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Cover Page Footnote

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*Bruce A. Boyer**

INTRODUCTION

STORIES like those of Joseph Wallace and Emily Hernandez dominate public perception of the world of child welfare. The case of Joseph Wallace, chronicled exhaustively in the Chicago media, continues to command attention more than two years after his tragic death in April of 1993. When Joseph was only three years old, police found him hanged by an extension cord in his mother's apartment, an apparent victim of a heinous and conclusive act of abuse. The child was a veteran of the foster-care system, having been the subject of three different petitions for abuse in two counties. He had been in and out of foster care during his short life. At a hearing several months before Joseph's death, Mrs. Wallace convinced a judge of her improvement and continued willingness to cooperate with child welfare workers, and the court returned Joseph to the care of his mother. Descriptions of the case understandably evoked no sympathy for Joseph's mother, a disturbed woman whose most notable skill appeared to be her ability to seem compliant and cooperative with child welfare services and to submerge manifestations of her psychoses at critical moments before critical decision makers.

Joseph's death has come to symbolize, most notably, our child welfare and juvenile court systems' collective unresponsiveness to children in jeopardy, and their inability to protect innocent children from their abusive parents.[1] His case spawned both intangible and measurable changes, ranging from a heightened sensitivity to the risk of harm to children left with biological parents,[2] to the passage of legislative changes emphasizing the "best interests" of the child over the goal of family preservation.[3]

Response to the more recent death of nine-month-old Emily Hernandez, in March of 1995, was equally forceful. Coming from a family known to the Connecticut child welfare agency for several years, Em-

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1. *See* The Independent Comm. to Inquire into the Practices, Processes and Proceedings in the Juvenile Court as They Relate to the Joseph Wallace Cases, Report to the Honorable Harry G. Comerford, Chief Judge of the Circuit Court of Cook County 71-80 (1993).

2. Leslie Baldacci, *Abuse Cases Stymie Courts; Judges Are Pushing For More Evidence*, Chi. Sun-Times, May 14, 1993, at 1.

3. *See* 1993 Ill. Legis. Serv. 88-7 (West) (amending various sections of the Juvenile Court Act of 1987, Ill. Comp. Stat. Ann. ch. 705, § 405/1-1 et seq. (Smith-Hurd West 1993 & Supp. 1995)).

ily was the victim of repeated instances of abuse before her death at the hands of her mother's paramour. The mother was publicly faulted for her failure, through omission or commission, to protect Emily.[4] Reaction galvanized by her death prompted a sweeping review of the cases of thousands of children at home with their parents, as well as the creation of a panel charged with reevaluating the agency's risk assessment practices. Recommendations of the "Emily Panel" have led already to the adoption of much more aggressive removal policies and a sharp increase in the numbers of children removed from their parents and placed in foster care.[5]

The common thread of these and a handful of other similar stories is that collectively they define the public vision of families enmeshed in juvenile court and child welfare systems across the country. Tragic stories generate extensive attention from every facet of the media, eclipsing the more mundane routines of child welfare workers. It is no wonder that every year, early in the semester, each of the law students enrolled in Northwestern's clinical practice course and newly assigned to aid in the representation of parents in child protection cases[6] invariably raises questions about the ethics of representing parents charged with mistreating their children. The students know that at a minimum their prospective clients face accusations that they have, in some fashion, violated the trust that every child places in his or her parents to create a safe and nurturing environment. The students bring with them an understanding of abusive parents fostered by unrelenting media coverage of children ravaged in and by the child welfare system. Thinking of Mrs. Wallace, the students understandably assume that at some point during the semester a client will ask them to take a position that they find personally repugnant, on behalf of a parent who they suspect to be incapable of providing adequate care for his or her children.

Consider the case of Ms. B.,[7] whose seven-year-old son was taken into foster care after a receptionist witnessed the mother using excessive corporal punishment on her son while waiting in a public aid office. On advice of prior counsel, the mother had already admitted to facts supporting a finding of physical abuse, and she came to the Legal Clinic seeking assistance in having her child returned from foster care.

4. Kimberly J. McLarin, *Slaying of Connecticut Infant Shifts Policy on Child Abuse*, N.Y. Times, July 30, 1995, at 1, 34.

5. *Id; see also* The Independent Panel to Investigate the Death of Emily, Report to Governor John G. Rowland and Commissioner Linda D'Amario Rossi (1995) (making numerous recommendations for improving the child welfare system in response to the death of Emily Hernandez).

6. In the Legal Clinic's Family Advocacy Project, students are assigned to assist in the representation of clients in child welfare cases, including parent-respondents, children, and foster parents.

7. To protect confidentiality, I have adopted a fictitious name and altered some of the circumstances of the case of Ms. B., a client represented by the Legal Clinic.

The case initially seemed sympathetic: The child had a hyperactive disorder and was unresponsive to more measured forms of discipline, and the use of corporal punishment was arguably defensible. In addition, the mother had completed a program of parenting classes offered by the responsible child welfare agency. More importantly, the child was clearly attached to his mother, and the agency's decision to remove the child from her care seemed extreme. After representation was undertaken, however, additional facts learned during the course of a more thorough investigation suggested a more complicated picture: Ms. B. had a history of mental illness and was admittedly responsible for the accidental death of another child some years ago, under circumstances leaving open questions about the possibility of physical abuse. The agency was aware of some, but not all of the mother's history. Moreover, the child was living with a family member and had become quite settled in substitute care. Finally, the client's apparent disability raised significant concerns about her ability to engage in a reasoned dialog about the merits and/or appropriateness of pursuing various legal strategies. After conducting a full investigation and meeting several times with the client, her student advocates carried away a high level of uncertainty about Ms. B.'s ability to care properly for her child and the personal belief that the child might be better off in his foster home.

This kind of situation raises unsettling questions: How, the attorney asks, do I resolve the moral, ethical, and personal dilemma of advocating—at the expense of an innocent child—for a client who has mistreated the child and who may do so again? Clearly, the ethical issues faced by attorneys representing parents in child welfare cases are both complex and worthy of considerably more attention than legal scholars generally have devoted to them. Yet perhaps even more pressing than the need to face the complexities of the parent-attorney's vexing ethical dilemmas is the need to understand the context in which such dilemmas arise. The distortion of the routine of child welfare that makes these questions seem so pointed[8] carries its own disturbing consequences. Moved inexorably by the reaction and outrage spawned

8. For an excellent example of this distortion, see the op-ed piece by the Cook County Public Guardian. Patrick Murphy, *Family Preservation and its Victims*, N.Y. Times, June 19, 1993, at 21 (arguing, based on selective descriptions of extreme instances of child abuse, against family preservation programs generally). *But see* Elizabeth Vorenberg, *Child Services Can Tear Families Apart*, N.Y. Times, June 28, 1993, at A16 (letter to the editor) (responding to Patrick Murphy and arguing that the "confusion of poverty with neglect is the biggest single problem in the child protective system"); Marcia Robinson Lowry, *No Quick Fixes*, N.Y. Times, July 3, 1993, at A18 (letter to the editor) (responding to Patrick Murphy and arguing that protective services often destroy families while appropriate family preservation services enable children to stay safely with their families, where they generally do best); Richard Wexler, *Foster Care's Horrors Argue for Intact Families*, N.Y. Times, July 3, 1993, at A18 (letter to the editor) (same); Bruce A. Boyer, *Assault on the Poor*, N.Y. Times, July 3, 1993, at A18 (letter to the editor) (same).

by cases like those of Emily and Joseph, public policy makers react largely to the most serious failures of our child protection systems. Legislative policies increasingly constrain judicial officers in their efforts to identify and distinguish the most serious cases of child abuse. As a result, regardless of the severity of their misconduct, parents charged with acts of mistreatment are collectively vilified and demonized.[9] Frustrated by their failings, judicial child protection systems, like their criminal counterparts, increasingly emphasize punishment over rehabilitation of the family, with less and less attention devoted to the identification and support of families whose problems might be solved by carefully planned intervention.[10]

This Article addresses some of the more compelling ethical dilemmas that from time to time confront attorneys for parents. The primary purpose of this Article, however, is not so much to explore the contours of those dilemmas, but rather to paint a more realistic picture of the typical dynamic between a lawyer and a client charged with child abuse or neglect. The legal community often overstates the likelihood that a lawyer will be placed in an untenable ethical situation, even in circumstances where the charges against the parent are serious.

As a starting context, part I of this Article addresses some of the unusual pressures child abuse and neglect cases regularly bring to bear on parent advocates and the way in which those pressures have influenced much of the effort to answer ethical dilemmas that may confront the parent advocate. I begin by exploring the single issue that has dominated the relatively limited literature on the lawyer-parent relationship in child welfare: The lawyer's obligation to report confidential disclosures that threaten to harm to a child. The purpose of this effort is not so much to add to the discourse addressing this specific issue, but rather to help appreciate the context in which the traditional understanding of an attorney's loyalty to the client comes under siege when the welfare of children is involved.

The Article then considers how, in the routine practice of the juvenile courts, parent advocates treat or, more commonly, avoid ethical issues. Part II undertakes to describe both the nature of the task of

9. *See* Sandra A. Garcia & Robert Batey, *The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 Ga. L. Rev. 1079, 1083 (1988). In their article, Garcia and Batey report the results of a 1986 study of the function and perception of parents' attorneys in child welfare cases in the Tampa, Florida area, reflecting among other things a high degree of animosity directed towards both parents and their counsel. *Id.* at 1082-85.

10. The trend in juvenile law towards increasingly punitive responses to the problems of children and their families has been marked not only in the field of child welfare, but also in the area of juvenile justice. *See, e.g.*, Roger J.R. Levesque & Alan J. Tomkins, *Revisioning Juvenile Justice: Implications of the New Child Protection Movement*, 48 Wash U. J. Urb. & Contemp. L. 87 (1995) (arguing that often the family, not the juvenile justice system, is the best vehicle for helping troubled youth).

the parent advocate and the ways in which the practical realities of representation either foster or minimize the likelihood that ethical conflicts will arise. Part II also explores the ethical parameters of the situation in which a client insists on pursuing a course of action that the lawyer finds personally repugnant, suggesting that on occasion ethical rules may oblige an attorney to pursue such a course. Finally, part III argues that a variety of factors limit the occurrence of such ethical dilemmas. These factors relate variously to governing legal standards, client competence, and the practical limitations facing parents whose ability to accomplish the ultimate objective of family reunification may be chiefly dependent on the client's willingness to conform to external expectations of their conduct.

I. THE ROLE OF THE PARENT ADVOCATE IN CHILD WELFARE PROCEEDINGS

Few tasks in law seem as consistently daunting as the representation of parents in child welfare cases, in which the parent is charged with mistreatment of an innocent and defenseless child. In one sense, the task of the parent advocate is comparatively straightforward, involving none of the ambiguities found in the definition of the role of the child-advocate. While the representative of the child faces a host of complex problems—measuring the child's capacity, defining "best interests," and balancing those interests against the child's stated desires, to name a few[11]—the parent advocate owes no such divided loyalty. Though juvenile hearings are civil rather than criminal, the lawyer in the trial process carries the traditional burden of the defendant's counsel, requiring the state to meet its burden of establishing the factual basis for adjudication.[12] In the dispositional phase, though proceedings are typically governed by the indeterminate standard of

11. The many fine articles in this Conference explore a broad range of ethical issues in the representation of children. *See, e.g.*, Emily Buss, *"You're My What?": The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 Fordham L. Rev. 1699 (1996); Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 Fordham L. Rev. 1873 (1996); Jean Koh Peters, *The Roles and Content of Best Interest in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 Fordham L. Rev. 1505 (1996) (establishing a paradigm for determining the best interests of the child).

