyer from disclosing confidential information gained in the course of representing her client.<sup>97</sup> The duty to maintain confidentiality, as well as the attorney-client privilege, provide powerful proscriptions against any kind of disclosure which does not fall under certain enumerated exceptions. These proscriptions are generally justified by the following syllogism: a lawyer must have complete and truthful information in order competently to counsel and advocate for her client; a client will provide complete and truthful information only if he is assured that the lawyer will not and cannot disclose that information without his consent; therefore, in order to assure competent representation, lawyers must be prohibited from disclosing confidential information without a client's consent.<sup>98</sup>

The first part of the syllogism presumes that, both as an advocate and as a counselor,<sup>99</sup> a lawyer must know all that his client knows concerning the facts of

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96. See *supra* note 28 for a definition of diminished capacity child client.

97. See MODEL RULES, *supra* note 13, R. 1.6 ("A lawyer shall not reveal information relating to representation of a client . . ."); MODEL CODE, *supra* note 5, DR 4-101(B)(1)("[A] lawyer shall not knowingly [r]eveal a confidence or secret of his client.").

98. See MONROE H. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 5, 27 (1975) (stating that if confidence not kept, client would not feel free to confide fully, leaving lawyer unable to fulfill duty to ascertain all relevant facts). While this syllogism is the basis for the confidentiality rules in the Model Code and Model Rules, there are certainly other reasons why confidentiality should be observed. See, e.g., HAZARD & HODES, *supra* note 23, § 9.2, at 9-8 (stating that "[b]eyond [] pragmatic and utilitarian concerns, the confidentiality principle can stand on a moral base of its own" and presenting moral reasons); Bruce M. Landesman, *Confidentiality and the Lawyer-Client Relationship*, in *THE GOOD LAWYER* 191 *passim* (David Luban ed. 1984) (arguing for moral reasons for protection of confidentiality). In addition, some scholars question the soundness of the syllogism. See, e.g., Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 376-82 (1989) (discussing study showing that clients put far less stock in confidentiality than lawyers believe that they do).

99. The Model Rules specifically refer to the duties of a lawyer to be both a counselor, MODEL RULES 2.1, and an advocate, MODEL RULES 3.1-3.9.

the case in order to provide competent representation.<sup>100</sup> As an advocate, the lawyer must know as many facts about the case as possible in order to perform an independent professional assessment of which facts are relevant or irrelevant, helpful or harmful, in the pursuit of the representational goals. That ability to evaluate the relevance or significance of particular facts is one which a client ordinarily does not possess.<sup>101</sup>

As a counselor, a lawyer can give proper advice only if she has complete information about a client and his situation. The most persuasive example of the importance of informed counseling is a lawyer's ability, through proper counsel and advice, to prevent harms or illegal acts which a client may be planning to commit.<sup>102</sup> When a client discloses such information, a lawyer may be able to help him find other ways to deal with his problem. In some cases, the client might be the potential recipient of the harm. Again, if the client fully discloses information, the lawyer will be in a much better position to provide advice on how to protect the client from the harm, or on what options are available to the client to stop or prevent the harm. With full disclosure, therefore, lawyers have an increased ability to help protect both clients and society from harms.<sup>103</sup>

The second part of the syllogism asserts that, without a feeling of trust and confidence in his lawyer, a client will not disclose information in the fully complete or truthful manner necessary for competent representation. A client may withhold information for any number of reasons, including embarrassment or guilt.<sup>104</sup> Disclosing information thus requires a belief that the information will not be exposed to others. Indeed, both the Model Code and Model Rules presume that there is nothing more fundamental to establishing trust and confidence than a client's belief that his disclosures to his attorney will be confidential.<sup>105</sup> In fact, the nonconsensual exposure of confidential information by a lawyer may even have implications beyond the legal system; individuals may refrain from seeking consultation with *any* skilled professional if they feel that they cannot trust even a person whose job is to advocate on their behalf.<sup>106</sup>

Exceptions in the ethical rules and standards to the general duty to maintain confidentiality generally fall under one of four categories: disclosure of

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100. FREEDMAN, *supra* note 98, at 4.

101. *Id.*

102. See HAZARD & HODES, *supra* note 23, § 9.2, at 9-8 (suggesting that lawyers may prevent violations of law by being fully informed when counseling clients).

103. This benefit is an especially persuasive ground to encourage full disclosure in the context of child clients, who often are particularly in need of good legal counseling and advice about their options. A teenaged client, for example, who wishes to run away from a foster home to return to her parents, would be very reluctant to disclose those plans to anyone. If the client knows that disclosing the plans to her lawyer will not mean that they will be exposed, she is more likely to share them. Upon hearing the plans, the lawyer has the opportunity, and duty, to explain the various ramifications of the client's plans, and to attempt to dissuade her.

104. See Landesman, *supra* note 98, at 197 (discussing categories of confidential information).

105. MODEL RULES, *supra* note 13, R. 1.6 cmts. 3-4; MODEL CODE, *supra* note 5, EC 4-1; FREEDMAN, *supra* note 98, at 27.

106. FREEDMAN, *supra* note 98, at 5.

confidential information to prevent a substantial future harm;<sup>107</sup> if necessary in the course of litigation between a lawyer and her client;<sup>108</sup> with the consent of a client;<sup>109</sup> and if otherwise mandated or "impliedly authorized."<sup>110</sup>

The first two categories are "explicit exceptions to confidentiality."<sup>111</sup> Each of these categories is relevant only if two preconditions are met: a lawyer disclosing the information must "reasonably believe" that the situation calls for disclosure; and she must disclose information only "to the extent . . . necessary" to satisfy the exception.<sup>112</sup> Both exceptions recognize the fact that, at times, a lawyer has obligations which override her duty to maintain confidentiality. The future harm exception acknowledges that lawyers have moral obligations to society that, on occasion, will trump their obligations to their clients.<sup>113</sup> The

107. See MODEL RULES, *supra* note 13, R. 1.6(b)(1) ("A lawyer may reveal information relating to the representation of a client . . . to prevent reasonably certain death or substantial bodily harm."); MODEL CODE, *supra* note 5, DR 4-101(C)(3) ("A lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime."). Note that while the Model Code allows a confidentiality breach only if the harm is a crime which the client intends to *commit*, the Model Rules allow a lawyer to reveal information if the harm is one perpetrated either *by* or *on* the client.

108. See MODEL RULES, *supra* note 13, R. 1.6(b)(3) ("A lawyer may reveal such information . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . ."); MODEL CODE DR 4-101(C)(4) ("A lawyer may reveal . . . [c]onfidences or secrets necessary . . . to defend himself . . . against an accusation of wrongful conduct."). Model Rule 1.6(b)(2), a new provision, also allows disclosure if a lawyer is attempting to "secure legal advice about the lawyer's compliance with these Rules."

109. See MODEL RULES, *supra* note 13, R. 1.6(a) ("A lawyer shall not reveal information . . . unless the client gives informed consent . . ."); MODEL CODE, *supra* note 5, DR 4-101(C)(1) ("A lawyer may reveal . . . [c]onfidences or secrets with the consent of the client or clients affected . . .").

110. See MODEL RULES, *supra* note 13, R. 1.6(a) ("A lawyer shall not reveal information . . . unless . . . the disclosure is impliedly authorized in order to carry out the representation . . ."); MODEL RULES, *supra* note 13, R. 1.6(b)(4) (A lawyer may reveal information . . . to comply with other law or court order"); MODEL CODE, *supra* note 5, DR 4-101(C)(2) ("A lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order.").

