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## Talk Don't Touch? Considerations for Children's Attorneys on the Physical Touch of Clients

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## Talk Don't Touch? Considerations for Children's Attorneys on the Physical Touch of Clients

### Cover Page Footnote

Associate Professor, University of Georgia School of Law. This Article benefited from the insights of participants in a roundtable discussion on ethical issues in the representation of children at the 2014 Annual Meeting of the Southeastern Association of Law Schools, as well as the insights of the Mid-Atlantic Criminal Law Research Collective. Valuable research assistance was provided by Imani Carter, Alicia Luncheon, and Mairin Ashley McGinley. Thanks for everything, Plum.

# TALK DON'T TOUCH? CONSIDERATIONS FOR CHILDREN'S ATTORNEYS ON THE PHYSICAL TOUCH OF CLIENTS

Andrea L. Dennis<sup>+</sup>

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Imagine the myriad of ways in which individuals may platonically touch one another in their daily lives.<sup>1</sup>

*Hand-shake. High five. Fist bump. Grip.*  
*Hand hold. Hand grasp.*  
*Leaning on. Bumping into.*  
*Hug. Full frontal. Side armed. Shoulder.*  
*Pat. On the head. On the shoulder. On the arm. On the back.*  
*Tap. On the shoulder. On the arm.*  
*Poke. On the arm. In the stomach.*  
*Back slap. Butt slap.*  
*Pinch on the cheek.*  
*Noogie. Hair tussle.*  
*Neck squeeze. Shoulder squeeze.*  
*Kiss. Peck. In the air. On the lips. On one cheek. On two cheeks.*  
*Tickle. Nuzzle. Caress.*  
*Stroke. Massage.*  
*Carry. Cradle. Lap sit.*  
*Grooming. Straightening. Hair. Clothes.*

Now imagine the many positive sentiments individuals intend to convey when physically touching others.<sup>2</sup>

*Affection. Support. Solidarity.*  
*Joy. Comfort. Friendship. "Hello." "Goodbye."*  
*Sympathy. Empathy.*  
*Encouragement. Understanding. Agreement.*

Finally, imagine what guidance might be offered to an attorney who represents children and is contemplating whether it would be appropriate to touch child clients.<sup>3</sup> The attorney might approach the question by relying on the attorney's individual predilection. So, if the attorney were euphemistically

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1. This Article is concerned solely with physical contact or touch between individuals that is pro-social or neutral and of a non-sexual nature or intended non-sexually. Examples are provided. This Article does not concern itself with touch that is anti-social in nature or negatively intended, such as hitting, slapping, punching, kicking, or biting.

2. Given the Article's focus on pro-social, non-sexual touch, the discussion herein is concerned solely with intentions to convey positive emotions, not negative sentiments, such as anger, displeasure, or disapproval.

3. In this Article, the terms "juvenile," "child," "children," and "youth" are used interchangeably. The terms refer to individuals eighteen years of age or younger.

described as “touchy feely,” then the attorney would likely not hesitate to touch a juvenile client. On the other hand, if the attorney was of a conservative mindset, that attorney might altogether avoid touching a juvenile client. While both responses may reflect an approach that is comfortable for the attorney, neither is sensitive to the complexities and difficulties of working with child clients. Unfortunately, if the attorney were to look for thoughtfully developed professional guidance on the matter, none would be found.<sup>4</sup>

Lawyers for children understand the need to develop trusting, positive relationships with their vulnerable, immature clients. Various publications on children’s attorneys routinely discuss the topic of relationship formation.<sup>5</sup> Attorneys are offered guidance on such matters as where and when to meet clients, how to create comfortable meeting spaces, and what constitutes effective verbal and non-verbal communication.<sup>6</sup> Despite this wealth of information, a discussion of the role that physical touch plays in the attorney-client relationship is absent from this literature. Neither ethical rules, professional benchmarks, nor instruction manuals address this issue. Even though children’s advocates identified the significance of this issue almost twenty years ago, the omission still exists.<sup>7</sup>

The absence of conversation on the propriety of an attorney physically touching a child client is notable for several reasons. First, scientific research has established that touch is a potent form of non-verbal communication, important for the physical and psychological health of children, and often

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4. See MODEL RULES OF PROF’L CONDUCT R. 1.8(j) cmts. 17–19 (1983). This is the only section of the ABA’s Model Rules that discusses touching one’s client, and it is in the context of discouraging sexual relationships. This does not provide any guidance for attorneys working with children who would like to know the limits of their ability to comfort child clients or establish rapport in a non-sexual, physical manner.

5. See, e.g., Lauren Girard Adams & Maisley Paxton, *Counseling Children and Youth in Times of Crisis: Tips To Achieve Success and Avoid Pitfalls*, AM. BAR ASS’N, SECTION LITIG., 1, 5–10, <https://apps.americanbar.org/litigation/committees/childrights/docs/CounselingChildrenandYouth.pdf> (discussing recommendations on how to build a relationship with a youth in crisis); *Superior Court of District of Columbia Child Abuse and Neglect Attorney Practice Standards* 13–15 (2003), [http://www.dccourts.gov/internet/documents/practice\\_standards.pdf](http://www.dccourts.gov/internet/documents/practice_standards.pdf) (last visited Jan. 18, 2016) [hereinafter *D.C. Attorney Practice Standards*]; *Standards for Attorneys Representing Children*, N.Y. ST. BAR ASS’N COMM. ON CHILDREN & THE LAW 2–8 (2015), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55901>.

6. See, e.g., Adams & Paxton, *supra* note 5, at 5–10.

7. In 1996, children’s advocates identified the issue but did not explore it at that time. See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1307 (1996) [hereinafter *Fordham Conference Recommendations*] (“What are the boundaries of appropriate lawyer-client contact, including financial assistance and physical touching?”). Elder law practitioners also have recognized the importance of touch in development of the lawyer-elderly client relationship. See Rebecca C. Morgan, *The Practical Aspects of Practicing Elder Law: Creating an Elder-Friendly Office*, 38 FAM. L. Q. 269, 283 (2004) (“Touch is important to clients, so do not be afraid to hug them (where appropriate) or hold their hands, especially when things are particularly difficult for the clients.”).

considered a natural part of most relationships.<sup>8</sup> Second, anecdotal information documents that many children's attorneys—often uncritically—have touched their clients at some point without receiving any official guidance on the matter.<sup>9</sup> Third, other professionals who work closely with children—such as pediatricians, social workers, K-12 teachers, and child psychologists—have expressly devoted attention to the matter.<sup>10</sup> In short, non-verbal communication through physical touch is occurring in attorney-child client relationships; yet in contrast to other professional disciplines focused on caring for children, the children's bar has neglected to explore whether lawyers representing children should physically touch them and what advice should be provided to lawyers for children. This Article seeks to fill that gap.

This Article consists of three parts. Part I describes the literature commanding attorneys for children to develop quality relationships with their clients. These works recognize that young clients seek good relationships with their attorneys, but that barriers to creating quality relationships may exist. Next, Part I summarizes the current state of scientific knowledge regarding touch. Finally, Part I explains the potential benefits when attorneys use touch in their professional role.

Part II reveals the glaring lack of guidance offered to children's attorneys regarding whether it is appropriate to physically touch their clients and the reasons to caution against attorneys doing so. Explaining that neither ethical nor

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8. See Jeffrey D. Fisher et al., *Hands Touching Hands: Affective and Evaluative Effects of an Interpersonal Touch*, 39 *SOCIOMETRY* 416, 416 (1976), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.474.5401&rep=rep1&type=pdf> (“The essential nature of early touching for human infants was first established by Spitz (1946); more recent work with infants . . . indicates that tactile stimulation is important for emotional, intellectual, and psychological development.”); Matthew J. Hertensein et al., *The Communication of Emotion Via Touch*, 9 *EMOTION* 566, 566 (2009), <http://ist-socrates.berkeley.edu/~keltner/publications/hertenstein.2009.pdf> (“Touch has been described as the most fundamental means of contact with the world . . . and the simplest and most straightforward of all sensory systems . . . Touch is vital in several domains of the infant's and child's life, including social, cognitive, and physical development.”).

9. See, e.g., *Children's Program*, ROCKY MOUNTAIN IMMIGR. ADVOC. NETWORK, <http://www.rmian.org/childrens-program/> (last visited Jan. 18, 2016) (“In a recent court hearing, RMIAN's Managing Attorney had a four year [old] boy sit on her lap, his legs dangling from the chairs, because he was terrified of court.”).

10. See, e.g., Janie B. Butts, *Outcomes of Comfort Touch in Institutionalized Elderly Female Residents*, 22 *GERIATRIC NURSING* 180, 180–81, 183 (2001) (concluding that elderly female residents reacted positively to comforting touch from nurses and family); Sheryle J. Whitcher & Jeffrey D. Fisher, *Multidimensional Reaction to Therapeutic Touch in a Hospital Setting*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 87, 87–88, 96 (1979) (explaining an experiment that looked at how touch affected the nurse-patient relationship and concluding that women tend to react positively, while men tend to react negatively to touch in the hospital setting); Maria Newman, *Cautious Teachers Reluctantly Touch Less: A Fear of Abuse Charges Leads to Greater Restraint with Students*, *N.Y. TIMES* (June 24, 1998), <http://www.nytimes.com/1998/06/24nyregion/cautious-teachers-reluctantly-touch-less-fear-abuse-charges-leads-greater.html> (discussing how teachers have become nervous about touching children for fear that the touch will be deemed inappropriate).

professional standards prevent attorneys from touching their clients in non-sexual, pro-social ways, Part II begins by revealing that the existing literature fails to consider touch as a possible tool for developing a quality relationship. Part II then examines the potential negative outcomes that may occur when an attorney physically touches a child client. Not only may the child or attorney-client relationship be affected negatively, but the attorney may also be negatively influenced.

Drawing upon the first two Parts, Part III offers several suggestions for addressing the matter. It begins by reviewing approaches taken by other professionals who work closely with children. These occupations, which embrace different perspectives, offer worthwhile viewpoints for consideration. Part III then proposes that all attorneys for children receive training on whether and how to appropriately touch child clients. Finally, Part III recommends that legal organizations and lawyers for children adopt formal policies governing attorney-client touch. Three alternative policy options are advanced, although no particular approach is ultimately recommended. The choice of which policy to adopt is context-specific and heavily driven by the particularities of organizations, lawyers, and clients, as well as the circumstances of the representation. Thus, any of the suggested approaches could reasonably be adopted.

#### I. PHYSICAL TOUCH CAN POSITIVELY AFFECT THE ATTORNEY-CHILD CLIENT RELATIONSHIP

Part One explains that children's attorneys are instructed to develop quality relationships with their clients, who can be sensitive to how their lawyers treat them.<sup>11</sup> However, as this Part also makes clear, creating a good lawyer-child client relationship can be difficult.<sup>12</sup> Part One offers a solution to overcoming these hurdles: physical touch. The science of physical touch reveals that it may benefit both the child and attorney-client relationship.<sup>13</sup>

##### A. *The Relationship Between Attorneys and Juvenile Clients*

Scholars and practitioners of juvenile law routinely advise attorneys for children to establish rapport and trust with their clients.<sup>14</sup> They argue that an

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11. See sources cited *supra* note 5.

12. See Adams & Paxton, *supra* note 5, at 2, 15–16, 17 (identifying the many difficulties attorneys face when trying to create a positive relationship with child clients).

