

## ARTICLES

# THE ETHICAL STRUGGLE OF USURPING JUVENILE CLIENT AUTONOMY BY RAISING COMPETENCY IN DELINQUENCY AND CRIMINAL CASES

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### I. INTRODUCTION

For years lawyers representing juveniles struggled over the ethical dilemmas involved in decision-making for juvenile clients in delinquency and criminal proceedings. Sometimes these debates separated and divided professionals who otherwise worked in the same field and vigorously represented the same group of clients.<sup>1</sup> Should counsel for a juvenile model the representation under a best interest of the client theory,<sup>2</sup> or should counsel always be bound by the client's decisions?<sup>3</sup> Should counsel defer to the wishes of the juvenile's parents in cases where the client appears to lack the ability to make competent decisions,<sup>4</sup> or should counsel strive to

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<sup>1</sup> See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996).

<sup>2</sup> See Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505 (1996). In discussing the chaos engulfing the definition of counsel's role in child protection cases, Peters writes:

*Despite the pervasive appearance of the words "interest" and "best interest," both the statutes and our interviews showed absolutely no consensus about what it means to represent a child's best interests or interest. Few, if any, of our individual state contacts suggested that practitioners in a given state have a uniform understanding of what "best interests" means or understand the lawyer's role in relation to best interests.*

JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 32 (1997) [hereinafter PETERS, REPRESENTING CHILDREN].

<sup>3</sup> A third possibility is that the Model Rules acknowledge that intermediate degrees of competency exist so that a child client's ability to direct litigation was not an all-or-nothing matter. See Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 FORDHAM L. REV. 1435, 1440 (1996).

<sup>4</sup> See Janet R. Fink, *Who Decides: The Role of Parent or Guardian in Juvenile Delinquency Representation*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 119 (Rodney J. Uphoff ed., 1995).

maintain a more traditional model of representation in which the client and the client alone decides upon the objectives of litigation?<sup>5</sup> These ethical issues often differed from the types of problems confronting attorneys in child welfare or dependency cases where the clients might be preverbal,<sup>6</sup> or where the parents were often themselves accused of abusive behavior or neglect which forced the child client into juvenile court in the first place.<sup>7</sup>

Many of the disputes centered around disagreement over the ambiguities of the one legal ethics rule which addresses the role of children's counsel, the American Bar Association Model Rules of Professional Conduct Rule 1.14.<sup>8</sup> Today, some of the controversy over the particulars of Rule 1.14 has died down, especially after the rule's amendment on February 5, 2002,<sup>9</sup> but new ethical issues emerge regarding

<sup>5</sup> See RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT §2.03, at 14 (1991) ("[I]t is the child, and not the parent or the guardian, who is the 'client' . . .").

<sup>6</sup> See generally Guggenheim, *supra* note 1.

<sup>7</sup> See generally CHILD WELFARE LAW & PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES (Marvin Ventrell & Donald Duquette eds., 2005).

<sup>8</sup> The version of the ABA Model Rules of Professional Conduct *before* the amendments that the ABA House of Delegates approved in 2002 and 2003 is also the version that underlies the rules of lawyer conduct adopted by a majority of U.S. jurisdictions contained in the controversial M.R. 1.14. The pre-2002 M.R. 1.14 reads:

Rule 1.14 Client Under a Disability

(a) 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.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

MODEL RULES OF PROF'L CONDUCT R. 1.14 (2001). For the language of M.R. 1.14 after the amendments, see *infra* note 9.

<sup>9</sup> The ABA House of Delegates amended the rule in Philadelphia, Pennsylvania in reaction to the Ethics 2000 Commission Report. Elizabeth Laffitte, Note, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 GEO. J. LEGAL ETHICS 313, 315 (2004).

The amended version of the original M.R. 1.14 has been expanded to read as follows:

Rule 1.14: Client With Diminished Capacity

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is

the duties and responsibilities of lawyers who provide representation to child clients, especially when there is reason to question the juvenile client's competency to stand trial in juvenile delinquency or adult criminal proceedings.<sup>10</sup> This Article will examine the legal ethics issues attorneys representing juveniles in delinquency and adult criminal cases face when the client's behavior and communications suggest that competency should be raised, but the client disagrees with counsel about broaching the issue.<sup>11</sup> The United States Supreme Court defined competency in its 1960 decision *Dusky v. United States*, which held that "the test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."<sup>12</sup> The pertinent legal ethics rule should not be analyzed by itself, however, because the juvenile's constitutional rights, the process of enforcing state ethics disciplinary rules, and the current procedure in many states which allows judges and prosecutors to raise competency issues all contribute to making the issue more complicated than it might otherwise appear.

## II. CLIENT AUTONOMY AND DECISION-MAKING

With the recent identification of mental illness,<sup>13</sup> mental retardation,<sup>14</sup> and developmental immaturity<sup>15</sup> as major factors impacting the competence of juveniles to stand trial in delinquency cases,<sup>16</sup> one of the new ethical challenges requiring debate and resolution is when counsel may usurp the client's autonomous decision-making and raise the client's competency as an issue over the explicit objections of the client.<sup>17</sup> It is the expressed desire of the juvenile client that complicates matters, and attorneys should appreciate the reason why client autonomy in cases involving competency should be held in such high regard.<sup>18</sup>

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impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

MODEL RULES OF PROF'L CONDUCT R. 1.14 (2002).

<sup>10</sup> See generally Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question*, 18 CRIM. JUST. MAG. 20 (2003).

<sup>11</sup> For a discussion of negating client autonomy in an adult criminal defense context, see Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1998).

<sup>12</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

<sup>13</sup> See generally THOMAS GRISSO, *DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS* (2004).

<sup>14</sup> See AM. ASSOC. ON MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS* (10th ed. 2002).

<sup>15</sup> See Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) [hereinafter *The MacArthur Study*].

<sup>16</sup> See Norman G. Poythress et al., *Adjudicative Competence: The MacArthur Studies*, 15 PERSP. L. & PSYCHOL. 145 (2002).

<sup>17</sup> See generally Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005).

<sup>18</sup> The constitutional significance of the competency issue contributes to the need for attorneys to scrutinize and respect client wishes:

The etymology of the word “autonomy” dates back to early Greek “auto” and “nomos,” or self-governing or self-legislating, also meaning “the having or making of one’s own laws, independence. . . . Liberty to follow one’s will, personal freedom.”<sup>19</sup> The Greeks used the terms to refer to their city-states that were permitted to craft their own laws, in sharp contrast to those city-states that were under foreign governance.<sup>20</sup> Thus, the term was originally used in the context of states rather than individuals.<sup>21</sup> St. Augustine later wrote that “God gave us free will,”<sup>22</sup> thus changing the concept of free will from a purely political paradigm. The term evolved to include individuals with the Judeo-Christian focus on freedom of the individual to act and to accept the consequences of individual actions.<sup>23</sup> Western literature<sup>24</sup> and philosophy<sup>25</sup> did not extensively discuss the fundamental place of autonomy and free will in human society until Immanuel Kant’s eighteenth century moral theory on autonomy.<sup>26</sup> Kant wrote, “[f]reedom is independence of the compulsory Will of another; and in so far as it can co-exist with the freedom of all according to a universal Law, it is the one sole original, inborn Right belonging to every man in virtue of his Humanity.”<sup>27</sup> In yet another work, Kant wrote, “*Autonomy of the will is the sole principle of all moral laws and of duties in keeping with them . . .*”<sup>28</sup> Kantian autonomy<sup>29</sup> can be differentiated from Greek

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Fifteen years after *Dusky*, in *Drope v. Missouri* (1975), the [United States Supreme] Court held that the incompetence doctrine was “so fundamental to an adversary system of justice,” that conviction of an incompetent defendant, or failure to adhere to procedures designed to assess a defendant’s competence when doubt has been raised, violates the due process clause of the federal Constitution.

Poythress et al., *supra* note 16, at 40.

<sup>19</sup> OXFORD ENGLISH DICTIONARY 807 (2d ed.1989).

<sup>20</sup> See generally ARISTOTLE AND MODERN LAW (Richard O. Brooks & James Bernard Murphy eds., 2003).

<sup>21</sup> See John P. Safranek & Stephen J. Safranek, *Can the Right to Autonomy be Resuscitated After Glucksberg?* 69 U. COLO. L. REV. 731, 733 (1998).

<sup>22</sup> SAINT AUGUSTINE, ON FREE CHOICE OF THE WILL 37 (Anna S. Benjamin & L.H. Hackstaff trans., The Bobbs-Merrill Company 1964).

<sup>23</sup> In the Book of Genesis of the Torah, the first of the three books that make up the Tanach, the Hebrew Bible, it is written that on the sixth day following creation “God created man in His own image, in the image of God created He him; male and female created He them. And God blessed them; and God said unto them: ‘Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that creepeth upon the earth. Genesis 1:27–28, THE TORAH (Henry Holt 1996) (emphasis added). Furthermore, for colonial American Minister Jonathan Edwards, man had free will as he was created in God’s image, citing *Genesis* 1:26, “Let us make man in our own image, after our likeness; and let them have dominion over the fish of the sea, over the fowl of the air, and over the cattle, and over all the earth, and over the every creeping thing that creepeth upon the Earth,” *Genesis* 1:27, “And God created man in His own image,” and *Genesis* 9:6, “for in the image of God made He man.” JONATHAN EDWARDS, FREEDOM OF THE WILL 166 (Yale Univ. Press 1957) (1754) (if God is autonomous and humans are made in God’s image, then humans are also autonomous creatures possessed of free will).

<sup>24</sup> See MARK R. PATTERSON, AUTHORITY, AUTONOMY, AND REPRESENTATION IN AMERICAN LITERATURE, 1776–1865 (1988).

<sup>25</sup> While Thomas Hobbes rejected the idea that human beings were free to will, he did still believe that each person had power over what they willed. See Thomas Hobbes, *Of Liberty and Necessity*, in HOBBS AND BRAMHALL ON LIBERTY AND NECESSITY 15 (Vere Chappell ed., 1999).

<sup>26</sup> See Safranek & Safranek, *supra* note 21, at 734–35.

<sup>27</sup> IMMANUEL KANT, *Introduction to the Science of Right*, in THE PHILOSOPHY OF LAW 56 (Augustus M. Kelly Publishers 1974) (1887).

<sup>28</sup> IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 30 (Mary Gregor trans. & ed., Cambridge Univ. Press, 1997) (1788).

autonomy in that it focuses on individuals, not state entities.<sup>30</sup> John Stuart Mill's<sup>31</sup> nineteenth century criticisms of Kant's theory of autonomy resulted in much loss of interest in autonomy among philosophers of that era.<sup>32</sup>

Today autonomy of will may be thought of as part of the foundation of much of modern day Western philosophy and orientation.<sup>33</sup> Certainly, autonomous decision-making<sup>34</sup> is central to the very existence of the United States, which broke its colonial ties with Great Britain in large measure due to rejection of the lack of participation in governmental policy and taxation.<sup>35</sup> Governmental participation and personal autonomy have shaped much of the American mindset,<sup>36</sup> and they function as major pillars in the legal system.<sup>37</sup> The historical evolution of juries<sup>38</sup> and reliance on citizen

<sup>29</sup> See IMMANUEL KANT, *THE METAPHYSICAL PRINCIPLES OF VIRTUE* (James Ellington trans., Bobbs-Merrill Co. 1964) (1797) (includes Kant's attempt to combine his moral theory and his political philosophy); IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 67 (Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785).

<sup>30</sup> See Safranek & Safranek, *supra* note 21, at 734.

<sup>31</sup> Mill envisioned limitations on individual autonomy, but wrote:

But neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has . . . .

JOHN STUART MILL, *ON LIBERTY* 140 (David Bromwich & George Kateb eds., 2003) (1859).

<sup>32</sup> See John Stuart Mill, *Utilitarianism*, in *UTILITARIANISM, LIBERTY, REPRESENTATIVE GOVERNMENT* 4 (H.B. Acton ed., 1972).

<sup>33</sup> See generally KANT AND LAW (B. Sharon Byrd & Joachim Hruschka eds., 2006).

<sup>34</sup> See generally GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988); Gerald Dworkin, *The Concept of Autonomy*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 54, 61 (John Christman ed., 1989).

<sup>35</sup> It is bitterly ironic that as the concept of "autonomy" became so important to the former European colonists and founding fathers of the U.S. in developing models of government in the New World, that slavery was legal and tolerated and that the very land upon which the colonists inhabited had been forcibly taken from indigenous people and native Americans. See Wenona T. Singel, Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 *TULSA L. REV.* 21 (2005); Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery*, 36 *SETON HALL L. REV.* 481 (2006). See also Eugene A. Foster et al., *Jefferson Fathered Slave's Last Child*, 396 *NATURE* 27 (Nov. 1998) (comparisons of male-line descendants of U.S. President Thomas Jefferson and Sally Hemings—one of Jefferson's slaves—by using Y-chromosomal DNA haplotypes indicated that Jefferson was likely the biological father of Eston Hemings Jefferson, last son of Sally Hemings). William W. Freehling, *The Founding Fathers and Slavery*, 77 *THE AM. HIST. REV.* 81 (1972). "By freeing their slaves George Washington and John Randolph lived up to Revolutionary ideals. These men, however, were exceptions. Thomas Jefferson, who freed nine while blithely piling up debts that precluded freeing the rest, was the rule." *Id.* at 85.

<sup>36</sup> One scholar notes:

As early as 1756, British policymakers and outraged colonists agreed that taxes could be levied only with the consent of taxpayers. They concurred with Pennsylvanian John Dickinson's declaration: "Men cannot be happy, without Freedom; nor free, without Security of Property; nor so secure, unless the sole Power to dispose of it be lodged in themselves; therefore no People can be free, but where Taxes are imposed on them with their own Consent, given personally, or by their Representatives."

MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 62 (1997).

<sup>37</sup> See Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 *STAN. L. REV.* 875 (1994).

<sup>38</sup> See Richard S. Arnold, *Trial By Jury: The Constitutional Right to a Jury of Twelve in Civil Trials* 22 *HOFSTRA L. REV.* 1 (1993); WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 2 (Lenex Hill Pub. & Dist. Co., 2d ed. 1971) (1878).

participation in the judicial branch<sup>39</sup> changed Western legal systems and moved them away from aristocratic-controlled judge-run predecessor court systems.<sup>40</sup> The rise of participatory democracy etched into our legal system the necessity of free will and autonomy<sup>41</sup> as fundamental rights enjoyed by the citizens involved in legal processes.<sup>42</sup> It is no small matter that the American legal system has evolved<sup>43</sup> making fundamental assumptions about the autonomy of client participation and decision-making in legal matters.<sup>44</sup> However, the concept of client autonomy<sup>45</sup> in decision-making and participation in criminal legal systems was initially limited to adult clients.<sup>46</sup>

<sup>39</sup> See THE FEDERALIST NO. 83 (Alexander Hamilton), reprinted in THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES 255 (Roy Fairfield ed., 2d ed., The Johns Hopkins Univ. Press 1981) (1788) (arguing that the silence in the Constitution in regard to civil cases and trial by jury was not a call for abolition of the trial by jury except in criminal cases, and the reasons why juries were so significant).