111. See HAZARD & HODES, *supra* note 23, § 9.2, at 9-6 (discussing exceptions to requirement of confidentiality).

112. See *id.*, § 9.19, at 9-71 (explaining these two conditions of Model Rule 1.6(b)).

113. Until recently, Model Rule 1.6(b)(1), like Model Code DR 4-101(C)(3) allowed only disclosure of information related to intentions of clients to commit criminal acts likely to result in imminent death or substantial bodily harm. However, the 2002 edition of the Model Rules expanded the exception to include "reasonably certain death or substantial bodily harm," MODEL RULES, *supra* note 13, R. 1.6(b)(1), whether or not the harm would result from a criminal act, and whether or not the perpetrator of the act would be the client. In the context of child maltreatment, this expansion is especially significant, since the information which a lawyer may feel the strongest compunction to share does not involve the child client's actions; rather, it involves potential future actions by the child client's parents or other perpetrators of neglect or abuse. Emily Buss, "You're My What?": *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1725 n.79 (1996). A lawyer for a child client can now presumably disclose confidential information if she "reasonably" believes disclosure necessary to prevent any actions of parents, guardians, or others, which she is "reasonably" certain will lead to death or substantial bodily harm. The question of what is "reasonable" in both clauses is sure to be answered very differently by different attorneys, as is the question of whether "psychological" harm should also be considered grounds for disclosure. HAZARD & HODES, *supra* note 23, § 9.20, at 9-75.

"self-defense" exception acknowledges that lawyers must have the ability fully to defend themselves from an action brought against them by a client, and to bring a claim against a client.<sup>114</sup> These abilities would be unfairly compromised in many cases if the lawyer could not reveal confidential information necessary for her claim or defense.<sup>115</sup>

The third category recognizes that the client always retains control of the information, and therefore the power to consent to disclosure.<sup>116</sup> Clients regularly consent to their lawyers' disclosure of information, implicitly and explicitly, in order to enable their lawyers to carry out the representation in as effective a manner as possible.<sup>117</sup> A truly informed consent entails a full explanation by the lawyer of the "pros and cons of permitting the disclosure, in language appropriate to the client's level of sophistication."<sup>118</sup> Allowing the client to provide informed consent for disclosure conforms to the understanding that, generally, the determination of when information should remain confidential remains with the client.

The final category, which allows for disclosure if "otherwise authorized," involve both "forced" exceptions, and disclosures impliedly authorized to carry out the representation of a client.<sup>119</sup> Forced exceptions occur where laws outside the professional codes override the confidentiality provisions. Such outside laws include judicial orders, statutes, or and other ethical provisions. These exceptions permit, for example, a lawyer to override the confidentiality obligation where she must avoid becoming an accessory or instrument of a client's current or future misdeed.<sup>120</sup> "Impliedly authorized" exceptions permit disclosure where such disclosure advances or safeguards the interests of the client, such as "admitting a fact that cannot properly be disputed, or in negotiation . . . making a disclosure that facilitates a satisfactory conclusion."<sup>121</sup> Part II.B discusses in part how the "implied authorization" of any disclosure necessary to provide competent representation permits lawyers for child clients to consult with mental health professionals under certain circumstances.<sup>122</sup>

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114. See HAZARD & HODES, *supra* note 23, § 9.22, at 9-84 (explaining that this exception applies predominantly to fee disputes or allegations of legal malpractice).

115. *Id.*, § 9.22, at 9-85 (concluding that "simple fairness demands that the lawyer be permitted to present her claim or defense without handicap").

116. *Id.*, § 9.17, at 9-58.

117. *Id.*

118. *Id.*, § 9.16, at 9-57 to 9-58.

119. HAZARD & HODES, *supra* note 23, § 9.24, at 9-91.

120. *Id.*, § 9.24, at 9-92.

121. MODEL RULES, *supra* note 13, R. 1.6 cmt. 7. This implied authorization includes what is reasonably necessary for the lawyer taking action, including consulting with individuals or entities that have the ability to take action, to protect the interests of a client with diminished capacity. *Id.* R. 1.14(b)-(c).

122. The other exceptions hold less promise. The future harm exception applies to situations where a lawyer's moral obligations to society to prevent harms override her obligation to protect confidential information. This exception is inapplicable, however, to any situation where the consultation is not for the explicit purpose of avoiding the death or substantial physical injury to a person, or preventing the client's commission of a crime. The self-defense exception to the

*B. How the Confidentiality Duty Applies in the Representation of Diminished Capacity Clients*

The ethical provisions on representing diminished capacity clients presume that, while the diminished capacity<sup>123</sup> of a client may affect the responsibilities and duties of that client's lawyer generally, the lawyer must continue to maintain a normal client-lawyer relationship as far as is reasonably possible.<sup>124</sup> A normal client-lawyer relationship includes treating the client with attention and respect,<sup>125</sup> according the represented person the status of client as far as is possible,<sup>126</sup> and safeguarding and advancing the client's interests.<sup>127</sup> None of these mandates does anything explicitly to minimize the confidentiality duty; in fact, they strongly imply that whenever possible the duty should be maintained. As discussed above,<sup>128</sup> confidentiality is a pillar of the lawyer-client relationship, and certainly a crucial part of the represented party's "status as client." In a "normal" lawyer-client relationship, no disclosure of confidential information is permitted unless the client provides consent, or some other exception is met.<sup>129</sup> The presumption with diminished capacity clients is therefore that confidentiality should be maintained unless there is some rationale that this is not reasonably possible.

While the ethical provisions on representing diminished capacity clients create a presumption that the confidentiality duty should be observed, they also suggest the conditions under which confidentiality could be breached. A rationale for why confidentiality could not reasonably be maintained, for example, certainly could exist in the context of consultations with mental health professionals by lawyers for diminished capacity clients. In that context, lawyers often cannot reasonably meet their duty to provide competent representation<sup>130</sup>

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confidentiality rule applies only to situations where a lawyer must disclose confidential information to defend herself or to establish a claim in the course of any formal legal dispute with a client; such situations have no bearing on the question of consultation for the purposes of the representation of the client. Finally, the consent exception also does not apply. Lawyers for diminished capacity child clients cannot avail themselves of informed consent as a method of circumventing the ethical quandary because, by definition, their clients are not yet capable of providing a knowledgeable, intelligent and voluntary waiver of confidentiality.

123. Ethical provisions recognize that diminished capacity may be caused, among other things, by age and experience. See MODEL RULES, *supra* note 13, R. 1.14(a) ("minority, mental impairment or for some other reason"); MODEL CODE, *supra* note 5, EC 7-11 ("intelligence, experience, mental condition or age").

124. MODEL RULES, *supra* note 13, R. 1.14.

125. *Id.*, R. 1.14 cmt. 2.

126. *Id.*

127. See MODEL CODE, *supra* note 5, EC 7-12 (dictating that in absence of other legal guardian or representative, lawyer compelled to make decision for incompetent child).

128. *Supra* note 113 and accompanying text.

129. See *supra* notes 114-29 and accompanying text for a discussion of the consent and other exceptions to the confidentiality requirement.

130. See MODEL RULES, *supra* note 13, R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); MODEL CODE, *supra* note 5, DR 6-

without such consultation.<sup>131</sup> Ethical rules,<sup>132</sup> statutes,<sup>133</sup> and practice guidelines<sup>134</sup> all create responsibilities and duties for lawyers for diminished capacity child clients that often cannot be met without consultation with a mental health professional. In these cases, it is not always reasonably possible for these lawyers to maintain the confidentiality duty inherent in a "normal" lawyer-client relationship while at the same time providing competent representation. The disclosure of confidential information is ethical under such circumstances, then, because without it, it is not possible for a lawyer competently to fulfill her representational duties and responsibilities.

The duty of lawyers for diminished capacity clients to safeguard and advance their clients' interests<sup>135</sup> illuminates further the proper circumstances for breaching the confidentiality duty. As discussed above, clients have an important interest in maintaining confidentiality.<sup>136</sup> Without confidentiality, a client may feel less free to disclose information fully to his lawyer because he knows there is a risk that the lawyer will disclose information to others; yet in the absence of that full disclosure, a lawyer cannot provide thorough counsel and advocacy. A client's interest in competent representation is thus inextricably linked with his interest in confidentiality. In order to receive fully informed representation, he must believe any information disclosed to his lawyer will remain confidential.

How should the link between confidentiality and competent representation be taken into account by lawyers for diminished capacity clients? It might seem as though no interest in confidentiality exists for a diminished capacity child client. Diminished capacity, after all, affects the client's ability to perform two functions which are vital to the justification for the confidentiality duty: imparting complete and accurate information,<sup>137</sup> and understanding the promise of confidentiality.<sup>138</sup> The inability to comprehend the promise of confidentiality

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101(A)(1) ("A lawyer shall not . . . [h]andle a matter which he knows or should know that he is not competent to handle . . .").