13. See sources cited *supra* note 8.

14. See *Fordham Conference Recommendations*, *supra* note 7, at 1303 (“The lawyer should be trained, and take the time to establish rapport with the child client.”); see also *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 612 (2006) [hereinafter *UNLV Conference Recommendations*] (recommending the establishment of trust and ongoing communications with a child client and his or her family to facilitate the attorney-client relationship); Lauren Girard Adams & Maisley Paxton, *Counseling Children and Youth in Times of Crisis Understanding Child*



attorney who forms a quality relationship with a child client will better represent that child.<sup>15</sup> They support their claims by referencing anecdotal information from juvenile clients about their experiences with attorneys.<sup>16</sup> In practice, however, developing a quality relationship with a juvenile client can be complicated by the client's developmental stage, the age and developmental gap between adult and child, and the circumstances of representation.<sup>17</sup>

### *1. Attorneys Are Instructed to Emphasize Rapport and Trust*

Since the 1970s, scholars and practitioners of juvenile law have devoted attention to the issue of whether children should be provided lawyers and if so, what their role should be and to what professional standards they should be held.<sup>18</sup> At the time, however, only a few were writing on the topic, as a more robust conversation had not emerged.<sup>19</sup> By the 1990s, circumstances had changed.<sup>20</sup> Specifically, a consensus had arisen that children's lawyers were operating without sufficient guidance and best practices to the detriment of their clients.<sup>21</sup> Thus, in 1996, academics, policymakers, and practitioners focusing on

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*Development and Building Rapport (Part 1)*, 30 CHILD. L. PRAC. 49, 54 (2011) [hereinafter *Building Rapport*] ("Additionally, building rapport and establishing trust are key to a productive, collaborative attorney-client relationship, and the ultimate success of the case.").

15. See *Building Rapport*, *supra* note 14, at 54, 58 ("By developing a production relationship with the child client, you can increase the likelihood of a more positive outcome for the child.").

16. See Brent Pattison, *You Better Represent: Lessons About Lawyering from Adolescents (Real and Imagined)*, 62 DRAKE L. REV. DISCOURSE 1, 2–3, 6–7 (2013) (explaining that attorneys have to overcome preconceived notions about their role by building a meaningful relationship with their child-client). For example, some child clients become exasperated by how little contact they have with their attorney:

The only time I ever see my lawyer is five minutes before we go into court. How can they expect to know anything about me? And how am I supposed to decide what I want to do when I don't even know what might happen until right before the hearing?

*Id.* at 8.

17. See, e.g., Adams & Paxton, *supra* note 5, at 2 (explaining how traumatic experiences can affect a child's development, how critical it is to determine a child's developmental stage in order to successfully represent the child, and how those developmental difficulties can affect the attorney-client relationship).

18. See Emily Buss, *You're My What?—The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1700–06 (1996) (discussing the various types of roles children's attorneys can play); see generally Martin Guggenheim, *The Right To Be Represented But Not Heard: Reflections on Representation of Children*, 59 N.Y.U. L. REV. 76 (1984); Wallace J. Mlyniec, *The Child Advocate in Private Custody Disputes*, 16 J. FAM. L. 1 (1977–1978); Robert E. Shepherd, Jr., *Solomon's Sword: Adjudication of Child Custody Questions*, 8 U. RICH. L. REV. 156 (1974).

19. See generally Mlyniec, *supra* note 18; Shepherd, Jr., *supra* note 18.

20. See, e.g., Bruce A. Green & Bernadine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1284–86 (1996); see generally *Fordham Conference Recommendations*, *supra* note 7 (providing a summary of the recommendations from the Conference on Ethical Issues in the Legal Representation of Children).

21. See Green & Dohrn, *supra* note 20, at 1281–83 (explaining why children's attorneys feel a need to come together to discuss best practices).

lawyering for children collaborated to develop and publish aspirational best practice standards concerning the legal representation of children.<sup>22</sup> These standards are commonly called the Fordham Recommendations, named for the law school that hosted the working group.<sup>23</sup> Among the many topics covered, the Fordham Recommendations devote significant attention to standardizing the interactions between attorneys and clients.<sup>24</sup>

The Fordham Recommendations sought to improve the representation of children by addressing questions, such as:

How should lawyers determine whether the child has the capacity to direct the representation? How should the lawyer conduct the representation when the child does not or cannot direct the representation? How should the lawyer interview and counsel the child and address issues of confidentiality and conflicts of interest? And, how should courts and other legal institutions facilitate the provision of effective and appropriate legal services to children?<sup>25</sup>

With respect to interviewing and counseling, the Fordham Recommendations repeatedly advised attorneys to interview and counsel clients in ways that would be comfortable for the clients.<sup>26</sup> The recommendations also encouraged attorneys to “be trained, and take the time to establish rapport with the child client.”<sup>27</sup> Finally, attorneys were cautioned to be sensitive to race, class, ethnicity, and cultural differences between them and their clients.<sup>28</sup>

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22. See sources cited *supra* note 20.

23. See sources cited *supra* note 20.

24. See generally *Fordham Conference Recommendations*, *supra* note 7 (recommending concrete standards of practice for attorneys working with children).

25. Green & Dorn, *supra* note 20, at 1283.

26. See, e.g., *Fordham Conference Recommendations*, *supra* note 7, at 1301. The Fordham Recommendations include the following suggestions:

Contact with the child should occur where and when such contact is comfortable for the child, not merely where and when it is convenient for the lawyer. . . . The lawyer should exercise judgment when considering whether the presence of a third person . . . would make the child more comfortable when speaking with the lawyer. . . . With the requisite training, the lawyer should use developmentally appropriate language. . . . When discussing the case with the client, the lawyer should use concrete examples and hypotheticals and should provide the client with a “road map” of the interview and legal process. . . . The lawyer should employ appropriate listening techniques and provide nonjudgmental support. . . . Questions should be noncoercive and culturally competent. . . . The lawyer conducting the interview should explain the lawyer’s role and make it clear to the child that the judge, rather than the lawyer or the client, is the ultimate decision maker. . . . The lawyer also should explain the court or legal process, the issue(s) to be considered by the court, the options available to the client, and the consequences of those options.

*Id.* at 1302–04.

27. See, e.g., *id.* at 1303.

28. Green & Dorn, *supra* note 20, at 1295–96.

In 2006, researchers, practitioners, and policymakers again came together to reflect and consider children's representation and offer recommendations.<sup>29</sup> This time the group was hosted by the University of Nevada-Las Vegas (UNLV) School of Law.<sup>30</sup> The resulting UNLV Recommendations built upon the Fordham Recommendations by prioritizing the child's voice in the representation, recognizing the complexity of children's lives, and tackling the tension between "client-directed, multi-disciplinary, holistic, and contextual representation"—several modes of representation that the children's bar had embraced.<sup>31</sup> Crucial to facilitating the child's voice in representation and representing the whole child, the UNLV Recommendations emphasized the ability of the attorney to connect with the child in developing a good working relationship.<sup>32</sup> Thus, when communicating with child clients, the UNLV Recommendations support lawyers taking time to get to know clients, meeting face-to-face with them whenever possible, and using both verbal and nonverbal communication methods.<sup>33</sup>

These early efforts by both scholars and practitioners succeeded in ushering in important change to the representation of children. Considerably more attention has been paid by legal scholars to both the theoretical and practical aspects of representing children, including the formation of an attorney-child client relationship.<sup>34</sup> Non-governmental organizations devoted to juvenile representation have promulgated aspirational standards reflecting the current scholarly thinking and developed complementary training curricula.<sup>35</sup> For example, in 2011, the Children's Rights Litigation Committee of the ABA Section on Litigation published an article aimed at guiding attorneys on how to effectively counsel children involved in court proceedings.<sup>36</sup> Emphasizing that establishing rapport and trust are vital to the development of a collaborative, positive attorney-child client relationship, the authors provided specific

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29. See generally *UNLV Conference Recommendations*, *supra* note 14, at 592–93 (providing a new set of recommendations based on ten years of practice after the Fordham Conference in 1996).

30. See *id.*

31. See *id.*

32. See *id.* at 598–99.

33. See *id.* at 596.

34. In addition to the recommendations, both the Fordham and UNLV Conferences resulted in the publication of scholarly articles on the topic. Scholars have continued those conversations by publishing elsewhere at other times on the issue. See generally Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999); Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357 (2006); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005); Abbe Smith, "I Ain't Takin' No Plea": *The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11 (2007).

35. See generally Adams & Paxton, *supra* note 5.

36. See generally *id.*

strategies for attorneys to pursue these objectives.<sup>37</sup> The strategies included (1) “[c]reat[ing] a quiet, distraction-free, and comfortable meeting environment,” (2) “[d]evelop[ing] a collaborative, interactive, style,” (3) using language and interviewing techniques appropriate for the child’s developmental level and background experience, (4) listening actively, and (5) “[e]ncourag[ing] the client to actively evaluate options,” and motivating the attorneys to “be honest and reliable” and “take an unbiased, non-judgmental approach.”<sup>38</sup> Local jurisdictions, tasked with training and appointing counsel to children, have embraced these recommendations.

For example, D.C.’s current standards of practice on establishing rapport with a client and better tailoring recommendations to his or her wishes for guardians *ad litem* in child abuse and neglect cases emphasize the importance of an attorney developing a trusting relationship with a child client.<sup>39</sup> New York promulgated standards for attorneys representing children in a wide variety of proceedings, including adoption, child protection, delinquency, custody, and status cases.<sup>40</sup> Regardless of legal context, these standards mandate the use of “developmentally appropriate language” and the “aware[ness] of power dynamics inherent in adult/child relationships.”<sup>41</sup>

## 2. Adolescent Clients Value Rapport and Trust

Researchers have not systematically studied the child client perspective on attorney-client relationships. Drake University Law Professor Brent Pattison, however, talked with adolescents about their experiences with and perspectives on legal representation.<sup>42</sup> Three themes arose from these conversations: the importance of building trust with the client, the need to invest time in communicating with the client, and the necessity of checking assumptions about clients.<sup>43</sup>

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37. See *id.* at 5–10 (“As an initial matter, always think about establishing and re-establishing rapport as the first order of business.”); see also *Building Rapport*, *supra* note 14, at 5 (“To develop an attorney-client relationship that encourages collaboration, you must build rapport and establish trust with your child client.”).

38. Adams & Paxton, *supra* note 5, at 5–10.

39. See *D.C. Attorney Practice Standards*, *supra* note 5 at 14, 18.

40. See *Standards for Attorneys Representing Children*, *supra* note 5.

41. *Id.*

42. See generally Brent Pattison, *Sound Advice: Learning from Juvenile Clients Can Make You a Better Advocate*, ABA SECT. LITIG. (2013), <http://www.americanbar.org/content/dam/aba/multimedia/migrated/litigation/soundadvice/mp3/022513-b-pattison-crlc-lessons-from-clients-final.authcheckdam.mp3> [hereinafter *Sound Advice*]. This podcast by Drake Law Professor Brent Pattison and Lori Bullock, a second-year law student and former foster-care child, discusses three critiques of legal representation expressed by adolescents who are in the child-welfare system. See *id.*; see also Pattison, *supra* note 16.

43. See *Sound Advice*, *supra* note 42.

With respect to trust, teen-clients indicated that attorneys unrealistically expected clients to trust them.<sup>44</sup> Often teens in legal predicaments have been previously let down by adults, and are more likely to trust their friends than adults.<sup>45</sup> This distrust can be further complicated by cross-cultural or socioeconomic differences between attorneys and their young clients.<sup>46</sup>

With respect to communication, many adolescents only met their attorneys shortly before going into court, which they considered insufficient to allow for a thorough conversation about the attorney's role and what would happen in court.<sup>47</sup> Such brief meetings and inadequate information created confusion and anxiety for the child.<sup>48</sup> Lastly, teens advised that attorneys should be vigilant in monitoring their assumptions, both conscious and unconscious, about their clients.<sup>49</sup> For example, one child revealed that it seemed as if the child's attorney believed, because the child was in foster care, that the client was bad or something was wrong with the child.<sup>50</sup> All of this anecdotal information reveals that juvenile clients can be sensitive to the quality of their relationships with attorneys.