<sup>40</sup> *But cf.* KRUMAN, *supra* note 36, at 103, who indicates: "For all the alterations in political rights wrought by the Revolution, more than half the adult population remained disenfranchised. Among them were many propertyless men, women, slaves, some free black men, apprentices, indentured laborers, felons, and persons considered *non compos mentis*." *Id.*

<sup>41</sup> See generally EDWARDS, *supra* note 23. See also JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690). "The Will being nothing but a power in the Mind to direct operative faculties of a Man to motion or rest, as far as they depend on such direction. To the Question, what is it determines the Will? The true and proper Answer is, The mind." *Id.* at 249.

<sup>42</sup> See generally Jamison E. Colburn, "Democratic Experimentalism": A Separation of Powers for Our Time?, 37 SUFFOLK U. L. REV. 287 (2004); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L. J. 27 (2003).

<sup>43</sup> By the year 1910, twenty-two states had adopted the American Bar Association's 1908 Canons of Ethics. Subsequently, the ABA adopted the 1969 Model Code of Professional responsibility, then the 1983 Model Rules of Professional Conduct, and then the Ethics, 2000 overhaul of the Model Rules. Most states have adopted the ABA models, but usually with local variations. See Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1434-36 (2004). See also Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 918 (1994).

<sup>44</sup> See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

<sup>45</sup> See generally Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705 (1992).

<sup>46</sup> See NANCY E. WALKER, CATHERINE M. BROOKS & LAWRENCE S. WRIGHTSMAN, CHILDREN'S RIGHTS IN THE UNITED STATES: IN SEARCH OF A NATIONAL POLICY 21 (1999). See also Lois A. Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 Hofstra L. Rev. 1305 (2005). Weithorn argues:

The Fifth and Fourteenth Amendments of the U.S. Constitution guarantee that no one shall be deprived of "life, liberty, or property, without due process of law . . ." In addressing the question of what process is due one whose liberty the state seeks to restrict, courts, legislatures, and scholars have focused overwhelmingly on criminal defendants. . . . Not until the mid-twentieth century did courts and legislators begin to address the procedural and substantive due process rights of two other groups of individuals whose physical liberty was systematically restrained by the state pursuant to various statutes: minors incarcerated (or at risk of incarceration) under the authority of the juvenile justice or mental health systems, and adults hospitalized (or at risk of hospitalization) in facilities for the mentally disordered or mentally disabled. Restrictions of liberty in the context of civil commitment and juvenile justice system intervention frequently involved a mixture of *parens patriae* and police power motives.

*Id.* at 1407-08.

By the 1960s, the United States Supreme Court ushered in a new era of recognition of juvenile constitutional rights,<sup>47</sup> culminating with the *In re Gault*<sup>48</sup> decision in 1967<sup>49</sup> recognizing the right of juveniles to be represented by counsel in delinquency cases.<sup>50</sup> As criticism from the public about different aspects of the legal profession became more vocal in the 1960s, the American Bar Association<sup>51</sup> (“ABA”) responded by adopting model ethics codes which were gradually adopted by state court systems.<sup>52</sup> Today, state legal ethics codes embrace the a priori assumption that the majority of clients, including mature juveniles, enjoy the right of autonomous decision-making as it relates to the objectives of the client’s litigation.<sup>53</sup> However, these legal ethics codes fail to adequately address the role of the lawyer<sup>54</sup> when representing developmentally immature juveniles or juveniles with mental illness or mental retardation.<sup>55</sup>

### III. EVOLUTION OF THE ABA CODES OF LEGAL ETHICS

As clinical education evolved in American law schools,<sup>56</sup> much scholarship emerged focusing on “client centered” approaches to skills training for the legal profession.<sup>57</sup> This client-focused approach seemed to coincide with the emergence of legal ethics as mandatory coursework for ABA approved law schools.<sup>58</sup> In the 1980s, the ABA promulgated legal

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<sup>47</sup> This began with the 1966 decision in *Kent v. United States*, which focused on the District of Columbia’s failure to comply with its provisions for waiving jurisdiction and transferring a juvenile to adult court and stating “[i]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” *Kent v. United States*, 383 U.S. 541, 556.

<sup>48</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>49</sup> See WALKER, BROOKS, & WRIGHTSMAN, *supra* note 46, at 7–8.

<sup>50</sup> See generally Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

<sup>51</sup> For a discussion of the history of the American Bar Association, see generally John A. Matzko, “*The Best Men of the Bar*”: *The Founding of the American Bar Association*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 75–96 (Gerard W. Gawalt ed., 1984).

<sup>52</sup> For a discussion of the development of state bar associations from colonial era to the early twentieth century, see Phillip J. Wickser, *Bar Associations*, 15 CORNELL L. Q. 390 (1930).

<sup>53</sup> See generally, Thomas L. Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721 (1975) (“[T]he ethical practice of law turns on the lawyer’s ability to help clients arrive at essential choices, not on the ability to make choices for clients.” *Id.* at 743).

<sup>54</sup> See Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839 (2001).

<sup>55</sup> See Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1989–90).

<sup>56</sup> See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

<sup>57</sup> See Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811 (1987).

<sup>58</sup> See generally Benjamin H. Barton, *The ABA, The Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411 (2005); Andrews, *supra* note 43; Walter P. Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1064 (1978).

ethics codes,<sup>59</sup> which were eventually adopted in various versions by states.<sup>60</sup> These ethics codes evolved from the original 1908 ABA Canons, but the more modern codes were thought to embrace both aspirational standards along with more specific rules of conduct which could be enforced by either bar associations or state supreme courts.<sup>61</sup> The enforcement mechanisms of legal ethics codes, however, may not be as effective as might be assumed. Many citizens who rely on attorneys remain blissfully unaware of bar association enforcement systems for violations of legal ethics codes,<sup>62</sup> so the general public probably would not consider filing an ethics complaint against their attorney as a first response to attorney misconduct. Additionally, some writers suggest that large law firms have successfully evaded ethics complaints by entering into nondisclosure settlement agreements with clients who might otherwise initiate ethics complaints.<sup>63</sup> Thus, there are many barriers and shortcomings to enforcement of legal ethics codes.

The state ethics codes are generally based upon the concept of self-regulation of the legal profession.<sup>64</sup> Lawyers are expected to turn in other

<sup>59</sup> See Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1 (1970).

<sup>60</sup> See STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 2004, 9–440 (2004) (citing the history and each state's variations on adoption of the ABA Model Rules).

<sup>61</sup> See generally, GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW (1978). Hazard contends:

The regulatory motif is conspicuous in the legal profession's Code of Professional Responsibility. The history of the code reflects its evolution from oath of office to something like a statute. Until the nineteenth century the bar was governed only by oral "traditions of the profession." In the mid-nineteenth century, there were efforts to reduce those traditions to writing, notably in lectures by Judge George Sharswood of Pennsylvania, entitled "The Aims and Duties of the Profession of the Law." . . . The lectures proved to be the nucleus of a more formal statement of rules adopted at the beginning of the twentieth century. At that point the American Bar Association promulgated its Canons of Professional Ethics, drawing heavily on Judge Sharswood.

*Id.* at 18. Although the enforcement of ethics codes in the U.S. is of fairly recent vintage, the actual practice of formulating codes of conduct for legal practitioners dates back to medieval times when ecclesiastical courts of England and western Europe required legal advocates to take oaths, swearing to God and thus inviting both punishment by lay authorities and retribution from the higher authority should the oath be violated. Such oath taking practices may have originated in ancient Rome where advocates' oaths included obligations "to avoid artifice and circumlocution," to "only speak that which he believed to be true," and to not use "injurious language or malicious declamations against [one's] adversary," or "any trick to prolong the cause." Andrews, *supra* note 43 at 1392–93 (2004). See generally JAMES ENDELL TYLER, OATHS; THEIR ORIGIN, NATURE AND HISTORY (1834).

<sup>62</sup> See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801 (1992). See also Elizabeth Chambliss, *Professional Responsibility Lawyers, A Case Study*, 69 Fordham L. Rev. 817, 822 (2000) ("[C]lients do not have sufficient knowledge to judge the quality of professional service.").

<sup>63</sup> See Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583 (1996) (criticizing the ABA's 1992 McKay Report for failing to address the many problems inherent in the self-regulatory approach to lawyer discipline for professional misconduct).

<sup>64</sup> Paragraph 16 of the Preamble to the ABA Model Rules of Professional Conduct reads:

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. . . . The Rules simply provide a framework for the ethical practice of law.



lawyers who violate the ethics codes, according to Model Rule of Professional Conduct (“M.R.”) 8.3.<sup>65</sup> Although clients may also file complaints for alleged ethical misconduct by attorneys,<sup>66</sup> the formulation of the rules is based on self-regulation rather than third party enforcement. It was within this statutory structure that M.R. 1.14 was enacted.<sup>67</sup> M.R. 1.14 describes the ethical duties of a lawyer representing a client with diminished capacity. This provision was written as a component of an ethics code, rather than as a substantive rule of criminal, civil, or procedural law. It may be that the placement of this provision concerning a lawyer’s options when the client appears to lack competency as only an ethics issue should be rethought for a number of reasons.<sup>68</sup>

Assume that an impaired client feels that her counsel has failed to properly follow the provisions of M.R. 1.14. Should it then be incumbent upon the client suffering the mental impairment to raise the issue with the bar association or with the state supreme court’s ethics investigation agency? It could reasonably be assumed that the vast majority of impaired adult clients are completely unaware of the provisions of M.R. 1.14,<sup>69</sup> thus, they would have no reason to even be aware that there was any misconduct, even if misconduct did occur. Accordingly, the likelihood that impaired juveniles charged with delinquencies and criminal misconduct would have the wherewithal to appreciate their right to file an ethics complaint against their counsel seems extremely remote. Thus, the rule does not seem to have been adopted as a measure designed to protect the public and provide the represented clients with recourse of some kind, but rather, the rule seems designed to give some sense of direction to lawyers.<sup>70</sup> The next question must be whether in fact the rule accomplishes the purpose of providing lawyers with direction when they are confronted with clients lacking the competency to go to trial.

The newly amended version of M.R. 1.14 does indeed create some new options and possible resources to assist counsel representing a child client who may lack competency. But ultimately, the rule solves whatever the original counsel’s problem was by simply appointing yet another lawyer to substitute judgment for the client. This process does make some sense. It

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<sup>65</sup> M. R. 8.3 entitled “Reporting Professional Misconduct” provides: “(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2003).

<sup>66</sup> See Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J. L. & PUB. POL’Y 6, 9 (1994).

<sup>67</sup> According to Comment 1 to M.R. 8.3, “Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct.” MODEL RULES OF PROF’L CONDUCT R.8.3 cmt. 1 (2002).

<sup>68</sup> See Don Gifford & Paul Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515 (1987).

<sup>69</sup> Even the ABA’s McKay Commission acknowledged that the public viewed “lawyer discipline as too slow, too soft, and too self-regulated.” CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT* xviii (1992).

<sup>70</sup> See generally, Kay A. Ostberg, *The Conflict of Interest in Lawyer Self-Regulation*, 1 THE PROF. LAW., Summer 1989, at 6.

specifically requires judicial intervention to appoint a guardian *ad litem*. This intervention may add a layer of protection and respect for the autonomous decision-making rights of the juvenile client. Ironically, however, the ultimate resolution of whether to substitute judgment and usurp client decision-making autonomy is once again placed in the hands of an attorney.

An additional problem emerges where a state's criminal procedure rules allow the court or the prosecution to broach the issue of client competency.<sup>71</sup> If the court and prosecution are allowed to broach this issue, then there appears to be no ethical limitations of any kind placed upon the lawyer who raises the issue, as long as the defense counsel for whatever reason is not the party raising client competency.<sup>72</sup> This is a particularly curious result. A judge or prosecutor can raise the issue of competency of the defendant even when the defendant and defense counsel do not want the issue raised. Furthermore, neither the judge nor the prosecutor apparently have any ethical duties to observe in this context, as neither one of them enjoys an attorney-client relationship with the accused juvenile.<sup>73</sup> Thus, the statutory criminal procedure has created something of a conundrum with no ethical parameters for judges or prosecutors to follow.

Modern day American legal ethics rules identify clients as the decision-makers in criminal matters, deciding on issues including whether to testify at trial, what plea to enter to the charge, and whether to accept a plea bargain.<sup>74</sup> Lawyers are generally accustomed to respecting the wishes of the

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<sup>71</sup> At least twenty-one jurisdictions expressly allow either the judge, prosecution or the defense to raise the issue of competency in adult criminal proceedings. See ALASKA STAT. § 12.47.100 (2005); ARIZ. REV. STAT. ANN. § 13-4503 (2006); CONN. GEN. STAT. §54-56d (West 2006); D.C. CODE § 24-531.03 (2006); FLA. STAT. ANN. § 3.210 (West 2006); 725 ILL. COMP. STAT. ANN. 5/104-11 (West 2006); KAN. STAT. ANN. § 22-3302 (2005); LA. CODE CRIM. PROC. ANN. art. 642 (2005); MINN. STAT. ANN. § 20.01 (West 2006); MISS. CODE ANN. § 99-13-11 (West 2006); MO. ANN. REV. STAT. § 552.020 (2006); MONT. CODE ANN. § 46-14-221 (2006); N.C. GEN. STAT. ANN. § 15A-1002 (West 2005); OHIO REV. CODE ANN. § 2945.37 (West 2006); R.I. GEN. LAWS § 40.1-5.3-3 (2005); S.D. CODIFIED LAWS § 23A-10A-3 (2006); TENN. CODE ANN. § 33-7-301 (West 2006); TEX. CODE CRIM. PROC. ANN. art. 46B.004 (Vernon 2006); VT. STAT. ANN. tit. 13 § 4817 (2005); VA. CODE ANN. § 19.2-169.1 (West 2006); WASH. REV. CODE ANN. § 10.77.060 (West 2006).

<sup>72</sup> See *supra* note 58.

<sup>73</sup> William Simon's perspective of the "Dominant View," or the prevailing approach to lawyers' ethics as reflected in the bar's disciplinary codes, the case law on lawyer discipline, and the burgeoning commentary on professional responsibility, is that "[l]egal ethics impose no responsibilities to third parties or the public different from that of the minimal compliance with law that is required of everyone." WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 8 (1998).

