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## Ties That Bind ?: Children's Attorneys, Children's Agency, and the Dilemma of Parental Affiliation

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# Ties That Bind?: Children's Attorneys, Children's Agency, and the Dilemma of Parental Affiliation

William A. Kell\*

## I. INTRODUCTION

*"But you're supposed to be working for us!"*

—Delia, a child client<sup>1</sup>

Another day at the attorney's office and Delia, your twelve year old client is upset. Delia is a bright, articulate sixth-grader whom the family court found to be neglected, after her parents allegedly hit Delia's oldest sister, Zelda, with a belt, buckle-side down. The family court removed Delia and Zelda from their home for a few weeks and placed them with their maternal aunt, whom the girls' parents now refer to as "traitor." The parents, poor and African-American, expressed hope that your appointment as Delia's new lawyer would finally bring some justice to a proceeding they deem fraught with error and racism. The family court based its finding of neglect of Delia and Zelda almost solely on the medical evidence of Zelda's bruises.

Delia is upset because you have told her that you do not think you can support her parents' motion to dismiss the finding of neglect. Against your better judgment, you previously advocated for Delia's return home following the fact-finding, because there was no evidence of maltreatment toward her and you viewed Delia as possessing adequate decision-making ability to take direction from her.<sup>2</sup> You also

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1. The following hypothetical is based on a compilation of cases in which the author represented child clients as a law guardian in upstate New York.

2. The *Model Rules of Professional Conduct* ("Model Rules") instruct that "[a] lawyer shall abide by client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are pursued." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983). *But see id.* Rule 1.14(a) (explaining a course of action when the attorney finds the client to have impaired decision-making ability). For purposes of this writing, this Article will use the Model Rules, which 37 states have adopted as of 1994. There are, however, important differences in the *Model*

recognized that Delia desperately missed her parents and had continually fought with Zelda while at her aunt's residence. Zelda wants to remain with her aunt permanently, and Delia's parents have consented to a transfer of legal guardianship.

Despite the neglect finding, Delia now wants the Department of Social Services ("DSS") "totally out" of her life, and she is against any court-ordered parenting classes, caseworker visits, or counseling for the family. You have just received her parents' attorney's motion to dismiss, which would result in the precise outcome your client has directed you to pursue. Although Delia listened and participated with great acumen during your counseling session with her regarding what to do with the dismissal motion, Delia disagrees with your risk assessment of having no further state oversight in her life.

Admittedly, such assessments, at least those of adults, are subject to reasonable differences of opinion. This is especially true in this case, where your client claims she has not been subjected to the same punishment, and there is no other alleged history of parental abuse against her. However, what weight, if any, should the child's assessment be accorded in this situation, given that you previously decided this assessment was sound enough to follow when you advocated for her return home? Should you now allow Delia to test out her assessment of the risk on her own, with no DSS oversight?

Thinking quickly, you take a break with a copy of the *Model Rules of Professional Conduct* ("Model Rules") under your arm. You emerge less troubled, and with a solution. Relying on the Model Rules, you have concluded that parental pressure has impaired Delia's decision-making ability to such an extent that you must now act as a de facto guardian for her "best interests."<sup>3</sup> Although you recognize that it will be difficult to explain to Delia why you will be unable to follow her direction, you can proceed with some comfort that you are on solid ethical ground, and that Delia will hopefully understand "in time." After all, she is a pretty mature kid.

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One of the most difficult dilemmas for any child advocate occurs when the client wants her attorney to advocate for something against her best interests, and when the client's choice may be attributable to

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*Code of Professional Responsibility* (1981) ("Model Code"), which still governs in a minority of states.

3. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, Rule 1.14(a), (b) cmt. 2 (explaining that if a client suffers from a disability such that she cannot act in her own interest, and that person has no guardian or legal representative, the lawyer must act as the de facto guardian).

parental affiliation.<sup>4</sup> Whether this affiliation manifests itself through identification, protective instincts, trust, love, placation, or parental pressure, the attorney must decide the extent to which her client can direct the litigation as an agent free from parental influence. The simplest approach, described above, is for the child's attorney to treat affiliative behavior as a substantial impairment under Model Rule 1.14, and then to proceed as the child's de facto guardian.<sup>5</sup> A similarly easy, but purer, approach would be for the attorney to request appointment of a guardian *ad litem* ("GAL") to protect the child's best interests, allowing the original attorney to continue representing the child's expressed wishes.<sup>6</sup>

Neither approach, however, directly considers the issue of whether the child can ever have agency,<sup>7</sup> or whether the law should treat her as

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4. The act of "affiliation" is: "[t]o adopt or accept as a subordinate associate [or] [t]o associate (oneself) as a subordinate, subsidiary, or member with . . . [or] to associate or connect oneself." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 29 (3d ed. 1992). The definition also includes reference to legal proceedings whereby a child's biological connection to a father is demonstrated. See *id.* Some have also referred to this phenomenon with respect to children as a form of "attachment." Attachment is "[a] bond of affection or loyalty [or] fond regard." *Id.* at 118.

5. See *supra* note 2 (discussing Model Rule 1.14). Current scholarship examining ethical issues and child representation have generally used the term "impairment" to denote a child who is incapable of making informed decisions. This Article will continue, reluctantly, to utilize the term while calling for the creation of less stigmatizing ways of describing child decision-making and competencies. Similarly, Anne Coughlin identifies the need for less pejorative language in calling for the revision of the concept of battered women's syndrome. See Anne Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 89-91 (1994) (criticizing the manner in which is currently utilized as battered women's syndrome as a defense when it implies that these women are psychologically disabled, self-sacrificing, and subordinate to men, thereby reinforcing gender stereotypes).

6. This approach would usually require an additional expenditure of state funds for assigned counsel. As such, judges are likely to be reluctant to appoint a guardian *ad litem* for a child who is already represented by counsel, even though this approach might provide the child with representation more consistent with her needs.

7. The concept of "agency," sometimes referred to as "self-direction," has been recently examined in the ways that law and society recognizes or restricts women's choices. See, e.g., Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (discussing the interrelationship between women's lives, culture, and law); Kathryn Abrams, *Sex Wars Redux*, 95 COLUM. L. REV. 304 (1995) (exploring the role of feminist legal theory in highlighting and enhancing women's agency under circumstances of oppression); Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY, 15 (1994) (challenging the assumptions underlying statutory rape laws by contrasting legal principles governing adolescents and psychosocial literature regarding adolescents). According to Professor Abrams, different manifestations of agency are seen in examining decision-making behavior, self-assessments of power or choice, as well as resistance to the influence of others. With regard to children, social scientists have examined agency under each of the above conditions, particularly with

having agency when a child is closely affiliated with a parent. In addition, neither approach examines the nature of that agency, or the accompanying ramifications posed by the attorney's duty of loyalty to the child client.<sup>8</sup> From my practice, the absence of such guidance encourages children's attorneys to dismiss or seek to alter their clients' expressed wishes whenever the child seems to be making a decision with another person in mind. This automatic equation of affiliation with undue influence demeans children and ignores the fact that children and adults are both social creatures, who often make decisions based on their affiliations with others. This Article offers some guidance to children's attorneys in sorting out when children's agency, exercised in the context of their affiliations with others, should be respected. Respect for children's decision-making power by their attorneys would promote important public interests, such as, (1) encouraging children to make decisions and take responsibility commensurate with their developing abilities, and (2) to develop more realistic conceptions of children as both dependent and decision-making individuals with their own identity.<sup>9</sup>

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regard to the influence on children's decision-making exerted by parents or peers. See, e.g., Elizabeth S. Scott, et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995) (challenging the use of a model for comparing adolescent and adult decision making by policy researchers that is based on informed consent); David G. Scherer, *The Capacities of Minors to Exercise Voluntariness in Medical Treatment Decisions*, 15 LAW & HUM. BEHAV. 431 (1991) (comparing the ability of children and adolescents to give informed consent to medical treatment); Kim White, et al., *Adolescents' Compliance-Resistance: Effects of Parents' Compliance Strategy and Gender*, 24 ADOLESCENCE 595 (1989) (discussing resistance strategy of adolescents when faced with compliance-gaining attempts by parents).