### 3. Attorneys May Have Difficulty Developing Rapport and Trust

Attorneys attempting to develop meaningful relationships with their young clients may face barriers in doing so. First, research indicates that adolescent clients have difficulty trusting adults, including attorneys, and that this difficulty can complicate developing an effective attorney-client relationship.<sup>51</sup> Second, juvenile clients of all ages have difficulty comprehending the role and obligations of attorneys, whether due to cognitive or experiential immaturity.<sup>52</sup> Specifically, it is well-documented that children may not understand attorney-client privilege and other confidentiality rules or that the attorney must represent the child's wishes.<sup>53</sup> This lack of comprehension can arise regardless of whether

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44. *See id.*

45. *See* Brief for the NAACP Legal Defense & Educational Fund, Inc. et al. as Amici Curiae in Support of Petitioners, at 8–10, *Graham v. Florida*, 560 U.S. 48 (2010) (Nos. 08-7412 & 08-7621) [hereinafter NAACP Brief]; Buss, *supra* note 18, at 1710–11; Henning, *supra* note 34, at 247.

46. *Cf. UNLV Conference Recommendations*, *supra* note 14, at 602 (requiring attorneys to have cross cultural knowledge); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33, 42-43 (2001).

47. *See Sound Advice*, *supra* note 42.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See* NAACP Brief, *supra* note 45, at 6–7; Buss, *supra* note 18, at 1726; Henning, *supra* note 34, at 247, 272–73.

52. *See* NAACP Brief, *supra* note 45, at 6–7; Buss, *supra* note 18, at 1726; Henning, *supra* note 34, at 247, 272–73.

53. *See* Buss, *supra* note 18, at 1726; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 *PSYCHOL. PUB. POL'Y & L.* 3, 15 (1997); M. Dyan McGuire et al., *Do Juveniles*

the information is conveyed to the child in a developmentally appropriate manner.<sup>54</sup> Confusion as to whether the attorney is really on the child's side or will work against the child's desires is bound to create some difficulty in forming a trusting relationship.

Finally, the attorney-child client relationship is usually involuntarily created between two strangers. A child is, except for delinquency cases, generally not a willing participant in the court process; rather, a child usually becomes involved with the court system because of the behavior of other people, such as a parent or caretaker.<sup>55</sup> Moreover, a child in this position is rarely able to select his or her own lawyer.<sup>56</sup> Instead, the court appoints a lawyer to represent the child.<sup>57</sup> Further, while a child facing delinquency charges may have contributed to the need for representation, many times the child receives court-appointed counsel rather than retaining counsel.<sup>58</sup> Not surprisingly then, in many circumstances, a court-appointed attorney who is a stranger is forced upon an unwilling juvenile participant in a court process, and the quality of that relationship is significantly influenced by the communication during that relationship.<sup>59</sup>

### B. *The Basic Science of Touch*

The science of touch, called haptics, concerns itself with “the use of touch, ranging from affectionate to violent touch.”<sup>60</sup> Haptics researchers believe that touch may communicate emotion more reliably than either facial or verbal communication.<sup>61</sup> Said another way, scientists believe that “[n]onverbal actions often do speak louder than words.”<sup>62</sup> Research suggests that at least eight emotions may be expressed through touch, including anger, disgust, fear, gratitude, happiness, love, sadness, and sympathy.<sup>63</sup> The communication occurs

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*Understand What an Attorney Is Supposed To Do Well Enough to Make Knowing and Intelligent Decisions About Waiving Their Right to Counsel?: An Exploratory Study*, J. APPLIED JUV. JUST. SERV. 1, 23 (2015), <http://npjjs.org/jajjs/wp-content/uploads/2015/02/JAJJS-Article-McGuire.pdf>.

54. See Buss, *supra* note 18, at 1726; Grisso, *supra* note 53, at 15; McGuire, *supra* note 53, at 14–15.

55. See *D.C. Attorney Practice Standards*, *supra* note 5, at 12 (noting that “[a] guardian ad litem is an attorney appointed by the court to represent the child in abuse and neglect proceedings”).

56. See Buss, *supra* note 18, at 1706.

57. See, e.g., *D.C. Attorney Practice Standards*, *supra* note 5, at 12.

58. See Barbara Fedders, *Two Systems of Justice, and What One Lawyer Can Do*, 12 WHITTIER J. CHILD & FAM. ADVOC. 25, 36 (2012); Karen L. Michaelis, *School Violence: The Call for a Critical Theory of Juvenile Justice*, 2001 B.Y.U. EDUC. & L.J. 299, 310 n.34 (2001).

59. See generally Adams & Paxton, *supra* note 5.

60. LAURA K. GUERRERO ET AL., *CLOSE ENCOUNTERS: COMMUNICATION IN RELATIONSHIPS* 13 (4th ed. 2014).

61. Matthew J. Hertenstein et al., *The Communication of Emotion via Touch*, 9 EMOTION 566, 570 (2009).

62. GUERRERO ET AL., *supra* note 60, at 13.

63. See Hertenstein et al., *supra* note 61, at 569; Matthew J. Hertenstein et al., *Touch Communicates Distinct Emotions*, 6 EMOTION 528, 532 (2006).

regardless of whether the touch itself is intentional<sup>64</sup> or the initiator intends to communicate.<sup>65</sup> These emotions can even be communicated between strangers.<sup>66</sup>

Communication through touch is always contextually bound.<sup>67</sup> To determine the meaning of a particular touch, multiple factors are analyzed. Furthermore, research indicates that the way a recipient interprets a particular touch is not always consistent with the manner in which it was intended.<sup>68</sup> The particular characteristics of the touch are significant: the movement used, the amount of pressure applied, the speed of the touch, the abruptness, the temperature, the location on the body, and the length of time of the touch can all inform meaning.<sup>69</sup> More concretely, for example, stroking communicates warmth, love, and sexual desire, while patting and squeezing are viewed as friendly and playful.<sup>70</sup>

The genders of both the sender and the recipient affect the communicative intent and interpretation of a touch. Men and women both use and interpret touch differently.<sup>71</sup> When briefly touching a stranger's arm, women can communicate sympathy and happiness, while men are able to communicate anger.<sup>72</sup> No gender-related differences exist for communicating disgust, anger, happiness, sympathy, envy, embarrassment, fear, gratitude, love, pride, and sadness.<sup>73</sup>

Whether a touch is welcome depends on the characteristics of the individuals. The nature of the relationship between the participants affects the meaning of a touch. People touch strangers less often than their intimates or friends, and depending on individual perspective or context, an individual can feel uncomfortable when touched by a stranger.<sup>74</sup> With respect to gender, generally speaking, being touched by an opposite-sex friend is more acceptable than being touched by either a same-sex friend or opposite-sex stranger.<sup>75</sup> However, within

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64. See Matthew J. Hertenstein et al., *The Communicative Functions of Touch in Humans, Nonhuman Primates, and Rats: A Review and Synthesis of the Empirical Research*, 132 GENETIC, SOC., & GEN. PSYCHOL. MONOGRAPHS 5, 9 (2006), [http://www.depauw.edu/learn/lab/publications/documents/touch/2006\\_Touch\\_The%20communicative\\_functions\\_of\\_touch\\_in\\_humans.pdf](http://www.depauw.edu/learn/lab/publications/documents/touch/2006_Touch_The%20communicative_functions_of_touch_in_humans.pdf).

65. See Matthew J. Hertenstein et al., *The Communicative Functions of Touch in Adulthood*, in HANDBOOK OF TOUCH: NEUROSCIENCE, BEHAV. & APPLIED PERSP. 301 (Matthew J. Hertenstein & Sandra J. Weiss, eds. 2011).

66. See Hertenstein et al., *supra* note 61, at 572.

67. See Hertenstein et al., *supra* note 65, at 301.

68. See *id.*

69. See Hertenstein et al., *supra* note 61, at 570–71.

70. See Hertenstein et al., *supra* note 65, at 307.

71. See Hertenstein et al., *supra* note 61, at 571.

72. See *id.*

73. See *id.* at 569, 571.

74. Hertenstein et al., *supra* note 65, at 307.

75. See *id.*

this category, gender differences are significant. Women viewed touch from opposite-sex strangers less favorably,<sup>76</sup> whereas “[m]en perceived touch of all kinds from an opposite-sex stranger to be as pleasant as from a close female friend.”<sup>77</sup> Several researchers have found that when an individual was touched in a platonic manner by a stranger, “women like touchers more, whereas men’s reactions to being touched are negative or neutral, particularly if they are touched by women.”<sup>78</sup> On the other hand, one study concluded that “both men and women reported more positive evaluations of a male interviewer after being touched by him.”<sup>79</sup>

Research across context demonstrates that an individual’s touch can influence another’s behavior. Studies reveal that an individual who touches a recipient while making a request increases the recipient’s likelihood of compliance with the request.<sup>80</sup> Individuals tip waiters and waitresses more if touched by a server, are more likely to take prescribed medication when touched by their physicians, and are more likely to sign a petition or complete a questionnaire if touched.<sup>81</sup>

Finally, individual comfort with touch, response to touch, and interpretations of touch vary in light of an individual’s culture.<sup>82</sup> In some instances, there is little variance between cultures. For example, studies in the United States and France regarding the persuasiveness of touch produce similar results, though the French are more amenable to touching than Americans.<sup>83</sup> On the other hand, there may be strong cultural differences. For example, Southern and Eastern European, Arab, Mediterranean, and Latin cultures are more likely to engage in interpersonal touching than North American, Northern European, and East Asian cultures.<sup>84</sup>

Religion is also an influential factor. Protestant and Catholic Americans are relatively averse to touching.<sup>85</sup> Fundamentalist Christians also tend to avoid much interpersonal touching.<sup>86</sup> Persons of the Jewish faith generally are less touch avoidant.<sup>87</sup> Individuals with no religious affiliation are the least opposed

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76. *See id.*

77. *Id.* For a review of the link between gender and touch, *see* Judith A. Hall, *Gender and Status Patterns in Social Touch*, in HANDBOOK OF TOUCH: NEUROSCIENCE, BEHAV. & APP. PERSPECTIVES 330–50 (Matthew J. Hertenstein & Sandra J. Weiss, eds. 2011).

78. *See* Hertenstein et al., *supra* note 65, at 313.

79. *Id.*

80. *See id.* at 313–14.

81. *See id.* at 314.

82. Peter A. Andersen, *Tactile Traditions: Cultural Differences and Similarities in Haptic Communication*, in HANDBOOK OF TOUCH: NEUROSCIENCE, BEHAV. & APP. PERSPECTIVES 351–65 (Matthew J. Hertenstein & Sandra J. Weiss, eds. 2011); *see also* TIFFANY FIELD, TOUCH 19–24 (Mass. Inst. Tech. Press ed. 2001).

83. *See* Anderson, *supra* note 82, at 354.

84. *See id.* at 355.

85. *See id.* at 362.

86. *See id.*

87. *See id.*



to touch.<sup>88</sup> While Muslim cultures may be more likely to touch, there are strongly prescribed norms about touch, including refusal or hesitation by Muslim women to be touched by a male.<sup>89</sup>

### C. Benefits of Touching Child Clients

Attorneys can impart many benefits to their young clients when they appropriately use physical touch during the attorney-client relationship. These benefits may accrue to the child as well as the attorney-client relationship. The benefits can include providing comfort or support for the client, imbuing the client with trust in the attorney, and promoting the client's physical and emotional health.

#### 1. Comforted Clients

Children who are involved in a legal matter in some capacity may have been previously let down by other adults and consequently do not have much, if any, adult support during court proceedings.<sup>90</sup> Additionally, the experience of being involved in the legal process can require extra emotional support for a child.<sup>91</sup> For these reasons, it can be vital that an attorney both display and provide support for a juvenile client during legal hardship. During representation, physical touch can be used to communicate encouragement between the attorney and client.<sup>92</sup>

#### 2. Supported Clients

Child clients may benefit from demonstrations of support in the courtroom. In-court litigation can be an arduous experience for children.<sup>93</sup> Merely being physically present in court can be a stressful circumstance.<sup>94</sup> Furthermore, to the extent that their perspectives are unheard or marginalized, young people may feel as if the world is against them, or they may worry that no one is listening to their needs and concerns.<sup>95</sup> Additionally, juvenile clients may be concerned that

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88. *See id.*

89. *See id.*

90. *See* Jodi L. Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Adjudicative Incompetence*, 13 PSYCHOL. PUB. POL'Y & L. 87, 105 (2007) (“[G]iven the limited time that juvenile court attorneys typically have to spend with individual clients and the fact that many parents are not actively or optimally involved in juvenile court proceedings, many juvenile defendants lack adequate support and guidance.”).