12. *See* Jacob L. Isaacs, *The Role of the Lawyer in Child Abuse Cases*, *in* Helping the Battered Child and His Family 225, 234-35 (C. Henry Kempe & Ray E. Helfer eds., 1972) ("[I]f the client insists upon his innocence, it is the function of the court and not the lawyer to determine the issue of guilt or innocence. If the client persists in denying guilt, it is not only the proper function but the duty of a lawyer to insist that the allegations of the charge be proved by whatever quantum of proof the law requires.").

the child's "best interests,"[13] the lawyer's task is defined by the traditional obligation to pursue zealously the client's stated objectives.[14]

Yet, while the role of the parent advocate may better fit the traditional model of attorney-client relationship, "the complexities of that role are often overlooked or unduly simplified."[15] To begin with, the climate in which parent advocates must serve their clients' interests may pose challenges beyond those typically associated with the furtherance of an unpopular cause.[16] Once the lawyer assumes responsibility for advocating for the parent charged with mistreating the child, he or she must face not only the opposition of the parties responsible for prosecution of the case, but often the prejudgment of the public, and indeed even the court as well.[17]

In one of the few published examinations of the lawyer-parent relationship in child welfare cases, Professors Garcia and Batey marked the fact that, following an adjudication of dependency, many parents are treated like "convicted criminals who should be punished."[18] Worse, the prejudgment of parents may also extend to the preadjudicatory stages of a child welfare case. In noting that negative attitudes toward parents may perpetuate a system with unchecked abuses, Garcia and Batey describe instances of judicial misconduct prior to trial, such as a judge's advice to a woman who asked for counsel that she did not need more men in her life, or a judge stating in response to a father's request to speak, "Shut up, I don't talk to child abusers."[19]

In addition, though parent advocates owe an undivided loyalty to their clients,[20] they must nevertheless contend with legal structures that are focused on the interests and circumstances of the child, and not the parent. Though the parent has critical rights and interests in

13. *See, e.g.*, Juvenile Court Act of 1987, Ill. Comp. Stat. Ann. ch. 705, § 405/2-22(1) (Smith-Hurd 1993 & Supp. 1995) (describing standards applicable to dispositional hearings).

14. *See* Model Rules of Professional Conduct Rule 1.2(a) (1983) [hereinafter Model Rules] (defining scope of representation).

15. Isaacs, *supra* note 12, at 233.

16. *See generally* Charles W. Wolfram, Modern Legal Ethics § 10.2.3 (1986) (discussing representation of unpopular clients and causes).

17. *See* Donald N. Duquette, *Liberty and Lawyers in Child Protection*, *in* The Battered Child 401, 412-14 (Ray E. Helfer & Ruth S. Kempe eds., 4th ed. 1987) (discussing difficult role of parent's counsel in child abuse cases); Isaacs, *supra* note 12, at 233 (same).

18. Garcia & Batey, *supra* note 9, at 1083. The term "dependency," as used by Garcia and Batey, encompasses children who have been abused and neglected, as well as children under the responsibility of the state for reasons relating to the incapacity of the parent or parents.

19. *Id.*

20. This undivided loyalty contrasts with the many potential conflicts arising from the various defined roles for child advocates. *See* Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399 (1996); *see, e.g.*, *In re* A.W., 618 N.E.2d 729, 733 (Ill. App. Ct. 1993) (dispute over child's right to select her own lawyer when her guardian *ad litem* refuses to advocate for her stated desires).

juvenile proceedings that clearly warrant the protections of due process,[21] governing legal standards in juvenile cases invariably require the court to determine first whether or not *the child* has been abused or neglected,[22] and secondarily what disposition is in *the child's* best interests.[23] Therefore, while the parent may often seek to vindicate his or her own interests through the judicial process, the parent's lawyer may at times be obligated to cast arguments less in terms of what is in the interests of the parent than what is in the interests of the child. Increasingly, these interests have come to be seen as fundamentally divergent, even in circumstances where children have significant attachments to their parents.[24]

It is in this context of vilification that lawyers must make ethical judgments impacting both their relationships with their clients and their clients' ability to accomplish desired ends within the judicial process. To the extent that notions borne of extreme cases that do not fairly represent the world of court-involved families drive policies and practices governing child welfare, the impact of these pressures becomes a cause for concern. In much of the literature addressing the ethical quandaries of the parent advocate, a legitimate and permeating concern for abused children may be seen to have eroded the care with which hard legal issues are analyzed. A case in point is the subject of the attorney's obligation to report client confidences that may suggest a risk to a child—a subject that has dominated the surprisingly limited scholarship devoted to the ethics of representing parents in

21. *See, e.g.*, Adoption Assistance and Child Welfare Act, 42 U.S.C. § 675(5)(C) (1988) (requiring states to conduct periodic dispositional hearings for children in foster care and to ensure that "procedural safeguards . . . be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges"); Santosky v. Kramer, 455 U.S. 745, 769 (1982) (requiring that parent be proven unfit by clear and convincing evidence before parental rights can be involuntarily terminated); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that parental rights can only be constitutionally terminated after a hearing regarding parental fitness).

22. *See, e.g.*, Juvenile Court Act of 1987, Ill. Comp. Stat. Ann. ch. 705, § 405/2-21 (Smith-Hurd 1993 & Supp. 1995) (describing standards applicable to adjudicatory hearings under Illinois Juvenile Court Act).

23. *See, e.g., id.* § 405/2-22 (describing standards applicable to dispositional hearings under Illinois Juvenile Court Act).

24. It is important to recognize that although the interests of parents and their children may conflict, they often overlap to a great extent, even in dysfunctional families. For a discussion of these overlapping interests, see generally the seminal work of John Bowlby on attachment, separation, and loss. 1 John Bowlby, Attachment and Loss (1969); 2 John Bowlby, Attachment and Loss: Separation: Anxiety and Anger (1973). *See also Santosky*, 455 U.S. at 760 ("[T]he State cannot presume that a child and his parents are adversaries . . . . [u]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 Duke J. Gender L. & Pol'y 63 (1995) (arguing that divergence of interests of parents and their children is often overstated).

child welfare cases.[25] Consider a scenario in which a mother seeks reunification with a daughter who was placed in foster care after being physically abused by her stepfather. During the course of discussions regarding a hearing strategy, the stepfather discloses to the mother's attorney that he, the stepfather, periodically disciplines his own children with a belt. In addition, the mother, outside the presence of the stepfather, states that he also uses other forms of corporal punishment, and that one child was recently hospitalized after the stepfather broke her arm. The parents told the hospital that the child was injured in a fall, and the hospital did not report the injury to the child abuse hotline.

This scenario raises a complicated set of questions turning on the application of three distinct sets of legal rules: (1) mandatory reporting laws requiring certain individuals to report known or suspected child abuse; (2) the attorney-client privilege; and (3) rules of professional responsibility, in particular the ethical duty of confidentiality. The attorney-client privilege and the ethical duty of confidentiality together presumptively protect both the communication of the client and the information shared by the client's husband.[26] Yet, the interplay between the attorney-client privilege and mandatory reporting rules leaves open significant questions.

First, it must be determined whether the scope of persons subject to mandatory reporting requirements encompasses the lawyer. State mandatory reporting laws differ in significant respects, though few laws clearly and explicitly indicate whether mandatory reporting requirements override ethical or evidentiary limitations on the disclo-

25. *See* Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts Over Disclosures of Client Communications*, 27 J. Marshall L. Rev. 617, 639-48 (1994); Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 Duke L. J. 203 (1992); Christine A. Picker, *The Intersection of Domestic Violence and Child Abuse: Ethical Considerations and Tort Issues for Attorneys Who Represent Battered Women with Abused Children*, 12 St. Louis U. Pub. L. Rev. 69, 72 (1993); Lenore C. Terr, M.D. & Andrew S. Watson, M.D., *The Battered Child Rebrutalized: Ten Cases of Medical-Legal Confusion*, 124 Am. J. Psychiatry 1432 (1968); Ruth Fleet Thurman, *Incest and Ethics: Confidentiality's Severest Test*, 61 Denv. L. J. 619 (1984); Robin A. Rosencrantz, Note, *Rejecting "Hear No Evil Speak No Evil": Expanding the Attorney's Role in Child Abuse Reporting*, 8 Geo. J. Legal Ethics 327 (1995); Nancy E. Stuart, Note, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 Geo. J. Legal Ethics 243 (1987).

26. *See* Model Rules, *supra* note 14, Rule 1.6 (Confidentiality of Information); Model Code of Professional Responsibility DR 4-101 (1980) [hereinafter Model Code] (Preservation of Confidences and Secrets of a Client). The Comment to Model Rule 1.6 states that the "confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Model Rules, *supra* note 14, Rule 1.6 cmt.; *see also* Mosteller, *supra* note 25, at 238 (including information gained from sources other than the client within the privilege).

sure of confidences.[27] Slightly less than half of the state statutes either explicitly or implicitly encompass lawyers within the scope of persons required to report suspected or known abuse.[28] Most of these statutes impose mandatory reporting requirements on any person who suspects a child may have been abused or neglected, and in a handful of instances, legislation expressly encompasses lawyers within the definition of mandatory reporters. Yet even state laws that clearly subject lawyers to mandatory reporting are generally unclear as to whether the duty to report encompasses information disclosed in confidence to the lawyer within the scope of representation.[29] States vary widely in their treatment of the attorney-client privilege vis-à-vis reporting laws, taking approaches ranging from express preservation[30] to express abrogation[31] of the privilege, and including several variations in between.[32] Thus, even in states where lawyers carry a duty to report suspected child abuse or neglect, the extent of this obligation is typically poorly defined.

Second, in the majority of states where reporting laws do not clearly abrogate the attorney-client privilege, significant questions may arise about the extent to which the privilege protects a lawyer from mandatory disclosure of suspected abuse that the client has communicated to the lawyer in confidence. The attorney-client privilege has been widely understood to protect confidential attorney-client communications from disclosure only in a judicial tribunal.[33] Defenders of the privilege, however, traditionally have relied largely on utilitarian notions about the practical importance of providing clients with an

27. For a discussion of the various forms of mandatory reporting statutes, see generally Mosteller, *supra* note 25, at 216-21.

28. *Id.* at 217.

29. Examining the range of state mandatory reporting laws, Professor Mosteller notes that most state reporting laws exhibit no clear intent to abrogate the attorney-client privilege. *Id.* at 223-24. Two student commentators suggest a contrary view of reporting statutes that do not explicitly preserve or abrogate the attorney-client privilege. Rosencrantz, *supra* note 25, at 348-49; Stuart, *supra* note 25, at 251.