131. See MODEL CODE, *supra* note 5, EC 6-3 ("Proper preparation and representation may require the association by the lawyer of professionals in other disciplines.").

132. See *supra* Part I.A for a discussion of ethical mandates of children's lawyers that require consultation with mental health professionals.

133. See *supra* Part I.B for a discussion of statutory requirements of children's lawyers that require consultation with mental health professionals.

134. See *supra* Part I.C for a discussion of practice guidelines for children's lawyers that require consultation with mental health professionals.

135. MODEL CODE, *supra* note 5, EC 7-12.

136. See *supra* notes 103-13 for a discussion of the rationale for the duty of confidentiality.

137. See CHILDREN'S TESTIMONY, *supra* note 67, at 53-199 (describing developmental issues relevant to children's ability to recall and relate events); Nancy W. Perry & Larry L. Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 CREIGHTON L. REV. 1369, 1386-98 (1985) (discussing problems children have with accurately recalling information); see also Walker & Nguyen, *supra* note 48, at 1587-88 (asserting that quality of information received from children depends in large part on methods and techniques used by interviewer).

138. See JANET WILDE ASTINGTON, *THE CHILD'S DISCOVERY OF THE MIND* 180 (1993)



renders that promise useless as a tool for procuring trust, and the client's inability to impart full and accurate information makes procuring the trust less relevant to the lawyer's duty to gather all relevant factual information.<sup>139</sup> Viewed from this perspective, a lawyer seemingly could disclose confidential information without compromising the trust of her client, since the client could not understand the promise of confidentiality, and without compromising information-gathering, because the client could not impart accurate information. There would therefore be no consequent detriment to the quality of representation if such disclosures were made.<sup>140</sup>

While there is no doubt that diminished capacity affects the interest in confidentiality preservation at least somewhat, it does so to a far lesser degree than it originally may seem, because of a consideration truly unique to the representation of child clients: *the capacity of a child to communicate and comprehend is a constantly developing one*. Almost all diminished capacity child clients will gradually develop the ability to impart accurate information verbally<sup>141</sup> and to understand the concept of confidentiality,<sup>142</sup> and many of them will develop this capacity over the course of their involvement with the child welfare system and their lawyer. A switch is not thrown which suddenly provides a previously non-comprehending child with the ability to provide complete, accurate information,<sup>143</sup> or the insight to understand fully all the nuances of confidentiality and ramifications of disclosure. Rather, that capacity develops, and as it develops, the client will take confidentiality increasingly seriously and will be increasingly reluctant to share information with his lawyer if he sees that she discloses information about him indiscriminately. Any responsible manner of disclosing confidential information must therefore account for the fact that while a child client may have a *diminished* capacity to understand confidentiality, he also has a *developing* capacity, and therefore a developing interest in confidentiality.

Most child clients will develop at least some ability to provide accurate information and understand confidentiality long before the end of the lawyer-client relationship.<sup>144</sup> One of the unfortunate realities of the child welfare

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(describing how comprehension of concepts such as secrets is expected to develop by age five).

139. In spite of any difference in how much information can be gleaned from young clients, however, lawyers for child clients still have as important a mandate as client-directed lawyers to have "full and accurate knowledge" about their cases. See STANDARDS, *supra* note 3, § C-2 (detailing duty to investigate); REPRESENTING CHILDREN, *supra* note 3, § 4-3, at 89-94 (describing methods of gathering full information about client).

140. If the confidentiality duty does *not* apply to lawyers for diminished capacity clients, then these lawyers face no ethical quandary. They may freely consult with mental health practitioners without violating any duty not to disclose confidential information.

141. See Robyn Fivush, *The Development of Autobiographical Memory*, in CHILDREN'S TESTIMONY, *supra* note 67, 55, 56-62 (describing development of verbal recall).

142. See ASINGTON, *supra* note 138, at 180 (describing how comprehension of concepts such as secrets is expected to develop by age five).

143. Adults, of course, are not always the most accurate reporters of information either.

144. See REPRESENTING CHILDREN, *supra* note 3, § 3-2(b)(2), at 53-54, for an enlightening description of how this development of capacities should affect advocacy.

system is that children spend years involved with their cases, and therefore years involved with their lawyers. (See Table 1.) One recent nationwide survey estimated that the average length of time a child in foster care spends in the system is thirty-two months.<sup>145</sup> When combined with the fact that a child is usually represented for at least one year upon release from foster care,<sup>146</sup> the total time of representation averages nearly four years.<sup>147</sup>

<b>Table 1: Lengths of Stay for Children in Foster Care in 1999</b>	
<b>MONTHS IN FOSTER CARE</b>	<b>PERCENTAGE OF TOTAL NUMBER OF CHILDREN</b>
< 1 Month	4% 24,329
1 to 5 Mos	16% 94,044
6 to 11 Mos	15% 85,036
12 to 17 Mos	11% 65,014
18 to 23 Mos	9% 51,985
24 to 29 Mos	8% 43,918
30 to 35 Mos	6% 33,269
3 to 4 Yrs	15% 85,128
5 Yrs or More	17% 98,276
Mean Months Spent in Foster Care	32
Median Months Spent in Foster Care	20
Source: The AFCARS Report, <a href="http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.htm">http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.htm</a>	

145. See U.S. DEPT. OF HEALTH & HUMAN SERVS., *The AFCARS Report* (June 2001), available at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.htm>.

146. Most states require representation through the expiration of the last order of the court, usually extending representation for twelve months beyond the date of discharge to the parents. See, e.g., N.Y. FAM. CT. ACT § 1016 (McKinney 1999) (providing that appointment of law guardian continue until expiration of appointment order).

147. This number is only an average. Many children remain in foster care much longer, and it is impossible to know at the inception of a case which children will remain in care for a brief time and which for a lengthy time. While the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 1997 U.S.C.A.N. (111 Stat.) 2115, has made attempts to reduce the amount of time children spend in foster care, it is still too early to know how effective the Act has been.

Table 2: Ages of Children in Foster Care in 1999	
AGE	PERCENTAGE OF TOTAL NUMBER OF CHILDREN
Under 1 Yr	4% 23,396
1 thru 5 Yrs	25% 143,268
6 thru 10 Yrs	26% 150,574
11 thru 15 Yrs	28% 164,134
16 thru 18 Yrs	16% 90,293
19 + Yrs	2% 9,335
Source: The AFCARS Report, <a href="http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.htm">http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.htm</a>	

At the same time, by five years of age, most children both understand the concept of keeping a secret,<sup>148</sup> and can recall past events with sufficient reliability to provide credible factual information.<sup>149</sup> Even children who are newborns when first assigned a lawyer,<sup>150</sup> therefore, may very well possess sufficient capacity both to understand the concept of confidentiality and to impart accurate information to his lawyer at some point during the course of the representation.<sup>151</sup>

Further, the argument that because the information from diminished capacity child clients is less reliable, it is not so important to encourage communication through the confidentiality promise belies the significance of that information. Even very young clients are capable of imparting information which, while perhaps different in nature than typical information gleaned from a client, can be equally important to competent advocacy and counseling. They can evince personalities, attachments to caretakers, and developmental milestones which are important pieces of information in advocating effectively for them as clients.<sup>152</sup> While the information obtained from many child clients may at times be less complete and less accurate than that obtained from older clients, it is nevertheless crucial to certain duties of the lawyer, such as

148. ASINGTON, *supra* note 138, at 180; see GARY SOLOMON, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS 87 (1999) (instructing to avoid use of "secret" in explaining confidentiality because it may have acquired other connotations).

149. Perry & Teply, *supra* note 137, at 1389.

150. See Table 2, *supra*, for a breakdown of the ages of children in foster care.

151. Some children may be severely mental retarded or have other similar problems which impair permanently their ability to develop this capacity.