91. *See id.*; *see also* Henning, *supra* note 34, at 272 (“Research suggests that youth rely on their cognitive reasoning skills with even less dependability and uniformity than adults in stressful settings.”).

92. *See, e.g., supra* note 9 and accompanying text.

93. *See Child-Friendly Courtrooms: Items for Judicial Consideration*, SUP. CT. TEX., PERMANENT JUD. COMM'N FOR CHILDREN, YOUTH, & FAM. 1, 1, <http://www.cactx.org/public/upload/files/general/CACBenchBook-FINAL.pdf>.

94. *Id.*

95. *See* Adams & Paxton, *supra* note 5, at 1.

the decisionmaker in their case views them as bad or undeserving of fair treatment.<sup>96</sup> To weather these challenges, children may benefit from active, visible support from concerned adults. To that end, academic writings and training materials for criminal defense attorneys recommend that attorneys physically touch their clients in court to bolster them, as well as humanize and show the judge or jury that the attorney supports the client.<sup>97</sup>

### 3. *Trusting Clients*

Generally, recipients of touch hold a more positive attitude toward the individuals who touch them than those who do not.<sup>98</sup> This conclusion is not limited to interpersonal or close relationships in which touch plays a significant role in creating intimacy.<sup>99</sup> This finding has been demonstrated even with respect to touch between strangers or in the context of role relationships, such as doctor-patient relationships.<sup>100</sup> Patients have responded more positively to nurses who physically interacted with them, as compared to nurses who only communicated verbally with their patients.<sup>101</sup> Customers and patrons have rated waiters and retail store employees who touch them more favorably than their counterpart employees who did not.<sup>102</sup> Finally, individuals who were lightly touched were more likely to give to charitable purposes, respond to questionnaires, and sign petitions than those not touched.<sup>103</sup> While there is no

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96. See Green & Dohrn, *supra* note 20, at 1289.

97. See Sarah Mourer, *Study, Support, and Save: Teaching Sensitivity in the Law School Death Penalty Clinic*, 67 U. MIAMI L. REV. 357, 380 (2013) (explaining that capital defense attorneys should touch, even hug, their clients in court to communicate their client's dignity and decency to the sentencing jury); Frank D. Eamen, *Voir Dire for the Criminal Defense Attorney: Effectively Leveraging the Process for Selecting Supportive Jurors*, ASPATORE, Jun. 2013, at \*8, 2013 WL 3760101 (recommending criminal defense attorneys touch their clients during voir dire and peremptories to show a connection to their client); see also *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias Special Committee on Race and Ethnicity*, 64 GEO. WASH. L. REV. 189, 278 (1996) (citing a white attorney who indicates that she touches her African-American criminal defense clients in front of white jurors "to show the jury that she is not afraid" of her clients).

98. See Fisher et al., *supra* note 8, at 416–20.

99. See Hertenstein et al., *supra* note 65, at 303.

100. GUERRERO ET AL., *supra* note 60, at 7.

101. Whitcher & Fisher, *supra* note 10, at 87, 91.

102. A.H. Crusco & C.G. Wetzel, *The Midas Touch: The Effects of Interpersonal Touch on Restaurant Tipping*, 10 PERSONALITY & SOC. PSYCHOL. BULL. 512, 512, 515 (1984).

103. See N. Gueguen & J. Fischer-Lokou, *An Evaluation of Touch on a Large Request: A Field Setting*, 90 PSYCHOL. REP. 267, 267–69 (2002) (finding that touched participants were more likely to tend to a stranger's dog); J. Hornik, *The Effect of Touch and Gaze upon Compliance and Interest of Interviewees*, 127 J. SOC. PSYCHOL. 681, 681–83 (1987) (finding that touched participants were more likely to complete a street survey); C. Kleinke, *Compliance to Requests Made by Gazing and Touching Experimenters in Field Settings*, 13 J. EXPERIMENTAL SOC. PSYCHOL., 218, 218–20 (1977) (finding that touched participants were more likely to give money); J. Nannberg & C. Hansen, *Post-compliance Touch: An Incentive for Task Performance*, 134 J. SOC. PSYCHOL. 301, 304–05 (1994), <http://www.communicationcache.com/uploads/1/0/8/8/10887248/post-compliance>

similar data confirming this finding between attorneys and clients of any sort, it stands to reason that juvenile clients who are touched may like their attorneys more, and thus have better rapport with and greater trust in their lawyers.

#### 4. *Healthy Clients*

Not only do people instinctually desire to be touched, they also require physical touch as a part of their normal biological and psychological development.<sup>104</sup> Scientists have reached a consensus that touch promotes physical and mental health in both infants and the elderly.<sup>105</sup> Touch is essential for individuals from the moment of birth to the first birthday.<sup>106</sup> Nurturing touch is most commonly provided by parents and caretakers.<sup>107</sup> Infants who are insufficiently touched develop attachment and emotional problems, acting physically aggressive throughout their lifespans.<sup>108</sup> Beyond infancy, American children “are the least touched in the world,” and touch tends to be used for social control rather than for affection.<sup>109</sup>

While scientists have conducted fewer studies regarding the impact of touch on individuals in the middle years of life, there is evidence that touch plays an important role throughout an individual’s life.<sup>110</sup> Recent research supports the conclusion that school-age children also benefit from being positively touched by their parents.<sup>111</sup> Thus, when an attorney touches a juvenile client, that touch may advance the client’s normal biological and emotional health. Moreover, that touch may help to heal trauma the child has experienced.<sup>112</sup>

Children who are court-involved often have experienced some sort of trauma or harm and “come from environments characterized by inconsistent care, unhealthy relationships, violence, ambivalence, and/or disorganization.”<sup>113</sup> Touch is understood to have therapeutic benefits and can remediate emotional

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\_touch-\_an\_incentive\_for\_task\_performance.pdf (finding that touched participants were more likely to complete a long, personal questionnaire); F.N. Willis & H.K. Hamm, *The Use of Interpersonal Touch in Securing Compliance*, 5 J. NONVERBAL BEHAV. 49, 49–54 (1980) (finding that touched participants were more likely to sign a petition).

104. Melody Whiddon & Marilyn Montgomery, *Is Touch Beyond Infancy Important for Children’s Mental Health?*, 1 (2011), [http://www.counseling.org/knowledge-center/vistas/by-subject2/vistas-school-counseling/docs/default-source/vistas/vistas\\_2011\\_article\\_88](http://www.counseling.org/knowledge-center/vistas/by-subject2/vistas-school-counseling/docs/default-source/vistas/vistas_2011_article_88).

105. For a review of studies concerning the impact of touch on infants, see Hertenstein et al., *supra* note 64, at 10–28. For studies of the impact of touch on the elderly, see Elizabeth Bush, *The Use of Human Touch to Improve the Well-being of Older Adults*, 19 J. HOLISTIC NURSING 256, 256–70 (2001); Janie B. Butts, *Outcomes of Comfort Touch in Institutionalized Elderly Female Residents*, 22 GERIATRIC NURSING, 180, 180–83 (2001).

106. See FIELD, *supra* note 82, at 8.

107. See *id.* at 33–51.

108. See Whiddon & Montgomery, *supra* note 104, at 2.

109. *Id.* at 3 (citing SHARON HELLER, *THE VITAL TOUCH* (1997)).

110. See Hertenstein et al., *supra* note 64, at 25–40.

111. See Whiddon & Montgomery, *supra* note 104, at 5–6.

112. See *infra* note 115 and accompanying text.

113. See *Building Rapport*, *supra* note 14, at 49–54.

trauma.<sup>114</sup> Thus, attorneys who conceive of their role as therapeutic in nature may want to physically connect with their clients to promote the child's biological and social health and development.<sup>115</sup> Additionally, attorneys who believe that they serve modeling or educational functions may want to model good touch for their clients, especially if they believe that the child client is otherwise not observing good touching behaviors.<sup>116</sup>

## II. CHILDREN'S ATTORNEYS WHO PHYSICALLY TOUCH CHILD CLIENTS DO SO WITH INSUFFICIENT GUIDANCE AND CAUTION

Almost two decades ago, a working group of academics and lawyers for children met at Fordham Law School and identified, for future discussion, the issue of whether an attorney should touch a child client.<sup>117</sup> Since then, however, researchers and professional standards setters have neglected to provide sufficient guidance on the matter.<sup>118</sup> This Part describes this inattentiveness from the legal community, then endeavors to identify drawbacks that may arise when attorneys use touch to connect with their clients, cautioning against touching child clients.

### A. Policies Governing Children's Attorneys

Neither legal ethical rules, aspirational professional standards for the children's bar, nor children's law offices provide sufficient guidance on the issue; although, to varying extents all address the development, nature, and quality of the relationship between attorney and child client.<sup>119</sup> This section illustrates this oversight by reference to ABA standards, state attorney

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114. See Michael H. Cohen, *A Fixed Star in Health Care Reform: The Emerging Paradigm of Holistic Healing*, 27 ARIZ. ST. L.J. 79, 91 (1995) (describing "therapeutic touch").

115. See *Building Rapport*, *supra* note 14, at 54 ("Using a trauma-informed approach can reduce client anxiety and its potential impact on the child client. By developing a productive relationship with the child client, you can increase the likelihood of a more positive outcome for the child."); see generally Susan L. Brooks, *Representing Children in Families*, 6 NEV. L.J. 724 (2006) (discussing therapeutic jurisprudence in connection with children's lawyering).

116. *Building Rapport*, *supra* note 14, at 54 ("As the lawyer, you can provide your client with safe, clear, and reliable, experiences by modeling appropriate interactions."); *UNLV Conference Recommendations*, *supra* note 14, at 610 (stating that an attorney should help a child develop decision-making capacity by "[m]odel[ing] the decision-making process by thinking through consequences with the child").

117. *Fordham Conference Recommendations*, *supra* note 7, at 1306-07.

118. Over two decades ago, a lone legal academic researcher focusing on nonverbal communication of attorneys with adult clients suggested, in passing and without commentary, that touching an adult client might be appropriate in a therapeutic relationship, but it would be "inappropriate for a legal interview." John L. Barkai, *Nonverbal Communication from the Other Side: Speaking Body Language*, 27 SAN DIEGO L. REV. 101, 124 n.164 (1990).

119. See generally MODEL RULES OF PROF'L CONDUCT (1983); David Katner et al., *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, NAT'L ASS'N COUNSEL FOR CHILDREN 1 (2001) (containing no guidance on physical touch of child clients).

appointment standards, scholarly and practical research, and law office policies and procedures.