30. Fla. Stat. Ann. § 415.512 (West 1986 & Supp. 1995); Ky. Rev. Stat. Ann. § 620.050(2) (Michie/Bobbs-Merrill 1990); Md. Code Ann., Fam. Law § 5-705(a)(2) (1991); Nev. Rev. Stat. Ann. § 432B.220(2)(i) (Michie 1991 & Supp. 1993); N.H. Rev. Stat. Ann. § 169-C:32 (1994); Ohio Rev. Code Ann. § 2151.42.1(A)(2) (Anderson 1994); Or. Rev. Stat. § 418.750 (1987); R.I. Gen. Laws § 40-11-11 (1990).

31. *See* Mosteller, *supra* note 25, at 218-19 (discussing the statutory abrogation of the privilege in Mississippi, New Mexico, and Oklahoma).

32. Indiana, for example, makes no mention of the attorney-client privilege, but expressly abrogates certain other privileges, encompassing both the in-court evidentiary privilege and out-of-court reporting. Ind. Code Ann. § 31-6-11-8 (Burns 1987 & Supp. 1995). Several other states—including Delaware, Idaho, Nebraska, North Carolina, Tennessee, Texas, and Wyoming—similarly abrogate certain privileges exclusive of the attorney-client privilege, but only with respect to judicial proceedings. Mosteller, *supra* note 25, at 220-21 & n.50.

33. *See, e.g.*, McCormick on Evidence § 72.1 (John W. Strong et al. eds., 1992).

opportunity to seek counsel in confidence.[34] Some commentators have argued persuasively that the protection of the attorney-client privilege would serve little continuing purpose if mandatory reporting laws could compel out-of-court disclosure of confidences.[35] Few decisions have considered whether the privilege protects against compelled out-of-court disclosures, but even these authorities suggest no such protection.[36] In other words, even a privileged communication about child abuse, entitled to protection from disclosure in court, might be subject to mandatory out-of-court disclosure.

Third, the lawyer must consider whether his ethical duty of confidentiality would protect either of the communications in the above scenario. Under the American Bar Association's Model Rules of Professional Conduct ("Model Rules"), the duty of confidentiality presumptively protects both the attorney's confidential communications with the client and confidences acquired from other sources.[37] The Model Rules, however, permit disclosure of confidences where necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.[38] Further, though the Model Rules do not require disclosure of confidences, many states have adopted more rigorous disclosure requirements by either expanding the circumstances under which permissive disclosure is allowed, by compelling disclosure in some circumstances, or by using both these methods.[39] Thus, depending on their specific terms, state ethical provisions may not only permit, but even require disclosure of information suggesting a risk of future harm.[40]

Finally, beyond the application of state rules of ethics, determining the scope of the ethical duty of confidentiality may require difficult nonlegal judgments about the predictive value of past conduct and the likelihood that past instances of abuse forebode a continuing risk of

34. *See generally* John Henry Wigmore, Evidence in Trials at Common Law § 2290, at 543 (rev. ed. 1961) (tracing the theoretical development of the attorney-client privilege).

35. Mosteller, *supra* note 25, at 229-35. Professor Mosteller argues that subjecting confidences to mandatory disclosure requirements might destroy the privilege entirely by negating the legitimate expectation of privacy upon which the privilege must rest. *Id.* at 231.

36. *See* Op. Utah Att'y Gen. No. 82-87 (Feb. 17, 1983); 76 Op. Wis. Att'y Gen. No. 10-87 (Mar. 16, 1987); Mosteller, *supra* note 25, at 224-29. Professor Mosteller suggests that "[t]he reason that the privilege has not been explicitly recognized to cover state-mandated out-of-court reporting appears not to have been the result of any theoretical limitation on the privilege but rather the result of there being virtually no occasion for the extension." *Id.* at 225-26.

37. Model Rules, *supra* note 14, Rule 1.6 cmt. 5.

38. *Id.* Rule 1.6(b)(1).

39. *See generally* Rosencrantz, *supra* note 25, at 353-54 (discussing application of Model Rule 1.6 by states).

40. The Model Code authorizes lawyers, in their discretion, to reveal confidences and secrets relating to the client's intention to commit a crime. Model Code, *supra* note 26, DR 4-101(c)(3).

harm to a child. Social scientists have amassed considerable evidence that child abuse is often a recurring problem,[41] and there can be little doubt that many victims of serious abuse suffer battering over an extended period of time.[42] Nevertheless, determining whether confidential information suggests the possibility of a "future crime" with sufficient certainty to merit disclosure is an especially difficult task.[43] Moreover, an accurate assessment of the likelihood of harm to a child will often demand that the lawyer rely on the knowledge and advice of nonlegal professionals.[44] Such reliance may pose additional problems to the extent that a lawyer's consultation with other professionals may obligate the consulting nonlegal professional to report suspected abuse. Thus, it may be difficult for the lawyer to secure critical information or advice necessary to judge whether or not he should withhold a confidential communication from disclosure.[45]

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41. *See, e.g.*, Roy C. Herrenkohl et al., *The Repetition of Child Abuse: How Frequently Does it Occur?*, 3 Child Abuse & Neglect 67 (1979) (showing the difficulty of identifying and quantifying recurring abuse); *see also* Anne Harris Cohn, *Essential Elements of Successful Child Abuse and Neglect Treatment,* 3 Child Abuse & Neglect 491 (1979) (presenting a study of the effect of different treatment strategies on reincidence of child abuse).

42. *See* Rosalie Anderson et al., Child Deaths Attributed to Abuse and Neglect: An Empirical Study, 5 Children & Youth Serv. Rev. 75, 85 (1983) (noting that many victims of child abuse are previously known to child welfare agencies); *see, e.g.*, Anna Quindlen, *Public & Private: Cradle to Grave,* N.Y. Times, Dec. 7, 1991, at A23 (recounting story of Adam Mann, a child victimized and ultimately killed by prolonged abuse).

43. Appellate courts faced with the task of judging whether past instances of child abuse indicate a sufficient risk of harm to warrant intervention have reached seemingly contrary results. *Compare In re* Edricka C., No. 1-94-2545, 1995 WL 631386, slip op. at *1 (Ill. App. Ct. Oct. 27, 1995) (reversing finding that children were at substantial risk of harm based on prior neglect and abuse of older siblings) *and In re* Baby Boy Butt, 395 N.E.2d 1, 6 (Ill. App. Ct. 1979) (reversing conclusion of trial court that child was at substantial risk of harm based on prior physical abuse of child's deceased stepsister) *with In re* Brooks, 379 N.E.2d 872, 881 (Ill. App. Ct. 1978) (affirming the conclusion that although there was no evidence of neglect or abuse toward subject child, evidence of physical abuse of two other children was sufficient to support finding of neglect).

44. Mosteller, *supra* note 25, at 251; Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 Fam. L.Q. 143, 144 (1984) (discussing critical role of medical and mental health professionals in evaluating abuse).

45. *See, e.g.*, Mosteller, *supra* note 25, at 251 & n.148 ("The lawyer, however, must be careful in seeking this advice because almost any other expert will have no discretion regarding reporting if that expert gains sufficient information for 'reasonable suspicion' to believe that abuse has occurred."); 75 Op. Md. Att'y Gen. No. 90-007 (Feb. 8, 1990) (holding that a psychotherapist has a clear duty to report abuse even when the client consulted her at the request of a lawyer except when consultation occurs during preparation of a defense to a criminal proceeding). *But see* Ann M. Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 Fam. L.Q. 1, 28-29 (1982) (suggesting that the presence of a child's parent during conversations between the child and her lawyer may still fall within the attorney-client privilege).

The determination of whether the law permits or requires disclosure of a confidence requires separate inquiries into (1) whether the lawyer is subject to mandatory reporting laws; (2) whether the attorney-client privilege or the duty of confidentiality protects the communication; and (3) if the answers to the first two questions suggest conflicting directives, the relationship between reporting laws and confidentiality requirements under state law. The circumstances noted above suggest a quandary: For the lawyer seeking to locate the boundaries of ethical rules of confidentiality, the safer course may be to favor maintaining client confidences. The costs of avoiding disciplinary action, however, may include both the possibility that the attorney becomes subject to prosecution for a violation of mandatory reporting laws and the possibility that a child might be victimized by future abuse.

What is perhaps most notable in much of the literature addressing this dilemma is a minimization of the importance of the role of parents' counsel in child abuse and neglect cases. Several recent commentators have suggested that in situations concerning child welfare, the usual balance between the attorney-client privilege and the obligation to report confidences threatening criminal or harmful behavior must shift in favor of protecting children.[46] This paradigm shift is most apparent in considering the critical question of whether a client's history of child abuse indicates a sufficient likelihood of future criminal harm so as to transcend the attorney-client privilege. For example, one recent commentator, basing her argument on the probability that abuse will recur, has advocated that disclosure of past abuse should be permitted under the "future crime" exception to confidentiality rules.[47] Another commentator has carried the argument even further, urging that once a lawyer learns in confidence about past abuse, the connection between this abuse and the probability of future criminal conduct is so strong as to prohibit the lawyer from ethically assisting the client in seeking custody.[48]

Two central assumptions underlie these arguments: First, that child abuse should fall within an expansive definition of "continuing crimes,"[49] and second, that continuing crimes should be subject to the

46. *See* Stuart, *supra* note 25; Rosencrantz, *supra* note 25.

47. Stuart, *supra* note 25, at 253-54; *see also* Rosencrantz, *supra* note 25, at 348, 354-55 (arguing that reporting of past child abuse is permissible under "crime-fraud" exception to the attorney-client privilege when a client who seeks custody might abuse the child in the future).

48. Rosencrantz, *supra* note 25, at 358 (arguing that a lawyer's obligation under Model Rule 1.2(d) to refrain from counseling a client to engage in criminal or fraudulent behavior may prohibit the lawyer from assisting an abusive parent in gaining custody).

49. Callan and David define a continuing crime as one "which, though committed in the past, has ramifications or effects which continue into the present or future." J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confiden-*

disclosure requirements generally applied to future crimes.[50] To begin with, the definition of "continuing crime" fits poorly, at best, with the problem of child abuse. Continuing offenses typically involve an ongoing illegal status, reflecting either a failure to take an action mandated by law, or a failure to correct a past action in the face of a continuing legal obligation.[51] Consistent with this notion, courts and legal ethicists[52] have defined as continuing crimes such circumstances as concealment of stolen property,[53] misappropriation of trust funds,[54] and failure to file a tax return.[55] In some circumstances, as with concealment of stolen property, criminal liability is independent of the original criminal act. In other circumstances, as with misappropriation of trust funds, it is the continuing failure to take corrective action to which criminal liability attaches. Unlike situations traditionally cast as continuing crimes, child abuse does not bear hallmarks of ongoing illegality. Even when child abuse is recurrent, it involves isolated and discrete acts with criminal liability attaching to each act of abuse. In contrast with ongoing crimes such as the failure to file income tax returns, it is the act of abuse, rather than the status of being an abuser, that is deemed illegal.[56]

Beyond distorting the traditional construction of "continuing crimes," much of the commentary on this issue fails to appreciate the difficult balancing of interests central to determining whether continu-

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tiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332, 363 (1976).