8. This Article examines parent-child affiliation only in the context of attorney-child client relationships. Those who support the expanded use of guardians *ad litem* argue that GALs are more effective at advocating for a child's interests, given the child's affiliation with a parent, because the GAL's client is essentially the child's best interests, not the child herself. The nonexistence of a GAL's duty of loyalty to follow the child's directives would likely make irrelevant the question of the child's agency to formulate such directives. See Emily Buss, "You're My What?:" *The Problem of Children's Mis-Perceptions of Their Lawyer's Roles*, 64 FORDHAM L. REV. 1699, 1732 (1996). However, the GAL's lack of allegiance to the child and the resulting wider discretion creates a serious risk of having the child discounted as a potential contributor of information and guide to the "best interests" analysis, regardless of the child's competence. See generally *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children—Report of the Working Group on the Allocation of Decision Making*, 64 FORDHAM L. REV. 1325, 1325-37 (1996) (providing an analysis of some of the ethical issues involved in the allocation of decision-making power between clients and advocates). This source also directs the reader to reports of other working groups and companion articles contained in the published material from this conference. See *id.* at 1325.

9. See Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 24 (1986).

## II. EXAMINING CHILD-PARENT AFFILIATION

Examining the extent to which a child can freely direct an attorney-client relationship requires an initial look at how parent-child relationships develop. Parent-child relationships have strong developmental and dynamic components.<sup>10</sup> A child's relationship with her parent is traditionally characterized by the gradual development from emotional and economic dependence to greater levels of independence.<sup>11</sup> Similarly, the relationship is usually marked by the child's strong identification with one parent or both at a young age, and with greater rebellion and self-definition asserted by the child beginning around adolescence.<sup>12</sup> Attention to the power dynamics operating between a parent and child is essential because exercises of power do not always run in one direction—that is, from parent to child.<sup>13</sup> Throughout the development of the parent-child relationship, there is the possible manifestation of pathology or possible disruption

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10. See generally Joanne L. Benn & James Garbarino, *The Developing Child in a Changing Environment*, in JAMES GARBARINO, ET AL., CHILDREN AND FAMILIES IN THE SOCIAL ENVIRONMENT 99-127 (1982); ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 247-74 (W.W. Norton & Company, Inc., 2d ed. 1963) (discussing developmental stages through adolescence); James Garbarino, *The Child's Evolving Capacities*, in CENTER ON CHILDREN AND THE LAW, ABA, CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 19-32 (Cynthia Price Cohen & Howard Davidson eds., 1990).

11. See William Gardner et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895, 896 (1989); John P. Hill & Grayson N. Holmbeck, *Attachment and Autonomy During Adolescence*, 3 ANNALS OF CHILD DEV. 145, 149-50 (1986); White et al., *supra* note 7, at 595. See generally ERIKSON, *supra* note 10, at 247-74.

12. See also Hill & Holmbeck, *supra* note 11, at 158-59 (detailing past research and studies on adolescent rebellion); White et al., *supra* note 7, at 595 (examining adolescent behavior in response to parental influence). See generally ERIKSON, *supra* note 10, at 247-63 (discussing developmental stages through adolescence). It should be noted that such rebellion or resistance to influence by others is treated as one component of "agency." See generally Abrams, *supra* note 7, at 304-07 (describing how feminists' anti-pornography movement has obscured the study of women's sexuality); Mahoney, *supra* note 7 (discussing the interrelationship between women's lives, culture, and law); Oberman, *supra* note 7, at 70-79 (challenging the assumptions underlying statutory rape laws by contrasting legal principles governing adolescents and psychosocial literature regarding adolescents).

13. See generally Gary W. Peterson, *Parent-Youth Power Dimensions and the Behavioral Autonomy of Adolescents*, 1 J. ADOLESCENT RESEARCH 231, 233-34 (1986) (recognizing the possibility that adolescents may acquire power in the parent-youth relationship); James L. Turk, *Uses and Abuses of Family Power*, in POWER IN FAMILIES 80, 91-92 (Ronald E. Cromwell & David H. Olsen eds., 1975) (suggesting that children have "considerable impact on family choices"); White et al., *supra* note 7, at 595 (describing strategies used by adolescents to resist compliance with parents' demands as varying with the gender of the adolescent and parent).

of family affiliations because of death, divorce, or other causes.<sup>14</sup> Both child and parent tend to assign varying amounts of importance to the relationship over its lifetime, which is sometimes manifested in the amount of respect or deference exhibited in their interactions.<sup>15</sup>

With the possible exception of the developmental aspects described, it should be noted that each of the above characteristics may also describe *any* adult relationship with, for example, a friend, lover, or mentor. Not surprisingly, the strength of these affiliations can be equal to, or even stronger than, that between a parent and child. As discussed *infra*, this is one reason why the law's treatment of this affiliation, as potentially impairing only a *child's* decision-making abilities, appears open to question.

### III. MANIFESTATIONS OF AFFILIATION

Children's affiliation with their parents can take many different forms, any of which can trigger the attorney's impairment "radar." There are the most obvious forms of overt parental pressure, such as physical brutality, sexual exploitation, threats, fear-mongering, and quid pro quo solicitations.<sup>16</sup> Threats can range from an actual parental promise of physical harm to the child or the parent, to loss of love or respect by the parent, or to other more subtle coercive messages.<sup>17</sup> Parental pressure raises the question of whether, in a dysfunctional parent-child relationship, the child's mere understanding of the parent and the past consequences of the child's behavior might create an atmosphere of ongoing threat.<sup>18</sup> For example, a child who witnessed

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14. See ERIK ERIKSON, *IDENTITY, YOUTH AND CRISIS* 165, 196-207 (1968) (providing examples of pathology in identity development). See generally ERIKSON, *supra* note 10, at 406-14.

15. See Hill and Holmbeck, *supra* note 11, at 181 (postulating that the parent-child relationship is continually transforming throughout its existence); White et al., *supra* note 7, at 609-11 (discussing the various strategies used by adolescents to resist compliance in light of their gender).

16. See Boyd C. Rollins & Darwin L. Thomas, *A Theory of Parental Power and Child Compliance*, in *POWER IN FAMILIES* 38, 40 (Ronald E. Cromwell & David H. Olsen eds., 1975) (describing bases of "potential influence or power in social relationships" as applied to parent-child relationships) (citing J.R.P. French, Jr. & B.H. Raven, *The Bases of Social Power*, in *STUDIES IN SOCIAL POWER* (D. Cartwright, ed. 1959)); Arlene Skolnick, *THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY* 314-50 (1973) (discussing historical influences on parent-child relationships); T.E. Smith, *Foundations of Parental Influence upon Adolescents: An Application of a Social Power Model*, 35 AM. SOC. REV. 860 (1970)). See generally Richard J. Gelles & Murray A. Straus, *INTIMATE VIOLENCE* 78-84, 79 (1988).