1. *American Bar Association's Model Rules of Professional Conduct*

The American Bar Association's Model Rules of Professional Conduct (ABA-MRPC), at best, impliedly regulates the non-sexual physical touch of a client, and even then does not prohibit the behavior outright.<sup>120</sup> The ABA-MRPC, when adopted by a state, applies to lawyers regardless of practice area and regardless of whether the client is an adult or child.<sup>121</sup> The ABA-MRPC devotes eighteen sections to the client-lawyer relationship.<sup>122</sup> Of these, only rule 1.8(j) addresses whether a lawyer may touch a client, and it only concerns physical contact in sexual relationships. Rule 1.8(j) states that: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."<sup>123</sup> The rule prohibits most sexual relationships between the attorney and client due to the fiduciary nature of the relationship and the possibility of exploitation of the client by the attorney.<sup>124</sup> Rule 1.8(j) also aims to prevent an attorney from becoming emotionally involved with a client, which may impair the attorney's individual judgment.<sup>125</sup> Finally, the prohibition helps to ensure that client communications remains within the context of the professional relationship, rather than the personal relationship, the latter being unprotected by the attorney-client privilege.<sup>126</sup>

While the language of neither Rule 1.8(j) nor any other rule focuses on non-sexual or platonic physical contact between attorney and client, whether an adult or child client, the principles underlying Rule 1.8(j) may still inform whether platonic physical contact can be appropriate under particular circumstances. Attorneys for children, in their capacity as officers of the court, owe fiduciary responsibilities to their young clients and should not be emotionally-driven in their representation.<sup>127</sup> Therefore, to the extent nonsexual touch complicates the fiduciary relationship or leads an attorney to be driven by non-legal concerns, the ABA-MRPC discourages touch. Additionally, the ABA-MRPC advise that if a close, personal, non-professional relationship is fostered by the touch, then an attorney must be mindful of confidentiality limits.<sup>128</sup>

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120. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2014).

121. *See generally id.* (noting no distinction between practice groups or client age).

122. *See id.* at R. 1.1–1.18.

123. *Id.* at R. 1.8(j).

124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.*

128. *See id.* at R. 1.8(j) cmt. 17 (stating that "a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be

## 2. State Standards for Representation of Children

A survey of state-adopted standards specific to representing children revealed no instances in which state competency or appointment standards addressed or regulated client touch.<sup>129</sup> Thus, state enacted versions of the ABA-MRPC control whether it is permissible to physically touch a child client.<sup>130</sup>

## 3. Fordham and UNLV Working Groups on the Representation of Children

The 1996 Fordham Recommendations expressly stated that the issue of whether an attorney should touch a client merited future study.<sup>131</sup> No guidance was offered at that time. Although the recommendations did not offer any particular help resolving the question, the mandated recommendations may inform one's thinking on the topic. The Fordham Recommendations encourage attorneys to develop rapport and trust with their clients.<sup>132</sup> Touch, as a non-verbal form of communication, can be a means of doing so. In contrast, other recommendations may give reason to pause before doing so. For example, the recommendations particularly emphasize doing what is comfortable for the client and respectful of race, class, ethnicity, and cultural differences between the attorney and client.<sup>133</sup>

Moving forward ten years, the 2006 UNLV Working Group also did not address the subject of an attorney physically touching a child client.<sup>134</sup> Without offering specific guidance on the topic, the recommendations may impliedly be helpful. The UNLV Recommendations emphasized that children's lawyers should be educated about, and appropriately utilize in the course of representation, knowledge and practices from other disciplines and professions.<sup>135</sup> More specifically, familiarity with child development and

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protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of a client-lawyer relationship").

129. See generally *Illinois Pro Bono, Procedures and Issues for Attorneys who Represent Children as Client's Representative Attorney for Child Guardian Ad Litem*, <http://www.illinoisprobono.org/calendarUploads/Child%20Rep%20Procedures.pdf>; *New York State Bar Association, Committee on Children and the Law: Standards for Attorneys Representing Children* (2015), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55901>; *National Juvenile Defender Center, Florida Guidelines of Practice for Attorneys who Represent Children in Delinquency Proceedings* (2014), <http://njdc.info/wp-content/uploads/2014/10/Florida-Guidelines-for-Attorneys-who-Represent-Children-in-Delinquency-Proceedings.pdf>; *Oregon State Bar, Report of the Task Force on Standards of Representation in Juvenile Dependency Cases* (2014), [https://www.osbar.org/\\_docs/resources/juveniletaskforce/JTFR3.pdf2](https://www.osbar.org/_docs/resources/juveniletaskforce/JTFR3.pdf2); *D.C. Attorney Practice Standards*, *supra* note 5.

130. See MODEL RULES OF PROF'L CONDUCT Scope (1983).

131. See *Fordham Conference Recommendations*, *supra* note 7, at 1306–07.

132. See *id.* at 1302–03.

133. See *id.* at 1312–13.

134. See generally *UNLV Conference Recommendations*, *supra* note 14 (omitting any guidance on physical contact between attorneys and child clients).

135. See *id.* at 600 ("Legal representation of children is in most instances multidisciplinary . . . Children's attorneys thus require knowledge about these other professions as well.").

cultural research is suggested,<sup>136</sup> and reliance on expertise from the social work, education, and health professions is encouraged.<sup>137</sup> Thus, to the extent that researchers and professionals in other disciplines support touching children with whom those professionals work, lawyers for children should also evaluate its use.

With respect to itemizing particular techniques for effective representation, the UNLV Recommendations advised that attorneys use both verbal and non-verbal communication.<sup>138</sup> Although examples of the two forms of communication are not provided, as already mentioned, touch is a form of non-verbal communication that attorneys might consider. Other aspects of the UNLV guidelines, however, may be understood to discourage an attorney from touching a client.<sup>139</sup> The UNLV Recommendations cautioned attorneys to be sensitive to trauma history and the professional boundary between a lawyer and client.<sup>140</sup> An attorney, therefore, should learn specifics about a client's trauma history before touching the client.<sup>141</sup> Depending on the child's past experiences, physical touch may be either beneficial or harmful for the child.<sup>142</sup>

Regarding the professional relationship, lawyers should avoid making assumptions based on the cultural background of either the attorney or the client to determine whether physical touch would be appropriate.<sup>143</sup> Finally, lawyers are advised to continually evaluate the attorney-client relationship so that they may respond accordingly.<sup>144</sup> Thus, attorneys may want to directly inquire with their clients or their clients' family members regarding whether the child is comfortable being touched by the attorney and whether that conduct should continue.<sup>145</sup>

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136. *See id.* at 601–02.

137. *See id.* at 596 (“To enhance the attorney’s ability to develop a relationship with the individual client, children’s attorneys should draw upon the teachings of, or experts within, other disciplines such as social work, education, history, health, and mental health . . .”).

138. *See id.*

139. *See, e.g., id.* (“Children’s attorneys should maintain professional boundaries and guard against over-identifying with clients.”).

140. *See id.* at 594, 596.

141. *See id.* at 596 (“Children’s attorneys should develop the ability to respond appropriately and supportively to client disclosures of past sexual abuse and other trauma.”).

142. *See Building Rapport, supra* note 14, at 54.

143. *See UNLV Conference Recommendations, supra* note 14, at 594 (“Professional Distance: Children’s attorneys should maintain professional boundaries and guard against over-identifying with clients, taking care not to presume that shared cultural backgrounds between attorney and client mean that their perceptions and experiences are the same or to otherwise disregard the child’s individuality and independence from the attorney.”).

144. *See id.* at 596.

145. *See id.* at 595 (“Feedback on Quality of Representation: Children’s attorneys should habitually solicit feedback from their clients and the clients’ families regarding the quality of their representation.”).

#### 4. American Bar Association's Center on Children in the Law

In addition to promulgating generally applicable ethical standards for representation, the ABA produced several sets of standards concerning the representation of children.<sup>146</sup> The differential standards are based on the legal scenarios presented, such as custody determinations, abuse and neglect cases, unaccompanied foreign born child clients, and representation for child victim-witnesses.<sup>147</sup> All of the standards emphasize the development of rapport and trust between the attorney and client; however, no standard acknowledges the possibility of touch as a way of doing so.<sup>148</sup>

Supplementing its standards of representation, the ABA has developed training materials to assist attorneys representing children. In 2004, the ABA Center on Children in the Law published a book entitled *Legal Ethics in Child Welfare Cases*.<sup>149</sup> Issues discussed include, inter alia, role identification, conflicts of interest, confidentiality, diminished capacity, relating to other interested adults, and issues arising in litigation.<sup>150</sup> Touching a child client is not addressed.

Similarly, a 2011 ABA article on effective representation of children prioritizes the establishment of rapport and trust, but it does not address the use of physical touch as a means of doing so.<sup>151</sup> The authors advise attorneys to help clients manage emotions.<sup>152</sup> The authors suggest verbal, face-to-face communication and verbal expressions of empathy to help children accomplish this.<sup>153</sup> Additionally, the authors recommend strategies including the use of

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146. See Jennifer L. Renne, *Legal Ethics in Child Welfare Cases*, ABA CENT. ON CHILD. & L. 1, 80 (2004), [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/2004\\_Legal\\_Ethics.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/2004_Legal_Ethics.authcheckdam.pdf).

147. See, e.g., *American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases*, ABA (Aug. 2003), [http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards\\_of\\_Practice\\_for\\_Lawyers\\_Representing\\_Children.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/0908/Standards_of_Practice_for_Lawyers_Representing_Children.authcheckdam.pdf); *American Bar Association Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, ABA (Feb. 5, 1996), [http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards\\_abuseneglect.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf); *Legal Advice and Counsel to Child Victims of Crime*, ABA (Feb. 2009), [http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/legal\\_advice\\_and\\_counsel\\_to\\_child\\_victims\\_of\\_crime.doc](http://www.americanbar.org/content/dam/aba/migrated/child/PublicDocuments/legal_advice_and_counsel_to_child_victims_of_crime.doc); *Standards For the Custody, Placement and Care; Legal Representation; And Adjudication of Unaccompanied Alien Children in the United States*, ABA (Aug. 2004), [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant\\_Standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf).

148. See sources cited *supra* note 147.

149. See Renne, *supra* note 146, at 1.

150. See *id.* at 17, 33, 47, 61, 69, 81.

151. See Adams & Paxton, *supra* note 5, at 2, 5 (“As an initial matter, always think about establishing and re-establishing rapport as the first order of business.”); see also *Building Rapport*, *supra* note 14, at 55 (“To develop an attorney-client relationship that encourages collaboration, you must build rapport and establish trust with your child client.”).

152. See Adams & Paxton, *supra* note 5, at 13–14.

153. See *id.* at 13.



visual aids or manipulables (such as stress balls, toys, or pieces of paper), coloring, walking, breathing exercises, and electronic communication.<sup>154</sup> Touch is not mentioned.

Finally, the ABA also produced a thirty-seven minute video entitled *Interviewing the Child Client*.<sup>155</sup> The video presents much of the substantive information of the 2011 article, but also offers additional vignettes of attorneys working with clients using the suggested techniques.<sup>156</sup> The video illustrates four scenarios involving different attorneys, different child clients, and both delinquency and child welfare cases.<sup>157</sup> The video also emphasizes best practices for communicating verbally and developing a good relationship with young clients.<sup>158</sup> Nonverbal communication is also addressed secondarily to verbal techniques and strategies.<sup>159</sup>

The use of touch, however, is not explicitly mentioned in the video, although it does make its way into the video. On four different occasions in the video presentation, the attorney in the vignette attempts to or actually physically touches the child client.<sup>160</sup> The first instance is at the 4:05 minute mark.<sup>161</sup> The attorney is meeting the client for the first time.<sup>162</sup> The attorney is a black woman with grey hair.<sup>163</sup> The client is a white boy seated in a wheelchair reading a book or magazine.<sup>164</sup> While introducing herself, the attorney offers her hand to the boy for a handshake.<sup>165</sup> He is non-responsive, seemingly because he is unhappy.<sup>166</sup> The attorney gracefully continues the interview, which is focused on establishing a connection with the client.<sup>167</sup>

The second instance of physical contact between an attorney and a child client also involves a handshake.<sup>168</sup> The attorney is a black male appearing to be middle age.<sup>169</sup> The client is a black female teenager seemingly accompanied by her foster mom.<sup>170</sup> At the 9:12 minute mark, the attorney is meeting the client

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154. *See id.* at 13–14.

155. *See* American Bar Association, Video, *Interviewing the Child Client: Approaches and Techniques for a Successful Interview*, <http://apps.americanbar.org/litigation/committees/child-rights/video/1006-interviewing-child-client.html>.

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.* at 4:05, 9:12, 32:01, 36:06.

161. *See id.* at 4:05.

162. *See id.* at 4:00.