50. Ethical rules generally preclude attorneys from disclosing confidential communications about past crimes, but permit the disclosure of information suggesting a client's intent to commit a crime at some point in the future. Model Rules, *supra* note 14, Rule 1.6; Model Code, *supra* note 26, DR 4-101; N.Y. Code of Professional Responsibility § 1200.19 (McKinney 1990).

51. *See* Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 Geo. J. Legal Ethics 703, 749 (1988) (discussing the meaning of the "peculiar animal known as the 'continuing' offense"). Sobelson also notes the distinct situation where a lawyer is actively or continually engaged in a criminal enterprise, a type of continuing offense not directly germane here. *Id.*

52. *See generally* Abraham Abramovsky, *A Case for Increased Confidentiality*, 13 Fordham Urb. L.J. 11, 17-19 (1985) (discussing the meaning of continuing crimes); Callan & David, *supra* note 49, at 362-65 (same); Sobelson, *supra* note 50, at 749-52 (same).

53. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 405 (1975) (implying that concealment of stolen property is a continuing crime).

54. *See, e.g.*, L.A. County Bar Ass'n Comm. on Legal Ethics, Op. 267 (1960) (discussing the misappropriation of trust funds as a continuing crime for purposes of the attorney-client privilege).

55. United States v. Marchant, 774 F.2d 888, 891 (8th Cir. 1985); *see also* Toussie v. United States, 397 U.S. 112, 134-35 (1970) (White, J., dissenting) (finding that areas included within the continuing offense doctrine are "embezzlement, conspiracy, bigamy, nuisance, [and] failure to provide support").

56. *See* Mosteller, *supra* note 25, at 249 ("[I]t is critical to note that child abuse is not a continuing offense, although sometimes loosely and incorrectly described as such. Instead, child abuse is a repetitive crime.").

ing crimes should be subject to the same disclosure obligations as confidential communications regarding future crimes. While several ethics bar opinions support the idea that disclosure of past child abuse may be warranted to prevent future harm,[57] ethicists have generally been very cautious of requiring lawyers to disclose information about continuing or future crimes that is inextricably bound up with the confidential admission of past crimes.[58]

Moreover, both the ethics bar opinions and the commentary to similar effect beg the difficult question of whether past abuse suggests the possibility of future harm with sufficient certainty to justify disclosure of confidential information under ethical rules.[59] One commentator argues, for example, that lawyers may ethically disclose privileged or confidential information about past abuse that suggests future harm whenever there is "cause to suspect" or "reasonable suspicion" that abuse has occurred, consistent with the standards that typically govern mandatory reporting requirements.[60] Ethical rules, though they leave unanswered the question of the exact degree of certainty required of the lawyer before disclosure of a confidence suggesting a possible future crime is permitted, nevertheless seem to require a higher standard of certainty than mandatory reporting requirements.[61] In this vein, case law treating lawyers' suspicions of a criminal defendant's intended perjury is instructive. In the leading case of *United States* ex rel. *Wilcox v. Johnson*, the Third Circuit concluded that without solid

57. *See, e.g.*, Legal Ethics Comm. of the Indianapolis Bar Ass'n Op. 1986-1 (1986) ("[W]here the lawyer reasonably believes that the client intends to engage in continued or future abuse or neglect, the lawyer may, but is not required to, reveal such information to the proper authorities."); Comm. on Ethics of the Md. State Bar Ass'n, Op. 83-60 (1983) (providing that a lawyer aware of ongoing child abuse by client should withdraw from representation and may disclose confidences reflecting client's intent to commit future crime, as necessary to prevent it).

58. *See, e.g.*, Abramovsky, *supra* note 51, at 17-18 ("[T]he prevalent and better view is that an attorney *may not* reveal this continuing crime to the authorities."); Callan & David, *supra* note 49, at 365 ("[W]hile the question is not free from doubt, it appears that the appropriate and prevailing view is that the attorney need not and should not disclose information received from his client which concerns continuing aspects or effects of past criminal conduct."); Sobelson, *supra* note 51, at 750-51 (suggesting that ethics opinions on the application of the "continuing crime" doctrine at times "fail to account for the overlap between what has occurred in the past and what may occur in the future").

59. *See supra* note 43 and accompanying text.

60. Rosencrantz, *supra* note 25, at 356-57 (citing Utah Code Ann. § 62A-4-503(1)-(3) (1993), which states that mandated reporters with "reason to suspect" child abuse must report suspicion).

61. The Model Rules state only that confidences may be revealed to the extent that the lawyer "reasonably believes necessary" to prevent a future crime. Model Rules, *supra* note 14, Rule 1.6. The Model Code states that a "lawyer may reveal . . . [t]he intention of his client to commit a crime." Model Code, *supra* note 26, DR 4-101(C)(3). Citing ABA Opinion 314 (1965), a footnote to DR 4-101 suggests that the lawyer should be sure "beyond reasonable doubt" that the client intends to commit a crime before disclosure is allowed. *Id.* at n.16.

support, the suspicion of intended perjury was insufficient to support the lawyer's refusal to continue representation:

> If an attorney faced with this situation were in fact to discuss with the Trial Judge his belief that his client intended to perjure himself, without possessing a firm factual basis for that belief, he would be violating the duty imposed upon him as defense counsel. While defense counsel in a criminal case assumes a dual role as a "zealous advocate" and as an "officer of the court," neither role would countenance disclosure to the Court of counsel's private conjectures about the guilt or innocence of his client. It is the role of the judge or jury to determine the facts, not that of the attorney.
>
> It is essential to our adversary system that a client's ability to communicate freely and in confidence with his counsel be maintained inviolate. When an attorney unnecessarily discloses the confidences of his client, he creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation. It is apparent that an attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured. To do so would undermine a cornerstone of our system of criminal justice.[62]

Though *Wilcox* involves constitutional dimensions not normally present in child welfare cases, the court's rationale nevertheless suggests compelling reasons why ethical rules should not lightly permit the disclosure of client confidences that suggest the possibility of future harm.

Commentators' calls for expansion of the circumstances under which lawyers may report known or suspected child abuse stem from understandable and compelling concerns about the need to protect children from a particularly invidious form of harm.[63] The position, however, that even a suspicion of future abuse compels not only the disclosure of client confidences, but possibly withdrawal as well, seems extreme. A lawyer prohibited by a suspicion of possible future abuse

62. United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977); *see also* Doe v. Federal Grievance Comm., 847 F.2d 57, 63 (2d Cir. 1988) ("[An] attorney [may] attempt to rectify or reveal the client's perjury only if the attorney has information establishing a 'firm factual basis' that the client will commit perjury. . . . [I]f any standard less than actual knowledge was adopted in this context, . . . courts would be inundated with such reports."); Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984) ("Mere suspicion or inconsistent statements . . . are insufficient to establish that the defendant's testimony would have been false."), *rev'd on other grounds sub nom.* Nix v. Whiteside, 475 U.S. 157 (1986); Shockley v. State, 565 A.2d 1373, 1379 (Del. 1989) ("[A]n attorney should have knowledge 'beyond a reasonable doubt' before he can determine under [Model] Rule 3.3 that his client has committed or is going to commit perjury."); *cf.* Osborn v. Shillinger, 861 F.2d 612, 628 (10th Cir. 1988) (finding that a lawyer who speculated in public about his client's lack of amenability to rehabilitation, and who failed to challenge factual assertions of prosecution that contributed to capital sentence because he personally believed them to be true, usurped fact-finding function of court and rendered ineffective assistance of counsel).

63. Rosencrantz, *supra* note 25, at 329-39; Stuart, *supra* note 25, at 245-46.

from advocating for custody[64] may be barred not only from seeking immediate custody, but also from advocating for other needed intermediate interventions that are necessary predicates to custody. For clients charged with serious forms of child abuse, as discussed in the concluding section of this Article, such a position would deny them not only critical legal assistance in defending their interests, but also the opportunity to seek services or supports that would serve their interests and also the interests of the children whose welfare is ultimately at stake in juvenile court proceedings.

II. Reconciling Attorney-Client Conflicts

In one of the few studies of the role of counsel for the parent in child dependency proceedings, Garcia and Batey identify three separate contexts in which ethical questions may arise in working with respondent parents in such proceedings: The client selection process, representation during the adjudicatory phase, and representation during the dispositional phase.[65] At the outset, the lawyer must make judgments about the allocation of resources that are often scarce. Once committed to the representation of a client, the lawyer must also make difficult judgments about the scope of advocacy and about the extent to which the lawyer is willing to pursue objectives that may not be consistent with the governing standard of the best interests of the child. The following section seeks to explore the boundaries of ethical rules, as applied to the processes of client selection, client representation during both the adjudicatory and dispositional phases of juvenile court hearings, and withdrawal.

A. *The Client Selection Process*

Not long ago, a man imprisoned for the murder of one of his children approached the Northwestern University School of Law Legal Clinic seeking legal assistance. The state had long ago placed the man's surviving children in foster care and terminated his parental rights. As a result of the circumstances leading to his conviction, already affirmed on appeal, the man sought assistance both to pursue a challenge on appeal to the termination of his parental rights, and to return custody of his children—long since settled into substitute homes—to his own mother. What proved notable about the event was not so much the legal circumstances of the family's situation, but rather the visceral reaction of the student who conducted the interview with the man's mother, who approached the clinic on her son's behalf and whose demeanor suggested a callous indifference to the death of her grandson. This reaction provoked an extended discus-

64. *See supra* note 48 and accompanying text.
65. Garcia & Batey, *supra* note 9, at 1097-1100.

sion about the extent to which a lawyer may fairly and ethically take into account nonlegal factors in the client selection process.

Professor Monroe Freedman has noted that the decision regarding whether or not to represent a client is one of the most significant moral decisions that a lawyer can make.[66] This notion, at bottom, reflects the minimal constraints that ethical rules impose on the client selection process. While the Model Rules describe a variety of limitations on withdrawal from representation of an existing client, they speak only in a limited fashion to the decision of whether or not to accept representation.[67] Indeed, to the extent that the Model Rules speak at all to the client selection process, it is only to impose outer limits on the acceptance of representation, most notably where it is apparent to the lawyer that the cause of the client is likely to lead the lawyer into a violation of rules or law.[68] Conversely, ethical rules impose few limits on the lawyer's freedom to reject a client. Thus, while the representation of a client need not connote the lawyer's endorsement of the client's views,[69] the lawyer may exercise a great deal of freedom in deciding whether or not to represent a particular client, based on the lawyer's social, moral, or other assessment of the client.[70] In a situation where constraints outside of ethical rules do not bind the attorney, he may take full account of any discord between his own views and interests and those of the client, without running afoul of ethical rules of conduct.[71]

While this flexibility in the client selection process may help to avoid ethical dilemmas posed by representation of an individual charged with a heinous act of abuse, several circumstances may significantly limit the lawyer's ability in child welfare cases to render the moral judgments permitted under ethical rules.[72] First, in the

66. *See* Monroe H. Freedman, *Ethical Ends and Ethical Means,* 41 J. Legal Educ. 55, 56 (1991).