17. See Rollins & Thomas, *supra* note 16, at 40; Skolnick, *supra* note 16, at 314-50. See generally Gelles & Straus, *supra* note 16.

18. Cf. Mahoney, *supra* note 7, at 93.

her parent's rage at the revelation of an initial child abuse report could reasonably perceive that any further disclosures about abuse would result in a similar or more serious reaction. Thus, it is consistent with the nature of the child-parent relationship (or possibly any intimate relationship) that the child could experience the existence of parental pressure without having actually received a specific confirmation, verbally or otherwise, that a threat exists.<sup>19</sup>

Both fear-mongering<sup>20</sup> and quid pro quo solicitations<sup>21</sup> take advantage of what may be the child's diminished power or ability to assess the value of parental advice or bargaining.<sup>22</sup> Thus, a parent can intimidate a child by providing information about his or her present or future well-being by describing, for example, the likelihood of foster care placement if the child acts undesirably. The parent can increase the power of the threat by using information known about the child's fears to highlight potential dangers, for example, by suggesting that the child will likely be more seriously abused while in foster care. Finally, the parent can offer to bestow certain material or emotional benefits, or to refrain from harming the child or himself, in exchange for the child's cooperation. Of course, if the need is great enough, a child (or any adult for that matter) may not have the ability to enter such a bargain of her own free will, nor hold a position to enforce such a bargain if the parent reneges. Again, past interactions between the parent and child can operate to create, in the child's mind, a real perception of the existence of a quid pro quo agreement, even without overt confirmation by the parent.<sup>23</sup>

There are other acts of parental affiliation by the child that may reflect an imbalance of power in the opposite direction, that is, when the child's decisions appear motivated by a desire to protect, reward, or rescue the parent.<sup>24</sup> This form of "role reversal," as well as the

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19. See *id.*; see also Gelles & Straus, *supra* note 16, at 67-68; Skolnick, *supra* note 16, at 289-96.

20. "Fear-mongering" refers to the information conveyed by a parent to a child with intent to elicit a fear response from the child, which may coerce the child either to take or refrain from some action consistent with the parent's desires.

21. "Quid pro quo solicitations" refer to an exchange of promises offered by a parent to a child. Such offers are, of course, common in all parent-child relationships. Some offers, however, may rise to the level of parental pressure when the consideration in question is something the child desperately needs (e.g., nurturance, food or protection), and the child perceives the parent as the only source of satisfaction.

22. See White et al., *supra* note 7, at 598; see also Rollins & Thomas, *supra* note 16, at 40.

23. See Skolnick, *supra* note 16, at 289-96; see also Gelles & Straus, *supra* note 16, at 78-84.

24. See Linda Burkett, *Parenting Behaviors of Women Who Were Sexually Abused as*

excessive use of parental power described above, each have potentially serious detrimental effects for children.<sup>25</sup> As in the case of "parental pressure" described above, attorneys tend to be cognizant of the potential harms of such affiliative behaviors when they appear to be influencing the child to choose a course of action contrary to the child's best interests.<sup>26</sup> Thus, when the attorney perceives an instance of faulty decision-making by the child client, and attributes it to a power imbalance in the parent-child relationship, the attorney is most likely to find "impairment" and proceed to advocate for the child as a *de facto* guardian.<sup>27</sup>

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*Children in their Families of Origin*, 30 FAMILY PROCESS 421, 430-34 (1991) (detailing role reversal in children of previously abused mothers, who are more parent-focused); Janet Johnston, 1989 *Role Diffusion and Role Reversal: Structural Aberrations in Divorced Families and Consequences for Children's Functioning* 1-20 (visited Nov. 17, 1997) <<http://erl1.ulib.iupui.edu/cgi-bin/webspirs.cgi>>.

25. See Burkett, *supra* note 24, at 432-33; Johnston, *supra* note 24, at 1-20; see also Gelles & Straus, *supra* note 16, 84-88; Skolnick, *supra* note 16, at 289-96. It should be noted that more benign forms of "role reversal" are present in all families, where family members draw emotional support from each other commensurate with their abilities. In particular, it is hard to imagine how families of multiple children could function without some amount of "parental" supervision transferred temporarily to a capable older sibling to look after a younger sibling. However, such assumptions of a parental role can be taken to extreme, with potential harm to both older and younger siblings. See, e.g., *Leaving 2 Home Alone, Parents Are Held*, N.Y. TIMES (late edition), Dec. 30, 1992, at A10 (reporting on children taken into state custody when two young children were left to fend for themselves for several days while parents vacationed in Mexico).

26. In such instances, an attorney might still be able to take direction from the client by trying to discern what the child would have wanted, but for the parental pressure. This process of determining "substituted judgment" has been used with adults who are deemed incompetent due to mental disability or medical condition. See *Washington v. Harper*, 494 U.S. 210 (1990); *In re Quinlan*, 355 A.2d 647 (N.J. 1976); *Rogers v. Commissioner of Dep't of Mental Health*, 458 N.E.2d 308 (Mass. 1983). Similarly, with a child, a substituted judgment inquiry would look for evidence of the child's prior unimpaired decision-making. See *Rogers*, 458 N.E.2d at 315. Unfortunately, unless the child is already in her teens, such an inquiry would have little history to draw from. However, the child could have, for example, confided in a counselor or teacher about her thinking prior to the application of parental pressure. This highlights again the importance of developing collaborative relationships between children's attorneys and mental health or educational professionals. See generally Donald N. Duquette, *Collaboration Between Lawyers and Mental Health Professionals: Making It Work*, in FOSTER CHILDREN IN THE COURTS 489 (Mark Hardin ed., 1983) (describing a model for collaboration in child welfare cases involving consultation and information sharing while protecting client confidentiality).

27. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, Rule 1.14. There are a number of alternative models for parent-child affiliation, power dynamics, and how these effect child decision-making. See Peterson, *supra* note 13, at 233-35; Rollins & Thomas, *supra* note 16, at 40; White, *supra* note 7, at 596. A psychoanalytic model would describe parent and child consciousness as each having three components, the *Parent*, *Adult*, and *Child*, roughly corresponding to the Freudian ego states of Superego, Ego, and Id. See ERIC BERNE, TRANSACTIONAL ANALYSIS IN PSYCHOTHERAPY: A

Until this point, the foregoing discussion has focused on some of the most pathological, harmful, or overt forms of parent-child affiliation, against which most attorneys would respond by taking protective measures on a child client's behalf. However, what about parent-child affiliation that seems to spring from the more socially desirable aspects of intimacy, for example, a child's expressions of loyalty toward or identification with a parent, or a child's expressions of self-sacrifice on the parent's behalf? In its most basic form, how should an attorney evaluate children's decisions governed by love or respect for a parent? What if those decisions do not appear sound or consistent with the attorney's perceptions of the child's best interests? Attorneys have used these decisions, also stemming from relational behavior, to find impairment where they wish to override a child's choice. The child's attorney's tendency to discount these manifestations of "family ties" is particularly problematic in light of the attorney's duty to try to empower the client consistent with her level of competence.<sup>28</sup>

#### IV. MATURE DECISION-MAKING

So how can an attorney discern whether the child client can adequately make decisions and "act in his own interests?"<sup>29</sup> How should attorneys begin to figure out whether their child client's

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SYSTEMATIC INDIVIDUAL AND SOCIAL PSYCHIATRY, 23-24, 31-36 (1961). The *Adult* mediates urges from the *Parent* to conform with norms established by parental and other authority figures, and urges from the *Child* to act more spontaneously in the pursuit of basic needs of nourishment, pleasure, and protection. Because under this model it is assumed that children basically have internalized their parents' views and power directives, this model suggests the presence of substantial emotional barriers discouraging thoughts or behavior that might contradict or harm parental interests. Under a psychoanalytic model it might be questionable whether a child (either as a minor or adult) could ever demonstrate pure "agency" in decision-making. See *id.* at 37-43.