152. REPRESENTING CHILDREN, *supra* note 3, § 3-2(b)(2), at 53.

determining her client's best interests.<sup>153</sup>

For those child clients who have developed, or are in the process of developing, the capacity to understand confidentiality and to impart accurate information, the interest in confidentiality is especially strong. The promise to keep a secret sends a powerful and clear message to a child, and resonates especially deeply with child clients in abuse and neglect cases, making it of critical importance in the formulation and maintenance of an effective lawyer-client relationship.<sup>154</sup> Children involved in maltreatment cases, betrayed by adults in myriad ways, have myriad reasons for distrusting them.<sup>155</sup> Parents who were supposed to love and protect them instead have abused or neglected them. Caseworkers have divulged their family secrets to judges, attorneys, and even their parents. Foster parents who were supposed to act as surrogate caretakers have reported their misbehaviors and confidences to social workers, therapists, and others. Through a promise not to tell these or other adults what a child tells her, a lawyer signals in a particularly powerful way that she is different from those adults, and, more importantly, that she has a relationship with the client that is deeply different from any relationship the lawyer may have with those other adults. When a lawyer promises to keep a child client's confidences, and then honors that promise, she takes the first and perhaps most critical step in establishing the sort of trusting lawyer-client relationship which is the hallmark of effective advocacy and counseling.<sup>156</sup> Without that promise, the client himself must try to make sense of what information is safe to share with the lawyer, and the lawyer consequently becomes just one more part of a system against which the client struggles.<sup>157</sup> The armor of confidentiality creates the safe haven for these children which makes effective advocacy and counseling for them possible. Lawyers, therefore, must carefully consider the developing ability of diminished capacity child clients to understand confidentiality, and the consequent

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153. See STANDARDS, *supra* note 3, § B-5 cmt. ("Even nonverbal children can communicate their needs and interests through their behaviors and developmental levels."). Professor Peters illuminates how significant the information from a young client can be for sound decision-making in assessing the best interests of a client. She writes:

In making a best interests determination, it is the lawyer's responsibility to carry out a full, efficient, and speedy factual investigation with the goal of achieving a detailed understanding of the child client's unique personality, her family system, history, and daily life. *This process should include the client's own words, stories, and desires at every possible point.* Even where the lawyer has determined that the child cannot fully understand or express desires about the legal issues of the case, there will be very few verbal children who cannot express some views about their own lives.

*Roles and Content*, *supra* note 6, at 1566 (emphasis added).

154. Randi Mandelbaum, *Rules of Confidentiality When Representing Children: The Need for a "Bright Line" Test*, 64 FORDHAM L. REV. 2053, 2057-58 (1996).

155. See *id.* (pointing out that many children are involved in court processes precisely because they shared secrets with those whom they thought they could trust).

156. See *supra* notes 103-13 and accompanying text for a discussion of the centrality of the duty of confidentiality in the attorney-client relationship.

157. See Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349, 352 (1981).

developing interest in confidentiality, as a significant factor in determining whether and how to disclose information.

Any disclosure of confidential information by a lawyer for a diminished capacity client to a mental health professional must therefore meet two conditions in order to be ethical. The disclosure must be necessary to meet an explicit representational responsibility of the lawyer, and the disclosure must be made in a manner which respects the client's developing interest in confidentiality. Part III illustrates how the current standard for disclosure by lawyers for diminished capacity child clients fails to meet either of those criteria, and Part IV proposes a new standard to ensure those criteria are met by lawyers in their daily practice.

### III. THE BEST INTERESTS STANDARD FOR DISCLOSURE

Lawyers who represent diminished capacity children must, in a variety of contexts, make decisions on behalf of their clients.<sup>158</sup> These decisions are usually made based on the lawyer's assessment of what would be in her clients' best interests.<sup>159</sup> One possible standard for disclosure of confidential information, then, would be to permit such disclosure whenever, in the lawyer's opinion, it would be in the best interests of the child client.<sup>160</sup> In the context of the consultation, the best interests standard would allow each individual lawyer to determine when to share confidential information with mental health consultants based on her personal assessment of whether it would be best for the client. While attractive both because it would be consistent with the criterion used for most decisions made by lawyers for diminished capacity clients, and because it would be consistent with the current practice of many lawyers, the best interests standard unfortunately fails to meet the two conditions discussed in Part II for the ethical disclosure of confidential information to mental health professionals by lawyers for diminished capacity child clients. It neither limits permissible disclosures to those which are necessary for the lawyer to meet an explicit representational responsibility, nor evinces any consideration for a child client's developing interest in maintaining the confidentiality of information relating to the representation. By merely requiring lawyers to follow their own values and beliefs in making disclosure decisions, the standard barely establishes even illusory conditions for disclosure, let alone a strict requirement that disclosure be permitted only if necessary to meet a representational responsibility.<sup>161</sup> Further,

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158. See e.g., MODEL CODE, *supra* note 5, EC 7-12 (dictating that in absence of other legal guardian or representative, lawyer compelled to make decision for incompetent child).

159. See STANDARDS, *supra* note 3, § B-5 (setting forth lawyer's duty to determine child client's legal interests).

160. See Ass'n of the B. of the City of N.Y. Comm. on Prof' & Legal Ethics, Formal Op. 1997-2, in REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 430, 436-38 (1997) (opining that where child client unable to make reasoned decision about whether to disclose abuse, lawyer may disclose if she concludes it would be in client's best interests); see also *Report of the Working Group on Confidentiality*, 64 FORDHAM L. REV. 1367, 1373 (1996) (proposing model statute for guardians ad litem which would allow disclosure when it is in best interest of child).

161. Even proponents of the best interests standard for guardians ad litem, rather than lawyers,

the unlimited discretion the standard gives to lawyers as to the nature and amount of information disclosed disregards the continuously developing interest in confidentiality of diminished capacity child clients. Both of these failures ultimately compromise the lawyer's ability to establish a trusting lawyer-client relationship, and consequently limit her ability to meet her responsibilities to advocate for, and counsel, her client competently.

*A. The Best Interests Standard's Failure to Condition Disclosure on the Necessity of Meeting Representational Responsibilities*

The best interests standard allows a lawyer to disclose confidential information if, in the lawyer's opinion, to do so would be best for the client. The standard offers no criteria for deciding if disclosure is, in fact, best for the client. By default, that determination relies on each individual lawyer's values and beliefs.<sup>162</sup> In order to justify disclosure, the lawyer must merely conform her decision with her personal opinion of what is best for the client. The standard thus not only ignores the ethical requirement that disclosure be necessary to meet a representational responsibility, it provides no meaningful guideline at all on determining when to disclose confidential information.<sup>163</sup> The following example illustrates how variable the disclosure decision can be when made using the best interests standard.

*Lisa M. Revisited*<sup>164</sup>

*Lisa M. is a four-year-old child whose father allegedly sexually abused her. The father vehemently denies the accusation, and claims that Lisa's mother, from whom he is divorced, has coerced Lisa into fabricating the allegations. In order to make Lisa more comfortable speaking with her, the lawyer has spent a lot of time with Lisa developing rapport. The lawyer hopes Lisa will feel comfortable enough either to provide additional corroborative details about the abuse, or perhaps to*

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recognize this as a limitation. See Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 *FORDHAM L. REV.* 1785, 1801 (1996) ("[Guardians ad litem] might make different judgments about disclosure than their wards' parents would make. Some decisions might serve children's interests better than their parents' decisions, others might not.").

162. This problem exists for "best interests" representation in general. A growing number of scholars and practitioners argue that any determination of a client's best interests should be based on the lawyer's duty to enforce and advance the legal interests of her client. E.g., Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1420 (1996). Such a standard grounds the lawyer's decisions not in how best to comport with the lawyer's own values and beliefs on what is best for her client; it grounds the decisions in how best to enforce and advance statutory or court-mandated rights. The pitfalls inherent in value-laden best interests determinations—the "chaos and randomness which a rational legal system would seek to avoid," *id.* at 1431—would be drastically reduced.

163. One could also argue that even where a lawyer making decisions based on her assessment of her client's best interests does not actually disclose confidential information directly to others, the very nature of best interests representation violates the confidentiality duty. See Buss, *supra* note 113, at 1744-45 (contending that lawyer's mere explanation to court of her "best interests" position on behalf of her client necessarily entails client's loss of control over private information).