163. *See id.*

164. *See id.*

165. *See id.* at 4:05.

166. *See id.* at 4:07.

167. *See id.* at 4:10.

168. *See id.* at 9:12.

169. *See id.*

170. *See id.*

for the first time and offers his hand.<sup>171</sup> The client takes it and they shake hands.<sup>172</sup> The meeting then proceeds.<sup>173</sup>

Much later in the video, two more instances of an attorney touching a child client occur. At the 32:01 minute mark, an attorney is intensely interviewing a client regarding his interrogation by law enforcement.<sup>174</sup> The attorney is a female and appears to be middle age and Latina.<sup>175</sup> The client is a black boy.<sup>176</sup> She is exploring with the client the facts surrounding his interrogation and why the child gave the officers a signed statement.<sup>177</sup> This is depicted as a distressing conversation and topic for the client, as reflected by the boy laying his head down on his arms at one point.<sup>178</sup> At this moment, the attorney, who is simultaneously taking notes, briefly and gently pats him on the forearm.<sup>179</sup>

The final instance of touch comes in the closing moments of the video when an attorney and her client are walking outside, seemingly happy and enjoying the moment.<sup>180</sup> One may speculate that the child's legal case was resolved favorably. During this moment, the attorney briefly and gently touches the client on the lower part of the upper arm, near the elbow.<sup>181</sup> The attorney is a white woman while the client is a teenage girl who may be Latina or biracial.<sup>182</sup>

Because the use of physical touch in the relationship is not expressly addressed, it is difficult to conclude whether the ABA video endorses touching child clients. From observations, however, the touch seemed appropriate to the particular scenario in light of the nature of the touch and the context in which it occurred. Moreover, the video is a high-quality training video, suggesting that the scenes were intentional. Thus, one might conclude that the ABA inherently recognizes the value of touch in the attorney-client relationship, although it offers no particular guidance.

##### 5. National Juvenile Defender Center

The *Juvenile Defender Delinquency Notebook (Notebook)*, published by the National Juvenile Defender Center, establishes best practice standards for

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171. *See id.*

172. *See id.*

173. *See id.* at 9:15.

174. *See id.* at 29:23 (showing the attorney interviewing the client). The physical contact occurs at the 32:01 minute mark. *See id.* at 32:01.

175. *See id.* at 29:23.

176. *See id.*

177. *See id.*

178. *See id.* at 31:55.

179. *See id.* at 32:01.

180. *See id.* at 36:06.

181. *See id.*

182. *See id.*

representing children in delinquency matters.<sup>183</sup> The *Notebook* addresses how attorneys should interact with clients, particularly during the initial meeting, but also interactions thereafter.<sup>184</sup> The material focuses on how lawyers should appropriately converse with a child client, specifically, how to develop good rapport, obtain the necessary information, and counsel the child client.<sup>185</sup> The manual does not, however, address the possibility of touching the client in order to facilitate the interview or build the relationship. Although it discusses ethical issues that delinquency attorneys may commonly face, the *Notebook's* particular emphasis is on conflict of interest issues and the distinction between advocating for the client's best interests and advocating the client's wishes.<sup>186</sup> The *Notebook* does not discuss whether, as an ethical matter, an attorney should touch a juvenile client.

#### 6. National Association of Counsel for Children

The National Association of Counsel for Children (NACC) published *Child Welfare Law and Practice*, which is affectionately known as *The Red Book*.<sup>187</sup> Providing a comprehensive overview of the field, *The Red Book* offers guidance on substantive child welfare law, procedural law, ethical obligations, and the pragmatic aspects of representation.<sup>188</sup> At various instances, the effective use of nonverbal communication in the context of interviewing and counseling juvenile clients receives attention, but the conversation does not address physical touch as a form of nonverbal communication.<sup>189</sup> And while attorneys are advised to show empathy, they are—somewhat contradictorily—also advised “not [to] show emotion, but rather remain professional.”<sup>190</sup> Accordingly, if touch is considered purely or primarily emotive and unprofessional, then one would expect the NACC to discourage touch. Yet, as consistently seen with other publications for children's attorneys, *The Red Book* does not address whether attorneys should physically touch their clients.

#### 7. Children's Law Offices

A systematic collection and review of children's law office policies was not undertaken for purposes of this Article. However, inquiries were casually made

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183. See ELIZABETH CALVIN ET AL., NAT'L JUVENILE DEF. CTR., JUVENILE DEFENDER DELINQUENCY NOTEBOOK, iii (Elizabeth Calvin et al. eds., 2d ed. 2006), <http://njdc.info/wp-content/uploads/2013/09/Delinquency-Notebook.pdf>.

184. See *id.* at 21–29.

185. See *id.* at 17–29.

186. See *id.* at 14–16.

187. CHILD WELFARE LAW AND PRACTICE (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010).

188. See generally *id.*

189. See *id.* at 118–19 (recommending attorney self-awareness of nods, facial expressions, filler comments, tone of voice, and body language).

190. See *id.* at 119.

of attorneys and interns from a number of different children's law offices on the east coast of the United States. These individuals recalled instances in which they personally touched clients or observed other attorneys doing so. When asked whether the touch was appropriate to the relationship, many seemingly had given little thought to the impact of the touch on the relationship. Similarly, most revealed that their offices did not have written policies on touching clients or that they were not aware of any such policies. Instead, any guidance was transmitted orally on an *ad hoc* basis. Further, any such advice rarely invoked a bright line rule prohibiting touch. Instead, guidance was usually contextually dependent and attorneys were advised to use their discretion.<sup>191</sup>

### B. Drawbacks of Touching Child Clients

Although scientific studies suggest that physical touch may increase the likelihood of an effective attorney-client relationship and improve the mental health of clients, it also should be recognized that physical touch may create negative outcomes for the client and the attorney's representation.<sup>192</sup> An attorney's touch may cause a client distress, ranging from minor anxiety to

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191. One supervising attorney in a children's law office explained that the oral "policy" is permissive; generally discouraging its attorneys from touching clients but identifying some acceptable touches that may be employed in the attorney's discretion. The office recognizes that holding an infant client is likely always appropriate. For older clients, the "policy" suggests that all touches be client-initiated and that side-arm—but not full-frontal—hugs can be appropriate. Finally, physical contact should be avoided where an attorney is concerned that the client may have inappropriate motives.

192. This Article concerns the impact of physical touch on the two people directly involved in the attorney-client relationship. The impact on the parent-child relationship is worthy of separate consideration. See generally Kristin Henning, *It Takes a Lawyer to Raise a Child?*, 6 NEV. L.J. 836 (2006). Here, two concerns potentially arise. First, a parent may not approve of an attorney touching his or her child or may not understand why the attorney needs to touch the child. Even when a represented child is the subject of a welfare case in which the parent was the questionable caregiver, the parent retains constitutional rights to control the child's upbringing. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

*Id.* Thus, not surprisingly, a parent may want to have some say as to what adults—including an attorney—are involved, and how intimately, in a child's life. Apart from fundamental rights concerns, if the attorney develops a close relationship with the child client, that relationship may interfere with the child's relationship with the parent. This may or may not be beneficial for the child. These concerns warrant a more in-depth separate discussion, but are worthy of mention because the relationship between the attorney and the parent is a matter that often must be addressed by children's attorneys.

serious victimization.<sup>193</sup> Being touched may also confuse the client as to the attorney's role. Touch may also skew negatively the power dynamics between the attorney and client, or it may serve to manipulate the client.<sup>194</sup> Attorneys may inadvertently employ improper stereotypes of their clients when engaging in touch, thereby severely damaging the attorney-client relationship.<sup>195</sup> Finally, attorneys who increase their emotional connection with their clients through touch may, as a result, make poor lawyering decisions.

### 1. *Distressed Clients*

When an attorney touches a child client, particularly an unfamiliar child client, the attorney may unwittingly cause the child distress.<sup>196</sup> In some circumstances, the negative impact of the touch may be nonexistent or nominal, posing no long-term troubles. For example, a client may be initially surprised or bothered by the touch, though later come to view the touch as acceptable. Alternatively, a child client who does not generally mind being touched may be put off by an attorney who uses touch too early in a relationship, but suffer no ill effects from being touched. Finally, some children may never want to be touched, but would not be substantially bothered by its occurrence.

A troublesome concern, however, is that in some scenarios an attorney who touches a child client will victimize or revictimize the client.<sup>197</sup> Many children become involved with the justice system because they are documented victims of physical, sexual, or emotional abuse, and others may have unidentified

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193. See generally, Rebecca J. Brooker et al., *The Development of Stranger Fear in Infancy and Toddlerhood: Normative Development, Individual Differences, Antecedents, and Outcomes*, 16 DEV. SCI. 864 (2013) (discussing stranger fear among children); Cathy Spatz Widom et al., *Childhood Victimization and Lifetime Revictimization*, 32 CHILD ABUSE & NEGLECT 785 (2008) (finding that “[a]bused and neglected individuals reported a higher number of traumas and victimization experiences than controls and all types of childhood victimization (physical abuse, sexual abuse, and neglect) were associated with increased risk for lifetime revictimization”).

194. See *Standards for Attorneys Representing Children*, supra note 5, at 2 (“Because a child may be more susceptible to intimidation and manipulation than an adult client, the attorney should ensure that the child’s decisions reflect his/her actual position.”).

195. See *infra* Part II.B.5.

196. See Brooker et al., supra note 193.

197. See Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children’s Law Clinic*, 17 ST. THOMAS L. REV. 623, 630 (2005) (identifying “low self-esteem, learned helplessness, and feelings of powerlessness” as factors that strongly contribute to revictimization of child abuse victims); Sara Shapouri, *Ending Child Sexual Abuse and Exploitation: A Guide for Child Protection in Iran*, 7 WHITTIER J. CHILD & FAM. ADVOC. 63, 98 (2007) (stating that “children who have been sexually abused . . . are at [a] higher risk of revictimization than children who have not been sexually assaulted”) (quoting Nat’l Clearinghouse on Fam. Violence, Child Sexual Abuse, [http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/html/nfntsxagrsex\\_e.html](http://www.phac-aspc.gc.ca/ncfv-cnivf/familyviolence/html/nfntsxagrsex_e.html) (updated June 10, 2005)).

histories of abuse.<sup>198</sup> Lawyers for children are sensitive to this information.<sup>199</sup> Professional standards and training guides advise lawyers for children to be attuned to the possibility of revictimization in the course of representation.<sup>200</sup> Despite an attorney's best intentions, a child may unavoidably experience the attorney's touch as traumatic, particularly if the child has prior experience with being abused. The touch may ignite past painful memories or trigger repressed memories. Because an attorney cannot predict with confidence whether touching the client will be emotionally traumatic for the client, attorneys arguably should categorically avoid touching this client population.

Beyond a history of abuse, other factors may influence whether an attorney's touch disturbs a client; race, gender, and sexual orientation all may be complicating factors.<sup>201</sup> Black children may find it off-putting to be touched by white adults.<sup>202</sup> Similarly, female clients may be uncomfortable with the touch of a male attorney.<sup>203</sup> Further, a client whose sexuality is emerging may be conflicted or confused by adult touch.<sup>204</sup>

## 2. Confused Clients

Legal scholars on the representation of children have devoted significant attention to the issue of role confusion for children.<sup>205</sup> Role confusion includes bewilderment as to the need for an attorney, and misapprehension as to what functions the attorney performs or what expectations must be met.<sup>206</sup> While role

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198. NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, <http://www.naccchildlaw.org/> (last visited Jan. 19, 2016) (stating that “millions of children are the subjects of judicial proceedings each year. They are involved in the court system as victims of abuse and neglect; as juvenile offenders; as subjects of custody, visitation and adoption proceedings; and as participants in civil damages litigation”).

199. See AM. BAR ASS'N, ABA POLICY ON TRAUMA-INFORMED ADVOCACY FOR CHILDREN AND YOUTH 4–6, 8–9, 11 (2014), [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ABA%20Policy%20on%20Trauma-Informed%20Advocacy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ABA%20Policy%20on%20Trauma-Informed%20Advocacy.authcheckdam.pdf).