As children reach adolescence, other more non-psychoanalytic social science literature generally describes children as beginning to "detach" from their parents, eventually abandoning their childhood sense of parents as omnipotent and omniscient. Instead, adolescents begin to value both parents and peers as potential sources of guidance in decision-making, giving greater value to parent or peer influence depending on the context. See Clay Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385, 385-91 (1963); Hill & Holmbeck, *supra* note 11; Scherer, *supra* note 7, at 434.

28. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, Rule 1.14 and cmt 1. Model Rule 1.14 states that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. See *id.* Rule 1.14. The commentary to Model Rule 1.14 explains that "[t]he client should have sufficient information to participate intelligently in decisions . . . to the extent the client is willing and able to do so. See *id.* Rule 1.14 cmt. 1.

29. *Id.*

decision-making is "impaired," and, if so, to what degree?<sup>30</sup> Until recently, the social science literature examining child decision-making has primarily focused on a person's cognitive abilities to make decisions.<sup>31</sup> A common avenue for studying these abilities was to observe how children and adults arrive at giving "informed consent," for example, in medical decisions.<sup>32</sup> A person is viewed as being capable of giving informed consent to treatment if she can demonstrate "an understanding of relevant disclosed information about the treatment, ability to appreciate its relevance to one's own situation, and an ability to use the information in comparing alternative options and in weighing their risks and benefits in making a choice."<sup>33</sup>

If attorneys look only to children's cognitive abilities in investigating children's decision-making, the literature suggests that most children have attained adult-like levels of cognitive skill by approximately age fifteen years old.<sup>34</sup> Before adolescence, children tend to process information in very concrete ways. As such, children have difficulty with the informed consent process because they have trouble imagining possible alternatives, and weighing each according to the likelihood of occurrence and normative standards of utility.<sup>35</sup>

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30. *Id.*

31. See generally JEAN PIAGET, *THE CHILD'S CONCEPTION OF THE WORLD* (1972) [hereinafter PIAGET, *THE CHILD'S CONCEPTION*] (describing a comprehensive developmental model of children's cognitive processes); JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1965) [hereinafter PIAGET, *THE MORAL JUDGMENT*] (examining the relationship between children's cognitive development and the emergence of moral reasoning).

32. See Scott et al., *supra* note 7, at 224-25.

33. *Id.* at 224. It is interesting to note that traditionally, social scientists have analyzed informed consent to evaluate only the *process* of decision-making, not the content of the outcome. Scott explains that the exclusive focus on process is consistent with a "strong norm . . . that choices about treatment should reflect the subjective values and preferences of decision-makers . . ." *Id.*

34. See Gary B. Melton, *Toward Personhood for Adolescents*, 38 AM. PSYCHOLOGIST 99, 100 (citing T. Grisso & L. Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOL. 412, 412-17 (1978)) [hereinafter Melton, *Toward Personhood*] ("there is no basis in . . . literature for distinguishing adolescents age 15 and older from adults."). Michael Saks notes the importance of case-by-case determinations of competency in decision-making, given possible variations according to subject matter and situation. For example, competence to consent to medical treatment might involve different mental operations than competence to make a decision regarding custody. See Michael Saks, *Social Psychological Perspectives on the Problem of Consent*, in GARY B. MELTON ET AL., *CHILDREN'S COMPETENCE TO CONSENT* 41, 50 (1983) [hereinafter MELTON ET AL., *CHILDREN'S COMPETENCE*] (stating "if case-by-case competence judgments are to be made the specificity of subject matter and situation become important considerations").

35. See Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychological Factors in Adolescent Decision Making*, 20 LAW & HUM.

According to Jean Piaget and other cognitive psychologists, sometime between the ages of eleven and fourteen years old, children have generally reached the stage of "formal operations" where they begin to think hypothetically in solving problems.<sup>36</sup>

A number of social scientists have found this cognitive model to present an incomplete picture of how children develop into decision-makers. The relevant literature has recently called for additional concepts to be added to the analysis of how children develop into decision-makers, including, among others, affiliative behavior.<sup>37</sup> For example, Professors Laurence Steinberg and Elizabeth Cauffman have suggested that the inclusion of three additional psychosocial concepts, under an expanded rubric of "maturity of judgment," may more directly address the concerns of judges and policy-makers when issues of child decision-making, particularly that of adolescents, arise.<sup>38</sup> Each of the three concepts attempts to group together a number of different psychosocial and cognitive theories. First, the concept of *responsibility* in adolescence includes the adolescent's demonstrated capacity for autonomy, independent thought, and developing ego or

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BEHAV. 249, 262-63 (1996) (examining cognitive and psychosocial factors in children's decision-making toward the development of new conceptions of "maturity"). See generally PIAGET, THE CHILD'S CONCEPTION, *supra* note 31; PIAGET, THE MORAL JUDGMENT, *supra* note 31. It appears that this more cognitive approach to looking at children's decision-making abilities is what Justice Douglas had in mind when he wrote his famous dissent in *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972), in which he called on the United States Supreme Court to allow the children in the case to participate in a decision regarding their religion and education. Justice Douglas stated:

The court below brushed aside the [children's] interests with the offhand comment that "[w]hen the child reaches the age of judgment, he can choose for himself . . . ." But there is nothing in this record to indicate that the moral and intellectual judgment demanded of the [child] by the question in this case is beyond his capacity. Children far younger than the 14 and 15-year-olds involved here are regularly permitted to testify in custody and other proceedings. Indeed, the failure to call the affected child in a custody hearing is often reversible error. Moreover, there is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult.

*Id.* at 245 n.3 (Douglas, J., dissenting) (citations omitted).

36. See Scott et al., *supra* note 7, at 225. Scott notes that in recent years such "stage" model theories have been revisited, and that the literature currently endorses a more "collaborative" model of child reasoning. See *id.* That is, current science describes children's abilities as comprised of "similar skills [which] develop at different rates in different task domains," rather than developing distinctively at different ages and demonstrated across tasks. *Id.* This "collaborative" model highlights again the importance of examining the *context* in which children's decisions are made.

37. See *id.* (stating that "few psychologists believe that children at a given stage engage in a characteristic reasoning across many tasks and that this process differs from reasoning at other stages"); Steinberg & Cauffman, *supra* note 35, at 249.