<sup>74</sup> M.R. 1.2(a) sets forth the scope of representation and allocation of authority between client and lawyer as follows:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

client with regard to these decisions.<sup>75</sup> However, a problem arises when the client is both a minor—presumably functioning in a less mature manner than adult counterparts—and the client appears to lack competency. Should counsel be allowed to disregard the express wishes of the client and challenge the client's competence to stand trial? The scope of allocation of authority between a client and lawyer according to M.R. 1.2(c) provides that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>76</sup> This rule does not expressly address the dilemma of what procedure to follow should the client appear to lack the ability or capacity to give “informed consent.” However, Comment 4 to M.R. 1.2 does address this scenario and admonishes that “[i]n a case in which the client appears to be suffering diminished capacity, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to Rule 1.14.”<sup>77</sup>

#### IV. RAISING JUVENILE CLIENT COMPETENCY

Juveniles appear in both delinquency cases where they are charged with offenses generally tried before judges alone and in the more serious cases for criminal conduct that have been transferred to adult courts for criminal trials.<sup>78</sup> Most legal systems presume that juveniles charged with delinquent or criminal misconduct are competent to stand trial.<sup>79</sup> To be considered competent the accused juvenile must have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,<sup>80</sup> and he must have a rational as well as factual understanding of the proceedings against him.<sup>81</sup> Since competency is legally presumed, the issue of competence must be affirmatively challenged, and in approximately twenty states it may usually be raised by either the prosecution, the defense, or the court itself.<sup>82</sup> This rather unusual

<sup>75</sup> *Id.* R. 1.2(c).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* R. 1.2 cmt. 4.

<sup>78</sup> See C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659 (2005); Brent Pollitt, *Buying Justice on Credit Instead of Investing in Long-term Solutions: Foreclosing on Trying Juveniles in Criminal Court*, 6 J. L. & FAM. STUD. 281 (2004); Melissa A. Scott, Comment, *The “Critically Important” Decision of Waiving Juvenile Court Jurisdiction: Who Should Decide?* 50 LOY. L. REV. 711 (2004).

<sup>79</sup> See *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>80</sup> The very subjective nature of determining a client’s ability to consult with counsel has been conceded by experts in adjudicative competence:

The current practice of competence assessment and adjudication lacks a great deal of normative texture on aspects of the inquiry relating to assistance of counsel and, as a result, is highly discretionary. Appellate courts rarely review and almost never reverse trial court decisions regarding defendants’ competence to proceed. . . . [T]rial judges almost always defer to clinical opinion in pretrial competence determinations (Golding et al., 1984; Hart & Hare, 1992; Reich & Tookey, 1986). Thus, forensic clinicians rather than judges effectively exercise discretion to define competence, which is a source of continuing dissatisfaction to commentators, if not to forensic clinicians and judges.

Poythress et al., *supra* note 16, at 41–2.

<sup>81</sup> *Id.*

<sup>82</sup> See *supra* note 71.

criminal process emphasizes the high level of importance of trying only competent individuals capable of 1) appreciating the consequences of their conduct, 2) understanding the way the system is designed to work, 3) recognizing their legal rights, and 4) assisting their counsel in the preparation of their defense.<sup>83</sup> If the full resources of the state may be used to enforce the criminal law, the system functions fairly only when the accused has the capacity to understand and appreciate what is transpiring before, during, and after trial. For example, constitutional considerations, including the right to bail, due process, the right to remain silent, the right to counsel, and the right to trial<sup>84</sup> are impacted whenever a juvenile lacking competence is forced to proceed in either a delinquency or adult criminal case.<sup>85</sup> In fact, the Supreme Court in *Schall v. Martin*<sup>86</sup> upheld a New York statute which allowed for preventive detention for juveniles posing “ ‘a serious risk’ that the child ‘may before the return date commit an act which if committed by an adult would constitute a crime.’ ”<sup>87</sup> This legal formulation for preventive detention would likely not occur with adult defendants similarly situated.<sup>88</sup>

A challenge to the client’s competency generally halts all legal proceedings until and unless the defendant is found to be competent to stand trial.<sup>89</sup> Should a juvenile be declared not competent to stand trial,<sup>90</sup> several legal options are available in most jurisdictions: 1) the juvenile may be placed in a state mental institution, hospital, or similar facility until competency is “restored,”<sup>91</sup> 2) the juvenile may be released and returned to the community for out-patient services, depending upon the severity of the mental condition and the nature of the charged offense,<sup>92</sup> and 3) the juvenile may continue to be detained and receive mental health services at

<sup>83</sup> See *Dusky v. United States*, 362 U.S. 402 (1960). See also *Gadinez v. Moran*, 509 U.S. 389, 398 (1993) (decision-making abilities are encompassed within the construct of competence to plead guilty).

<sup>84</sup> See generally Emily Buss, *The Missed Opportunity in Gault*, 70 U. CHI. L. REV. 39 (2003).

<sup>85</sup> For an argument that the majority of recognized juvenile procedural rights in delinquency cases are based upon the Due Process Clause of the Constitution, rather than the Fifth or Sixth Amendments, see Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions From Law and Social Science*, 57 HASTINGS L. J. 955 (2006).

<sup>86</sup> *Schall v. Martin*, 467 U.S. 253 (1984).

<sup>87</sup> *Id.* at 255.

<sup>88</sup> But see *Salerno v. United States*, 481 U.S. 739 (1987). See Michael Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent*, 78 J. CRIM. L. & CRIMINOLOGY 1048 (1988); Keith Eric Hansen, *When Worlds Collide: The Constitutional Politics of United States v. Salerno*, 14 AM. J. CRIM. L. 155 (1987).

<sup>89</sup> This applies only in those jurisdictions which recognize the insanity defense in juvenile cases. See, e.g. Paul E. Antill, Comment, *Unequal Protection? Juvenile Justice and the Insanity Defense*, 22 J. VUL. L. 50 (2002) (discussing the Arkansas Supreme Court ruling in *Golden v. State* that a juvenile offender’s due process and equal protection rights were *not* violated when the trial court refused to allow the juvenile to argue an insanity defense).

<sup>90</sup> See MENTAL HEALTH SCREENING AND ASSESSMENT IN JUVENILE JUSTICE (Thomas Grisso et al., eds., 2005) (reviewing twenty screening and assessment instruments used in various states to determine juvenile competence).

<sup>91</sup> See Shawn D. Anderson & Jay Hewitt, *The Effect of Competency Restoration Training on Defendants With Mental Retardation Found Not Competent to Proceed*, 26 L. & HUM. BEHAV. 343 (2002).

<sup>92</sup> See Bruce J. Winick, Ken Kress & Jan C. Costello, “Wayward and Noncompliant” People with Mental Disabilities: What Advocates of Involuntary Outpatient Commitment Can Learn From the Juvenile Court Experience with Status Offense Jurisdiction, 9 PSYCHOL. PUB. POL’Y & L. 233 (2003); COMMUNITY TREATMENT FOR YOUTH: EVIDENCE BASED INTERVENTIONS FOR SEVERE EMOTIONAL AND BEHAVIORAL DISORDERS (Barbara J. Burns & Kimberly Hoagwood eds., 2002).

the place of the detention.<sup>93</sup> Some states have enacted additional predispositional alternatives that provide the juvenile's judge with great discretion, sometimes including dismissal of the charges if it appears that the juvenile will never be declared competent to stand trial and where the juvenile appears to pose no danger or threat to the community or to himself.<sup>94</sup> For example, this dismissal option might be appropriate in cases involving nonviolent offenses where the accused is diagnosed with severe or moderate mental retardation—conditions which most experts believe are not subject to remediation or rehabilitation to the extent that the accused would be expected to “regain” competency. According to the Supreme Court, only people with “mental illness” or “mental disorder” may be placed in indeterminate preventive commitment based upon their dangerousness.<sup>95</sup>

The issue of client competency raises issues that are difficult to resolve by many advocates handling delinquency and criminal cases involving juveniles.<sup>96</sup> Mental health issues arise in delinquency cases in juvenile court settings as well as criminal cases in adult courts where many juveniles today find themselves going to trial for more serious offenses.<sup>97</sup> Although the forums are different, the same mental health issues are present in both settings.<sup>98</sup>

The frequency of mental disorders in this population of juvenile defendants was difficult to quantify until three studies emerged by three groups of researchers<sup>99</sup> suggesting that:

the prevalence of mental disorders among youths in their studies was between 60% and 70%. That is, *about two-thirds of youths in pretrial detention or juvenile corrections programs in these studies met criteria for one or more of the psychiatric disorders within the mood, anxiety, substance use, disruptive behavior, and thought disorders categories.* This prevalence is about two to three times higher than the prevalence of the

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<sup>93</sup> See Scott W. Henggler et al., *Multisystemic Therapy: An Effective Violence Prevention Approach for Serious Juvenile Offenders*, 19 J. OF ADOLESCENCE 47 (1996) (discussing the theoretical foundation of Multisystemic Therapy (MST) and the findings of two studies on juvenile delinquents).

<sup>94</sup> See Eileen C. Murphy, *Multisystemic Therapy in the Juvenile Justice System: Changing Punishment into Treatment*, 25 CHILD. LEGAL RTS. J. 29 (2005).

<sup>95</sup> See *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (White, J., plurality opinion) (holding that a system that permits commitment of dangerous persons who are not mentally ill constitutes a departure from “our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law”). See generally, Christopher Slobogin, *Rethinking Legally Relevant Mental Disorder*, 29 OHIO N.U. L. REV. 497 (2003). But see Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56 (2004) (discussing the problems of preventive detention based on the dangerousness of the accused, and the enormous costs to the individual and to society).

<sup>96</sup> See generally Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 WASH. U. J. L. & POL'Y 327 (2004).

<sup>97</sup> See Melissa A. Scott, Comment, *The “Critically Important” Decision of Waiving Juvenile Court Jurisdiction: Who Should Decide?* 50 LOY. L. REV. 711 (2004).

<sup>98</sup> See Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 VA. J. SOC. POL'Y & L. 61 (2004).

<sup>99</sup> The researchers were Teplin and colleagues (2002); Abraham, Teplin, & McClelland, (2003), and Atkins, Pumariega, and Rogers (1999), and Wasserman and colleagues (2002). MENTAL HEALTH SCREENING AND ASSESSMENT IN JUVENILE JUSTICE, *supra* note 90, at 6.

same disorders among U.S. youths in general (Costello et al., 1996; Kazdin, 2000; Roberts, Atkinson, & Rosenblatt, 1998).<sup>100</sup>

Frequency of mental disorders notwithstanding, the very issue of a client's competency may well be overlooked by experienced attorneys in this field.<sup>101</sup> Attorneys ordinarily are not trained in child developmental fields, let alone in mental health fields.<sup>102</sup> With no specialized training to communicate with children and no education in mental health issues, many lawyers are simply not well prepared to identify juvenile client competency problems.<sup>103</sup> Even when attorneys have experience working with adults with mental health problems, such background may not adequately prepare counsel to identify similar problems exhibited by juvenile clients.<sup>104</sup>

Because of the few reported cases on appeal in most jurisdictions, one might assume that the issue remains relatively undiscussed in trial and appellate cases.<sup>105</sup> It may be that because of the criminal procedure in some states which allows judges and prosecutors to raise the issue of the defendant's competency, these issues simply fall outside the traditional adversarial process. By opening up the process of competency challenge to the unbiased fact finder as well as the prosecutor, the procedure changes and goes far beyond the roles traditionally played by these participants in delinquency adjudications and criminal trials. Theoretically at least, all participants wish to ensure that the accused understands and can properly participate in the process of a criminal or delinquency case.

Of course, theory and reality are often at odds with one another in a courtroom. For instance, if a prosecutor senses that there is insufficient evidence to secure a delinquency conviction in a particular case, an alternative approach to removing a juvenile from society might be for the prosecutor to exercise discretion and to have the accused declared not competent to stand trial.<sup>106</sup> This resolution would remove the juvenile from his neighborhood—assuming that the community offers no mental healthcare facilities of some sort—while keeping the juvenile involved in the juvenile court system and theoretically providing some protection to the public at large. Such a procedure might result in the juvenile's hospitalization or institutionalization for a period of time similar to a disposition (or sentence) had the juvenile been convicted of the

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<sup>100</sup> *Id.* at 6–7 (emphasis in original).

<sup>101</sup> See V.L. Cowden & G.R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney-Client Relationship*, 33 J. FAM. L. 629 (1994–95).

<sup>102</sup> See David B. Mitchell, *Building a Multidisciplinary, Collaborative Child Protection System: The Challenge to Law Schools*, in ON TEACHING FAMILY LAW: ESSAYS FROM THE FAMILY COURT REVIEW 7 (2004).

<sup>103</sup> See generally Bonita M. Veysey, et al., *Using the Referral Decision Scale to Screen Mentally Ill Jail Detainees: Validity and Implementation Issues*, 22 LAW & HUM. BEHAV. 205 (1998).

<sup>104</sup> See Darla M.R. Burnett, Charles D. Noblin & Vicki Prosser, *Adjudicative Competency in a Juvenile Population*, 31 CRIM. JUST. & BEHAV. 438 (2004).

<sup>105</sup> See Poythress et al., *supra* note 16, at 41 (“Appellate courts rarely review and almost never reverse trial court decisions . . .” in competency rulings.).

<sup>106</sup> For a discussion of prosecutorial discretion in charging decisions in some of the most serious of juvenile offenses, homicide cases, see Victor L. Streib, *Prosecutorial Discretion in Juvenile Homicide Cases*, 109 PENN. ST. L. REV. 1071 (2005).

delinquency offense in the first place.<sup>107</sup> According to the ethical duties of prosecutors described in M.R. 3.8, the prosecutor shall “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>108</sup> However, satisfying the probable cause requirement is a much lower burden than proving a case beyond a reasonable doubt.<sup>109</sup> Thus, it may be fairly easy for a prosecutor to employ such a strategy.

Although moving to determine a juvenile’s competency may be seen as a viable option in only a relatively small number of cases, the numbers are likely to greatly increase as mental health issues are identified more frequently in delinquency and criminal cases involving minors. In the case of a juvenile charged with a violent felony offense where the state believes there is inadequate evidence to secure a conviction (or adjudication), the prosecutor might well wish to consider challenging the juvenile’s competency where the jurisdiction permits such an option.<sup>110</sup> Thus, the state accomplishes the goal of providing some level of protection to the public at large, even though the state may not have been successful had the case been forced to go to trial (or adjudication hearing).<sup>111</sup>

So what options exist when the issue of competency has not been raised by the court or by the prosecution, and when the defense counsel has been advised by the client not to broach competency? In the case of juvenile clients, defense counsel might take comfort in adopting a paternalistic role<sup>112</sup> and assuming that the client is not in a position to fully understand the system or the consequences of eliminating a viable defense option that might provide a more therapeutic remedy for the client.<sup>113</sup> In the alternative, counsel might avoid all paternalistic urges to the contrary and seek to define the role of counsel as respecting the decision-making of the client regarding the objectives of the litigation.<sup>114</sup> This latter approach might be well defended with a *stricti juris* reading of current ethics codes,<sup>115</sup> while the former paternalistic role might be well defended by defense counsel who think of this role as necessary pragmatism.<sup>116</sup>

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<sup>107</sup> See Alexander V. Tsesis, *Protecting Children Against Unnecessary Institutionalization*, 39 S. TEX. L. REV. 995 (1998) (discussing the Supreme Court’s decision in *Parham v. J.R.*, 442 U.S. 584 (1979) which recognized minimal due process rights for children facing confinement in mental institutions).

<sup>108</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2002).