164. See *supra* Part I.C for a discussion of the "Lisa M." example.

*admit that she was not actually abused. To reach that comfort level, the lawyer consistently reassures Lisa that the lawyer is not allowed to tell other people what they talk about. At their most recent meeting, Lisa says she has something she wants to tell the lawyer about her mother, but that she wants to know first whether the lawyer always has to follow the rule about not telling other people. The lawyer then explains the best interests exception by saying that she will only tell other people what Lisa says if she thinks "that is what is best for Lisa." Lisa proceeds to disclose that, two weeks earlier, Lisa told her mother that it was her mother's fault that Lisa was abused because she let Lisa go visit her father. Lisa says that her mother was so mad when Lisa said this that she slapped Lisa hard in the face. When the lawyer asks if this often happens, Lisa says it happens whenever her mother is really angry. After this disclosure, the lawyer tries to convince Lisa that the family therapist who is seeing Lisa and her mother should be told about the incident. In spite of much counseling by the lawyer, Lisa continues adamantly to insist that the lawyer not tell anyone else.*

Pursuant to the best interests standard for disclosure, the lawyer must now consider whether it is in Lisa's best interests for the lawyer to inform the therapist of Lisa's disclosure of corporal punishment. On the one hand, the lawyer believes that the therapist, who has just begun seeing Lisa and her mother, should have complete information in order to provide effective counseling. On the other hand, the lawyer has concerns both that the therapist may be required to call in a report to child protective services based on the slapping incidents,<sup>165</sup> thereby putting Lisa at risk of being removed from her mother's care and placed in foster care, and that the lawyer's relationship with Lisa may be damaged if she discloses the information against Lisa's will.<sup>166</sup> The lawyer personally believes that effective therapy is of paramount importance for Lisa at this point, and in general highly values the restorative power of informed family counseling; she also is strongly opposed to all forms of corporal punishment and is deeply disturbed that a child in Lisa's delicate emotional state is being slapped in the face by the person who is supposed to be providing her with comfort and reassurance. Given her personal values, the lawyer decides disclosure would be in Lisa's best interests, and tells the therapist about the corporal punishment.

Lisa's lawyer considered several issues in making her disclosure decision, including the risk of a temporary removal, whether that removal is appropriate, and the importance of informed counseling. The amount of weight the lawyer gave to each of these factors ultimately determined what decision the lawyer made about disclosure. Different lawyers, guided only by their own values and experiences, could easily come to completely opposite conclusions on what is in Lisa's best interests. While Lisa's lawyer may feel that the disclosure is crucial to effective family counseling in such a difficult time, another lawyer may believe

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165. See *supra* notes 26-27 and accompanying text for a discussion of the duty to report abuse.

166. See, e.g., *Report of the Working Group on Allocation of Decision Making*, 64 FORDHAM L. REV. 1325, 1336 (1996) (describing how one child client was not able to trust her lawyer again after lawyer disclosed a confidence *six years earlier*).

that the risk of Lisa's being removed from her mother, even if a small risk, is of far greater concern. A third lawyer may decide not to disclose because of the importance she places on Lisa's wishes. A disclosure determination which could have profound and long-lasting effects on Lisa's continued placement with her mother, on the effectiveness of the family therapy, and on the trust between Lisa and her lawyer, therefore depends essentially on the lawyer's own values and experiences.<sup>167</sup> The purely subjective nature of the best interests standard make it only an illusory guideline, and lead to a randomness which is anathema to a rational legal system.<sup>168</sup>

*B. The Best Interest Standard's Failure to Consider the Child Client's Developing Interest in Confidentiality*

The best interests standard also fails to take into consideration the developing interest of child clients in confidentiality. This failure manifests itself most starkly in the standard's lack of either any limits on the amount of information which lawyers may disclose, or any precautions which lawyers must take to prevent further exposure of that information. The absence of such limits or precautions exhibits an utter disregard for the fact that disclosures made by the lawyer easily can come to the attention of clients who are developing some capacity to understand the confidentiality duty. When a client sees that his lawyer has been indiscriminate as to the amount of information disclosed, and as to the risk of further exposure, it places in serious jeopardy the lawyer's ability to cultivate in her client the trust necessary for an effective lawyer-client relationship. By minimizing the exposure of confidential information when some disclosure is necessary to meet a representational responsibility, the lawyer sends an important signal that she values the client's developing understanding of, and interest in, confidentiality.

The following example illustrates the unnecessary permissiveness of the best interests standard.

*Jason S. Revisited*<sup>169</sup>

*Jason is four-and-one-half-years-old. His parents admitted to engaging in acts of domestic violence in Jason's presence, and to cocaine use. The local department of social services has referred the parents to a domestic violence program and a drug rehabilitation program, each of which provides weekly group counseling. Jason's lawyer has decided that it would be best for Jason if she contacted the counselor providing the group counseling to the parents to determine whether these programs are sufficient and appropriate for the ultimate goal of*

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167. See *Roles and Content*, *supra* note 6, at 1554 (arguing that while discretion often given to lawyers for children can be minimized and exercised in principled manner, it cannot be eliminated). Professor Peters also notes that some discretion is inherent in the representation of all clients, whether or not they are children. *Id.*

168. See Guggenheim, *supra* note 162, at 1440, 1431 (stating that allowing child's lawyer to advocate for outcome she believes is in child's best interest leads to inconsistency that should be avoided whenever possible).

169. See *supra* Part I.C for a discussion of the "Jason S." example.



*reunifying the family. The counselor requests some additional background on the case, and the lawyer subsequently provides the counselor with her file, which includes notes from the lawyer's interviews with Jason, copies of the petition, case records, and various other documents. The lawyer does not remove the interview notes when she provides the file to the counselor.*

In this case, the needs of the lawyer do not require her to disclose the amount of confidential information which she provided to the counselor. The interview notes, for example, likely contain little or no information of relevance to an assessment of the appropriateness of the counseling services provided to the parents. The information about the length and severity of the domestic violence and drug abuse, which are the crucial factors in the assessment, is readily obtainable from the petition and other court documents. Under the best interests standard, however, the lawyer is under no obligation to remove or redact the interview notes.

In addition, the information is being given to an individual who has no obligation to preserve Jason's confidences, and whose therapeutic obligation is in fact to Jason's parents, creating an even greater risk of disclosure. The counselor, for example, may very well see a therapeutic benefit for the parents if she brings up information from the interview notes concerning Jason's reaction to seeing his parents fight.<sup>170</sup> That conversation with his lawyer, however, may be one Jason is especially concerned remain confidential. The risks of exposure of the confidential information could very easily have been avoided if the lawyer had consulted with a psychologist not involved with the family. Mental health professionals can be involved with families in a variety of ways, including as a retained mental health professional, as a mental health professional providing treatment to the child or family, and as a mental health professional appointed by the court to evaluate the child or family.<sup>171</sup> Each role poses a different level of risk of exposure.<sup>172</sup> The best interests standard, however, imposes no obligation on the lawyer to minimize the risk of exposure of confidential information by consulting with a professional whose role minimizes that risk.

### *C. The Best Interests Standard's Effect on Competent Advocacy and Counseling*

The best interests standard's deferral to each individual lawyer's personal assessment of a client's best interests, and its failure to consider in any manner the developing interest of child clients in confidentiality, pose serious risks to the lawyer's ability to provide competent advocacy and counseling to her client. The promise of confidentiality stands as a pillar of the lawyer-client relationship.<sup>173</sup> If the promise of confidentiality does not apply whenever the lawyer thinks it

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170. See *supra* note 17 for more detail on the confidentiality obligations of mental health professionals.

171. See REPRESENTING CHILDREN, *supra* note 3, § 5-4(a), at 133-40 (discussing various types of mental health experts who might be involved with a child in maltreatment case).