38. See Steinberg & Cauffman, *supra* note 35, at 249.

sense of identity.<sup>39</sup> Second, the authors describe the concept of *temperance* as the ability to limit impulsivity, to evaluate a situation completely before acting, and to seek advice when needed to assist in arriving at a decision.<sup>40</sup> Finally, the concept of *perspective* is described as including the ability to recognize the complexity of a situation, to frame a decision within a larger context, and to take the perspective of affected others.<sup>41</sup>

If attorneys look to more psychosocial factors in trying to discern a child client's decision-making ability, a far murkier picture emerges. First, attorneys are confronted with what Professors Steinberg, Cauffman, and other individuals have referred to as a dearth of solid research in these areas.<sup>42</sup> According to these authors, individual studies of the above concepts included in this new rules of "maturity of judgment" have tended to be flawed. For example, studies generally look at only one aspect of several phenomenon that are probably interrelated, such as the effect of mood on decision-making, but the studies do not examine how this effect might change developmentally.<sup>43</sup> In addition, these authors call for more research of decision-making in the context of "real-life" situations, since most studies in these areas have involved after-the-fact interviews and subject responses to hypothetical questions.<sup>44</sup>

Second, when looking at the existing data, one is immediately struck by the findings that many adolescents, even by the age of majority, have not attained what might be deemed as "mature" judgment.<sup>45</sup> In fact, it appears that in some studies, a number of adults in their early twenties have not yet attained this level.<sup>46</sup> In

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39. *See id.* at 252.

40. *See id.*

41. *See id.* at 252, 262-63.

42. *See id.* at 249; *see also* Scott et al., *supra* note 7, at 221.

43. *See* Steinberg & Cauffman, *supra* note 35, at 269.

44. *See id.* at 268.

45. For example, regarding the concept of responsibility, Steinberg and Cauffman explain that "while self-examination may take place throughout adolescence, the consolidation of a coherent sense of identity does not begin until the late teens or early twenties. To the extent, then, that maturity of judgment goes hand in hand with consolidation of a sense of identity, [the available] research . . . suggests that most individuals would not be expected to display consistently mature judgment until the age of 18, at the *earliest*." *Id.* at 255 (citations omitted) (emphasis added); *see also supra* text accompanying note 39.

46. For example, in looking at the strength of peer and parent influences on children's decision-making on medical and other important decisions, the research describes deference to parents as quite powerful even up to age 24 years old. *See, e.g.,* Scherer, *supra* note 7, at 442-43. Scherer's study did not find any significant differences in the amount of deference given to parents in two of three hypothetical medical

summarizing the available literature, Steinberg and Cauffman hypothesized that there may be more differences in maturity, particularly with respect to the two concepts of *temperance* and *perspective*, between adolescents age sixteen and younger, and adolescents age seventeen and older into adulthood.<sup>47</sup> As to the concept of *responsibility*, including the effect of peer and parental influence, the authors claimed there was insufficient research to draw definitive conclusions about age differences.<sup>48</sup>

In the area of parental and peer influence, with which this writing is particularly concerned, Steinberg, Cauffman, and other authors identify a number of challenges for future research on "maturity." They point out that while research generally describes a developmental trend of decreasing parental influence during adolescence,<sup>49</sup> peer influence follows more of a bell curve, with influence peaking at approximately fourteen years old.<sup>50</sup> The authors question whether the diminishing peer influence after fourteen is due to increased self-direction, or possibly diminished intensity in "peer pressure."<sup>51</sup> As mentioned earlier, the relative strength of peer and parental influence appears to vary depending on the context of the decision.<sup>52</sup> Adolescents turn to peers for guidance with more day-to-day matters, such as fashion and dating, while they turn to parents for guidance with more long-term matters, such as religion and education.<sup>53</sup> Most importantly, Steinberg and Cauffman question whether "maturity" should always be equated with "independent judgment," or whether the avoidance of social influences is even possible.<sup>54</sup> Instead, the authors call for greater valuation of "maturity" for decisions made with the guidance and advice of others.<sup>55</sup> The authors explain, "[i]ndeed,

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decision-making exercises involving three different age groups with mean ages of 9.8, 15.1 and 21.9 years old. *See id.* at 435. Interestingly, when asked for their reasons for deferring to their parents, the younger group tended to explain that they respected their parents' judgment. *See id.* at 443. The older two groups' reasons generally consisted of either (1) they felt they would have no real choice, or (2) if they did have a choice, they would defer to their parents anyway to avoid family tension and conflict. *See id.*

47. *See* Steinberg and Cauffman, *supra* note 35, at 269.

48. *See id.* at 258.

49. *See, e.g.,* Thomas Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 608 (1979).

50. *See id.* (stating "age trends for conformity [with peers] were curvilinear, and peer conformity peaked at the 6th or 9th grade").

51. *See* Steinberg & Cauffman, *supra* note 35, at 254.

52. *See supra* note 46 and accompanying text.

53. *See* Steinberg & Cauffman, *supra* note 35, at 253.

54. *See id.*

55. *See id.* at 254.

one of the hallmarks of mature judgment is knowing where to turn for advice, knowing how to solicit it, and knowing whether and to what extent to follow it.”<sup>56</sup>

In summary, while the social science literature examining children’s decision-making appears to be in a state of change, important themes are emerging that may help guide attorneys in taking direction from their child clients. First, children’s decisions clearly result from a complex interaction of both cognitive and psychosocial factors. Second, in trying to evaluate decision-making, there is the danger of essentializing such that only a subset of these factors are considered to the exclusion of others. For example, an attorney or other evaluator of the child’s decision-making skills might give determinative weight to the perceived effects of peer or parental influence, ignoring the possibility that the child’s decision might be more a product of several factors, including the child’s sense of identity, and evaluation of risks. As described *supra*, which factors are included or excluded in the evaluation will greatly determine the answer—whether the child can make decisions in her own interest, at age twelve, fifteen, eighteen or older.

Finally, social science is beginning to ask important questions about what should qualify as “mature” judgment by children. Are mature decisions usually arrived at by “independent judgment”? Or, can maturity also be found in children who seek others’ advice, or who act out of loyalty or deference to someone whom they have grown to trust? With this questioning, social scientists are joined by other scholars in law and social policy to reexamine how law treats decision-making, particularly children’s agency and autonomy.

## V. HUMAN AFFILIATION, LAW, AND THE MODEL RULES

Compared to the ambivalent treatment of affiliation in social science, the law’s response to affiliation has been confused and inflexible. As noted by Professors Martha Minow and Martha Fineman, the law appears unable to embrace the often interrelated phenomenon of affiliation, dependency, and decision-making with anything but bright-line rules.<sup>57</sup> The law is, of course, quite varied in the extent to which it allows children to make decisions.<sup>58</sup> Ideally, such allowances would

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56. *Id.*

57. See Minow, *supra* note 9, at 4-5; see also Martha Fineman, Dependencies, Keynote speech delivered at Cornell Symposium on Women and Welfare (October 3, 1997).