<sup>109</sup> See generally Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

<sup>110</sup> See generally R. BARRI FLOWERS, *KIDS WHO COMMIT ADULT CRIMES: SERIOUS CRIMINALITY BY JUVENILE OFFENDERS* (2002) (discussing the magnitude of serious youth violence, drugs, youth gangs, and a statistical analysis of the pervasiveness of the problem).

<sup>111</sup> See James C. Backstrom & Gary L. Walker, *The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 32 WM. MITCHELL L. REV. 963, 969 (2006).

<sup>112</sup> See Guggenheim, *supra* note 1.

<sup>113</sup> See Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 260 (2005).

<sup>114</sup> *Id.*

<sup>115</sup> In fact, under M.R. 1.2(a):

[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client’s decision, after

If the juvenile is presumed by the American legal system to have limited civil rights—for example, juveniles cannot vote, must obey curfews, cannot work without permits and reaching a certain age, cannot purchase alcoholic beverages, and cannot obtain medical care in some instances without parental approval—then a greater burden is placed on their legal representatives whenever their competency to stand trial becomes an issue.<sup>117</sup> Because the legal rights of children are routinely restricted in so many arenas, many child advocates may tacitly assume that it is appropriate for them to substitute their own judgment for that of their underage client without question.<sup>118</sup> This tacit assumption dismisses the client's participation in what may become the single most important decision-making process in his or her life.<sup>119</sup> This paternalistic approach to substitute a juvenile client's judgment with counsel's judgment has become the subject of a great deal of criticism.<sup>120</sup> The issue may not be quite as clear cut when the juvenile de facto lacks competency to stand trial.<sup>121</sup>

If the issue is broached without his or her consent, the client is further denied participation in the preparation of his or her own defense. During an era in American history where the executive branch has 1) created extrajudicial "commissions" to substitute for Article III courts for detainees from various theaters of military conflict and unilateral military invasions,<sup>122</sup> 2) embraced the use of torture during interrogation of foreign

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consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002).

<sup>116</sup> For a discussion of contextual views of juvenile competency and defining the role of counsel for juveniles, see Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *FORDHAM L. REV.* 1473 (1996).

<sup>117</sup> In *Vernonia Sch. Dist. v. Acton*, Justice Scalia noted that:

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.

*Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995).

<sup>118</sup> One scholar notes that "[l]awyers for children have tended, empirically, to rely upon their total discretion in determining their client's best interests in these situations." PETERS, REPRESENTING CHILDREN, *supra* note 2, at 547.

<sup>119</sup> See Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 *U. KAN. L. REV.* 1 (1998).

<sup>120</sup> See Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 *FORDHAM L. REV.* 1571 (1996).

<sup>121</sup> Such controversy surrounded the case of Ted Kaczynski, the "Unabomber." See *United States v. Kaczynski*, 1997 U.S. Dist. LEXIS 23805 (E.D. Cal. 1997). Although not a juvenile, Kaczynski's much publicized case involved the defendant's constant struggles with court-appointed counsel over defense trial strategy, and this culminated in lengthy trial delays and an eventually resulted in a negotiated plea. Much of the national debate following Kaczynski's case focused on the right of the accused to decide trial strategy, despite the fact that the defendant's mental status was highly questionable. See Daniel Klaidman & Patrick King, *Suicide Mission: Trial of Accused Unabomber Ted Kaczynski*, *NEWSWEEK*, Jan. 19, 1998, at 22.

<sup>122</sup> See Mathew Purdy, *A Nation Challenged the Law; Bush's New Rules to Fight Terror Transform the Legal Landscape*, *N.Y. TIMES*, Nov. 25, 2001, at A1 (initial announcement of military tribunals); Katharine Q. Seelye, *A Nation Challenged: Military Tribunals; Government Sets Rules for Military on War Tribunals*, *N.Y. TIMES*, Mar. 20, 2002, at A1 (initial rules for tribunals announced). See also



combatants,<sup>123</sup> 3) wire tapped American phone conversations without warrants,<sup>124</sup> and 4) surreptitiously reviewed private banking records,<sup>125</sup> this loss of civil and constitutional rights may seem somewhat unimportant.<sup>126</sup> The loss felt by the accused juvenile, however, is anything but trivial.<sup>127</sup> If the client refuses to allow counsel to raise the competency issue,<sup>128</sup> counsel may feel that the only adequate course of action is to resign from the case in compliance with the provisions of M.R. 1.16.<sup>129</sup> The client also has the option of discharging the attorney from the representation.<sup>130</sup> However, both options appear to be inadequate and unsatisfying from both the client's and counsel's perspective.<sup>131</sup>

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Hamdan v. Rumsfeld, 415 F.3d 33 (2005), *overruled by* Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006) (holding unconstitutional President George W. Bush's unilateral plans for tribunals), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (MCA), *as recognized by* Boumediene v. Bush, No. 05-5062, 2007 U.S. App. LEXIS 3682 at 8-9 (D.C. Cir. 2007).

<sup>123</sup> See Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Dec. 31, 2005, at A11; Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 7, 2004, at A1.

<sup>124</sup> See Eric Lichtblau, Scott Shane & Ken Belson, *Bush is Pressed Over New Report on Surveillance*, N.Y. TIMES, May 12, 2006, at A1.

<sup>125</sup> Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

<sup>126</sup> Even the attorney-client privilege dating back to the time of Elizabeth I has been subject to attack in the post-9-11 era. See Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233 (2003).

<sup>127</sup> See Bernard P. Perlmutter & Carolyn S. Salisbury, *"Please Let Me Be Heard": The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution*, 25 NOVA L. REV. 725 (2001) (criticizing the result of the Supreme Court's decision in *Parham v. J.R.*, 442 U.S. 584 (1979) that the 14<sup>th</sup> Amendment does not require court hearing prior to parents or the state committing a child to a psychiatric hospital); Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773 (1988) (criticizing *Parham's* allowance of inappropriate use of inpatient facilities for children); GARY B. MELTON, PHILLIP M. LYONS, JR., WILLIS J. SPAULDING, NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS 15-16 (1998) ("[A]t least 40% of children and youth in state hospitals could have been treated in less restrictive settings, by the states' own admission. This is true of residential treatment facilities as well." *Id.* at 37(emphasis in original)).

<sup>128</sup> See Alexander V. Tsesis, *Protecting Children Against Unnecessary Institutionalization*, 39 S. TEX. L. REV. 995 (1998) (reviewing state legislation which prohibits "voluntary" psychiatric hospitalization by parents or others of children in the system).

<sup>129</sup> M.R. 1.16 on declining or terminating representation, provides in relevant part:

Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . (2) the lawyer's . . . mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged.  
 (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: . . . (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002).

<sup>130</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.14, cmt. 2 (2002). On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objective.

<sup>131</sup> See generally Jan C. Costello, *"The Trouble is They're Growing, The Trouble is They're Grown": Therapeutic Jurisprudence and Adolescents' Participation in Mental Health Care Decisions*, 29 OHIO N.U. L. REV. 607 (2003); Jan C. Costello, *Why Have Hearings for Kids if You're Not Going to Listen?: A Therapeutic Jurisprudence Approach to Mental Disability Proceedings fro Minors*, 71 U. CIN. L. REV. 19 (2002).

## A. APPLYING THE PROVISIONS OF THE ORIGINAL M.R. 1.14

According to the provisions of the original text of M.R. 1.14,<sup>132</sup> if counsel believed that it was in the client's best interest to challenge competency, the lawyer was first required to determine that the client's ability to make adequately considered decisions in connection with the representation was impaired.<sup>133</sup> Clearly, if counsel strongly believed that competency was an issue worth raising, and the client strongly disagreed with raising the issue, this ethics rule could be invoked to resolve the dispute. However, just because the lawyer disagreed with the client's decision, the conclusion that the client's ability to make decisions was somehow impaired would not necessarily be valid.

The client might be influenced by any number of factors that weighed against raising competency issues.<sup>134</sup> The client might be sensitive to having his or her mental health condition made public, assuming that either the criminal case or delinquency case was to be litigated in public.<sup>135</sup> Some delinquency cases are still closed to the public,<sup>136</sup> but virtually all adult criminal cases and most transfer hearings where juvenile courts surrender jurisdiction over the case to adult criminal courts are open to public scrutiny.<sup>137</sup> Because of the stigma that may attach to mental illness,<sup>138</sup> a client suffering from diagnosable mental illness or mental retardation<sup>139</sup> may wish to withhold or attempt to exclude such information from the trial process.<sup>140</sup> Additionally, it is possible that counsel's assessment of the

<sup>132</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.14 (2001).

<sup>133</sup> See Thomas Grisso, *Dealing With Juveniles' Competence to Stand Trial: What We Need To Know*, 18 QUINNIPIAC L. REV. 371 (1999).

<sup>134</sup> See Richard E. Redding, *Why It Is Essential to Teach About Mental Health Issues in Criminal Law (And a Primer on How To Do It)*, 14 WASH. U. J. L. & POL'Y 407 (2004).

<sup>135</sup> See generally David R. Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM. & MARY BILL RTS. J. 511 (2004) (arguing in favor of affording greater protections of confidentiality for children's mental health records in neglect and abuse cases).

<sup>136</sup> The United States Supreme Court actually identified as one of the distinct features of the juvenile court system being "shielded from publicity." *Kent v. United States*, 383 U.S. 541, 556 (1966). Today, of course, many previously closed juvenile court proceedings are open to the public. See Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520 (2004) (arguing against both legal and illegal disclosure of delinquency records to preclude basic public services in education and housing); Susan Harris, *Open Hearings: A Questionable Solution*, 26 WM. MITCHELL L. REV. 673 (2000) (arguing against the opening of juvenile hearings); Stephan E. Oestreicher, Jr., Note, *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VAND. L. REV. 1751 (2001); Cheri Panzer, *Access to Juvenile Court Proceedings*, 18 J. JUV. L. 209 (1997) (arguing that the Federal Juvenile Delinquency Act, 18 U.S.C. §5031-42 (2000), does not violate the First Amendment nor common law right of access to the public to juvenile court proceedings because it does not mandate closure of juvenile court proceedings).

<sup>137</sup> See David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555 (2004).

<sup>138</sup> See Jo Anne Sirey et al., *Perceived Stigma As a Predictor of Treatment Discontinuation in Young and Older Outpatients with Depression*, 158 AM. J. PSYCHIATRY 479 (2001).

<sup>139</sup> See Daniel B. Kessler, *Atkins v. Virginia: Suggestions for the Accurate Diagnosis of Mental Retardation*, 43 JURIMETRICS J. 415 (2003).

<sup>140</sup> Winick documents the powerful stigma associated with children labeled mentally retarded or mentally ill:

Labeling people as mentally retarded imposes a "shattering stigma," impairing their educational and occupational opportunities and dominating every aspect of their lives. The severe social disadvantages of labeling people as mentally ill or mentally retarded are

client's lack of competency may simply be erroneous. The client may be nervous while communicating with counsel, and this may manifest in ways that make the attorney suspicious about the client's competency. The client may have serious reservations of raising the issue due to concern over the side effects of the antipsychotic medications administered to "restore" the client's competency.<sup>141</sup> In any event, a client's decision not to raise competency may be rational<sup>142</sup> and have no bearing on the client's ability to make "adequately considered decisions in connection with [the] representation."<sup>143</sup>

Assuming that the client is unable to articulate some rational thought about not wanting to raise competency as part of the defense, counsel must still determine whether the client's decision-making is somehow "impaired."<sup>144</sup> There is a certain degree of latitude afforded clients charged with criminal charges whereby the criminal defense counsel may not agree with the client's decisions, but the attorney will respect the client's autonomy.<sup>145</sup> Somehow, this situation must be differentiated from the case where the attorney genuinely believes the client is unable to make a good decision because of some objectively identifiable impairment.<sup>146</sup>

Assuming that the attorney does believe that the client's ability to make adequately considered decisions in connection with the representation is impaired,<sup>147</sup> the attorney then must "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."<sup>148</sup> This language

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augmented when the individual also is labeled *incompetent*, thereby confirming general stereotypes about mental disability and providing a further rationalization for the deprivation of social, occupational, and educational opportunities.

Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 12 (1995) (emphasis in original) (footnote omitted). See also Steven H. Miles, *A Challenge to Licensing Boards: The Stigma of Mental Illness*, 280 JAMA No. 10, 930 (1998).

<sup>141</sup> See Kathy Swedlow, *Forced Medication of Legally Incompetent Prisoners: A Primer*, 30 HUM. RTS. 3 (2003) ("The process of competency restoration is hardly easy: the drugs most often at issue in the forced medication cases—antipsychotic drugs—have substantial and debilitating side effects." *Id.* at 4.).

<sup>142</sup> See Joanne R. Propst, *Restoring Competency: Does the State Have the Right to Force Anti-Psychotic Medications on the Mentally Ill Pretrial Detainee?*, 49 DRAKE L. REV. 147 (2000).

<sup>143</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2001).

<sup>144</sup> See Ronald Schouten, *Commentary: Training for Competence—Form or Substance?* 31 J. AM. ACAD. PSYCHIATRY & L. No. 2, 202 (2003) (criticizing the practices of "competency restoration programs" which overlook the ability of the individual to meaningfully participate in the trial process).

<sup>145</sup> See Uphoff & Wood, *supra* note 119, at 45–51.

<sup>146</sup> Poythress et. al., *supra* note 16.

<sup>147</sup> This is an interesting limitation in the old ethics rule. Should the client reveal a penchant for poor judgment, such decisions must somehow bear some connection to the actual representation in order for the rule to be applied. If the client's poor judgment or inability to make decisions center on his inability to decide whether to order a ham or turkey sandwich for lunch, then in all likelihood, the rule's provisions can not be invoked. Whereas, if the client's decision is linked to the representation, and if it somehow displays the client's impairment, then the rule comes into play. It would appear that the rule is designed to afford counsel a great deal of discretion when determining that the client's decision-making is both related to the representation and is impaired. If the client reaches the same result as counsel, but for different reasons, would this usher in application of the ethics rule? Assume that the attorney determines that competency should be raised because the client speaks in "tongues" whenever responding to questions from counsel. Assume that the client determines that competency should be raised because his attorney's first name starts with the letter "B." Same result, different reasons.

<sup>148</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2001).

became the subject of a great deal of criticism from practitioners and scholars alike.<sup>149</sup>

Once these preconditions were satisfied, counsel then has an option. She could “seek the appointment of a guardian or take other protective action with respect to a client.”<sup>150</sup> This option could only be invoked when the lawyer reasonably believed that the client could not “adequately act in the client’s own interest.”<sup>151</sup> The appointment of a guardian was an interesting solution to the dilemma. Assuming that most court-appointed guardians would be lawyers, this solution takes the decision-making out of the hands of lawyer number one, and places it in the hands of lawyer number two. Given that most lawyers have absolutely no training in mental illness, mental retardation, or developmental immaturity, it is curious that such professionals would be selected to substitute their judgment for that of the client. It is equally curious how or why a lawyer’s substituted judgment for that of a client is somehow more reliable or valid. One must question whether other professions which offer specific training in child and adolescent development might present better candidates for substituting their judgment for that of the child client. An alternative to the use of lawyers as guardians might simply be the appointment of trained foster parents as guardians.