67. *See* Model Rules, *supra* note 14, Rule 1.16.

68. *Id.* Rule 1.16(a), (a)(1).

69. *See id.* Rule 1.2(b).

70. Indeed, the Model Rules contemplate an expansive view of the attorney's role that may transcend the strict boundaries of a legal advisor. Rule 2.1 permits a lawyer, in advising an existing client, to refer not only to law, but to other moral, economic, social, and political factors. *Id.* Rule 2.1. The comment to Rule 2.1 states that "[a]lthough a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." *Id.* Rule 2.1 cmt.

71. The attorney may also confine the scope of representation, after consultation with the client. *See id.* Rule 1.2(c). The Model Code contains no direct counterpart to this provision; it provides only that in representing a client, a lawyer may, "[w]here permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." Model Code, *supra* note 26, DR 7-101(B)(1).

72. Such judgments may encompass a range of concerns, focused variously on the client's objectives in the instant litigation, other client objectives, or the client's character or history. While the specific source of the lawyer's consternation may have some impact on the ethical obligations of the lawyer, *see, e.g.*, Charles W. Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise, in* The Good Lawyer

broadest sense, lawyers collectively share an ethical obligation to provide representation to unpopular clients, an obligation reflected in both the American Bar Association Model Code of Professional Responsibility ("Model Code") and the Model Rules.[73] Representation of an individual client may not be compelled in a particular case; however, attorneys share a professional duty to ensure that unpopular clients have available counsel. This obligation is particularly important in an area of law where few clients can afford to pay for an attorney,[74] and where the declination of representation is more likely to leave a client unrepresented. Indeed, commentators have suggested that a moral obligation to represent a repugnant client may arise if the client's objectives are lawful, and if no other lawyer is available or willing to continue the representation.[75]

Second, as a practical matter, local practice may constrain many lawyers' freedom to refuse representation of a particular client. In many jurisdictions, the court appoints counsel for parents. For example, in Chicago, the Office of the Public Defender represents the great majority of respondent parents in child welfare proceedings, appointed pursuant to statutory authority.[76] In other jurisdictions, juvenile judges appoint attorneys for parents from lists of private attorneys kept by the court.[77] Courts generally permit a refusal to accept appointment only under extreme circumstances; the Model

214, 223-33 (David Luban ed., 1983) (discussing a lawyer's obligation to represent repugnant clients), consideration of such nuances is beyond the scope of this Article.

73. The Model Code states:

> A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally."

Model Code, *supra* note 26, EC 2-26. The Code further states that "[r]egardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse." *Id.* EC 2-27. The directives of the Model Code are echoed in comments to the Model Rules:

> A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.

Model Rules, *supra* note 14, Rule 6.2 cmt. (citation omitted); *see generally* Wolfram, *supra* note 16, § 10.2.3 (discussing a lawyer's representation of unpopular clients and causes).

74. *See infra* notes 103-115 and accompanying text.

75. *See* Murray L. Schwartz, *The Zeal of the Civil Advocate*, *in* The Good Lawyer 150, 161-69 (David Luban ed., 1983); Wolfram, *supra* note 72, at 223-33.

76. *See* Juvenile Court Act of 1987, Ill. Comp. Stat. Ann. ch. 705, § 405/1-5(1) (Smith-Hurd 1993 & Supp. 1995).

77. Bernardine Dohrn, Representation of Parties in Child Protection Cases in Juvenile Courts Visited by Bernardine Dohrn in 1991-1992, at 1 (1992) (unpublished paper on file with author).

Rules limit the situations in which a lawyer may refuse to accept appointment to cases where representing the client may (1) result in a violation of ethical rules or other law, (2) impose an undue financial burden on the lawyer, or (3) impair the attorney-client relationship or the lawyer's ability to represent the client because the client or the cause is repugnant to the lawyer.[78]

Finally, even the experienced practitioner often has difficulty making the kind of moral assessment of the client or the cause contemplated by Professor Freedman before deciding whether or not to assume representation. The moral, social, and personal conflicts that arise between lawyers and clients are rarely apparent at the outset and often arise only after the lawyer has had an opportunity to investigate a case and develop a more thorough understanding of the client, as illustrated by Ms. B.'s case. A variety of factors may constrain the lawyer's ability to make an accurate assessment of the client during an initial contact, including limitations of the client's perspective, the client's lack of candor or forthrightness, and the lawyer's own inability to evaluate the client after only limited contact. Additionally, in child welfare cases, the issues raised at the outset of a case—typically focused on the specific charge of neglect or abuse forming the jurisdictional predicate for the court's involvement—often have little to do with the causes that ultimately consume the lawyer's advocacy efforts. Juvenile cases are dynamic; once judges have assumed responsibility for a child through the judicial process, they generally believe themselves obliged to treat new issues and circumstances as they arise, regardless of their relationship to the original charges that brought a case into the court system.

In short, the client selection process may help to avoid many ethical dilemmas. Any lawyer who regularly represents parents in child welfare cases, however, regardless of whether the lawyer typically acts as appointed counsel, will likely confront demands from an existing client to pursue objectives deemed repugnant or imprudent by the lawyer.

78. Model Rules, *supra* note 14, Rule 6.2. The Model Code is less tolerant of appointed counsel seeking to withdraw because the cause of the client seems repugnant:

> When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, [the lawyer] should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case . . . or the belief of the lawyer regarding the merits of the civil case.

Model Code, *supra* note 26, EC 2-29.

B. *Attorney-Client Conflicts: Defining and Limiting the Goals of Advocacy*

The more vexing practical question that regularly faces the parent advocate involves the problem of reconciling the objectives of an existing client with the attorney's own personal assessment of the merits of the client's cause. This problem, it seems, is the source of significant consternation among parent advocates, who are regularly asked to represent clients whose conduct may not comport with the attorney's personal views about what constitutes appropriate parenting.[79] What happens when a client insists on pursuing a hearing seeking custody of children who have suffered abuse at the hands of the client, and who if successful, may in the attorney's estimation do so again? Does it matter whether the case has already been to trial?

Ethical rules impose on lawyers not only a duty to represent zealously the interests of the client, but also a presumptive expectation that the lawyer will see a case through to its conclusion.[80] In circumstances where the lawyer develops serious concerns about the wisdom of the cause the client seeks to pursue, ethical rules set only broad outer boundaries on the attorney's options, leaving open a substantial realm of possible situations in which such rules provide no definitive guidance as to how to resolve conflicts. The indeterminacy of governing legal standards in child welfare cases may further complicate potential conflicts. The lawyer's prerogative to refuse to pursue client objectives that are frivolous, malicious, or totally unsupported in law[81] establishes some theoretical outer limits on the bounds of advocacy. Yet, in the practice of child welfare, these bounds may be exceedingly difficult to locate. Because of the subjectiveness and vagaries of the legal standard of best interests that governs most juvenile court hearings,[82] only in extreme circumstances will a client's objective be unsupportable by any good faith argument.

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79. *See* Duquette, *supra* note 17, at 412 ("The feelings toward a client parent, unless dealt with properly from the beginning, can sabotage a lawyer's advocacy either consciously or unconsciously.").

80. Commentary to the Model Rules states that "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion." Model Rules, *supra* note 14, Rule 1.16 cmt.; *see also* Model Code, *supra* note 26, EC 2-31 ("Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved.").

81. *See, e.g.*, Model Rules, *supra* note 14, Rule 3.1 (prohibiting an attorney from bringing or defending a frivolous claim); Model Code, *supra* note 26, DR 7-102(A) (prohibiting an attorney from taking action on behalf of his client to harass or maliciously injure another, or knowingly advancing a claim unwarranted under existing law); Fed. R. Civ. P. 11 (prohibiting an attorney from asserting a claim for any improper purpose, such as to harass, cause delay, or increase its litigation cost).

82. *See* Leroy H. Pelton, For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in the United States 49-50 (1989) [hereinafter For Reasons of Poverty]; Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, Law & Contemp. Probs., Summer 1975, at 226, 255-68.

When the lawyer develops a conflict with the goals of the client, ethical rules contemplate only limited circumstances in which withdrawal from representation, or refusal to continue representation, is mandatory. The Model Rules require withdrawal or termination where the representation will result in a violation of the rules of professional conduct or other law.[83] Similarly, the Model Code obligates an attorney to withdraw only if the lawyer knows or it is obvious that continued employment will result in a violation of a disciplinary rule.[84] Lawyers may often harbor reservations about their clients' ability to parent, giving rise to concerns that advocacy for the client might lead to placing a child in jeopardy. Nevertheless, for such concerns to rise to the level where withdrawal is compelled, the lawyer must be certain that continued representation will lead to a violation of the rules or law. If the concerns of the lawyer stem from the belief that advocating the parent's cause is not in the best interests of the child, such concerns will generally not rise to the point of compelling mandatory withdrawal. Initially, the lawyer typically focuses advocacy on an end—returning the child to the custody of the parent. Although this end may increase the likelihood that a child will be victimized by abuse, it is not in itself unlawful. Perhaps more importantly, even in an extreme circumstance where a client with a clear history of abusive behavior asks a lawyer to advocate for returning custody of a child, uncertainties in the predictive value of past conduct will generally preclude any definitive conclusion that an award of custody will lead to a violation of law.[85]

Generally, then, the lawyer whose views as to the appropriate outcome of a child neglect or abuse case conflict with the stated desires of the client must look to more nebulous permissive rules for guidance. On their face, the Model Rules provide attorneys with a fair measure of flexibility in making ethical judgments about the continued representation of clients whose causes may seem repugnant, but do not rise to the point of clear illegality. Model Rule 1.16 permits an attorney to withdraw from a client's case if the client either "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent,"[86] or insists on "pursuing an objective that the lawyer considers repugnant or imprudent."[87]

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83. Model Rules, *supra* note 14, Rule 1.16(a)(1).

84. Model Code, *supra* note 26, DR 2-110(B)(2).

85. *See supra* note 43 and accompanying text. In Illinois, rules of evidence governing child welfare cases allow for the introduction of prior findings of neglect or abuse as evidence at trial, but exclude such findings from a comprehensive list of circumstances that constitute *prima facie* evidence of abuse or neglect. Juvenile Court Act of 1987, Ill. Comp. Stat. Ann. ch. 705, § 405/2-18(1), (2) (Smith-Hurd 1993 & Supp. 1995).

86. Model Rules, *supra* note 14, Rule 1.16(b)(1).

87. *Id.* Rule 1.16(b)(3).