200. Lawyers for children are sensitive to the revictimization of child clients that may result from the lawyer's actions, the behavior of other legal actors, and the legal process generally. See, e.g., *id.* at 9.

201. See discussion *supra* Part I.B.

202. See, e.g., H. Andrew Sagar & Janet W. Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590 (1980) (observing differences in threat perception based on race).

203. See Hertenstein et al., *supra* note 65, at 307.

204. See generally Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. YOUTH & ADOLESCENCE 1001 (2009) (discussing how LGBT adolescents may face increased exposure to “negative experiences, including social rejection and isolation, diminished social support, discrimination, and verbal and physical abuse”).

205. See, e.g., Buss, *supra* note 18, at 1699.

206. See *id.* at 1710–11.

confusion may occur in the ordinary course of representation, an attorney's physical touch may serve to magnify the problem.<sup>207</sup>

Children with limited knowledge of, or experience with, attorneys may confuse the goals and responsibilities of attorneys with those of other interested adults involved in their lives, such as parents, babysitters, teachers, and doctors.<sup>208</sup> Children's first and most interactive relationships are with their daily caretakers.<sup>209</sup> Children later interact regularly with teachers and periodically with medical doctors.<sup>210</sup> In contrast, whether young or old, there are far fewer occasions for children to be exposed to an attorney. Thus, it would be quite natural for a new juvenile client to fail to understand the concept of an attorney.

Even among children who comprehend the role of attorneys in the abstract or at least have interacted with attorneys, role confusion may still occur. Older children may learn about lawyers in school, on television, or through experience, but this exposure does not necessarily lead to a clear understanding of the attorney's role. Although the child may theoretically understand an attorney's function, the child may be confused as to the attorney's role in the child's particular case. For example, the child may know that an attorney represents an individual in court, but not grasp whether the attorney is obligated to do whatever the child wishes or can act independently. Additionally, even after being told about the nature of the attorney-client privilege, children may not understand confidentiality.<sup>211</sup> A child may not understand that the attorney has a specialized responsibility to attend to the child's legal needs, and may not realize that the attorney is not acting as a caretaker.

Touch can possibly magnify role confusion. Parents and teachers—particularly of young children—often touch children in positive ways.<sup>212</sup> Even the touch of a doctor, while sometimes painful, is aimed ultimately at helping the child.<sup>213</sup> Consequently, when an attorney touches a child, the behavior may signal to the child that the attorney is just like another interested adult or professional whose goal is to help the child grow, feel good, and learn.

Similar to the concern that a child may view the attorney as a caretaker, a child may experience transference with the attorney, resulting in confusion regarding the attorney's role or relationship to the child. Transference is a psychological

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207. *See id.*

208. *See id.*

209. *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 485 (1984); *see also* Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 428 (1990) (referencing a Minnesota Supreme Court's decision "emphasizing the importance of the stability of the child's relationship to a primary caretaker as a measure of the child's best interests").

210. *See* discussion *infra* Parts III.A.1–2.

211. *See* Grisso, *supra* note 53, at 15–16 (discussing results of several studies regarding children's beliefs about attorneys).

212. *See supra* notes 9–10 and accompanying text.

213. *See infra* note 260 and accompanying text.

phenomenon occurring when an individual unconsciously redirects feelings or attitudes from a past relationship or situation to a present relationship or scenario, often inappropriately.<sup>214</sup> For example, a child may transfer feelings about a parent to the child's attorney, particularly because children are most often touched by their parents.<sup>215</sup> Whether transference is neutral, desirable, or beneficial varies. While transference is usually considered in the context of the therapist-patient relationship, children's attorneys should consider that a child client may transfer feelings from one adult in the child's life to the attorney.<sup>216</sup> Quite possibly the transferred feelings do not affect the attorney-client relationship in any manner, or alternatively they ensure a good relationship. On the other hand, however, the transferred emotions can be negative, causing the client to have a troubled relationship with the lawyer.<sup>217</sup> Here, the attorney would have to work to overcome those emotional barriers. The transferred feelings may also cause the child client to be unhelpfully or inappropriately deferential to the attorney. In all of these non-neutral circumstances of transference, children may confuse the lawyer's role with that of a caretaker, and may also confuse the lawyer with a particular adult from the child's life. Either circumstance can complicate representation.

### 3. *Disempowered Clients*

The attorney-client relationship always risks disempowering the client. Individuals usually work with attorneys during times of crisis.<sup>218</sup> Attorneys have greater knowledge of the legal system and legal rules than their clients.<sup>219</sup> Attorneys are highly respected professionals with an elevated status in society, notwithstanding the frequent criticism and negative jokes targeted at them.<sup>220</sup> These factors may cause a client to be inappropriately deferential to an attorney.

In the context of lawyers and juvenile clients, the power disparity owing to the above elements can be magnified due to the age disparity between the child and attorney, the child's developmental immaturity, and the child's lack of life

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214. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 19, 23 (3d ed. 2007).

215. *See id.* at 22–23.

216. *See id.*; Rhoda Feinberg, & James Tom Greene, *Transference and Countertransference Issues in Professional Relationships*, in REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 1129, 1129 (Jean Koh Peters ed., 3d ed. 2007).

217. *See* Feinberg & Greene, *supra* note 216, at 1129.

218. *See Building Rapport*, *supra* note 14, at 49, 56.

219. *See* ROBERT F. COCHRAN, JR. ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 11, 12 § 2(2) (3d ed. 1999); *see also* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS 4 (2d ed. 2004).

220. *See* COCHRAN, JR. ET AL., *supra* note 219, at § 2(1)–(2); *see generally*, Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998) (discussing society's criticism of, and jokes about, lawyers).



experience.<sup>221</sup> For this reason, competent lawyers for children endeavor to empower their clients to the fullest extent possible.<sup>222</sup> They strive to avoid the use of disempowering behaviors during representation and seek to “put[] the child on equal footing with the other parties.”<sup>223</sup>

Touching a juvenile client, even when intended to help the client or the attorney-client relationship, can remind the client of her status as a child in relation to an adult attorney. Superiors tend to initiate touch with subordinates, who are unlikely to welcome or reciprocate the touch.<sup>224</sup>

Therefore, if an attorney touches a child, the child may be compelled to respond in kind even when the child does not want to or feel compelled to respond in a way the child does not prefer; for example, when hugged, the child may prefer to shake hands but feel coerced into reciprocating the hug.<sup>225</sup> The child may reciprocate out of deference or out of concern that if the child does not show respect to or behave as the attorney likes, then the attorney will not work as hard for the child.

For female clients and clients of color, being touched by opposite sex or other race attorneys can be particularly disempowering.<sup>226</sup> Societal biases that lead to black and Latino girls being more freely touched than other children indicate that these children experience a diminished sense of bodily integrity, which can be particularly harmful to a child at a time when they have little control over their life.<sup>227</sup>

#### 4. *Manipulated Clients*

Much of the discussion herein has assumed that the attorney employs touch with the goal of fostering the client's participation in representation and that any resulting connection between the two is authentic.<sup>228</sup> It stands to reason, however, that this may not be the case for all attorneys. Some attorneys may be purely instrumental in their approach to representation. These attorneys may use touch instrumentally, as a means of making their efforts at representation easier or achieving a better outcome, rather than because the attorney wants to empower the client or actually is concerned for the child.

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221. See *supra* Part I.A.3.

222. See Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 926 (1999).

223. See *id.*

224. See, e.g., *supra* text accompanying notes 161–66 and Part II.B.

225. See, e.g., Adams & Paxton, *supra* note 5, at 4, 13 (discussing how many child clients with a history of trauma may misinterpret social cues and have low self-esteem).

226. See *supra* text accompanying notes 201–04.

227. Sonja C. Tonnesen, “Hit It and Quit It”: Responses to Black Girls' Victimization in School, 28 BERKELEY J. GENDER L. & JUST. 1, 6, 9 (2013) (discussing the sexual harassment of African-American girls in schools).

228. See, e.g., *supra* note 9 and accompanying text.

Inauthentic, purely instrumental, and performative touch used by an attorney is manipulative whether of benign or mal intent.<sup>229</sup> The behavior is manipulative because the attorney is endeavoring to guide the child's behavior or thoughts in a particular direction and undermine the child's ability to make the decision.<sup>230</sup> And while the outcomes may be positive for the youthful client, manipulation itself is troubling when dealing with a marginalized, vulnerable population.<sup>231</sup> The manipulation evidences an abuse of privilege and can exacerbate subordination.<sup>232</sup> Moreover, the manipulative behavior will be especially problematic if detected by the client. No one likes to be "handled" by another, and a child who is court-involved may be particularly distrustful of adults and justice system actors. Should the client become aware of the attorney's manipulation, this likely will have the unintended effect of tearing down any existing relationship between attorney and client.

### 5. *Stereotyped Clients*

Adolescent clients have advised that attorneys should both monitor and be cognizant of their assumptions—either conscious or unconscious—about their clients.<sup>233</sup> When employing touch, stereotypical assumptions about the client may mislead an attorney about whether to touch a client and in what manner. For example, a clinical professor has described a scenario in which she observed a white male attorney try to "give dap" to a young black male client.<sup>234</sup> From her perspective, the scene was awkward as the two did not seem to be of the same mindset on the greeting. One can speculate that the client might have been put-off by the effort. The client may not have appreciated the white attorney employing a greeting shared commonly by black men, or the client may not have been the type who "gave dap" to people generally. In either case, it would be fair to assume that the white attorney was relying on stereotypical assumptions of appropriate behavior with black males.

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229. See, e.g., Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717, 727 (1987) (explaining that an attorney may intentionally or unintentionally manipulate his or her client).

230. See, e.g., Henning, *supra* note 34, at 309–11 (describing a defense attorney's use of superior knowledge of the law to coerce a child to follow the attorney's opinion: "[My first task is] to get these kids help. If they don't agree with me, I don't care. I know what is in their best-interest better than their parents do.") (citation omitted).

231. See *supra* note 96 and accompanying text (discussing the marginalization of children's perspectives).

232. See *supra* Part II.B.

233. *Sound Advice*, *supra* note 42 (stating, at 5:13–5:23, "One of the things that my juvenile clients have told me is that we really have to check our conscious and unconscious assumptions about juveniles in order to be good advocates for them").

234. To "give dap" means to use a series of hand slaps, claps, and hand and arm gestures. Ta-Nehisi Coates, *The Sacred Art of Giving Dap*, THE ATLANTIC (June 4, 2008), <http://www.theatlantic.com/entertainment/archive/2008/06/the-sacred-art-of-giving-dap/5121/> (explaining that giving dap is a common feature of African-American culture).

### 6. Underserved Clients

Touch communicates a message to the recipient, but it can also elicit feelings in the messenger. In this context, an attorney may experience emotions regarding the client as a result of touch. Unfortunately, these feelings may interfere with the professional relationship or lawyer's decision-making. Similar to a child who has been touched, an attorney may experience transference. And again, these emotions may lead an attorney to feel role confusion or draw inappropriate assumptions about the client—legal or social—that affect representation.

Attorneys for children may transfer feelings from other relationships to their child clients. As discussed earlier, that transference may impact the relationship. And when a child client is engaging in transference, another psychological response may be elicited in the attorney: countertransference. Generally, countertransference is a psychological phenomenon wherein an individual reacts emotionally to another individual's transference.<sup>235</sup> Usually, the concept is discussed in the context of therapist-patient relationships but it also applies in the context of attorney-client relationships.<sup>236</sup> Countertransference can also pose problems for the attorney-client relationship.<sup>237</sup>

Any engendered feelings in the attorney resulting from touch may trigger role confusion for the attorney. Not only do children suffer role confusion respecting attorneys, but lawyers for children also experience role confusion. Some jurisdictions demand that attorneys for children zealously represent their clients' wishes to the fullest extent possible.<sup>238</sup> Enacted standards in other jurisdictions, however, dictate best interest representation, rather than expressed interest advocacy.<sup>239</sup> Other localities adopt a hybrid approach, allowing an attorney to adopt different standards depending on the particular posture of the case or client characteristics.<sup>240</sup> In either circumstance, touch may alter the attorney's mode of representation. An attorney obligatorily dedicated to zealous representation of the client's wishes may grow emotionally attached to the child and shift consciously or unconsciously to best interest representation. Alternatively,

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235. 2 ALAN E. KAZDIN, *Countertransference*, in *ENCYCLOPEDIA OF PSYCHOLOGY* 1, 33 (AM. PSYCHOL. ASS'N 2000).