Overlooking these obvious limitations of the original version of M.R. 1.14, the more interesting issues involve the diminishing panoply of rights accorded the accused whose competency is challenged. If the original lawyer appointed to represent the client follows the provisions of the old M.R. 1.14, and a new lawyer gets appointed to act as a guardian, then the client’s statements to the second attorney may not be protected by attorney-client confidentiality, assuming that the second attorney is actually functioning in the same manner as a guardian *ad litem*. Guardians *ad litem* generally report to the court, so any communications between them and the accused would ordinarily not be considered confidential under M.R. 1.6.<sup>152</sup> In addition to suffering the loss of confidentiality, the client also loses control over the objectives of litigation as defined in M.R. 1.2.<sup>153</sup> Thus, by substituting one presumptively untrained attorney<sup>154</sup> for two untrained

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<sup>149</sup> See *Report of the Working Group on Determining the Child’s Capacity to Make Decisions*, 64 *FORDHAM L. REV.* 1339 (1996). See also Peters, *supra* note 2.

<sup>150</sup> MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (2001).

<sup>151</sup> *Id.*

<sup>152</sup> Confidentiality as it is recognized as an evidentiary lawyer-client privilege dates back at least to the time of Elizabeth I, being cited in English cases dating from 1577 through 1693. See 8 *WIGMORE, EVIDENCE* § 2290, at 542 (McNaughton rev., Little, Brown and Co. 1961) (1904).

<sup>153</sup> M.R. 1.2.: MODEL RULES OF PROF’L CONDUCT R. 1.2. (2003).

<sup>154</sup> The use of the term “untrained” attorney is not meant to be derogatory. Rather, it is meant to recognize that attorneys for the most part have no professional training in child developmental behavior or developmental stages. Additionally, attorneys generally have no professional training in mental health issues or in the recognition of client mental health problems. Of course, many attorneys are parents and thereby have first hand experience in dealing with children, but perhaps not with children suffering from mental illness, mental retardation, or other competency related problems. Additionally, some other attorneys do have specialized training in other disciplines, such as child psychologists who are also attorneys, or social workers who are also lawyers, but these professionals are relatively small in number.

attorneys to substitute judgment and decision-making autonomy for the client, the old M.R. 1.14 actually reduced the rights and protections ordinarily recognized in an attorney-client relationship.

Consider these additional consequences under the language of old M.R. 1.14. Counsel has a guardian appointed because the attorney believes that the juvenile client is “impaired.” Once the guardian receives the appointment, the juvenile consults with the guardian and asks what the legal options would be if the issue of competency is raised. The guardian advises the juvenile of all possible consequences under the appropriate state statute, but the guardian develops an opinion that the juvenile is actually competent, based on the way the juvenile is able to communicate with the guardian. Following this discussion, the judge asks the guardian to appear in court, and requests the guardian’s opinion of whether the juvenile’s competency should be raised. Because the guardian is functioning as an agent of the court, the guardian owes her principal duty of allegiance to the court which appointed her.<sup>155</sup> The guardian then reveals, without the child’s consent, that the juvenile inquired about the ramifications of broaching the competency issue. The guardian freely discloses her impressions to the court without requiring informed consent or permission from the client.<sup>156</sup> The judge then decides that the juvenile is using the competency issue as a ploy or as a defense strategy. The judge might determine that the competency issue lacks merit because it is simply a strategic move by the defense.<sup>157</sup> Additionally, any discussion between the juvenile and the guardian may be disclosed to the court. If the juvenile is to be tried as an adult with the right to a jury trial, the impact of disclosing statements made by the accused directly to the judge can at least be minimized to some degree. However, because of the United States Supreme Court’s decision in *McKeiver v. Pennsylvania*<sup>158</sup> to not extend the Sixth Amendment right to jury trials to juvenile proceedings, if the juvenile is to be tried as a juvenile before the judge alone, then no buffer exists when the juvenile’s questions and statements are revealed to the court.<sup>159</sup>

This scenario is the result of the conflicting duties owed to the court and the ethical rules which govern licensed attorneys. Comment 2 to M.R. 1.6 indicates that:

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<sup>155</sup> See Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1823 (1996).

<sup>156</sup> The doctrine of “informed consent” has received extensive discussion in the context of medical decision-making by patients and disclosures by health care providers to patients to facilitate treatment. See JESSICA W. BERG ET AL., *INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE* (2d ed. 2001).

<sup>157</sup> For a proposal to establish a new evidentiary privilege applicable to guardians *ad litem*, see Roy T. Stuckey, *Guardians Ad Litem As Surrogate Parents: Implications For Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785 (1996).

<sup>158</sup> *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

<sup>159</sup> See generally Kerrin C. Wolf, Note, *Justice By Any Other Name: The Right to a Jury Trial and the Criminal Nature of Juvenile Justice in Louisiana*, 12 WM. & MARY BILL RTS. J. 275 (2003) (arguing that the Louisiana Supreme Court and the rest of the nation should reconsider the place of juries in juvenile proceedings following the State ex rel. D.J. decision).

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.<sup>160</sup>

Whatever trust might otherwise develop would surely be in jeopardy when the client who is thought to lack competence begins communicating with an attorney who is now functioning more as a conduit of information directly to the court rather than as the client's legal counselor and advisor.

#### B. APPLYING THE PROVISIONS OF THE NEWLY AMENDED M.R. 1.14

Some have argued that the amendments to the old M.R. 1.14 are more changes in form rather than substance, and the application of the new rule produces the same "murky result" as the old rule.<sup>161</sup> While this may well be the case in some contexts, it is difficult to know how the language of the new version of M.R. 1.14 will be applied in the routine handling of child client cases. The titular heading of the old rule, "Client Under a Disability" has been changed to "Client with Diminished Capacity." This seemingly innocuous language should resonate with the many child advocates who argued that the old legal ethics provision appeared to equate childhood with some form of debilitating disease or condition. The new rule reads as follows:

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

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<sup>160</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 2 (2003).

<sup>161</sup> See James D. Gallagher & Cara M. Kearney, *Representing a Client With Diminished Capacity: Where the Law Stands and Where It Needs To Go*, 16 GEO. J. L. ETHICS 597, 600 (2003).

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.<sup>162</sup>

It should be noted that in addition to this new language in the ethics rules, individual state procedural rules defining juvenile competency have many variations, so the combination of state statutory definitions of competency must be relied upon when counsel looks to the new ethics rule.<sup>163</sup>

The old language of M.R. 1.14 required the lawyer first to examine whether the client's ability to make adequately considered decisions was "impaired," whereas the new language requires focus on whether the client's "capacity" (rather than "ability") to make adequately considered decisions is "diminished." The old impairment language created a great deal of controversy for child advocates. Would minority in and of itself result in such "impairment" in decision-making, or would some minors be capable of making adequately considered decisions while other minors could not? The MacArthur juvenile competency study suggests as much by comparing the decision-making of minors involved in state juvenile systems with the decision-making of adults deemed to be not competent to stand trial.<sup>164</sup> By eliminating the "impairment" requirement, and by introducing the diminished capacity language, a new standard has been adopted. No longer must the client suffer some form of "impairment." Thus, a developmentally immature client<sup>165</sup> might fall within the new language of M.R. 1.14 although the client suffers no impairment of any sort.<sup>166</sup> The newly adopted language might thus create even greater latitude for practitioners seeking to engage in more paternalistic roles as counsel for children.

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<sup>162</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14 (2003).

<sup>163</sup> See Kellie M. Johnson, Note, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L. J. 1067 (2006).

Perhaps the most contentious issue within juvenile competency legislation is the determination of *what* constitutes an acceptable cause of juvenile incompetency. Some states require incompetency to be the result of a mental illness or mental retardation, while other states do not even mention those disorders in their juvenile competency provisions. These discrepancies illustrate the difficulty in determining the etiology of juvenile incompetency. . . . Some state statutes allow for incompetency to be based solely on age or developmental immaturity, but other states expressly maintain that these factors should not be taken into consideration.

*Id.* at 1085 (emphasis in original).

<sup>164</sup> See The MacArthur Study, *supra* note 15.

<sup>165</sup> See *id.* at 356 ("[J]uveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding. . . . [A]pproximately one third of 11- to 13-year-olds, and approximately one fifth of 14- to 15-year-olds are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial.").

<sup>166</sup> See Robert E. Shepherd, Jr., *The Relevance of Brain Research to Juvenile Defense*, 19 CRIM. JUST. 51 (2005).

Although this suggests a different outcome from what might have been anticipated under the old M.R. 1.14 language, the results might be the same. For instance, if under the old M.R. 1.14 counsel believed the client suffered some impairment which impacted the client's decision making ability, counsel could move for appointment of a guardian who would be legally entrusted with making all decisions on behalf of the "impaired" client.<sup>167</sup> The client would thus lose much, if not all, autonomy in legal decision-making.<sup>168</sup> The new language of M.R. 1.14 creates a number of options available to counsel when the client's "capacity" to make decisions is "diminished." Note that the client need not be incapable of decision-making, just that the client's capacity to make decisions be diminished. The options in the new M.R. 1.14 include the lawyer taking "reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian."<sup>169</sup>

In the case where counsel believes that a client's capacity to make adequately considered decisions concerning raising the issue of the client's competency is diminished, then counsel today has a number of ethical options. Counsel may "take reasonably necessary protective action."<sup>170</sup> One might argue that such language includes the prospect of raising the client's competency as an issue in a criminal or delinquency case. Counsel might view the prospect of obtaining mental health care for the client as a "protective action," especially when the other options would be to not raise competency, to not obtain mental health care, and to not provide the client with medication or therapy. Of course, the options are not mutually exclusive. One might elect not to challenge competency, but to strive to obtain mental health care services for the client nonetheless. Additionally, counsel might seek to obtain medication for the client without challenging the client's competency. Although these options are not mutually exclusive, by pursuing one of them without alerting the legal system to the client's mental health needs, counsel may foreclose the introduction of relevant and significant information which may change the outcome of the client's case.

Under the old M.R. 1.14, once a client had a guardian appointed, theoretically all decision-making autonomy would be turned over to the guardian.<sup>171</sup> Additionally, depending on the state statute defining the role of the guardian, the client's communications, at least those with the guardian,

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<sup>167</sup> For a discussion of the biological basis of adolescent behavioral strategies, see Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REV. 417 (2000).

<sup>168</sup> For a discussion of the role of guardians *ad litem* and the conflicts such guardians have when they are also attorneys at law, see Stuckey, *supra* note 157.

<sup>169</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2003).

<sup>170</sup> *Id.*

<sup>171</sup> One author identified Prof. Geoffrey Hazard, who helped adopt the new M.R. 1.14, as explaining the rationale behind M.R. 1.14: "We thought there should be recognition that a lawyer had special responsibility when the client could not exercise the normal decision-making functions of ordinary clients. We did not want to require that a lawyer seek appointment of a guardian. Accordingly, it was necessary to formulate an intermediate position." Laffitte, *supra* note 9, at 313.



might no longer be accorded the protections of attorney-client communications as defined in M.R. 1.6, the confidentiality rule.<sup>172</sup> The result might be that the client's questions and musings in the presence of the guardian could be disclosed to the prosecution as well as to the court. Given that most of the legal proceedings involved with delinquency cases are to be tried by the court alone, and not subject to determination by juries,<sup>173</sup> the consequences of such communications by juveniles could turn out to be quite risky, if not costly.

The new M.R. 1.14 suggests that additional options may be considered and are available to counsel prior to resorting to appointment of a guardian. Under the new language, counsel may decide that protective action could be taken without asking the court to appoint a guardian.<sup>174</sup> Thus, counsel might raise the client's competency, but not have a guardian appointed. Under this scenario, the client's communications to counsel remain protected by M.R. 1.6.<sup>175</sup> The client's statements need not be disclosed to the opposing counsel or to the court. Thus, the more traditional protections found in M.R. 1.6's confidentiality provisions remain undisturbed.<sup>176</sup>

<sup>172</sup> The old confidentiality rule, M.R. 1.6, was amended by the ABA House of Delegates in August, 2002, but later amended again in August 2003 to read as follows:

Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

<sup>173</sup> See Sandra M. Ko, Comment, *Why Do They Continue to Get The Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 AM.U. J. GENDER SOC. POL'Y & L. 161 (2004).

<sup>174</sup> MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2003).

<sup>175</sup> See generally Karen L. Ross, *Revealing Confidential Secrets: Will It Save Our Children?* 28 SETON HALL L. REV. 963 (1998).

<sup>176</sup> Even though the confidentiality rule appears to restrict lawyers from revealing confidential client disclosures, the comments to the rule identify situations where disclosures adverse to the client's interests would be permitted. Comment 6 to M.R. 1.6 cautions:

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to

Yet another option now provided in new M.R. 1.14 includes discussions with “individuals or entities that have the ability to take action to protect the client . . . .”<sup>177</sup> One might logically assume that this group of people includes the client’s family members, treating physicians, therapists, teachers, and other concerned adults (or other minors for that matter) who are able to assist in protective actions designed to help the client.<sup>178</sup> By opening the door to “entities” that have the ability to protect the client, it may be that hospitals, clinics, state and private mental health providers, self-help groups such as Alcoholics Anonymous, Alateen, and Narcotics Anonymous,<sup>179</sup> and perhaps even the court itself may be included in this group. Thus, it may be that counsel need not be the only concerned adult to initiate some action designed to help the client under this new rule. However, it is difficult to understand how confidentiality would be maintained if a third party, such as a 12-step self-help program, becomes involved in providing services designed to help protect the client in some manner.<sup>180</sup>

The amended version of M.R. 1.14 might encourage client communications with third parties that counsel finds too risky to allow. For instance, assume that the client suffers from early onset schizophrenia,<sup>181</sup> is not medicated, but does engage in communications with M.R. 1.14-sanctioned third parties about the pending charges. The disclosures made to third parties might become the focal point at trial (assuming the case eventually is set for adjudication or trial) and if counsel does not prevent such communications from occurring, counsel may inadvertently help supply evidence to the detriment of the client’s defense. Such inaction by counsel might foreseeably result in the filing of a writ of habeas corpus based on the lawyer’s ineffective assistance, a civil action against the lawyer for malpractice, or both. Such results might not occur with a high

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prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.

MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. 6 (2003).

<sup>177</sup> MODEL RULES OF PROF’L CONDUCT R. 1.14(b) (2003).

<sup>178</sup> See generally Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosure of Client Communications*, 27 J. MARSHALL L. REV. 617 (1994).

<sup>179</sup> See John F. Kelly & Stephen W. Tracy, *Relapse Prevention for Substance Use Disorders: Adapting the Adult-Based Paradigm for Youth*, in HANDBOOK OF MENTAL HEALTH INTERVENTIONS IN CHILDREN AND ADOLESCENTS: AN INTEGRATED DEVELOPMENTAL APPROACH 704 (2004).