58. See Minow, *supra* note 9, at 3-4 (discussing the “varied legal treatments of young people”); Theresa Glennon and Robert Schwartz, *Foreward: Looking Back, Looking*

reflect a considered judgment by the legislature or judges to grant children autonomy commensurate with their developing abilities. Instead, the law expressly allocates rights and responsibilities according to children's ages rather than their abilities. For example, the law provides that a child can be drafted and vote at age eighteen, the "age of majority."<sup>59</sup> In almost every state, the ability to be prosecuted and incarcerated for adult-like criminal activity is set at an age far below the age of majority.<sup>60</sup> At twenty-one years old, the law generally gives a child autonomy to consume alcohol, and at the same time, her parents usually are granted freedom from financial responsibility for child support.<sup>61</sup>

On the other hand, where the law does not respond to affiliation, dependence and decision-making with bright line rules, it fails to respond at all. For example, the guidelines for attorneys in the *Model Code of Professional Responsibility* ("Model Code") and the *Model Rules of Professional Conduct* ("Model Rules") appear to be meant for the representation of clients who are wholly independent, autonomous decision-makers, unmoored to or uninfluenced by their relationships.<sup>62</sup> This approach belies several important facts about human interaction. First, everyone, including adults, are dependent on someone at some time or another.<sup>63</sup> Second, as discussed in Sections II & III *supra*, everyone occasionally makes decisions because of personal affiliations with others, either out of deference, trust, altruism, self-sacrifice, or a host of other motivations—each of which has the potential for producing bad decisions.<sup>64</sup> Thus, both the Model Rules and Model

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*Ahead: The Evolution of Children's Rights*, 68 TEMPLE L. REV. 1557, 1561-62 (1995) (stating "the various laws affecting children appear incoherent . . .").

59. Professor Weithorn notes that the use of ages 18 and 21 to define adulthood "stem[s] from currently irrelevant historical concerns such as sufficient physical strength to bear heavy armor." Lois Weithorn, *Involving Children in Decisions Affecting Their Own Welfare: Guidelines for Professionals*, in MELTON ET AL., CHILDREN'S COMPETENCE, *supra* note 34, at 235, 239.

60. See generally PATRICIA TORBET ET AL., NATIONAL CENTER FOR JUVENILE JUSTICE, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & U.S. DEPARTMENT OF JUSTICE, THE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3-9, 5 fig. 3 (1996) (describing the variety of state initiatives in recent years addressing juvenile delinquency).

61. See, e.g., N.Y. FAM. CT. ACT § 413 (McKinney 1983) (stating that parents of a child under the age of 21 years old are chargeable with the support of the child); *id.* § 513 (stating that each parent of a child born out of wedlock is chargeable for the support of that child).

62. See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1405-06 (1996).

63. See Minow, *supra* note 9, at 15-17; Fineman, *supra* note 57.

64. Some individuals would argue that society actually values altruism and loyalty in

Code can be seen as inadequately cognizant of humans as social beings.

The law generally assumes that the age of majority is the point of transition to a new state of being whereby rational, independent choice takes charge of decision-making.<sup>65</sup> Once having reached majority, the theory purports that an adult can reasonably choose whether to act on his affiliations; that is, whether to make decisions based on any of the above motivations.<sup>66</sup> It is further presumed that after the age of majority, the individual is resilient enough to resist most forms of pressure or influence from others.<sup>67</sup> Most importantly, except in cases where a person is at risk of serious harm to herself or others,<sup>68</sup> the law tends to allow individuals age eighteen and older to make bad decisions stemming from their affiliations with others.<sup>69</sup>

Should the law allow some children to make bad decisions as well? Certainly, research shows that the age of eighteen is not a magical age for someone to become capable of making decisions. As discussed, depending on the cognitive or psychosocial approach, for many children the capability to make decisions develops earlier than the age of majority, for many other children it develops at the time they reach majority, and for some children it may never happen at all.<sup>70</sup> The Model Rules, as previously noted, provide a sliding scale approach that allows the attorney to adjust the amount of decision-making authority given to the client according to the attorney's assessment of the client's ability to make informed decisions that further her best

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some people more than others. For example, arguably females receive greater encouragement for exhibiting these traits while males are more often praised for demonstrating independence and toughness. Cf. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 159-60 (1982); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-19 (1988).

65. See Weithorn, *supra* note 59, at 239. But see TORBET ET AL., *supra* note 60, at 3-9 (describing the trend of states to remove jurisdiction of cases of serious and violent juvenile offenders from the juvenile justice system to the adult criminal court's jurisdiction with the result that most states prosecute and punish children as adults for adult-like crime, and, by implication, deem them capable of rational, independent choice).

66. See *id.* See, for example, the United States Supreme Court majority opinion of Amish children's interest in making decisions about their religion and education in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

67. See Scherer, *supra* note 7, at 455.

68. See *Addington v. Texas*, 441 U.S. 418 (1979) (holding that a "clear and convincing" standard of proof that finds dangerousness to self and others is required for involuntary commitment).

69. See generally Steinberg and Cauffman, *supra* note 35, at 249.

70. See *id.*; see also Hill & Holmbeck, *supra* note 11.

interests.<sup>71</sup> For child clients, however, the attorney usually approaches this assessment with several assumptions, each of which is likely to result in the child being deemed an impaired decision-maker because she does not fit the traditional model of the independently minded, autonomous adult. One assumption is that children are economically dependent on their parents, therefore, they are unlikely to make decision that might create economic uncertainty. Another assumption is that children are emotionally dependent on their parents, thus they are unlikely to make decisions that might jeopardize that relationship. As observed by this author in practice, these assumptions manifest themselves in a number of attorney "rules-of-thumb." For example, situations arise in which the parent is pressing for a particular outcome in court that the attorney believes is contrary to the child's best interests. If the parent strongly believes that this outcome is best and the child expresses the same or similar opinion, it is likely that the attorney will deem the child's decision-making as impaired due to assumed parental pressure.<sup>72</sup>

The same difficulties related to affiliation, albeit in more restricted forms, arise in adult decision-making. For example, adult workers' dependency on their jobs can result in poor decision-making to please employers and to ensure greater job security. Similarly, most adults would be loathe to make a decision that could disrupt an important interpersonal relationship. How many adults likely make decisions, particularly bad decisions, to please parents, spouses, lovers, friends, or even their children?

It should be noted that when children act in ways consistent with their dependency, whether emotional or economical, they may be exhibiting very sound decision-making processes, the same kind of processes adults employ in their more "autonomous" relationships with others.<sup>73</sup> Advocates should want their clients to have close bonds with their parents because society generally desires children to take direction from parents, even when there may be some dysfunction present in the parent-child relationship.<sup>74</sup> Our society depends upon

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71. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, Rule 1.14.

72. Note that it would be unlikely that the attorney would find the child impaired, despite overt parental pressure on the child, if the parent's desired result is perceived as *consistent* with the child's best interests.

73. Once a child acquires the cognitive ability to make decisions analogous to that of an adult, there still may be some ways that the child's decision-making will differ from the adult's. For example, a child who has recently acquired these abilities will not have experience utilizing them to the extent adults have.

74. See, e.g., *In re Jeannette S.*, 156 Cal. Rptr. 262 (Cal. Ct. App. 1979) (denying removal of a child from her parent even where poor parenting is present, because

children developing new abilities and perspectives in the context of their interdependency. In fact, it is usually very difficult for any child, even an adult child, to be immune from parental influence.<sup>75</sup>

Advocates generally want children to act out of "love" and respect for their parents and others. However, advocates take great pause when it is recognized that sometimes "love" can blind, preventing the consideration of alternative options, and sometimes beckoning children (and adults) to place their personal needs second. To the extent that such adult-like behavior in children is considered impaired decision-making, there is cause for concern regarding the message this sends to children—about the value of responding with self-sacrifice to a loved one's needs, or deferring to the judgment of someone with whom they have a close relationship.