172. See *infra* notes 199-206 for a discussion of these levels of risk.

173. See *supra* notes 103-13 and accompanying text for a discussion of the centrality of the duty of confidentiality in the attorney-client relationship.

should not, and if the lawyer, in fact, may completely disregard confidentiality in the manner in which she discloses information, the power of that promise and the trust it inspires are drastically weakened. Without that trust, a lawyer will be severely handicapped in any attempt to provide her client with informed counseling, or to advocate with a full understanding of her client's position and interests. The dependence on the values of individual lawyers to make disclosure decisions on behalf of their clients, rather than dependence on the existence of an explicit representational responsibility, thus affects the lawyer-client relationship in an especially disruptive manner when the determinations relate to the disclosure of confidential information.<sup>174</sup> The following example illustrates how, by relying on subjective considerations and by granting complete discretion on how much and to whom disclosures may be made, the best interests standard risks undermining the trust between a child client and his lawyer which is necessary for effective advocacy and counseling.

*Roger M. Revisited*<sup>175</sup>

*Roger M. is a four-year-old boy who has been removed from his parents due to allegations of excessive corporal punishment. Roger has been placed in the care of his maternal grandparents, who supervise his contact with his parents. At several of the visits, Roger has continued to be beaten by his parents. Roger discloses this information to his lawyer. Roger, who has been seeing a child psychologist to address issues of hyperactivity, does not want the lawyer to disclose the information to anyone, including the psychologist. The lawyer, however, feels that the psychologist's treatment of Roger may be much more effective if he knows about the continued beatings. The lawyer decides to tell the psychologist, who then confronts the grandparents. The grandparents admit that they have allowed the beatings to occur. The psychologist, as a mandated reporter, calls in a report to child protective services. Roger is subsequently removed from the care of his grandparents, placed in non-kinship foster care, and has his contact with his parents limited to agency-supervised visitation. Over the course of the next four years, Roger's parents only sporadically cooperate with the child protective agency's referrals for services. Eventually, the agency files a petition to terminate the parental rights of Roger's parents so that he can be adopted by his foster parents. Roger is conflicted and unsure about whether he wants to be adopted. He is in real need of advice on his options and their ramifications. In addition, now eight-years-old, he has a much greater capacity to share information and seek counsel from his lawyer. He also has a better understanding of the concept of confidentiality. Roger, however, knows that his request to his lawyer that she not disclose the continued beatings by his parents was ignored. He does not trust that his communications with his lawyer will remain confidential, and is reluctant to seek her advice.*<sup>176</sup>

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174. Although this disruption is more pronounced in disclosure decisions, best interests decision-making on behalf of a client in general suffers from the flaw of subjectivity.

175. See *supra* Part I.B for a discussion of the "Roger M." example.

176. See, e.g., *Report of the Working Group on Allocation of Decision Making*, *supra* note 166, at 1336 (describing how one child client was not able to trust her lawyer again after lawyer disclosed a

Because of his reluctance to communicate openly with his lawyer, Roger is being denied effective representation. The lawyer neither knows what position to advocate on behalf of Roger at the termination proceeding,<sup>177</sup> nor is aware of Roger's need for legal counseling on the ramifications of each of the possible outcomes in court.<sup>178</sup> For many children in the child welfare system, most adults involved in their life are individuals against whom they have struggled in one way or another: a parent who neglects or abuses; a caseworker who removes them from the home; a judge who makes seemingly unfair decisions.<sup>179</sup> When a client sees that his interest in confidentiality is, *or has been*, important to his lawyer, he is much more likely to see the lawyer as an ally rather than a part of an overwhelming and insensitive "system."<sup>180</sup> Consequently, he is more likely to share information necessary for effective advocacy and counseling.

#### IV. A PROPOSED STANDARD FOR THE DISCLOSURE OF CONFIDENTIAL INFORMATION TO CONSULTING MENTAL HEALTH PROFESSIONALS

##### Standard for the Disclosure of Information to Consulting Mental Health Professionals by Lawyers for Child Clients With a Diminished Capacity to Provide Informed Consent:

Any lawyer who represents a child client with a diminished capacity to provide informed consent for the disclosure of confidential information must observe the duty to preserve the confidentiality of all information relating to the representation, unless the disclosure of that information is for the purpose of meeting an explicit representational responsibility. The lawyer may disclose only the minimal amount of information necessary to meet that responsibility, and must limit to the greatest extent possible the potential exposure of the disclosed information to individuals not covered by the attorney-client privilege. The lawyer must make a written record of any decision to disclose confidential information, and the grounds for that disclosure, so that the client may review the disclosure decision when the client develops the capacity to do so.

The proposed standard specifically prohibits lawyers from disclosing confidential information to mental health professionals unless the lawyer is

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confidence six years earlier); see also Janet A. Chaplan, *Youth Perspectives on Lawyers' Ethics: A Report on Seven Interviews*, 64 *FORDHAM L. REV.* 1763, 1778-81 (reporting seven foster children's feelings that, generally, other than reporting abuse, "if you and your lawyer say something or talk about something that you think is personal, then that should be between you two").

177. Roger is thus being denied advocacy of his position, in direct violation of ethical provisions. See *MODEL RULES*, *supra* note 13, R. 3.1-3.9 (setting forth duty of advocacy); *MODEL CODE*, *supra* note 5, *CANON* 7 (setting forth duty of zealous representation).

178. Roger is thus being denied legal counseling, again in violation of ethical provisions. See *MODEL RULES*, *supra* note 13, R. 2.1 (setting forth duty of counseling); *MODEL CODE*, *supra* note 5, *EC* 7-8 (explaining duty of counseling).

179. See *Objection Your Honor*, *FOSTER CARE YOUTH UNITED*, Jan.-Feb. 2001, at 2-15 (presenting series of articles by youth in foster care expressing frustrations with caseworkers, judges, and lawyers involved in their cases).

180. See *id.* at 9-12 (reporting positive experiences with lawyers).

disclosing the information in order to meet an explicit representational responsibility. The standard also contains provisions which should ensure that disclosures are made in a manner which respects the fact that child clients are in the process of developing an understanding of, and interest in, the confidentiality of information relating to their case. These provisions require lawyers to tailor the scope of information disclosed, and the number of persons to whom the information is exposed, to the minimum amount necessary to meet the representational responsibility. The provisions also impose a duty on lawyers to record their disclosure decisions and the rationale behind them, so that when child clients develop an understanding of, and interest in, confidentiality, they will have access to explanations for decisions previously made on their behalf.

*i. Any lawyer . . . must observe the duty to preserve the confidentiality of all information . . .*

The ethical rules require that clients with a diminished capacity to make decisions for themselves should be treated, as much as possible, like clients with a normal capacity to do so.<sup>181</sup> The presumption is that the confidentiality duty, a pillar of a "normal" lawyer-client relationship, should apply to diminished capacity clients as well. The proposed standard therefore begins with an assertion that the confidentiality duty must be observed.

*ii. . . . unless the disclosure . . . is for the purpose of meeting an explicit representational responsibility.*

The ethical rules permit disclosure of confidential information without client consent if the disclosure is necessary to carry out the representation of the client.<sup>182</sup> Accordingly, lawyers for diminished capacity clients may disclose confidential information to mental health professionals whenever that disclosure is for the purpose of meeting an explicit representational responsibility. The distinction between a disclosure to meet such a responsibility, and one which is not, is best illustrated through examples.

In the case of Tara G.,<sup>183</sup> Tara has said that she wishes to return to the home of her parents, who allegedly have punched her and beat her with a belt buckle to the extent of causing bruises on her face, torso, and legs. Tara's lawyer must develop her position on Tara's return to her parents. As a lawyer for a "client with diminished capacity,"<sup>184</sup> she therefore has a representational responsibility to determine Tara's level of impairment in order to know how much weight her client's wishes should have in the decision-making process. Because Tara's lawyer, like most lawyers will need to consult with a mental health professional

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181. See *supra* Part II.B for a discussion of the applicability of the duty of confidentiality in the representation of diminished capacity clients.

182. See *supra* notes 114-29 and accompanying text for a discussion of the exceptions to the duty of confidentiality.

183. See *supra* Part I.A for a discussion of the "Tara G." example.

184. MODEL RULES, *supra* note 13, R. 1.14.

in order to meet her responsibility of determining Tara's level of impairment,<sup>185</sup> the disclosure of confidential information for that purpose is permissible.<sup>186</sup>

The case of Jason S.<sup>187</sup> provides another example of a disclosure for the purpose of meeting an explicit representational responsibility. After allegations of drug abuse and domestic violence were made against Jason's parents, he was temporarily removed from their care and placed in a non-kinship foster home. Jason has been seeing a psychologist to evaluate both his adjustment to the foster home, which has been difficult, and the effects of his witnessing domestic violence. Jason's paternal aunt, who previously had adopted Jason's brother, Sam, has offered to take Jason until he can be returned to his parents.