<sup>180</sup> See Phyllis Coleman, *Privilege and Confidentiality in 12-Step Self-Help Programs*, 26 J. LEGAL MED. 435 (2005). See also *Cox v. Miller*, 296 F.3d 89 (2d Cir. 2002), cert. denied, 537 U.S. 1192 (2003) (the Supreme Court denied certiorari following the Second Circuit’s decision denying application of confidentiality and privilege to disclosures made at a twelve-step Alcoholics Anonymous meeting when Cox asserted the cleric-congregant privilege to his confession to several AA members that he had killed two people four years earlier).

<sup>181</sup> See Pauline Lee et al., *Early-Onset Schizophrenia in Children With Mental Retardation: Diagnostic Reliability and Stability of Clinical Features*, 42 J. AM. ACAD. CHILD & ADOLESC. PSYCHIATRY 162 (2003).

degree of frequency because of the difficulties involved in identifying lawyers willing to provide representation to juveniles charged with delinquency and criminal misconduct, however, these are legal actions which juveniles may be entitled to initiate even if the identification of available counsel to file them presents challenges.<sup>182</sup>

In cases where the client does not wish competency to be raised, but where counsel believes strongly that waiving the competency issue would only be done by a person with diminished capacity to make adequately considered decisions in connection with the representation, the new M.R. 1.14 recognizes some courses of action not previously available under the old ethics regime. Under the old rule, counsel would first attempt to establish the same type of relationship with the impaired client as would exist with an unimpaired client. In the event that counsel was unable to accomplish this, then the only option was to request the appointment of a guardian. Under the amended version of M.R. 1.14, individuals or entities other than the attorney are allowed to play a role in counsel's attempt to provide representation to the client. This approach creates some new options for counsel, but it is not altogether without pitfalls of its own.

If a group therapy service, for instance, becomes the "entity" of choice to assist the client with the diminished capacity, then attorney-client confidentiality may be limited to communications between the lawyer and the client, and such confidentiality would not necessarily extend to any disclosures made during the group therapy sessions. Although a physician or licensed therapist may owe a duty to maintain confidentiality of patient disclosures<sup>183</sup> under landmark cases such as *Jaffee v. Redmond*,<sup>184</sup> the other patients present during such sessions would ordinarily owe no similar duty of confidentiality to the client. As such, although the new M.R. 1.14 identifies additional resources for attorneys seeking assistance when representing clients with diminished capacity, the rule does not ensure that the resources would be bound to the same duty of care or the ethical obligations owed by counsel to the client.

Such group services are resources likely to be considered in many instances given the very limited mental health services for juveniles in many communities. Group therapy has become a more economical means of providing some form of mental health service for juveniles and

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<sup>182</sup> Additionally, it is believed that many malpractice cases never get reported because of nondisclosure pacts which lawyers enter into as a precondition when a malpractice action is settled without resort to litigation. It is therefore difficult to quantify the frequency of such actions being brought against members of the legal profession. See generally Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583 (1996).

<sup>183</sup> See generally Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1 (2000); Christopher B. Mueller, *The Federal Psychotherapist-Patient Privilege After Jaffee: Truth and Other Values in a Therapeutic Age*, 49 HASTINGS L. J. 945 (1998).

<sup>184</sup> *Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing patient-psychotherapist evidentiary privilege in federal proceedings).

indigents,<sup>185</sup> and although such services may be directed by social workers, psychologists, or psychiatrists who might have a confidential relationship with the client, because of the presence of other patients and nonprofessionals, the client should be warned that any disclosures made in such settings might not be considered confidential. In many self-help organizations such as Alcoholics Anonymous, Alateen, and Narcotics Anonymous, in many sessions no licensed professionals may be present to direct or control the meeting,<sup>186</sup> and thus the parties in attendance are under no professional or licensure-required duty to maintain the confidentiality of disclosures made during the meetings or sessions. Of course, as long as the client is aware that any disclosures made during such sessions would not be treated in the same manner as disclosures made to an attorney, therapist, psychiatrist, or psychologist, then the client has assumed whatever risk attaches to making public disclosures.<sup>187</sup>

Also in stark contrast to the workings of old M.R. 1.14, the new language makes clear that any disclosures of information from the client enjoys the protections of M.R. 1.6. This protection, however, is limited to the communications between the attorney, including the agents of the attorney, and the client. Thus, the combined impact of the evidentiary attorney-client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics rules would protect the communications between the client and counsel when considering whether or not to raise client competency.<sup>188</sup>

Recall the scenario described earlier where counsel has a guardian appointed and the judge determines the competency issue is a ploy.<sup>189</sup> Such a result could be minimized under the new language of M.R. 1.14 because of the adoption of the confidentiality rule. Of course, it would also help for states to individually adopt confidentiality rules applicable to guardians who also hold professional licenses which recognize confidentiality as a component of their professional service obligation, including, but not limited to, attorneys, psychotherapists and mental healthcare providers, clergy, and other professions designated by state evidentiary laws as privileged communicators, and by professions which recognize ethical duties of confidentiality owed to their clients and patients.

Many of these juvenile clients charged with delinquencies and criminal offenses live below the federal poverty line and are impoverished.<sup>190</sup> As

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<sup>185</sup> See Joanmarie Ilaria Davoli, *No Room at the Inn: How the Federal Medicaid Program Created Inequities in Psychiatric Hospital Access for the Indigent Mentally Ill*, 29 AM. J. L. & MED. 159, 162 (2003).

<sup>186</sup> See PHILIP P. MUISENER, UNDERSTANDING AND TREATING ADOLESCENT SUBSTANCE ABUSE 110 (1994). See generally RELAPSE PREVENTION, MAINTENANCE STRATEGIES IN THE TREATMENT OF ADDICTIVE BEHAVIORS (G. Alan Marcatt & Dennis M. Donovan eds., 2d ed. 2005).

<sup>187</sup> See Coleman, *supra* note 180.

<sup>188</sup> Comment 3 to the new M.R. 1.6 recognizes these three sources giving rise to the principle behind confidentiality of information relating to the representation of a client. MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. 3 (2002).

<sup>189</sup> See *supra* Part IV.A.

<sup>190</sup> According to the Annie E. Casey Foundation:

such, the majority of attorneys handling these cases are likely to be public defenders. In those cases where private defenders are available, counsel may depend upon third parties for payment of legal fees. Some of these third parties will likely be family members, legal guardians, and, in some instances, organizations which are providing support services already to the client. As one scholar has noted:

Potential financial difficulties may add another layer of issues . . . . Many prospective disabled clients are poor or lack control over their assets; as a result, lawyers will often look to third-parties for payment. But those third parties . . . may have interests that conflict or at least diverge in some respects from those of the person with mental disabilities. Thus, the ethically sensitive lawyer faces complex issues in deciding what duties are owed the disabled client. When such clients have difficulties articulating personal interests, the lawyer must consider the allocation of responsibilities between disabled clients, their organizations, their friends and other personal representatives, and the lawyer herself.<sup>191</sup>

Thus, the additional resources identified under the new language of M.R. 1.14 may not resolve all existing ethics issues. In fact, the language may have created new ethical quagmires for counsel to attempt to avoid.

## V. SOME PROPOSALS

Some of the problems identified in this piece may require no remedy. As states adopt the newly revised language of M.R. 1.14, it may be that the process of using third party resources to help influence the decision-making of clients thought to be impaired or not competent will resolve itself satisfactorily. However, in those cases where family members, treating physicians, and psychotherapists are unable to dissuade juvenile clients from making poor judgments and decisions, some alternative approaches may help resolve these issues.<sup>192</sup>

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This sizeable and growing population of poor families remains entirely disconnected from employment. In 2004, almost 4 million American children lived in low-income families where neither their parent(s) nor any other adult in the household worked at all in the past year. U.S. Census Bureau data show that during the late 1990s, as new welfare work rules took effect and the economy surged, the number of children living in non-working, low-income families dropped considerably. But since then, largely unacknowledged by policymakers or the media, the figure has been rising. Between 2000 and 2004, the number of children in low-income households where no adult worked grew from 2.9 million to 3.9 million. One million of these children live in the suburbs, and 600,000 live in rural America.

KIDS COUNT DATA BOOK 6 (The Annie E. Casey Foundation eds., 2005).

<sup>191</sup> Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 614–15 (1990).

<sup>192</sup> See generally Jodi L. Viljoen, Jessica Klaver & Ronald Roesh, *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 LAW & HUM. BEHAV. 253 (2005).

Under a criminal process that allows the court or prosecution to raise competency issues, the only party with any ethical constraints according to the Model Rules is the defense counsel, not the court or the prosecution. It may be that state ethics codes should be upgraded to include provisions which apply to all lawyers who seek to make an issue of the competency of a juvenile charged in a criminal or delinquency case.<sup>193</sup> However, there are other alternatives to crafting such ethics rules.<sup>194</sup>

Recall that approximately twenty states' criminal procedures presently allow defense counsel, judges, and prosecutors to raise the issue of competency. Much consideration should be given to at least altering such criminal procedures.<sup>195</sup> When a judge is in a position to both challenge a juvenile's competency and to ultimately decide the question of whether the juvenile is competent to proceed, at the very least, such procedures should mandate that once a judge broaches the issue, he or she should be subject to recusal from the case.<sup>196</sup> While recusal may be easily achieved in large jurisdictions with dedicated juvenile courts, such a process may become burdensome in rural communities and in jurisdictions which lack courts dedicated to handling only juvenile cases.<sup>197</sup> Nevertheless, recusal of the judge helps to ensure fairness of the proceedings for the accused juvenile.

Given that the judge has no attorney-client relationship with the juvenile, it is difficult to appreciate the circumstances under which the judge would be communicating with the juvenile *ex parte*.<sup>198</sup> Controversial disciplinary hearings before judicial boards of conduct may result from such *ex parte* communications between the judge and the represented party or the party's attorney.<sup>199</sup> Given that the juvenile is presumptively charged with a delinquency or criminal offense, such *ex parte* communications

<sup>193</sup> It seems that such an ethics rule would be quite cumbersome as the prosecution and court have no attorney-client relationship with the juvenile. It is difficult to understand why only defense counsel should work within the parameters of the ethics code when competency becomes an issue. One alternative might be to completely remove all provisions from the state ethics code, and to handle this process as a matter of state statutory law. Because the enforcement of ethics violations by attorneys is at best sketchy when infractions do not involve misconduct with client funds, one might reasonably anticipate that enforcement of M.R. 1.14 would be somewhat lax.

<sup>194</sup> One such alternative might be the complete elimination of any references to the representation of juveniles in current ethics codes. Another alternative might be the creation of special ethics codes tailored to the representation of juveniles. Such efforts have resulted in the drafting of ethics codes for lawyers who represent children in dependency (abuse and neglect) cases by the National Association of Counsel for Children, and by the ABA. See David R. Katner, *Coming to Praise, Not to Bury the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103 (2000).

<sup>195</sup> See Buss, *supra* note 84.

<sup>196</sup> See *Authority of the Trial Judge*, 35 Geo. L. J. Ann. Rev. Crim. Proc. 553 (2006).

<sup>197</sup> For a general discussion of methods to improve judicial recusal practices in courts, including the United States Supreme Court, that suggest written reasons for decisions and subjecting recusal decisions to review, see Timothy J. Goodson, Comment, *Duck, Duck, Goose: Hunting for Better Recusal Practices in the United States Supreme Court in Light of Cheney v. United States District Court*, 84 N.C. L. REV. 181 (2005).

<sup>198</sup> See Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431 (2004).

<sup>199</sup> See Abraham Abramovsky & Jonathan I. Edelstein, *Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, or Do They Constitute a Threat to Judicial Independence?*, 33 FORDHAM URB. L. J. 727 (2006) (discussing the 2004 case against Kings County Supreme Court Justice Gerald Garson of New York charged with "acting criminally by conducting improper *ex parte* communications and by accepting fees for referring unrelated cases to a private attorney").

appear to run counter to the *Gault* rationale,<sup>200</sup> let alone Canon 3(B)(7) of the ABA Code of Judicial Conduct.<sup>201</sup> However, it may be that in jurisdictions which allow, and in some cases encourage, juveniles to waive counsel in delinquency adjudications, that the court may find itself in a position to speak directly with the accused juvenile rather than with the juvenile's legal representative.<sup>202</sup> By crafting a procedure that continues to allow the court to raise the competency issue, but then requires the court to recuse itself in compliance with the ABA Model Code of Judicial Conduct Canon 3(E)(1)(a),<sup>203</sup> and refer the case on the merits to a different court, the juvenile's communications in the absence of counsel would generally not be known by the ultimate trier of fact (unless the judges elect for some reason to communicate with one another about the case privately).

In the alternative, if judges are to be allowed procedurally to raise the issue of the juvenile's competence, then it would be appropriate to adopt a special ethics rule which governs the court's use of discretion in such circumstances.<sup>204</sup> It seems fitting that if defense counsel should be forced to comply with an ethics rule restricting options in the representation of a client, then similar restraints should apply to judges as well. Prohibiting any private communications between judges following recusal of one of the judges would not be inappropriate.<sup>205</sup> Prohibiting communications by a judge directly with the juvenile rather than with the juvenile's counsel, other than under the most exceptional circumstances, would also be appropriate.<sup>206</sup> It must be stressed that these are juveniles whose

<sup>200</sup> *In re Gault*, 387 U.S. 1 (1967) (Supreme Court relied on the Fourteenth Amendment Due Process Clause in granting juvenile defendants a constitutional right to counsel).

<sup>201</sup> The Model Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association in August 1990, and amended in August, 2003. Canon 3 (B)(7) states:

A judge shall accord to every person who has a legal interest in a proceedings, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . .

MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990).

<sup>202</sup> See Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577 (2002) ("Studies report that more than one-half of children accused of criminal acts appear in juvenile court without counsel and enter pleas to crimes they may or may not have committed." *Id.* at 580.).

<sup>203</sup> The Model Code of Judicial Canon 3(E)(1)(a) provides:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:  
(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.

MODEL CODE OF JUDICIAL CONDUCT Canon 3(E)(1)(a) (1990).

<sup>204</sup> For a discussion of media and bar polls used as methods to evaluate and hold judges accountable, see Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L. J. 1053, 1064–66 (2002).

<sup>205</sup> See Miller, *supra* note 198.

<sup>206</sup> Some would argue that Canon 3(B)(7) of the Model Code of Judicial Conduct already creates just such a prohibition:

competence is in question, and whose cases may be decided by the same judge, or the same judge may be sitting for the decision whether to transfer the case from the juvenile system into the adult criminal system. Additionally, scholars note the importance of the trial judge's role in these proceedings because "[a]ppellate courts rarely review and almost never reverse trial court decisions regarding defendants' competence to proceed."<sup>207</sup> Most importantly, the juvenile's Fifth Amendment privilege against self incrimination would become meaningless if the trier of fact were allowed to discuss issues directly with the accused without the benefit of counsel.<sup>208</sup>

Finally, if prosecutors are to be allowed to raise a juvenile's competency as well, then yet another ethics rule should be adopted to create some parameters for the exercise of such discretion.<sup>209</sup> Although some have argued that prosecutors are part of the judicial branch of government,<sup>210</sup> the Supreme Court has recognized that prosecutors are not.<sup>211</sup> These attorneys are already enshrouded with the power to decide what charges to bring against the juvenile,<sup>212</sup> whether to bring the case in juvenile or adult court systems,<sup>213</sup> and then additionally they enjoy the ability to challenge the competency of the accused. Once again, it is unclear why only defense counsel should have an overriding ethics rule governing decisions and options in the application of a defense, but no similar ethics rules apply to either the court or the prosecutor.<sup>214</sup>

The more propitious remedy would be to eliminate the ability of the judge and the prosecutor to challenge the juvenile defendant's competency.<sup>215</sup> Consider the blurring that occurs in the respective roles of

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[A] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . .

MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(7) (1990).

<sup>207</sup> See Poythress et al., *supra* note 16, at 41.

<sup>208</sup> See Christopher Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 EMORY L. J. 71 (1982).

<sup>209</sup> See generally Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337 (2004).

<sup>210</sup> See William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989) (crafting a historical argument for considering the prosecution as both executive and judicial). *But see* Saikrishna B. Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521 (2005) (arguing that historically the President retained full control over the office of the federal prosecutors. *Id.* at 546-65.).

<sup>211</sup> See *Morrison v. Olson*, 487 U.S. 654 (1988) (prosecution is a power of the executive branch. *Id.* at 691.).

<sup>212</sup> For a general discussion of the power of the prosecutor in the federal system to exercise prosecutorial discretion in charging decisions with virtually no public scrutiny, see Harry Litman, *Pretextual Prosecution*, 92 GEO. L. J. 1135 (2004).

<sup>213</sup> See Lisa M. Flesch, *Juvenile Crime and Why Waiver is Not the Answer*, 42 FAM. CT. REV. 583 (2004); Kelly M. Angell, Note, *The Regressive Movement: When Juvenile Offenders are Treated as Adults, Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125 (2004).

<sup>214</sup> See generally Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21 (2003).

<sup>215</sup> See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (discussing the problems and consequences of executive and legislative branches allying themselves with one another as members of a common party. *Id.* at 952-58.).



the professionals involved in criminal justice once the door to competency swings open at anyone's request. The judge who functions as the objective fact finder is now functioning as advocate for the accused. The judge may be able to both raise the issue and to rule on it all in one swift setting.<sup>216</sup> The prosecutor who serves as the representative of the people in enforcing the criminal and delinquency laws is now focusing on what she believes is in the best interest of the person accused of violating the law in the first place.<sup>217</sup> An even more interesting issue is raised when the judge or prosecutor raises the juvenile's competency over the express objection of the juvenile or the juvenile's defense counsel.

An equally important issue is the practice of a prosecutor in a jurisdiction which allows prosecutorial waiver of juveniles into adult courts both raising the juvenile's competency and then subsequently transferring the case to the adult criminal court system should the juvenile be found competent to stand trial. The prosecutor might seek to introduce the testimony of the mental health evaluators at some stage in the adult criminal trial, perhaps during the trial on the merits or during the sentencing stage, should a verdict be returned allowing such testimony in the record.<sup>218</sup> However infrequently the judge or the prosecutor might actually challenge juvenile competency, the procedure itself appears to be inappropriate and results in shifting the roles of the various professionals in criminal justice systems.<sup>219</sup>

The next issue meriting consideration is the appointment of licensed attorneys as guardians *ad litem* in delinquency and criminal cases.<sup>220</sup> Perhaps one way of avoiding the rather obvious potential ethics conflicts for this group would be to enact special legislation which exempts this group from compliance with the state legal ethics code. Thus, a lawyer appointed to report back to a judge as a guardian, rather than functioning as the actual legal representative for the juvenile client, would not be required to comply with the traditional ethics duties and obligations such as maintaining confidentiality of communications with the represented party and complying with the objectives of litigation as indicated by the client or represented party.<sup>221</sup> One must question the utility of such a legislative

<sup>216</sup> For a criticism of abuse of judicial power, see Lynn D. Wardle, *Goodridge and "the Justiciary" of Massachusetts*, 14 B.U. PUB. INT. L. J. 57 (2004).

<sup>217</sup> For a discussion of the confusion of the role of the prosecution in a different context, see Suzanne M. Jost, Comment, *Unconstitutional Delegation of Prosecutorial Discretion in Texas: The Pollution of Environmental Violation Deterrents*, 36 ST. MARY'S L. J. 411 (2005).

<sup>218</sup> See generally John D. Burrow, *Punishing Serious Juvenile Offenders: A Case Study of Michigan's Prosecutorial Waiver Statute*, 9 U.C. DAVIS J. JUV. L. & POL'Y 1 (2005).

<sup>219</sup> See M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000) (arguing that prosecutors' decisions about how to enforce a law is indistinguishable from lawmaking itself).

<sup>220</sup> See JANE KNITZER & MERRIL SOBIE, *LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN* 82-88 (1984) (over two-thirds of the appointed law guardians were given no special training and had no special interest in juvenile law, at least half were unprepared for trial, and half of the transcripts of the proceedings appeared to have errors not challenged by the children's lawyers either at trial or on appeal).

<sup>221</sup> See David Rosenthal, *The Criminal Defense Attorney, Ethics, and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct*, 6 ST. THOMAS L. REV. 153 (1993).

solution, however. If there is a compelling reason to have only lawyers functioning as guardians, then such a remedy might make more sense. However, if others, both laymen and professionals alike, are just as capable as lawyers of substituting their judgment for that of the represented client, and if the role of the guardian is not to give legal advice or representation to the juvenile, then it serves no purpose to place lawyers in the position of functioning as a parent or legal guardian for the juvenile lacking competence. Further, by eliminating lawyers from this role, it becomes unnecessary to craft a legislative reprieve from complying with the state ethics code when a lawyer serves at the court's pleasure as a guardian *ad litem*. Finally, the lawyer would then function as the child's legal representative consistent with the attorney's training and professional duties and obligations.

There may be no compelling reason for courts to appoint lawyers to function as guardians *ad litem* for children in legal proceedings. Such a practice has tremendous potential for creating confusion for attorneys forced to serve in a hybrid role wherein they have specific ethical duties under their state professional ethics codes which inherently conflict when they are asked to disclose information they have obtained from the represented party.<sup>222</sup> The conflict may be altogether avoided if courts appoint individuals who do not owe such ethical duties by virtue of their professional licensure.<sup>223</sup> Additionally, many groups of individuals other than attorneys actually have professional training to work with juveniles; for instance pediatricians, child psychologists, social workers, teachers, juvenile guidance counselors, and trained foster parents. Other people without specialized educational backgrounds in child development might be equally well qualified to serve as child guardians, such as parents, youth group workers, youth sports coaches, and child care workers. But these nonlawyer court-appointed guardians *ad litem* ("GALs")<sup>224</sup> should still make it clear when communicating with the juvenile that while their role is to communicate with the juvenile, they may also be required to disclose information to the court. If the client decides to speak with the GAL, the client should be advised that the GAL is in a position to make decisions on behalf of the juvenile much like a parent deciding what might be best for the parent's own child. There should be no confusion about the role of the GAL, the issue of loyalty, or confidentiality of communications.

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<sup>222</sup> For an excellent example of the confusion created when lawyers function as guardians *ad litem* and attorneys, see, e.g., *State v. Harrison*, 24 P.3d 936 (Utah 2001) (where a child victim in a criminal case had a guardian *ad litem* appointed who sat next to the prosecutor and asked questions of the witnesses during the trial). The Supreme Court of Utah noted "that the duties and responsibilities of a guardian *ad litem* are not always coextensive with those of an attorney representing a party in an action. While the term guardian *ad litem* is often used as a general term to mean attorney guardian *ad litem*, a guardian *ad litem* in the general sense need not be an attorney." *Id.* at 942, n.4.

<sup>223</sup> A relatively straightforward and simple solution to the conflict issues present for attorneys serving as guardians would be to appoint lay guardians rather than licensed attorneys. See Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 FAM. L. Q. 327 (1993).

<sup>224</sup> The term GAL is used in this article to refer specifically to nonlawyer guardians *ad litem*.

Nevertheless, there are at least two compelling reasons to promote the confidentiality of juvenile client communications with their counsel rather than with the guardians *ad litem* when client competency is at stake.<sup>225</sup> First, the client has a constitutional right to counsel<sup>226</sup> which is significantly impeded if counsel is functioning as a guardian *ad litem* required by law to serve as an agent of the court. Many of these clients are not among the most sophisticated or best educated, and the prospect of explaining the role of an attorney who is actually serving the interests of the court may be more than a little confusing. Consider further that the very reason a guardian appointment is under consideration is based upon the belief by the representing attorney that the client demonstrates some serious deficiency in intellect, emotional stability, judgment, mental comprehension, and/or decision-making capabilities. Second, the rationale that gave rise to separate juvenile court systems was to pursue rehabilitative models for the children in the system.<sup>227</sup> Such an objective is all but eliminated where the juvenile has no one person in whom he or she can place his or her trust, let alone communicate with privately and without fear that any disclosures will be revealed to the judge who will determine the adjudication result. Any pretense to crafting a rehabilitative system is eliminated when the juvenile senses that there is no advocate there to champion his or her cause; instead the juvenile senses that the only parties present are there for the convenience of the system, or they are present to somehow assist the court, not the child.<sup>228</sup>

The appointment of a GAL whenever counsel is unable to effectively communicate with a juvenile client<sup>229</sup> appears to resolve many problems counsel might otherwise have with an incompetent juvenile client, assuming, of course that lawyers will actually invoke and comply with such provisions in the state ethics code. This author speculates that most juvenile advocates will *not* apply the provisions of M.R. 1.14 for a number of

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<sup>225</sup> *But see* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (questioning the application of strict confidentiality rules).

<sup>226</sup> *See* Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L. J. 467, 470 (1992).

<sup>227</sup> *See* Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951 (2006):

Juvenile courts were created for the express purpose of rehabilitating offenders. Most histories of modern American juvenile justice begin in 1899, when Illinois established the first separate juvenile court for prosecuting delinquent children. Over the course of the next twenty-five years, virtually every other state adopted a similar tribunal for juveniles charged with crimes. According to the accepted history of American juvenile justice, the commitment to rehabilitation began to wane in the second half of the twentieth century, particularly after the United States Supreme Court extended many criminal procedural rights to children during the civil rights revolution of the 1960s.

*Id.* at 952-53.

<sup>228</sup> *See* Kenneth E. Meister, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants*, 11 COLUM. J.L. & SOC. PROBS. 403 (1975).

<sup>229</sup> *See* ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (2d ed. 1999); WENDY BOURG ET AL., A CHILD INTERVIEWER'S GUIDEBOOK (1999); DEBRA A. POOLE & MICHAEL E. LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE FOR HELPING PROFESSIONALS (1998).

reasons.<sup>230</sup> First, many states rely extensively on volunteers to provide legal representation to juveniles charged with delinquency offenses, while other states allow procedures for counsel to be waived by the accused,<sup>231</sup> thus creating the possibility of the accused in a serious delinquency matter not having an attorney.<sup>232</sup> Ironically, part of the legal requirement for defendants to waive their right to counsel<sup>233</sup> involves the defendant's prior experience in the court system, yet one of the nation's most respected scholars in this field has found that prior court experience bears no direct relationship to juveniles' understanding of their legal rights.<sup>234</sup> Thus, juveniles frequently waive their right to counsel even before they have ever consulted with an attorney.<sup>235</sup>

<sup>230</sup> In coming to this conclusion, the author agrees with Stanley Herr's criticism of the application of the ethics rules in cases where clients suffer from mental disabilities:

The legal profession's ethical codes have offered little guidance on how to represent a client with a mental disability. The codes permit a lawyer to be the partisan champion of her client's expressed wishes, or the benevolent protector of the client's best interests. For example, the controversy over the attorney's role in civil commitments has raged for nearly two decades between the "client-centered-expressed interests" model and the "best interests" model. But the Code of Professional responsibility and the newer Model Rules of Professional Conduct have been silent on the controversy. Indeed, the codes of the organized bar foster confusion about the lawyer's proper roles and the scope of the aid lawyers should offer clients. Exacerbated by the disabled client's poverty, physical isolation, or unusual legal problems, this lack of clear ethical guidance may lead some lawyers to shun mentally disabled clients. Even worse, such imprecision may contribute to substandard legal representation and a failure to attend to clients with mental disabilities.

Herr, *supra* note 55, at 615.

<sup>231</sup> The Supreme Court's requirements for adequate waiver of a juvenile's right to an attorney was stated in *Fare v. Michael C.*, 442 U.S. 707, 725 (1978) (requiring "inquiry into all the circumstances surrounding the interrogation . . . includ[ing] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.")

<sup>232</sup> The United States Supreme Court's test for waiving counsel requires an "examination of a multiplicity of factors to determine the validity of a waiver, including the person's age, intellectual ability, educational level, emotional or mental problems, and prior experience with the court system." Berkheiser, *supra* note 202, at 613 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

<sup>233</sup> One scholar notes that:

The crucial question, of course, is whether juveniles possess the competence to waive counsel "voluntarily and intelligently," particularly without consulting counsel. When the judges who give youths advisories seek predetermined results – waivers of counsel – they compound the problem, as this affects both what and how they inform juveniles and how they interpret their responses. Every scholar has criticized the "totality" approach to juveniles' waiver of rights for failing adequately to compensate for youths' immaturity and lack of adjudicative competence. Not surprisingly, the empirical research indicates that juveniles are not as competent as adults to waive their rights in a "knowing and intelligent" manner. Particularly for younger juveniles, their capacity to understand and waive rights is especially problematic.

Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1175–76 (2003).

<sup>234</sup> THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 194 (1981).

<sup>235</sup> See GABRIELLA CELESE & PATRICIA PURITZ, THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA 59–62 (2001) (80 to 90% of juveniles charged with delinquency offenses waive their right to counsel); PATRICIA PURITZ & KIM BROOKS, KENTUCKY: ADVANCING JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 29 (2002) ("[L]arge

Additionally, where lawyers *are* present to represent juveniles in delinquency and criminal cases, many state public defenders report that their dockets remain overloaded to such an extent<sup>236</sup> that their contact time with new juvenile clients is very limited.<sup>237</sup> By not having sufficient time to communicate with a juvenile charged with a delinquency or criminal offense, counsel may be unaware of the client's competency status.<sup>238</sup> Under any of these circumstances, it is likely that counsel faces strong disincentives to strictly apply the language of M.R. 1.14 and to request appointment of separate guardians *ad litem* in the appropriate cases, as such compliance further slows down the system and creates additional work responsibilities for the lawyers in question.<sup>239</sup> It is far more expedient for counsel to determine that the client presents no competency issues and then to go forward with the representation.<sup>240</sup> If most cases are resolved without trial, then the system functions more efficiently, and counsel can quickly move to the next matter on the docket. The only problem is that the client may not comprehend what has occurred, or the client may not have

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numbers of youth are still waiving counsel."); PATRICIA PURITZ, ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 24–25 (2002) (where 50% of juveniles are estimated to have waived their right to counsel in delinquency cases).