Again, this dilemma illustrates how the law and current attorney ethical codes offer little guidance to the child's attorney. Moreover, in requiring compliance, the ethical codes force the child's attorney into a false choice of finding a client either autonomous (i.e. "unimpaired") or dependent (i.e. "impaired").<sup>76</sup> The above analysis, however, reveals a much more complex reality. Some children's decisions are influenced by love, loyalty, and respect for a parent, in similar fashion to the way adults' decisions are influenced by their intimate relationships. These influences are akin to the influence of intimate relationships on decisions made by adults. Where a decision poses a potential risk to the child, some children will have a different, yet reasonable, assessment of that risk, on which reasonable people may differ. In the above instances, the determining factor for the state to override a child's decision would not be poor decision-making, but rather the desire to protect children from the consequences of what, in hindsight, might be regarded as a bad decision. Whether this factor constitutes a legitimate state interest is questionable, especially because of the flawed message about decision-making that is sent to the competent child. If a valid state interest could be identified in saving

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removal is a drastic remedy given the vital human relationship between parent and child).

75. See Garbarino, *supra* note 10, at 40-66 (discussing various stages of the development of independent decision making); MELTON ET AL., CHILDREN'S COMPETENCE, *supra* note 34, at 24-25; also Scherer, *supra* note 7.

76. The law's tendency to dichotomize in this fashion, rather than to recognize human interdependence and gradations of dependency, has likely resulted in displacement of adult dependency onto children. Similar dichotomization appears in other contexts where the law has difficulty accounting for interdependence, for example, the use of the battered women's syndrome as a defense. See generally Mahoney, *supra* note 7.

competent children from the risk of making a bad decision, even where reasonable people would disagree about the proper choice, an attorney or the state who appointed him could validly decide to withhold the recognition of the child's autonomy. In the tradition of such concepts as "guilty, but mentally ill," one could hypothesize the use of the term "competent, but not given autonomy."<sup>77</sup> The use of the term "impairment," with all the serious ramifications for the attorney-client relationship, should be limited to those child clients who are incapable of making decisions, either due to cognitive deficits, parental pressure, or role-reversal.

How might attorney-child client relationships change under this scenario? First, the child's attorney would need to take a more serious approach in getting to know the child in context.<sup>78</sup> This would require the attorney to learn about the child's affiliations with her parents and others without the presumption that affiliation necessarily governs and impairs decision-making. The attorney should get to know the child's unique tendencies as a decision-maker in different contexts by interviewing parents, teachers, counselors, and others with knowledge about the child. If there is no counselor present, it may be appropriate for the child to have one, depending on her needs. Such a counselor would be invaluable in helping the attorney sort out the extent to which the influence of parents and other individuals, as well as other variables, are affecting the child's decision-making ability for better or for worse.<sup>79</sup> Even when the child does not need a counselor, a child's

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77. Recognizing that there might be instances when a competent child (or adult) is being unduly influenced, one could suggest a more systemic change: recognition of a category of situations where the decisions of people unduly influenced (children included) should not be honored. This change would require additional study of adult legal concepts such as duress, undue influence, and diminished capacity, as well as re-examination of the legally-recognized defense of battered women's syndrome. See generally Mahoney, *supra* note 7. In the interim, this author suggests a smaller step (possibly a major one) for attorneys—to take direction from a competent child client who is not "unduly influenced," but only behaving consistently with her affiliative relationship with her parent.

78. For an excellent and detailed analysis of how a child's attorney should work to create an effective attorney-client relationship, see JEAN KOH PETERS, REPRESENTING CHILDREN IN ABUSE AND NEGLECT PROCEEDINGS (1997). In this Article, the suggestions about how to deal with the child's affiliations and its implications for the attorney-client relationship are meant to supplement Professor Peter's writings about ethical and sound practices for children's attorneys.

79. See generally Duquette, *supra* note 26. Given the relative newness of the social sciences' analysis of "maturity," it could be helpful for the child's attorney to inquire as to the mental health professional's knowledge and view of this literature. In this regard, the articles by Steinberg and Cauffman, *supra* note 35, Scott et al., *supra* note 7, and Scherer, *supra* note 7, would be particularly helpful. A mental health professional in a counseling relationship with a child or family can also play an essential role in

attorney should have access to a mental health professional on either a formal or informal basis, particularly for purposes of assessing the child's abilities and interests.<sup>80</sup> As discussed earlier, an attorney who relies solely on his lay abilities to discern a child's decision-making is prone to following his own presumptions about children as decision-makers instead of informed revelations about his client's decision-making abilities.

Once an adequate atmosphere for counseling is established, a major portion of such counseling should involve practicing and evaluating decision-making with the child.<sup>81</sup> The attorney should find out about the child's desires and concerns, as well as what the child believes would be the best outcome for the proceeding. Then the attorney should again give the child an opportunity to practice decision-making by slightly changing the facts, particularly where there are likely to be disputes of fact in the court proceeding, and ask the child to consider the effect on her decision. The attorney can role-play with the client by having the child take her parent's role, or by having the attorney take the judge's role, and hypothesizing an interaction in which the child's wishes or best interests are discussed. The attorney may also want to try hypothesized changes of fact and role-playing related to affiliated issues.<sup>82</sup> Examples of these hypotheticals might be: "What if your Dad called me tomorrow and said, 'Look, I'd be really upset if my kid wants to live with her mom.' Would that change what you want to do? Pretend your dad could join in your regular counseling session, and he asked you to explain what you want. What would you say? What would that be like for you?"

Finally, where issues of risk assessment may be important, it is useful for the attorney to play the role of a very skeptical judge,

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monitoring and intervening when either a parent or other influences on the child begin to impair the child's judgment and harm the child's emotional health.

80. See generally Duquette, *supra* note 26.

81. This evaluation and practice could occur after the attorney provides an explanation of his role, assurances of confidentiality, and a description of the client's reasonable expectations regarding confidentiality and how decisions will be made in the attorney-client relationship in language that the child can understand. See generally PETERS, *supra* note 78; William Kell, *Voices Lost and Found: Training Ethical Lawyers for Children*, IND L.J. (forthcoming winter 1998).

82. The child's counselor would likely be extremely helpful in identifying possible inquiries, both in terms of questions and format. Whenever needed, the counselor should also advise the attorney against using such counseling and evaluative strategies when it would be too difficult, emotionally or otherwise, for the child. The author has had occasions where it was helpful to sit in on the child's regular session with her counselor (with both client and counselor consent). During these sessions it was useful to conduct some of the above evaluation and counseling in the presence of the counselor.

unwilling to take chances. Following this approach, the attorney might ask the child: "Explain to me the best you can why you do not think there is a risk if your return home—make your best argument." If after making these efforts, there continues to be a question of risk upon which reasonable people may differ, the attorney should treat the child who demonstrates adequate decision-making as one of those reasonable people.

Consider again Delia's case and the pending motion to end further state oversight with her family. Assume that the attorney interviewed and counseled Delia, and talked to her counselor, teacher, and others about her decision-making ability. In addition, the attorney would have to assess the risk to the child client of supporting the dismissal by talking to the DSS caseworker, additional family, family friends, and other individuals with knowledge of the child's situation. Such assessment would include consideration of the extent to which continued state involvement would be either beneficial or harmful.