The Model Code, at first blush, seems somewhat less permissive than the Model Rules, with no direct counterpart to the provision of the Model Rules regarding repugnant or imprudent objectives.[88] On closer inspection, however, the provisions of the Model Code regarding permissive withdrawal seem equally liberal; they permit withdrawal when a client "renders it unreasonably difficult for the lawyer to carry out his employment effectively."[89] While this provision brooks no obvious limits on the meaning of "unreasonably difficult," some limits must fairly be read into the provision. If lawyers were permitted to withdraw based solely on a disagreement over the wisdom of client objectives, it would of course render meaningless the fundamental assignment of responsibility for establishing case goals to the client. Yet in practice, as commentators have often noted, the theoretical line between the client's responsibility of setting goals, and the lawyer's province of determining the means most appropriate to meet those goals, is hard to define.[90] Even when the subject of a dispute is something that falls squarely within the realm of the client's decision-making responsibility, courts may tend towards leniency to the attorney, allowing withdrawal under this rule even in circumstances where the disagreement is over something as fundamental as whether or not to accept a settlement offer.[91] Finally, beyond the unbounded language of the Model Code, some jurisdictions that continue to rely on its language have adopted comments that explicitly authorize withdrawal where the client insists on a repugnant or imprudent objective.[92] In short, both the Model Code and the Model Rules

88. Like the Model Rules, the Model Code allows an attorney to withdraw from representation of a client who insists on pursuing a course of conduct that is either illegal or prohibited under ethical rules. Model Code, *supra* note 26, DR 2-110(C)(1)(b), (c). The Model Code also allows an attorney to withdraw if the client insists on pursuing a claim or defense that is "not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law." *Id.* DR 2-110(C)(1)(a).

89. *Id.* DR 2-110(C)(1)(d).

90. *See, e.g.*, Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory,* 93 Mich. L. Rev. 485, 507 (1994) ("Whether framed as a distinction between ends and means, substance and procedure, or merits and tactics, this standard creates a dichotomy between client goals and the attorney's plan for achieving these goals." (citations omitted)).

91. For example, in Kannewurf v. Johns, 632 N.E.2d 711 (Ill. App. Ct. 1994), the court allowed an attorney to withdraw over the client's refusal to accept a settlement offer, finding that the refusal made it "unreasonably difficult for the lawyer to carry out the employment effectively." *Id.* at 715 (citation omitted). This conclusion was reached notwithstanding the court's recognition of the tension between the permissive withdrawal rule and the rule requiring the lawyer to abide by a client's settlement decision. *Id.*; Illinois Rules of Professional Conduct Rule 1.2, 1.16 (1993). Professors Hazard and Hodes find this decision to be "clearly wrong." Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, § 1.16:306, at 482.1 (1990 & Supp. 1994).

92. *See, e.g.*, Colorado Rules of Professional Conduct Rule 1.16 cmt. (1995) (allowing optional withdrawal). Comments to the Rules of Professional Conduct for the Federal District Court of the Northern District of Illinois go even further, allowing for

generally recognize the freedom of a lawyer to withdraw from representation of a client who insists on pursuing a course that is legal but repugnant to the lawyer.[93]

One significant exception to this general rule involves appointed counsel. Where lawyers are generally free to decline the representation of repugnant clients, the Model Code's Ethical Considerations explicitly state that lawyers should not refuse an appointment on these grounds.[94] The Model Rules similarly reflect a stronger obligation on the part of appointed counsel to continue the representation of repugnant clients, though they permit a lawyer to withdraw from the representation of a client whose cause is so repugnant as to be likely to impair the lawyer's representation.[95] Case law has not explored in depth the question of appointed counsel's obligation to continue representation of a repugnant client at the trial court level.[96] Similar questions have arisen, however, regarding the obligations of appointed counsel on appeal of termination of parental rights orders.[97] Typically, before a court allows withdrawal in such cases, lawyers appointed on appeal must follow the standards described in *Anders v.*

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withdrawal not only where the client "insists on a repugnant or imprudent objective," but also where "some personal incompatibility exists between the lawyer and the client or where a substantial disagreement exists between the lawyer and the client on litigation strategy." Rules of Professional Conduct for the Federal District Court of the Northern District of Illinois Rule 1.16 cmt. (1995) (stating criteria for optional withdrawal).

93. *See generally* Wolfram, *supra* note 16, § 13.3.10 (discussing repugnant or imprudent client projects). Garcia and Batey note that danger signals indicating possible grounds for tempering advocacy on behalf of a parent might include "recidivism, patterns of abuse, resistance to advocacy from guardians and experts, and the child's own expressed preferences." Garcia & Batey, *supra* note 9, at 1094.

94. *See* Model Code, *supra* note 26, EC 2-29; *supra* note 78.

95. Model Rules, *supra* note 14, Rule 6.2. The Comment to Rule 6.2 provides:

> A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rules 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Id. Rule 6.2 cmt.

96. For both appointed and nonappointed counsel, ethical rules limit the ability of a lawyer to withdraw if the client will suffer significant adverse effects, or if the court orders the attorney to continue representation notwithstanding the presence of good cause for withdrawal. *See* Model Rules, *supra* note 14, Rule 1.16(b), (c); Model Code, *supra* note 26, DR 2-110(A)(1), (2). Thus, a court may clearly deny a request for withdrawal if the request would cause prejudicial delay, or if the "trial court has a reasonable basis for concluding that the lawyer-client relationship has not deteriorated to the point that counsel is unable to give effective assistance to his client." *In re* M.M., 726 P.2d 1108, 1121 (Colo. 1986) (en banc).

97. *See, e.g.*, Jack M. Bains, Comment, *Termination of the Attorney-Client Relationship: How Far Must* Anders *Compliance Go?: A Survey of Decisions*, 16 J. Legal Prof. 229 (1991) (discussing state court applications of the standards developed in *Anders v. California*).

California,[98] filing a memorandum setting forth anything in the record that might arguably support an appeal.[99] At least one court has gone to the extreme of suggesting that withdrawal of appointed counsel on appeal may never be allowed in child deprivation proceedings, even where a careful review of the record reveals no nonfrivolous issues for appeal.[100]

Finally, even where grounds for withdrawal otherwise exist, a lawyer must take steps to avoid material prejudice to the interests of the client.[101] Particularly in jurisdictions where parents are statutorily entitled to counsel, a lawyer who seeks to withdraw must ensure that the client has every opportunity to secure alternative representation in advance of any critical aspect of court proceedings. This requirement may limit the freedom of the lawyer to withdraw prior to trial, or prior to a dispositional hearing. Indeed, local rules may specifically authorize the court to deny an otherwise meritorious request for withdrawal if granting the motion would cause undue delay.[102]

III. Reconciling Attorney-Client Conflicts in Practice

As challenging as conflicts between parents and lawyers in child welfare cases may prove to be in theory, the debate over the morality of representing parents consumes a far greater degree of attention than is warranted by the frequency with which such dilemmas arise. In the actual practice of the juvenile courts, surprisingly few cases pose the difficult dilemmas that seem to command so much attention of legal ethicists focused on the field.

98. 386 U.S. 738, 744 (1967) (allowing counsel to inform the court and request permission to withdraw from a frivolous appeal after "conscientious examination," but counsel's request must be accompanied by a brief referring to anything in the record that may support an appeal).

99. *See, e.g.*, Keller v. Keller, 486 N.E.2d 291, 292 (Ill. App. Ct. 1985) (finding memorandum that set forth arguable reasons to support appeal as sufficient to allow counsel's withdrawal); Morris v. Lucas County Children Servs. Bd., 550 N.E.2d 980, 981-82 (Ohio Ct. App. 1989) (noting *Anders v. California*'s procedures are applicable to appeal involving termination of parental rights); State *ex rel.* Juvenile Dep't of Multnomah County v. Stock, 784 P.2d 1103, 1108 (Or. Ct. App. 1989) (discussing the Oregon Rules of Appellate Procedure regarding withdrawal of representation based upon a lack of meritorious issues to be raised on appeal).

100. *In re* Hall, 664 P.2d 1245 (Wash. 1983) (en banc). In *Hall*, the Washington Supreme Court held that "absent client consent, withdrawal of counsel on appeal in a child deprivation proceeding will never be permitted. . . . While this may require counsel to argue some frivolous appeals, we believe this is a small price to pay for assuring that the rights of all parents are fully protected." *Id.* at 1248.

101. Model Rules, *supra* note 14, Rule 1.16(b); Model Code, *supra* note 26, DR 2-110(A)(2); *id.* EC 2-32.

102. *See, e.g.*, Ill. Sup. Ct. Rule 13(c)(3) (stating that a motion to withdraw may be denied if it would cause delay); *see also In re* M.M., 726 P.2d 1108, 1121 (Colo. 1986) (en banc) (upholding denial of motion to withdraw filed by attorney on the day hearing scheduled to commence).

In the case of Ms. B., described at the outset of this Article, representation of the client never actually led into the ethical thickets that early in the attorney-client relationship might have seemed inevitable. Though the attorney's relationship with the client was at times contentious, it proved overall to be generally cooperative. Advocacy on behalf of the client focused initially on the responsible child welfare agency's failure to provide appropriate services or to conduct a careful family assessment. Subsequently, as anticipated, it became clear that the obstacles facing the client's desired goal of reunification were likely to be insurmountable. Advocacy then focused on the goals of stabilizing the child's placement in the home of a suitable relative agreeable to the parent, regularizing the client's visitation with her son, and ultimately on facilitating a consensual relative adoption that allowed the client to maintain the greatest possible involvement with her son. Given what seemed at the outset to be an apparently considerable likelihood of ethical conflicts between parent and lawyer in this case, it is worth considering the forces that kept the potential conflicts from coming to fruition.

To begin with, much of the parent advocate's routine involves working with families whose principle affliction is poverty. Numerous studies have documented the high correlation between families involved in child welfare systems and low income status. Summarizing evidence of the relationship between poverty and child maltreatment, Professor Pelton has noted, "Every national survey of officially reported incidents of child neglect and abuse has indicated that the preponderance of the reports involves families from the lowest socioeconomic levels."[103] Studies have marked the correlation between child maltreatment and poverty for all forms of neglect and abuse,[104] including for serious categories of harm where the greater susceptibility of poor people to public scrutiny cannot easily explain disparities in the income of reported families.[105]

Moreover, the correlation between child maltreatment and poverty is especially high for the categories of neglect that dominate reporting statistics. In Illinois, over the last ten years,[106] the largest categories of reported harms have consistently been lack of supervision,[107] environ-

103. Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, *in* The Social Context of Child Abuse and Neglect 23, 24 (Leroy H. Pelton ed., 1981) [hereinafter *The Myth of Classlessness*].

104. *Id.* at 24-26.

105. *Id.* at 27. Serious injuries to a child, of the kind likely to arouse suspicion, are more difficult to shield from the scrutiny of a child welfare agency through recourse to private remedies or treatment. *Id.* at 29.

106. *See* Ill. Dep't of Children and Family Serv., Child Abuse & Neglect Stat.: Ann. Rep.—Fiscal Year 1993, at 10.

107. The Illinois Juvenile Court Act includes within the definition of neglected minors "any minor under the age of 14 years whose parent or other person responsible for the minor's welfare leaves the minor without supervision for an unreasonable period of time without regard for the mental or physical health, safety, or welfare of that

mental neglect,[108] and risk of harm.[109] These categories, together with other allegations of neglect, typically account for nearly four-fifths of all reported harms to children.[110] The broad categories of environmental neglect and lack of supervision typically account for more than half of all reports of child maltreatment annually.[111] Studies have noted that while poverty increases the likelihood of all forms of child abuse and neglect, the relationship between poverty and child maltreatment is particularly strong for these categories of harm.[112]

To be sure, children need not suffer from major physical harm in order to be fairly characterized as victims of serious maltreatment. The harms associated with less visible forms of mistreatment—ranging from failure to provide a child with adequate care or a stable environment to emotional abuse—may be equally permanent and damaging.[113] Nor can there be any doubt that victims of extreme physical or sexual abuse may have suffered enduring mistreatment

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minor." Juvenile Court Act of 1987, Ill. Comp. Stat. Ann. ch. 705, § 405/2-3(1)(d) (Smith-Hurd 1993 & Supp. 1995).