<sup>236</sup> The massive case loads of public defenders is beyond the scope of this article, but the ABA's response to such situations has been to advise the public defenders to take affirmative steps such as:

[To] not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation.

ABA Standing Comm. On Ethics and Prof'l Responsibility, Formal Op. 06-441 (May 13, 2006), *cited in* 79 CRIM. L. REP. 668 (AUG. 9., 2006), available at <http://www.lajusticecoalition.org/doc/ABA-Ethics-Opinion.pdf>.

<sup>237</sup> AM. BAR ASS'N JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 52–56 (1995) (the size of the reported caseloads of public defenders creates barriers from quality representation of juveniles in delinquency cases).

<sup>238</sup> According to Morrison and Anders this problem is somewhat widespread in that there are too few trained professionals to perform mental health evaluations on children suffering diagnosable mental health problems:

By some estimates, just over 20% of all children and adolescents in the United States (more than 2 million) have a diagnosable mental disorder. Many of these are serious; that is, they cause significant distress or interfere with a child's or adolescent's ability to study or to relate to family or friends. Although some young people referred for mental health evaluation do not require treatment, hardly any referral we can imagine should be regarded as trivial. . . . At present there are far too few well-trained mental health professionals to evaluate more than a small fraction of all of these potential patients.

JAMES MORRISON & THOMAS F. ANDERS, INTERVIEWING CHILDREN AND ADOLESCENTS: SKILLS AND STRATEGIES FOR EFFECTIVE DSM-IV DIAGNOSIS 1 (1999).

<sup>239</sup> This is not an endorsement from the author for counsel to disregard legal ethical duties owed to juvenile clients. It is simply a recognition of the realities of present day practice throughout the country in juvenile delinquency and criminal defense work. Without a doubt, there are many attorneys who take seriously their ethical options mapped out in M.R. 1.14, but there are so few recorded decisions either from courts of appeal or state disciplinary board hearings that one can only speculate how frequently counsel comply with the ethics rule.

<sup>240</sup> See Marvin R. Ventrell, *Rights and Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259 (1995) (stating that many attorneys do not comply with the Model Rules of Professional Conduct with child-clients *Id.* at 270.).

sufficient abilities to make rational choices<sup>241</sup> given the juvenile's developmental immaturity,<sup>242</sup> mental retardation, or mental illness.<sup>243</sup>

Even for those counsel who do attempt to comply with the provisions of M.R. 1.14, however, the question remains as to why this procedure is included in the state ethics code, rather than incorporated as part of the state code of criminal or juvenile procedure. Whenever the state code of criminal procedure is at odds with the state ethics code, such inconsistent provisions should be eliminated or made to interact in a consistent fashion.<sup>244</sup> Furthermore, if the current ethics rule resulting in appointment of guardians *ad litem* were eliminated from the ethics code and written into the code of criminal or juvenile procedure, it is much more likely that it would be enforced, or at least subject to oversight by the judicial system at the trial and appellate levels.<sup>245</sup> As it stands today, it is unclear what action could be taken against an attorney who fails to "comply" with M.R. 1.14. Would counsel be subject to disciplinary proceedings if she failed to request the appointment of a guardian?<sup>246</sup> Who would be responsible for initiating such a complaint if the rule were ignored? The client whose competency is in question, or the judge or prosecutor who themselves have the option of raising competency in so many jurisdictions?<sup>247</sup> The vagaries of this process help to ensure noncompliance with the state legal ethics code provisions.<sup>248</sup>

Because state bar disciplinary hearings generally occur in separate proceedings rather than simultaneously with the pending litigation, and

<sup>241</sup> See Elizabeth S. Scott, *Reasoning and Judgment in Adolescent Decisionmaking*, 37 VILLANOVA L. REV. 1607 (1992).

<sup>242</sup> See The MacArthur Study, *supra* note 15.

<sup>243</sup> See David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J. OF LAW & MED. 4 (forthcoming 2006).

<sup>244</sup> See Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1 (2005).

<sup>245</sup> The ethical conflicts which guardian-attorneys might face when they are functioning as nontraditional lawyers might be resolved if the state ethics code adopted a provision waiving all ethical duties to clients in situations where the attorney is functioning as an appointed guardian *ad litem* by the court. Although this author does not believe such a remedy resolves the potential confusion a juvenile client whose competency is questioned may experience, there are other theaters where conflicting ethical duties have been resolved by crafting ethics rules which supersede other ethics rules. In the case of military attorneys who must be licensed in some state to practice law under the Uniform Code of Military Justice, article 27 of the UCMJ preempts the civilian ethics rules. See C. Peter Dungan, *Avoiding "Catch-22s": Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31 (2005).

<sup>246</sup> One critic has noted that:

[A]lmost thirty years after the Clark Commission noted serious problems with the lack of uniformity in lawyer discipline, attorneys continue to be sanctioned inconsistently. Moreover, even courts that attempt to follow the ABA Standards reach inconsistent results in seemingly similar cases. This occurs for a number of reasons mainly attributable to problems with the Standards themselves.

Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM U. L. REV. 1, 37 (1998).

<sup>247</sup> See Buss, *supra* note 84 (documenting the jurisdictions which allow judges to raise the issue of a defendant's competency to stand trial).

<sup>248</sup> See generally Levin, *supra* note 246.

because many jurisdictions hold closed hearings, it is unlikely that violations of M.R. 1.14 would come to the public's attention.<sup>249</sup> If the general public is unaware that they have recourse for lawyer "misconduct,"<sup>250</sup> then it is difficult to imagine juveniles with competency problems being any better informed or better equipped to seek a remedy.<sup>251</sup> Thus, the rule remains a somewhat obscure provision in state legal ethics codes. It remains virtually unenforced, and clients with issues about competency challenges have limited information and even more limited resources to ensure any oversight of counsel's exercise of discretion when client competency is at stake.<sup>252</sup> This does not sound like a system designed to ensure protection of the rights of the represented accused, or the public's for that matter.<sup>253</sup> If the purpose of M.R. 1.14 is merely instructional, and if it is intended simply as a suggested course of action for attorneys unable to resolve competency disagreements with their clients, then the status quo is more than satisfactory.<sup>254</sup> However, if M.R. 1.14 is intended to ensure the protection of juvenile's rights and the public's, then changes must be made.

## VI. CONCLUSION

If the legal profession is truly concerned about protecting the represented public from inappropriate or misguided conduct by licensed attorneys, then provisions such as M.R. 1.14 leave much to be desired.<sup>255</sup> While the current version of the amended rule 1.14 creates new resources

<sup>249</sup> See generally Charlotte K. Stretch, *Lawyer Regulation in the 1990s: Creating a System That is More Open, Accessible, Responsive and Responsible*, 20 BAR LEADER 20, 26–27 (1995) (providing a table listing all fifty states and the District of Columbia's changes in lawyer regulation in a three to five year time range).

<sup>250</sup> The term "misconduct" is being used loosely as it is unclear under what conditions an attorney's failure to follow the recommendations of M.R. 1.14 would actually constitute reportable lawyer misconduct under Rule 8.4 of the Model Rules. See also MODEL RULES OF PROF'L CONDUCT R. 8.4 (2002).

<sup>251</sup> In discussing the goals of lawyer discipline and the purpose of sanctions and standards, Levin argues:

Three reasons are typically cited for imposing discipline on lawyers: first and foremost, protection of the public, second, protection of the administration of justice and third, preservation of confidence in the legal profession. . . . Although the traditional approach to lawyer discipline follows a quasi-criminal model, in recent years a consumer protection approach to lawyer misconduct has emerged. The latter approach recognizes that much dissatisfaction with lawyers arises from their failure to perform legal services properly—often due to neglect, incompetence, or failure to communicate with clients—and attempts to respond to these problems in a manner that addresses consumer interests.

Levin *supra* note 246, at 17–19.

<sup>252</sup> See generally William T. Gallagher, *Ideologies of Professionalism and the Politics of Self Regulation in the California State Bar*, 22 PEPP. L. REV. 485 (1995).

<sup>253</sup> See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 697 (1994) (indicating that costs, complexities in proving a case, insufficiency of assets of uninsured lawyers, and minor damage claims are among the reasons why legal malpractice is inadequate as a form of regulation for the legal profession).

<sup>254</sup> See Stephen G. Bene, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907 (1991) (the ABA failed to include fines as potential sanctions for lawyer misconduct in the sanctions standards).

<sup>255</sup> See John D. Fabian & Brian Reinthaler, *An Examination of the Uniformity (or Lack Thereof) of Attorney Sanctions*, 14 GEO. J. LEGAL ETHICS 1059 (2001).

for the attorney who represents a juvenile client thought not to be competent, which may seem to benefit the client, it nevertheless seems to afford greater protection for the attorney than for the client. It is unclear how and under what circumstances M.R. 1.14 could be enforced through traditional bar disciplinary hearings.<sup>256</sup> Even if the language of the rule were once again modified, clients such as juveniles charged with delinquencies and criminal charges frequently lack the necessary resources to retain private counsel in the first place, let alone counsel willing to bring a disciplinary or malpractice action against the juvenile's previous representative.<sup>257</sup> The lack of attorneys available to represent juveniles in delinquency cases is an ongoing problem with no immediate solution in sight.

By inhibiting the appointment of lawyers as guardians *ad litem* for juveniles when the first attorney attempts to comply with M.R. 1.14 in delinquency and transferred criminal cases, the state legal ethics codes would not require change. If professionals other than licensed attorneys, and nonprofessionals are brought into the system to function as guardians, then assuming that the state system does not expect these guardians to provide legal counseling to the juvenile clients, there should be no further conflicts arising from lawyers functioning outside of their trained area of expertise.<sup>258</sup> The nonlawyer GALs could substitute their judgment for that of the impaired juvenile,<sup>259</sup> and the attorney representing the juvenile would then allocate the traditional decision-making issues to the client's GAL, such as whether to testify at trial, whether to engage in plea negotiations, and so forth.<sup>260</sup> In such cases, the GAL would then decide whether to raise the issue of the juvenile's competency, and frankly, it would be difficult to imagine a scenario where a court would willingly appoint a GAL because of the lawyer's representations and then turn around and not allow the juvenile's competency to be placed in issue.

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<sup>256</sup> Of course, this problem is not unique to the enforcement of M.R. 1.14. In 1989, the McKay Commission "found that the existing system of regulating the profession was too narrowly focused on sanctioning or disbaring errant lawyers. Even though the discipline office was generally the only place available to make a complaint about a lawyer, 80 to 90 percent of the complaints were dismissed for not being within the jurisdiction of the office." See Stretch, *supra* note 249, at 22.

<sup>257</sup> Crafting specialized ethics rules for attorneys who represent juveniles is neither new nor unique. The ABA has entered the field of child abuse and neglect by adopting its Standards of Practice. See David R. Katner, *Coming to Praise, Not to Bury, The New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 14 GEO. J. LEGAL ETHICS 103 (2000). Many have called for specialized legal ethics rules for lawyers specializing in certain fields. See e.g., Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993).

<sup>258</sup> Such a scheme does not completely eliminate possible ethical problems for the third parties, however. For instance, in the event the juvenile client discloses an intention to commit a serious or injurious tort against an identifiable third party should he be released from detention, the third party might be exposed to tort liability in many jurisdictions should he not take steps to inform the identified tort victim. See D.L. Rosenhan et al., *Warning Third Parties: The Ripple Effects of Tarasoff*, 24 PAC. L. J. 1165 (1993); Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L. J. 263 (1982).

<sup>259</sup> But see Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L. Q. 551 (1997).

<sup>260</sup> Stuckey, *supra* note 157.



In the alternative, if states wish to continue to rely upon lawyers exclusively as guardians *ad litem* for juvenile clients in delinquency and criminal cases where competency has been raised, then provisions must be enacted to exclude from state ethics code compliance those attorneys functioning as guardians who answer to the court, not to the juvenile client. Additionally, such attorneys should be required to clearly define their role to the client whose competency has been called into question. This clarification of roles for the GAL/attorney could prove to be more vexing than one might otherwise assume.<sup>261</sup>

If the issue of challenging a client's competency were codified as part of a jurisdiction's procedural law, the client would be better served where the competency issue might become part of the pending litigation record, where a transcript and court record would be made, and where an immediate challenge might be taken on the record and preserved for purposes of later appellate review.<sup>262</sup> The lack of recorded cases or state bar disciplinary rulings suggests that M.R. 1.14 has not been subject to rigorous enforcement thus far. The relative secrecy of bar disciplinary hearings and the lack of resources devoted to prosecuting attorneys for misconduct surely does not help make the system function in favor of clients bringing complaints.<sup>263</sup> Removing these issues from the exclusive province of state bar disciplinary hearings altogether affords better protection for the general public and for the client whose competency is at issue.

By incorporating provisions in state statutes, whether substantive criminal law or procedural law, juvenile clients would be able to eventually challenge those decisions made by their attorneys in cases where counsel has elected to disregard the client's expressed wishes on raising a competency issue.<sup>264</sup> In those cases where the client does wish to have competency challenged but counsel disagrees with the strategy, then the record would be made during the court proceedings, and the matter would not have to later be reviewed through a separate disciplinary process which would require the client to contact the bar association, initiate a complaint, and so forth.<sup>265</sup> By incorporating the question of the juvenile's attorney raising or failing to raise competency as part of the court record, the matter

<sup>261</sup> See generally Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699 (1996).

<sup>262</sup> Still another solution to this problem might lie in the development of a minor's mental health code which could address the procedures of allocating decision-making based on the child's mental acuity, developmental maturity, and the presence or absence of mental illness and the impact on the minor's ability to articulate rational thought and engage in communications with others. See generally, Dennis E. Cichon, *Developing a Mental Health Code for Minors*, 13 *T.M. COOLEY L. REV.* 529 (1996).

<sup>263</sup> For a discussion of the lack of uniformity in disciplinary processes for attorneys, see generally, John D. Fabian & Brian Reinthaler, *An Examination of the Uniformity (or Lack Thereof) of Attorney Sanctions*, 14 *GEO. J. LEGAL ETHICS* 1059 (2001) (examining the disparities between enforcement and sanctioning of attorneys in four different jurisdictions accused of violating Model Rule 3.3, entitled "Candor Toward the Tribunal").

<sup>264</sup> See Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 *TEMP. L. REV.* 1763 (1995).

<sup>265</sup> See Melissa J. Maguire, Note, *Depriving Children of a Voice is Not Harmless Error: An Argument for Improving Children's Representation in Massachusetts through Statutory Reform*, 38 *SUFFOLK U. L. REV.* 661 (2005).

is handled on the record with possible appellate court oversight. While this process does not make the decision-making about whether to raise competency on behalf of a juvenile client any easier, it does help to ensure that the record substantiates the acts of the juvenile's attorney, provides the attorney with a clearer sense of direction, and provides the client with an actual remedy available as the case progresses rather than relegating the issue to the self-regulatory and possible review—and likely much later review—by a state ethics disciplinary committee. Perhaps most importantly, such changes would help ensure protection and oversight of juvenile client autonomy in decision-making of a legal issue as critical as the client's competency to proceed to adjudication or trial.