Assume after this inquiry that the child's attorney believes the following: (1) Delia's cognitive decision-making abilities are basically sound; (2) Delia is very close to her parents, and out of love and concern she wants to spare them further discomfort from dealing with DSS;<sup>83</sup> (3) there is little or no evidence of overt parental pressure or role-reversal; and (4) reasonable people could disagree about the risk assessment to Delia if State oversight ended. On these bases, the attorney would properly find that Delia was capable of making decisions on her own behalf, and that she should have membership in the group of "reasonable people" who could disagree about the potential risk to her if State involvement in her family's life ceased. Similarly, the attorney would view Delia's decision, with its components of love and concern for her parents, not as demonstrating incapacity, but rather as exhibiting aspects of altruism and loyalty that are equally desirable in adults.<sup>84</sup> Thus, according to the Model Rules, the attorney would need to take direction from his client and support the motion for dismissal.<sup>85</sup>

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83. Delia may also identify with her parents as possible victims of racial discrimination, and may desire, out of loyalty, to speak out against what she perceives to be unjust treatment.

84. See *supra* note 64 and accompanying text.

85. Alternatively, the attorney could suggest other options to the child client that might address her desires and have a greater chance at success. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, Rule 2.1. For example, because the judge can deny the dismissal request on the basis that the child's best interests require it, the attorney might develop, with the client's consent, an alternative arrangement for DSS involvement, e.g., a motion for suspended judgment. See, e.g., N.Y. FAM. CT. ACT §§

A different result should follow if Delia's attorney discovered signs of parental pressure, of an amount beyond the child's ability to resist. If Delia's father, for example, had threatened similar harm to her for non-cooperation, or if he had misled her about the risks of further DSS involvement, and if the attorney perceived that consequently Delia felt constrained in her choices, then the attorney would need to assume a role more akin to a *de facto* guardian.<sup>86</sup>

The attorney's inquiry should be twofold: was a threat or other parental pressure applied, and what was the child client's ability to resist or weather the pressure. Finally, if pressure, role-reversal, or other potentially harmful parent-child affiliation is found, the attorney should take all steps to try and shield the child client from further exposure, though the assistance of the judge and any counselor for the child for family.

#### VI. CHILDREN LEARNING ABOUT DECISION-MAKING AND REPRESENTATION

Until social science scholarship and the law can provide more guidance about children's decision-making, attorneys will need to proceed cautiously in determining when to take direction from the child client. In the meantime, the approach described herein should feel familiar, as it relies on attorneys and judges maintaining their distinct roles. When children can count on attorneys to act like attorneys and judges to act like judges, children can truly have the opportunity to be empowered by representation commensurate with their emerging decision-making abilities. In addition, these children will be able to meaningfully participate in decisions that affect them and to practice sound decision-making processes with the effective assistance of counsel.

Under this approach, many child advocates and policy-makers might raise concerns about possible increased risks for children, and

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1052-53 (McKinney 1983). By entering a suspended judgment, the court, in its order, could identify a certain date when DSS would discontinue interference into the family's life. Assuming family compliance with monitoring, in the interim DSS would gradually make fewer visits up to the date ordered by the court. In addition, the attorney and client could explore whether there might be others whom DSS might agree to use as a monitor, e.g., the school social worker. Finally, the parties might agree to a settlement whereby there would be no visits to the home, but instead Delia's teacher and counselor would provide the court with status reports. If these reports raised no further concerns, the court could enter a dismissal order at the end of the adjournment period.

86. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, Rule 1.14. Instead, the attorney could also request the additional appointment of GAL for the client. See *supra* note 6 and accompanying text.

that these risks might outweigh any possible benefits derived from allowing more children to make decisions and direct their representation. It should be noted that once the attorney finds that reasonable people could disagree as to the existence of risk, it does not incrementally increase that risk for the attorney to follow the competent client's decision versus the attorney's own assessment. Ultimately, the final decision is not the child client's or the attorney's, but that of the judge. The judge is, of course, free to ignore the child client's competent decision, and should do so in favor of another result if it conflicts with the judge's determination of the child's best interests. This proposed approach only changes the behavior of attorneys. Once the attorney finds the child competent, however, the attorney should not have the same freedom as the judge to ignore her client's wishes.

The potential benefit of this approach is to increase the number of situations where children's competent decisions are honored. Professors Melton, Weithorn and others identify important public interests in encouraging children to exercise their developing decision-making abilities.<sup>87</sup> The acclaimed Russian psychologist Lev Vygotsky describes children as having a certain level of competency, but having the ability to achieve higher levels of competency with the assistance of a "teacher."<sup>88</sup> Such a teacher can work to expand what Vygotsky refers to as the child's "zone of proximal development,"<sup>89</sup> through patient listening, questioning, and providing additional instruction.<sup>90</sup> Clearly, the Model Rules hold out the promise of a similar model, describing how adults (and children) can achieve new levels of empowerment and competency when facing legal problems with the

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87. See generally Melton, *Toward Personhood*, *supra* note 34, at 99. The Sub-task Panel on Infants, Children and Adolescents of the President's Commission on Mental Health called for "youth participation as a sound strategy to enable young people to undertake responsible and rewarding involvement in the adult world." See Weithorn, *supra* note 59, at 241 (quoting SUB-TASK PANEL ON INFANTS, CHILDREN, AND ADOLESCENTS, REPORT OF THE TASK PANEL ON MENTAL HEALTH AND AMERICAN FAMILIES No. 040-000-00392-4 (1978)). Echoing this sentiment, Professor Weithorn asserts:

Involving children in decisions that affect their welfare affords them a learning opportunity that better prepares them for future joint or independent decision-making. Involving children in such decisions respects the autonomy, individuality, and privacy of each child, and may increase the children's sense of themselves as active and responsible participants in their own care, rather than powerless victims of the whims of adults.

Weithorn, *supra* note 59, at 241.

88. See L.S. VYGOTSKY, *THOUGHT AND LANGUAGE* 98-118 (Eugenia Hanfmann & Gertrude Vakar eds., 1965).

89. See *id.* at 103-05.

90. See *id.*

help of their attorneys.<sup>91</sup> Consistent with this role and with the need for improved research on child decision-making, attorneys should also seek ways to collaborate with social scientists to develop innovative and more accurate ways of evaluating child decision-making.<sup>92</sup>

## VII. CONCLUSION

Traditional legal ethical frameworks do not give adequate guidance for children's attorneys in dealing with parent-child affiliation. This lack of adequate guidance exists because such frameworks treat human beings as dispassionate, wholly rational decision-makers divorced from relationships that might affect the decision-making process. Such a conception inaccurately describes adults and children, it also potentially invalidates all children as potential decision-makers regardless of ability. Although children's attorneys need to continue to monitor and combat parent-child affiliation reflecting parental pressure or harmful role-reversal, the attorney should not dismiss the competent child as "impaired" when she makes decisions colored by her close relationships. Where reasonable people could disagree as to what is in the child's best interests, there is no valid reason to prevent the competent child from directing her representation, other than to paternalistically shield the child from the risks of having to live with a decision deemed bad in hindsight. If the attorney still feels compelled to shield the child, he should do so honestly, not by finding "impairment" where there is no reasonable basis to distinguish the child's affiliative behavior from an adult's. After counseling the child and advising her on the best course of action, if the competent child chooses a different path out of affiliation for others, the attorney should honor his duty to take direction from the child. The attorney should defer to state interest in protecting the competent child client from bad decisions to the judge. A child's agency must leave room for affiliative relationships, just as an adult's agency does. Although family ties can bind, attorneys need to learn how children's affiliations can also enable children to become the kind of decision-makers society expects them to be.

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91. See MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 2, Preamble §§ 1-12 (describing how attorneys are to empower clients).

92. See generally Steingberg & Cauffman, *supra* note 35, at 268.