The state where Jason resides, like many states, has a statute which requires that when removing a child from his parents, child protective services must place the child with relatives whenever such placement is not clearly contrary to the child's best interests.<sup>188</sup> A report from child protective services about the paternal aunt's fitness describes the home as "chaotic," and Sam's attendance at school as "poor." It further reveals that the aunt has, since her adoption of Sam, married a man with a criminal record for selling drugs, and that, since he moved into the aunt's home, the husband also has been arrested once for assault, although the charges were eventually dropped. Child protective services argues that the aunt's home is inappropriate for Jason.

Jason's lawyer has a representational responsibility to advance Jason's legal interests,<sup>189</sup> as well as a responsibility to assess those interests through a full investigation.<sup>190</sup> The psychologist who is treating Jason will very likely have information crucial to a comparison of the effects on Jason of placement in a foster home environment with the effects of placement with the paternal aunt. Such information would include Jason's need for a calm and structured environment and the importance to Jason's emotional and psychological well-being of placement with relatives. In order to obtain this information, and to explain why she needs it, Jason's lawyer will almost certainly have to disclose to the psychologist some background information—normally confidential—about Jason, Jason's family, and the case. Because those disclosures must be made in

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185. The need to consult in this and other situations may sometimes be obviated if the lawyer possesses an expertise in the mental health issues relevant to the situation. In fact, some believe that representatives for young children in maltreatment cases should be mental health professionals rather than lawyers. See, e.g., Appell, *supra* note 4, at 1959 (proposing that specially-trained social workers or other adults represent young children).

186. Note that, pursuant to the proposed standard, the information disclosed must be narrowly tailored to meet the purpose of the disclosure. Here, for example, subpoenaing educational and medical records, redacting them, and showing them to the expert, may very well be sufficient.

187. See *supra* Part I.C for a discussion of the "Jason S." example.

188. See, e.g., N.Y. FAM. CT. ACT § 1017(1)(a) (McKinney 1999) (directing local commissioner of social service to locate and inform relatives and determine whether there is a suitable relative with whom child may reside).

189. See *supra* Part I.B for a discussion of a lawyer's statutory requirement to represent a child's best interests.

190. See STANDARDS, *supra* note 3, § C-2 (stating responsibility to conduct "thorough, continuing, and independent investigations").

order for the lawyer to meet her representational responsibility to advance and assess Jason's interests in court, they are legitimate.

In contrast, however, under the proposed standard, the disclosure described in Part III.B, *supra*, would *not* be permissible. In that situation, Jason's lawyer disclosed to the parents' counselor information which included Jason's communications to the lawyer about his reactions to seeing his parents fight. Jason had specifically asked his lawyer not to tell anyone else about those reactions, but the lawyer, believing it ultimately would be best for Jason if his parents knew the effect their fighting had on Jason, disclosed that information to the parents' counselor for use in therapy. Since there exists no representational responsibility which requires lawyers for children to help therapists provide better counseling to clients and their families, this kind of disclosure<sup>191</sup> would be prohibited under the proposed standard, and Jason's confidentiality interest would enjoy a much greater protection.

*iii. The lawyer may disclose only the minimal amount of information necessary to meet that responsibility . . .*

Lawyers for diminished capacity clients must ensure that disclosure, even when necessary to meet a representational responsibility, is done in a manner which respects their child clients' developing interest in confidentiality. Narrowing the scope of information disclosed solely to that which is necessary for effective consultation is the simplest way of showing that respect. Otherwise, a child client who develops an understanding of, and interest in, confidentiality may feel much more reluctant to share information and seek counsel from his lawyer when he sees how carelessly the lawyer previously has treated information about him and his case. Many practical mechanisms exist to help attorneys limit the amount of information they disclose, and the subsequent exposure of that information, while still obtaining sufficiently informed consultation. Some mechanisms, such as the redaction of all unnecessary identifying information, are simple and effective at limiting the exposure of confidential information. In the case of Jason S., for example, the lawyer seeks input from a mental health professional on what services should be provided to Jason and his family. The lawyer should be able to get that input without disclosing much, if any, identifying information about Jason's case. Merely by explaining the nature and frequency of the drug use and of the domestic violence incidents, the lawyer may very well be able to provide sufficient information for the mental health consultant to help recommend the appropriate services for Jason.

Lawyers for children also should consider methods of minimizing the need for disclosure altogether. For example, whenever possible, children's lawyers

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191. While advocating for the best interests of a child client may be a legal responsibility in many jurisdictions, see *supra* Part I.B, there is no authority or mandate which extends this duty beyond the legal arena. In this instance, the decision about what information should be disclosed to the parents' therapist is clearly outside the legal arena.

should engage in training on mental health issues relevant to their practice.<sup>192</sup> Mental health training would minimize conflicts with the confidentiality duty because the increased level of a lawyer's mental health expertise on a specific issue could at times obviate the need for consultation.<sup>193</sup> Anything short of the detailed, intensive educational training required of mental health professionals, however, will not alleviate the necessity for consultation in all situations.<sup>194</sup> Mental health practitioners from the social work, psychological, and psychiatric disciplines all undergo comprehensive training, and the level of expertise which a lawyer could gain from occasional trainings is not comparable to that of such practitioners, and certainly would often not provide the necessary expertise to apply her knowledge in the context of a specific case.<sup>195</sup> In addition, the breadth of mental health issues which can be involved in abuse and neglect cases is extremely large.<sup>196</sup> To provide training in each of these issues would essentially amount to a full-time course of study.<sup>197</sup> In addition, lawyers are generally expected to be familiar with, and competent in, the legal aspects of their practice; if there are other areas with which they must familiarize themselves in order to sustain competence on the legal aspects of their practice, lawyers generally will make use of experts.<sup>198</sup>

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192. Training on when children generally begin to understand certain types of questions, for example, greatly assists lawyers in knowing how to frame appropriate questions for their client interviews.

193. Such training also improves the representation provided by children's lawyers. See Andrew Schepard, *Law School Program Set to Improve Representation of Children*, N.Y. L.J., Nov. 1, 2001, at 3 (describing some benefits of interdisciplinary advocacy programs).

194. In fact, even in those situations in which the lawyer had received extensive mental health training, consultation would at times be needed. Even fully trained mental health professionals, for example, will confer with colleagues who have an expertise in a specific issue on which the professional needs guidance.

195. REPRESENTING CHILDREN, *supra* note 3, § 5-4(a)(2)(ii), at 137.

196. See, e.g., Martha Farrel Erickson & Byron Egeland, *Child Neglect*, in APSAC HANDBOOK, *supra* note 1, 3, 7-12 (summarizing several studies which show long-term impact of neglect on children's mental health).

197. A trained mental health professional, for example, can provide significantly more educated insights than Roger M.'s lawyer can on the psychological factors relevant to the assessment of Roger's "interests" on placement; similarly, a trained mental health professional is much more likely to be aware of relatively new or innovative mental health treatment alternatives which the lawyer for Jason S. might seek on behalf of her client.

198. Even if a lawyer does become familiar with extra-legal issues involved in her practice, she would be irresponsible to consider herself an expert in those issues. A medical malpractice lawyer, for example, might become extremely familiar with a wide variety of medical terms, treatments and practices in the course of her legal practice. She would be remiss, however, if she failed to consult with a medical expert on her cases. Similarly, even if a children's lawyer became familiar, for example, with the counseling and therapeutic services which children in the child welfare system often require, she would often be remiss not to consult also with mental health practitioners, the real experts in those areas. See REPRESENTING CHILDREN, *supra* note 3, § 5-4(a)(2)(ii), at 137 (analogizing to product liability attorney facing intricate technological questions).