108. Neglected minors also include any child "whose environment is injurious to his or her welfare." *Id.* § 405/2-3(1)(b).

109. *See id.* § 405/2-3(2)(ii).

110. For the fiscal year 1993, the most recent year for which statistics are available, the Illinois Department of Children and Family services reported the following breakdown in types of reported harms: lack of supervision 27.7%; risk of harm 23.14%; environmental neglect 18.7%; physical abuse 10.9%; sexual abuse 9.9%; lack of health care 4.5%; blatant disregard 3.8%; emotional abuse 1.2%; and death .05%. Ill. Dep't of Children and Family Serv., Child Abuse & Neglect Stat.: Ann. Rep.—Fiscal Year 1993, at 10. In contrast, charges of physical, sexual, or emotional abuse together average 20% to 25% of all reported harms annually. *Id.* The rate at which charges of abuse and neglect are substantiated is generally comparable, though typically slightly higher for abuse charges. *Id.* The influential authors Goldstein, Freud, and Solnit suggest that categories of neglect with such broad definitions as "denial of proper care," "psychological abuse," and "serious emotional damage," because of their vagueness and a lack of professional and societal consensus as to their meaning, normally should not constitute grounds for state intervention. Joseph Goldstein et al., Before the Best Interests of the Child 74 (1979).

111. In 1993, these two categories accounted for 46% of all reported harms. Ill. Dep't of Children and Family Serv., Child Abuse & Neglect Stat.: Ann. Rep.—Fiscal Year 1993, at 10. Professor Leroy Pelton noted in a 1977 study in New Jersey that leaving a child unattended is the most prevalent form of neglect, accounting for 50% of such cases. Leroy H. Pelton, *Child Abuse and Neglect and Protective Intervention in Mercer County, New Jersey in* The Social Context of Child Abuse and Neglect 90, 98 (Leroy H. Pelton ed., 1981) [hereinafter *Protective Intervention in Mercer County*].

112. *See, e.g.*, *Protective Intervention in Mercer County, supra* note 111, at 106 (noting that financial irresponsibility by poverty stricken families may have disastrous effects on the children, such as denial of basic necessities); *The Myth of Classlessness, supra* note 103, at 34 (noting the stronger correlation between poverty and neglect than poverty and abuse reflected in the American Humane Association Statistics for 1978).

113. On the definitions, understanding, and effect of emotional or psychological abuse, see generally Thelma F. Baily & Walter H. Baily, Operational Definitions of Child Emotional Maltreatment (1986).

leaving no major physical indicators.[114] Even comparatively less significant instances of physical abuse may signal that a child is at risk of more serious harm. Nevertheless, much of the parent advocate's task involves the defense of individuals whose socioeconomic status limits their ability to provide a safe, nurturing environment for the child. As one commentator has explained:

> In middle-class families there is some *leeway* for irresponsibility, a luxury that poverty does not afford. A middle-class mother can be careless with her money and squander some of it, but still have enough so that her children will not be deprived of basic necessities. Identical lapses in responsibility on the part of the impoverished mother might cause her children to go hungry during the last few days of the month. The less money one has, the better manager of money one has to be.[115]

This is not to say that individual parents may not or should not be held accountable for their actions and failures; rather, it is a recognition of the fact that poverty makes children much more susceptible to the harms caused by inattentive, irresponsible, or ignorant parents.

This fact has two important implications. First, as a general matter, the representation of parents in child welfare cases seems less morally onerous—and less likely to lead to moral conflict—when the task of the parent advocate is understood to involve the representation of indigent clients more than the representation of abusive parents.[116] Second, more practically, in the typical circumstance where a parent charged with neglect or abuse faces the range of difficulties associated with poverty, the task of the advocate is likely to focus far more on the client's need for services and support than on responding to the underlying allegations of mistreatment. Indeed, pursuit of service-oriented objectives may even be incompatible with raising a vigorous defense of a client at trial. In their survey of the roles of parents' counsel in child dependency proceedings, Garcia and Batey rightly note that protecting parents' procedural rights is a critical function of the parent advocate at the adjudicatory stage of the court process.[117] Even beyond the pressures normally brought to bear on a criminal defendant to enter a plea agreement, however, the juvenile court exacts a high "trial tax" from parent-respondents in child welfare cases,

114. *See, e.g.*, Quindlen, *supra* note 42 (noting that while caseworkers had regularly visited a particular child, Adam Mann, and reported he appeared happy, the child's autopsy indicated that at one point or another every bone in his body had been broken).

115. *The Myth of Classlessness*, *supra* note 103, at 35.

116. Ethical canons governing the legal profession reflect a longstanding commitment to a public service ideal, and to the need for the profession as a whole to commit resources to the representation of clients who cannot afford to pay for legal counsel. *See* Model Code, *supra* note 26, EC 2-25; Model Rules, *supra* note 14, Rule 6.1.

117. Garcia & Batey, *supra* note 9, at 1099; *see also* Isaacs, *supra* note 12, at 236-37 (highlighting eight functions a parent advocate performs during trial).

leaving the typical parent with compelling reasons to avoid disputing charges of neglect or abuse at trial.

Imagine a scenario in which a parent is alleged to have taken pornographic or exploitative pictures of a minor, and the child has been removed from the home and placed in foster care. The child's parent has informed her lawyer that the pictures were taken by her child's friend, and that she was unaware of the incident until a child protective investigator arrived to question her after a local pharmacy developed the pictures. The parent-respondent brings to the proceedings two distinct objectives: (1) proving the underlying allegations to be untrue, and (2) securing return of the child out of foster care. For the lawyer, the former objective involves pursuing a traditional adjudicatory process of challenging facts, arguing evidence, and insisting that allegations be proven in a manner consistent with applicable standards of proof. The latter objective, however, typically requires persuading the court that no harm will befall the child if returned to the parent, an end that generally obliges the parent both to accept responsibility for whatever harm may have already befallen the child and to demonstrate an amenability to services. Frequently, the accomplishment of this end is directly at odds with the end of vindication at trial. The parent who insists at trial that she has done nothing wrong will have a particularly difficult time at the dispositional phase persuading the court of her willingness to cooperate with services deemed necessary by the responsible agency. Thus, the parent who argues that the factual foundation of the underlying charge is mistaken takes a position that may be fundamentally at odds with the goal of family reunification. If the higher objective of the client is to reunify the family, this tension will often compel a parent to make admissions at trial and cede the issue of the court's jurisdiction.

During the dispositional phases of the juvenile court process, it is more likely that the focus of the court's attention will coincide with the issues that are dominant for most clients, regarding the custody and disposition of the child. Yet here too, the forces brought to bear on the client will often drive cases away from the ethical dilemmas that may face attorneys who cannot personally condone the causes for which they must advocate on behalf of their clients. First among these forces is the fact that most of the families involved with child welfare agencies desperately need services and support. In the case of Ms. B., the child welfare system monitored her son's placement in foster care for more than two years without conducting an appropriate assessment of the parent's mental, physical, or emotional strengths and shortcomings; searching for an appropriate placement within the child's family; or engaging in any sort of permanency planning. This type of failing is by no means isolated. Professor Pelton has noted compelling evidence that the great majority of children removed from their parents come from families living in poverty or near poverty cir-

cumstances, suggesting public agencies place many children in foster care only because they fail to provide reasonable resources and services that might have obviated the need for placement.[118] For many clients, he concludes:

> [I]t would be far more fruitful to ask what services could have prevented placement rather than what the reasons are for placement. When we look at the classifications of "reasons" for placement listed in the foster care studies, and more surely, at the actual placement cases on a case-by-case basis, we find in many instances that the services most frequently requested by the clients themselves—such as babysitting, homemaking, day care, financial assistance, and housing assistance—are also the ones that best and most logically fit the situational deficits, and the personal deficits and problems, that prompted placement. However, such reasonable services public child welfare agencies have frequently failed to provide.[119]

Even in circumstances where the parent has been charged with inflicting serious abuse for seemingly trivial reasons, the provision of appropriate services may do much to further the interests of the parent in family reunification. Numerous studies have marked a substantial correlation between child abuse and the parent's lack of

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118. For Reasons of Poverty, *supra* note 82, at 51.

119. *Id.* at 53 (citations omitted); *see, e.g.*, Suter v. Artist M., 503 U.S. 347 (1992) (alleging failure of state agency to make reasonable efforts to prevent removal of a child from home); Del A. v. Edwards, 855 F.2d 1148, 1153 (5th Cir.) ("[N]o reasonable efforts were made to return [the child] home even though some of the parents were able . . . to take them home with only minimal help."), *vacated and en banc review granted*, 862 F.2d 1107 (5th Cir. 1988), *appeal dismissed*, 867 F.2d 842 (5th Cir. 1989); Lynch v. Dukakis, 719 F.2d 504, 507 n.5, 509 (1st Cir. 1983) (affirming injunction entered by Massachusetts District Court requiring a state child welfare agency to provide services to improve conditions in family homes); Angela R. v. Clinton, No. LR C 91 415 (E.D. Ark.) (settlement entered Oct. 1994); B.M. v. Richardson, No. IP 89 1054C (S.D. Ind.) (settlement approved Nov. 1992); B.H. v. Ryder, No. 88 C 5599 (N.D. Ill.) (consent decree entered Dec. 1991); Baby Neal v. Casey, No. 90-2343 (E.D. Pa.); City of Philadelphia v. Pennsylvania, No. 139 (M.D. Pa.) (settlement approved May 1990); LaShawn A. v. Dixon, No. 89 CV 1754 (D.D.C); *see also* 42 U.S.C. § 671(a)(15) (requiring states to make "reasonable efforts" to prevent or eliminate the need to remove children from their homes). Lest there remain any doubt as to the widespread and systemic failures of child welfare agencies across the country to provide basic, minimal services, one need only consider the myriad of lawsuits brought to address basic agency failings. Nat'l Ctr. for Youth Law, Foster Care Reform Litigation Docket (1995) (describing status of some 75 class-action lawsuits in child welfare). In Illinois, the state child welfare agency in recent years appears to have devoted considerably more attention to establishing its legal right to deny needed services to families at risk, than to actually providing such services. *See Artist M.*, 503 U.S. at 363 (denying plaintiff foster children's cause of action to have caseworkers assigned to their cases); Youakim v. Miller, Nos. 95-8515 & 95-2813 (7th Cir. Dec. 6, 1995) (upholding an injunction against an agency plan to eliminate supports for foster children placed with family members); *In re* Lawrence M., 645 N.E.2d 1069 (Ill. App. Ct. 1995), *appeal granted*, 652 N.E.2d 342 (Ill. 1995) (in consolidated cases, agency argued that juvenile court lacked authority to direct it to provide needed inpatient treatment to substance-abusing parents).

knowledge about child development.[120] This correlation suggests the strong possibility that in appropriate cases, the provision of services focused on educating parents about not only issues of appropriate methods of discipline, but also of child development, may do much to minimize the risk of harm to a child. It is thus apparent that in many cases, the parent advocate must devote a substantial part of his energy not so much to justifying the client's actions, but rather to challenging the appropriateness of the child welfare system's response to those actions.