*iv. The lawyer . . . must limit to the greatest extent possible the potential exposure of the disclosed information to individuals not covered by the attorney-client privilege.*

Just as lawyers should limit the amount of confidential information disclosed, they should also limit the number of people to whom the information potentially is exposed. Lawyers can to some extent control that exposure by choosing judiciously which type of expert is consulted. Lawyers for children maltreatment cases might consult essentially three types of mental health practitioners: the retained mental health professional; the mental health professional providing treatment to the child or family; and, the mental health professional appointed by the court to evaluate the child. Lawyers for diminished capacity clients always should attempt to consult with the mental health professional whose role involves the least risk that information provided in the consultation will be disclosed further.

Consultation with a court-appointed expert presents the greatest threat to the preservation of confidential information. Court-appointed evaluators must, by the very nature of their job, disclose information to the court. These experts are appointed by a judge to conduct evaluations for the court of children or parents, or to answer specific questions for the court, such as whether a child should be placed in a mental health facility. Such experts are extremely useful for judges, who can then base their determinations of what is in a child's best interests on the opinions of these professional analyses of the psychological, emotional, and other mental health issues involved. Information disclosed to court-appointed experts is almost always included as part of written or oral reports to the court, copies of which are routinely provided to counsel for respondent parents and counsel for the child protective agency. Not only, then, is confidentiality breached, it is breached to the very people from whom the child might want most to keep information private—parents who have been abusing him, or an agency that has the power to make decisions about his future with which he disagrees. Consultation with such an evaluator thus poses the greatest risk of exposure of confidential information.

Consultation with treating mental health professionals involves somewhat less risk of further disclosure. Treating mental health professionals, including therapeutic social workers, school psychologists, or psychiatrists at community-based clinics, can provide extensive information and opinions about their patients. Since these professionals generally have long-term, regular, intensive contact with the children and adults they treat and counsel, they are often the most informed and informative type of mental health consultant. Because these sorts of mental health professionals are not retained experts, however, they are not agents of the lawyer or client and are therefore not covered under the attorney-client privilege or work-product doctrine.<sup>199</sup> Therefore, any confidential information which is divulged by the lawyer to the consultant is at

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199. See *supra* notes 26-27 for a discussion of the persons covered by the attorney-client privilege and the work-product doctrine.



risk of further disclosure both because the information is subject to subpoena and discovery,<sup>200</sup> and because the consultant will be bound by his own, rather than the lawyer's, disclosure standards.<sup>201</sup>

By contrast, communications with a retained expert can be protected from further disclosure by the work-product rule, and thus offer the greatest protection of confidential information.<sup>202</sup> The work-product doctrine protects exchanges of information between the lawyer and the retained experts from discovery by other parties if the expert is consulted in anticipation of litigation.<sup>203</sup> Even this protection, however, does not safeguard the confidential information completely. In every state, psychologists and psychiatrists are required to report suspected neglect or abuse, and social workers are mandated reporters in most states as well.<sup>204</sup> Retained experts are offered no special exemption. Any consultation, therefore, even with a retained expert, subjects the information to a risk of disclosure if it indicates any reportable new instances of abuse or neglect.

In the case of Roger M., for example, the lawyer represents a client who is being subjected to beatings by his parents at visits supervised by his grandparents.<sup>205</sup> The lawyer may wish to inform a retained mental health consultant of the ongoing beatings in order to obtain a more informed opinion from the consultant regarding Roger's placement and his visits with parents. Once aware of the continued abuse, however, the mental health consultant may have a legal obligation to report it. This reporting could lead to various repercussions which might be contrary to the goals the lawyer might be seeking. Many judges, for example, might remove Roger from the care of his grandparents, or suspend all visitation between Roger and his parents, upon hearing about the continued corporal punishment. Roger's attorney might have developed a position contrary to those actions.<sup>206</sup> Therefore, although a retained expert may be the best option, lawyers should be aware that even where a consulting mental health professional is a retained expert, there are risks of

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200. Because the mental health professional-client privilege is not valid in some family court jurisdictions, see, e.g., N.Y. FAM. CT. ACT § 1046(a)(vii) (McKinney Supp. 2002), there is an even greater risk of disclosure. If subpoenaed to testify, an expert in such a jurisdiction would be under a compunction to answer questions asked, or produce documents requested, which might ordinarily be protected by the privilege.

201. See *supra* note 17 for a discussion of the confidentiality obligations of mental health professionals.

202. Unfortunately, retaining an expert is a costly proposition available to few attorneys. See REPRESENTING CHILDREN, *supra* note 3, § 5-4(a)(2)(ii), at 137 n.19 (pointing out that the problem is exacerbated by low compensation of children's lawyers and calling on state legislatures to allocate money for this need).

203. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. a (noting that federal and state rules extend work-product immunity to personnel who assist lawyer).

204. Zellman & Fair, *supra* note 26, at 451. See *supra* notes 26-27 and accompanying text for a discussion of the duty to report abuse.

205. See *supra* Part I.A for a discussion of the "Roger M." example.

206. In fact, even the consulting psychologist might be recommending a position contrary to the judge's actions. The judge's sense of the child's best interests, after all, is not necessarily informed by the same factors as a mental health professional.

further disclosure of confidential information.

*v. The lawyer must make a written record of any decision to disclose confidential information, and the grounds for that disclosure, so that the client may review the disclosure decision when the client develops the capacity to do so.*

Even where the client does not, at the time of the disclosure, possess the capacity to impart credible information or understand fully a promise of confidentiality, the fact that most clients will develop those capacities must be considered by the lawyer. As there is no way of predicting which clients will remain in foster care long enough to develop the appropriate capacities, each client must be treated as though he will develop them. A written record should therefore be made of each decision to disclose confidential information and the grounds for that disclosure so that the client can review the disclosure decision when he develops the capacity to do so. While this provision will add a small amount of paperwork to lawyers who are already frequently underpaid and overworked, it provides two important benefits. First, it allows clients who have the capacity to do so, to understand why certain decisions were made on their behalf when they were younger. Many older child clients look back in frustration on decisions that were made for them, failing to understand both why and how those decisions were made.<sup>207</sup> Especially in the sensitive area of the disclosure of confidential information, many clients may one day wish to understand why a certain decision was made. Trust in both lawyers and the legal system will increase if those frustrations can be allayed at least somewhat through a memorialization of the rationale behind the decisions. Furthermore, being required to memorialize the reasons for every confidentiality breach may have the added benefit of encouraging lawyers to conduct more scrupulous decisions about when to disclose confidential information. The requirement will force lawyers to consider their child clients as they will be in the future: curious, independent, and with the capacity to direct decisions both about the disclosure of confidential information, and about representational goals as a whole.

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207. Consider the following statements of three eighteen-year-olds who were at the time either in, or recently discharged from, foster care:

"[W]hen you're young and you don't have nobody to explain nothing to you and they just go ahead and make decisions for you then that discourages you so that when you're older you don't feel like you have a say."

Chaplan, *supra* note 176, at 1769.

"[J]ust to [have the lawyer] go through it [the basis of the decision being advocated], I think that helps a lot."

*Id.* at 1772.

"I only seen my lawyer when I went to court, basically, when I was a little kid. I didn't know what was going on back then. They should have asked me more and said why they questioned me so much, because I didn't know what was going on."

*Id.* at 1774.

## CONCLUSION

Children who are the subject of maltreatment cases benefit substantially when their lawyers are able to consult with mental health professionals. Access to the expertise of such professionals enables lawyers to adhere to the statutory requirements, ethical mandates, and representation standards which set forth their responsibilities and duties, and allows them to provide truly informed representation to their clients. The conditions under which consultation is ethical, however, are limited by the duty which every lawyer has to protect the confidential information of her client. Lawyers for diminished capacity child clients must find a way to fulfill their representational duties, but still honor the important role of confidentiality in their practice. The best interests standard currently used for most decisions by such lawyers on behalf of their clients fails utterly to acknowledge in any way that the fact the confidentiality duty must, and should, play a role in disclosure decisions. It is my hope that the standard proposed here will ensure that lawyers for diminished capacity child clients make disclosures to consulting mental health professionals on ethically permissible grounds, and in an ethically responsible manner.