Finally, although the lawyer must remain loyal to the client's desired ends, it is important to note the critical role of the lawyer acting as counselor. Through the exercise of the counseling function, and through the tempering of client demands that typically accompanies the counseling process, lawyers may avoid many potential ethical dilemmas.[121] Parents confronting the child welfare system for the first time often have little idea what is expected of them in order to secure return of their children from foster care. Though a client charged with excessive corporal punishment may seek ultimately to secure the return of her child, the lawyer may suggest that she instead begin by requesting that the court allow her liberal or unrestricted visitation with her child, or provide her with appropriate services to address her use of corporal punishment as a disciplinary tool. If it becomes clear to the lawyer that the obstacles facing the client are insurmountable, the lawyer may counsel the client to pursue alternative courses of action that permit her to maintain the maximum degree of involvement with the child.

While the counseling function plays a central role in the practice of the ethical lawyer, at another level the exercise of this function raises complex questions about the appropriate boundaries of lawyer influence. Cautions are particularly appropriate in a field such as child welfare, where clients are almost invariably handicapped by a dependence born of economic and social powerlessness and ignorance of judicial systems. The case of Ms. B. again suggests both the importance of the counseling function and the need for the exercise of a degree of care in responding to client demands that seem to the lawyer to be unwise or unattainable. Ms. B.'s initial request for legal assistance focused on her desire to secure the return of her son. Local practice generally requires a parent to establish a record of un-

120. *See* Karen Brandon, *Ignorance About Kids Can Unleash Deadly Discipline*, Chi. Trib., Oct. 14, 1993, at 1 (reporting studies noting correlation between child abuse and unrealistic expectations of children's capabilities).

121. Several commentators have noted the critical role that the parent advocate plays as counselor to a client confronted with an unfamiliar court system. *See, e.g.*, Duquette, *supra* note 17, at 326-29 (describing the importance of the parent advocate's role as counselor particularly in child protection); Isaacs, *supra* note 12, at 235 (stressing that the parents' lawyer's role as trial-advocate should not "obscure the equally important role of the lawyer as counselor").

supervised parent-child visitation as a prerequisite to family reunification and to undergo an often lengthy set of psychological and related assessments as a prerequisite to unsupervised visitation. When the Legal Clinic undertook representation of Ms. B., the responsible agency had made no effort either to provide her with supportive services or to assess her strengths and limitations. Moreover, because of the significant passage of time that had already occurred since her son was placed in foster care, it quickly became clear that even the provision of needed services would do little to allay the concerns underlying opposition to reunification stemming from the agency workers, the child's appointed guardian *ad litem*, and the prosecuting attorney.

Ms. B.'s overriding desire was to be with her son, and she found the thought of voluntarily surrendering legal rights through adoption or the appointment of a legal guardian to be deeply disconcerting. Balanced against her desire to contest her forceful separation from her child, however, Ms. B. faced significant pressures to seek prompt resolution of his legal status. She found herself tested almost weekly by the intrusions of the caseworker into her relationships with both her son and her sister, the child's caregiver; by the child's obvious preoccupation with his uncertain future; and by the ugly specter of protracted legal battles over the issues of custody and involuntary termination of parental rights. In addition, periodic disputes between Ms. B.'s sister and the child's caseworker raised the disturbing prospect that if the child welfare agency retained responsibility for the child for any significant period of time, the child might be removed and placed in the home of a stranger. Ms. B. felt above all that the child should remain with family. She was satisfied that her son was being appropriately cared for by his aunt in foster care and that she would continue to be able to have a significant relationship with the child as long as he remained in that home.

The counseling process was critical to Ms. B.'s understanding of the constraints of the judicial process, the limitations of her case, and the risks associated with her son's continued placement with the child welfare agency. This process ultimately led the client to conclude that both her long term interests and those of her son lay in agreeing to adoption by a relative, rather than pursuing a likely unsuccessful effort toward reunification. Ms. B., however, approached the process of developing a legal strategy with great ambivalence and uncertainty, and she embraced her ultimate decision to consent to a relative adoption tentatively at best. Though she was heavily dependent on her counsel to guide her through the intricacies of the legal process, counsel never fully persuaded Ms. B. that her interests were better served by foregoing the opportunity to contest the continued placement of her son in foster care. Indeed, as the designated time to sign consent forms drew closer, Ms. B. became increasingly agitated, reflecting

through her words and actions a growing dissatisfaction with the process.

Two symbolic acts of rebellion, committed by Ms. B. in conjunction with the "voluntary" surrender of legal rights, demonstrated her sense of powerlessness. First, approximately two weeks before signing a consent to adoption, Ms. B. called her counsel and insisted on assistance in treating what she described as gross inadequacies in her son's educational plan. Ms. B. was fully aware that she had lost any authority to speak for the child in the public school system and that the child's aunt had been involved in extensive discussions with the school over the provision of appropriate educational services. She nevertheless felt compelled not only to assert her interests in her son's education, but also to try and enlist the aid of counsel, despite her knowledge that counsel would have to pursue any advocacy effort on behalf of the child's caregiver and/or legal guardian. Ms. B. committed her second symbolic act of resistance on the day she signed her consent to adoption. Consistent with local practice, she was asked to answer a series of questions on a preprinted form, designed to assure that she understood the consequences of her act and that her consent was knowing and voluntary. When asked to affirm that all questions surrounding the signing of the consent form and the adoption process had been answered to her full satisfaction, Ms. B. balked. In discussing her refusal, she made clear that her "unanswered questions" had less to do with the consent and adoption process than with broader, unanswerable questions about why the judicial and child welfare systems had kept her son apart from her. Privately, she conceded her awareness that her act might "throw a wrench" in the adoption process, but stood by her act of defiance.

These events reflect more than the inaccessibility of legal processes to a parent who had lost custody of her child and the client's patent and painful frustration with those processes. By her acts, Ms. B. left counsel with the uneasy feeling that the decision to consent to adoption may not have belonged entirely to the client. The tension reflected by her acts of defiance highlights the precarious role of the attorney acting as counselor. Notwithstanding the client's responsibility to make critical strategic decisions about a case, the client's dependence on the lawyer gives rise to a substantial influence over the client that must be exercised with great caution.[122] Legal scholars increasingly recognize the importance not only of respecting client choice, but also of actively engaging clients in the process of developing case

122. *See, e.g.*, Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. Rev. 717 (1987) (discussing lawyer's role in shaping strategic client decisions); William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interaction*, 77 Cornell L. Rev. 1447 (1992) (same); Miller, *supra* note 90, at 510 (noting evidence that "lawyers who engage in strategy discussions with their clients dominate those discussions to the exclusion of their clients").

theory and strategy.[123] Yet it is not enough just to recognize the ethical obligation to defer to client choice with regard to matters having a substantial impact on the client.[124] In the counseling process, the lawyer must be sensitive not only to balancing the client's interests as they affect the process of legal strategizing,[125] but also to the fact that numerous factors may limit the client's ability or willingness to share fully with the lawyer the internal and external forces that impact on the client's calculus.[126] The task of distinguishing a client's understandable vexation with an unsatisfactory outcome from the unease of a client forced to accept the lawyer's choice of strategy may pose questions that are, at bottom, unanswerable. Nevertheless, the task is an important one for the lawyer who seeks to avoid usurpation of the client's authority and to adhere to the ideal of zealous advocacy.

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123. Highlights of the growing wealth of literature on client-centered lawyering include David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (1991); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. Rev. L. & Soc. Change 659 (1987-88); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501 (1990); Miller, *supra* note 90; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. Rev. L. & Soc. Change 535 (1987-88); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1 (1990) [hereinafter White, *Sunday Shoes*].

124. David Binder elaborates a standard for determining when a lawyer should defer a decision to a client. The standard focuses on the question of whether, in the view of the lawyer, the decision is "likely to have a substantial legal or nonlegal impact" on a client. Binder et al., *supra* note 123, at 268.

125. *See supra* p. 1648; *see generally* Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 Mich. L. Rev. 2459, 2470-73 (1989) (discussing limitations of lawyers' ability/willingness to hear client stories); Miller, *supra* note 90, at 503 (noting that "client decisionmaking is supported by the principle of client autonomy and by the idea that the client is in a better position than the lawyer to evaluate alternatives and consequences"). As an example of how client interests may diverge from the focus of a more traditional pattern of lawyering, Gabel and Harris describe the case of several local hispanic activists in the Mission District of San Francisco in 1971, charged with trespass for the distribution of political literature outside a department store. For these defendants, the traditional interests of the criminal defendant in avoiding the possibility of jail time were subordinated to more far-reaching political concerns and objectives. *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369, 389-90 (1982-83). Likewise, in the juvenile process, many parents find that they never have an opportunity to "tell their side of the story" in a formal court hearing, due largely to systemic pressures to focus on the disposition of their children to the exclusion of responding to jurisdictional charges.

126. Lucie White writes of the provocative case of Ms. G., a welfare client asked to reimburse the welfare agency for a claimed overpayment of public aid benefits. She pointedly describes forces—labeled as intimidation, humiliation, and objectification—limiting the client's ability to communicate her position in an administrative hearing, despite the scrupulous observation of the rituals of due process. White, *Sunday Shoes*, *supra* note 123, at 32-44. These same forces may similarly constrain free, open, and accurate communication between a lawyer and her client, where the client perceives limitations of the process within which the lawyer operates.

CONCLUSION

The job of the lawyer representing parents in abuse and neglect cases is never an easy one, but the ethical dilemmas that parent advocates face from time to time are often overemphasized. The common view among participants in the child welfare system is that lawyers are often overzealous in their representation of parents responsible for serious acts of abuse.[127] Yet, even in the face of pervasive criticism of parent advocates, there is widespread recognition of the beneficial effects that parent advocates have on the juvenile court system as a whole and of the need for expansion of their role.[128] Effective advocacy can accomplish much for parents, serving not only the interests of the parents, but of their children as well. Writing nearly twenty-five years ago, Jacob Isaacs emphasized the importance of the role of the parent's advocate in child welfare cases:

> It is difficult to conceive of a party in a court proceeding more in need of independent legal representation than a person charged with brutalizing his child. Even before the charge is proved, newspaper and other media may well have almost condemned the accused as a social outcast. The misdeeds he's charged with may automatically align the entire court staff against the alleged offender. Who but counsel can stand between the accused and public hysteria?[129]

Public reaction to the stories of Joseph Wallace, Emily Hernandez, and other victims of heinous acts of abuse stands as testimony to the fact that this admonition rings as true today as when it was written.

127. *See* Garcia & Batey, *supra* note 9, at 1084.
128. *Id.* at 1098.
129. Isaacs, *supra* note 12, at 233.