236. See PETERS, *supra* note 214, at 22–23.

237. See *id.* at 26 (finding that countertransference can obscure the advocacy in the attorney-client relationship if a lawyer subjects the client to his own hopes and dreams, instead of those of the client).

238. See *id.* at 53, 55 (noting the jurisdictions that require attorneys to advocate the views of the child and in which the role of the child's attorney is principal, including Louisiana, New Jersey, Oklahoma, and Pennsylvania).

239. See *id.* (noting the jurisdictions that require that the best-interest representative—either an attorney or a volunteer—expresses the child's view, including Arizona, California, North Carolina, and Utah).

240. See *id.* (noting the jurisdictions that require that the best-interest representative expresses the child's best interests and a child's attorney advocates for the child's views, but allowing an attorney to fulfill both roles, including Connecticut, Georgia, Ohio, and New York).

because of an emotional connection to the client, the attorney engaging in best interest representation may be affected in her analysis and conclusion as to what is best.

In addition to role confusion, the use of touch might lead an attorney to assume a connection with the client, and ultimately lead to poor representation. Clinical scholars representing vulnerable adult clients have studied assumed connections between lawyer and client, including touch as a force in drawing connections.<sup>241</sup> Drawing on their own actual instructional experiences, clinicians focused on helping clinic students and instructors recognize when they make assumptions, when their personal experiences or characteristics are similar to those of their clients, and how those assumptions might affect the formation of the attorney-client relationship and lawyering.<sup>242</sup> In one scenario, a student-attorney that felt emotionally connected to an adult client hugged her client and whispered reassuring words in an effort to comfort her.<sup>243</sup> The client was indigent, elderly, suffered from mental illness, lived in unhealthy conditions, and lacked a strong support network.<sup>244</sup> The clinical scholars conducting the case study did not rigidly conclude that the touch was inappropriate. Rather, they recognized that the student-attorney's effort to comfort her client might simply be either consistent with her personality or a manifestation of countertransference.<sup>245</sup> To determine the propriety of the hug and giving comfort, they suggested that the student-attorney should consider whether the behavior and what it represented exceeded professional boundaries, interfered with the attorney-client relationship, affected the student-attorney's lawyering decisions, and was sustainable.<sup>246</sup> Finally, the student-attorney should consider how to re-define the relationship and explain any new professional boundaries to the client.<sup>247</sup>

While this research concerns representation of an adult client, the issues raised are relevant to the conversation herein. Although the client was not a child, she was vulnerable in many of the same ways juvenile clients who are court-

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241. Clinicians engaging in scholarly research are particularly attune to the development of attorney-client relationships. There is a large volume of research on educating and training clinic students on many aspects of the relationship. Nonetheless, as is generally the case in legal scholarship, the issue of physically touching a client—adult or juvenile—has not received attention. *See, e.g.*, AM. BAR ASS'N, *supra* note 199.

242. *See* Alexis Anderson et al., *Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339, 343 (2012) (aiming to identify the assumptions of sameness and using personal experiences to enhance the attorney-client relationship).

243. *See id.* at 362–66.

244. *See id.* at 362–63.

245. *See id.* at 364.

246. *See id.* at 365 (finding that overengagement creates a risk of role confusion where a client is uncertain whether the student attorney is their lawyer, a friend, or someone who can help with non-legal matters).

247. *See id.* at 366.

involved are vulnerable. Despite considerable age differences, many similar experiences and challenges of lawyering arise for both these client populations.

### III. THE CHILDREN'S BAR SHOULD IMPLEMENT MEASURES TO HELP ATTORNEYS APPROPRIATELY USE PHYSICAL TOUCH WITH CHILD CLIENTS

Because of the wide variability and unpredictability of attorney-client relationships, an attorney cannot blindly follow a rigid formula or framework for interviewing and counseling.<sup>248</sup> Rather, flexible and creative counseling procedures for fostering lawyer-client relations are necessary. To that end, this Part sets forth a menu of measures from which lawyers and organizations representing children may choose in order to foster desirable use and alleviate any concerns arising from physical touch. It first looks to the approaches of other child-centric professionals. Next, in consideration of earlier discussion and models from other disciplines, this Part proposes mandatory training for attorneys on the use of touch in the attorney-child client relationship and recommends that lawyers and organizations adopt one of several proposed policies on this issue.

#### A. Model Approaches from Other Child-Focused Professions

Other professionals working closely with children also confront the issue of whether it is acceptable to touch the children with whom they work, and their approaches to the issue can guide children's lawyers. Four professions are particularly worth referencing because their work often intersects with court-involved juveniles: K-12 educators, child psychologists, pediatricians, and social workers. Additionally, these professional roles involve working closely with children much like children's attorneys do: to educate, advise, and counsel.<sup>249</sup> What sets these professionals apart from lawyers, and thus counsels against reference to these policies, are that pediatricians must touch patients as part of the treatment protocol, psychologists and social workers by definition are concerned with the human connection, and K-12 educators develop unique relationships with their students due to consistent contact over extended periods of time.<sup>250</sup>

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248. Robert Dinerstein et al., *Connection, Capacity and Morality in Attorney-client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 756, 804 (2004).

249. See Newman, *supra* note 10 (finding that teachers should create an environment of nurture for children to grow academically); see also Rose M. Handon, *Client Relationships and Ethical Boundaries for Social Workers in Child Welfare*, NEW SOC. WORKER (Jan. 7, 2009), [http://www.socialworker.com/feature-articles/ethics-articles/Client\\_Relationships\\_and\\_Ethical\\_Boundaries\\_for\\_Social\\_Workers\\_in\\_Child\\_Welfare/](http://www.socialworker.com/feature-articles/ethics-articles/Client_Relationships_and_Ethical_Boundaries_for_Social_Workers_in_Child_Welfare/) (finding that social workers need to earn their client's trust, confidence, and respect in order to help the client's growth or change).

250. See Am. Acad. of Pediatrics, *Policy Statement—Pediatrician-Family-Patient Relationships: Managing the Boundaries*, 124 PEDIATRICS 1685, 1687–88 (2009), [http://www.sbp.com.br/pdfs/policy\\_statement-pediatrician-family-patient\\_relationships.pdf](http://www.sbp.com.br/pdfs/policy_statement-pediatrician-family-patient_relationships.pdf) (finding that pediatricians need to be mindful of their words, and that body language may offend their patients or patients' families even when conducting routine treatment protocol); Handon, *supra* note 249

Each of these child-centric professions are guided by a standardized code of ethics or conduct. These standards all expressly ban sexual contact with children, and one expressly prohibits physical abuse.<sup>251</sup> Only physicians and social workers acknowledge nonsexual, pro-social contact in their professional codes, and neither code categorically advises against physically touching a client in a nonsexual manner.<sup>252</sup> Physicians are advised against having non-sexual contact that may be misinterpreted as sexual,<sup>253</sup> while standards for social workers, in determining whether to touch, emphasize whether the nonsexual contact will harm the client.<sup>254</sup>

### 1. Pediatricians

Pediatricians are governed by standards of both the American Medical Association (AMA) and the American Academy of Pediatrics (AAP).<sup>255</sup> According to the AMA Code of Medical Ethics, a physician commits sexual misconduct by engaging in sexual contact with a current patient.<sup>256</sup> Further, “[s]exual or romantic relationships with former patients are unethical if the physician uses or exploits trust, knowledge, emotions, or influence derived from the previous professional relationship.”<sup>257</sup> Finally, when “non-sexual contact with a patient may be perceived as or may lead to sexual contact,” the physician is advised to “avoid the non-sexual contact.”<sup>258</sup>

The AAP has issued a policy statement on the boundaries between pediatricians, patients, and patients’ family members that supplements the AMA Code of Ethics. According to the AAP, “[r]omantic and/or sexual relationships with patients are always inappropriate.”<sup>259</sup> The AAP recognizes that, in addition to what may be required to medically examine a patient, platonic physical

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(finding that social workers, in order to develop and foster client relationships, need to connect with their clients by earning their trust and confidence); Newman, *supra* note 10 (finding that early childhood education requires teachers to tie shoe laces, wipe away tears, and hold children to develop a relationship with students).

251. NAT’L ASS’N OF SOC. WORKERS, CODE OF ETHICS §§ 1.09–1.11 (2008).

252. *Id.* at § 1.10; Am. Acad. of Pediatrics, *supra* note 250, at 1687–88.

253. *See* Am. Acad. of Pediatrics, *supra* note 250, at 1687.

254. NAT’L ASS’N OF SOC. WORKERS, CODE OF ETHICS § 1.10.

255. *See* Am. Acad. of Pediatrics, *supra* note 250, at 1687 (finding that standards provided by the American Medical Association and American Academy of Pediatrics set appropriate boundaries between the pediatricians and their patients and patients’ family members). The American Academy of Pediatric standards require “that pediatricians . . . exercise substantial care in nonprofessional relationships with patients and families to promote the highest possible degree of trust”).

256. Am. Med. Ass’n Code of Med. Ethics, *Opinion 8.14—Sexual Misconduct in the Practice of Medicine*, AMA (1992), <http://www.ama-assn.org/ama/pub/physician-resources/medicalethics/code-medical-ethics/opinion814.page?>.

257. *See id.*

258. *See id.*

259. *See* Am. Acad. of Pediatrics, *supra* note 250, at 1688.

touching plays a role in the doctor-patient relationship and expressly counsels its physicians on whether to touch.<sup>260</sup> The policy states:

Pediatricians usually prefer warm, friendly relationships with their patients. The need to avoid untoward personal intimacy should not lead to a cold, indifferent manner in their interactions with patients or family members. Many cultures expect physical expressions of care and concern in times of personal crisis, including sickness. Pediatricians might well be seen as unsympathetic and excessively remote if they avoid handshakes or other socially approved touching during emotional encounters with families. In most social groups in the United States, interaction with children is likely to involve appropriate physical contact such as hugging. Pediatricians should be aware of their patients' customs and personal and religious beliefs. In addition, it may be helpful to recognize that some kinds of touching may be confusing or offensive to children, depending on their stage of physical and emotional maturation. For example, certain children may have strong preferences about whether their physical examination is performed by a male or female pediatrician or whether someone else besides the pediatrician is present during the examination. Anticipatory discussion of these issues should reduce fears and misunderstandings and lead to enhanced pediatrician, patient, and family comfort.<sup>261</sup>

Thus, pediatricians follow a standards-based, open-ended policy on the non-sexual touch of children.

## 2. K-12 Teachers

Putting aside abuse, anecdotal information reveals that some teachers do touch their students, particularly younger ones. Teachers of young children may often need to functionally touch students in order to tie shoes or put on coats.<sup>262</sup> Young children may also need to be nurtured or comforted by touch, such as when they are hurt or upset.<sup>263</sup> There are also students—even older ones—who need to be hugged because they are otherwise insufficiently nurtured due to their “culture, home situation, age, [or] emotional development.”<sup>264</sup>

Ethical standards do not prohibit teachers from touching students in the above scenarios. Each state adopts a code of ethics for its educators based on

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260. *See id.* (recommending that pediatricians use neutral language and discuss in advance, with the patients or parents, any aspects of a physical examination that may carry a sexual connotation, in order to avoid offending the patients or family members because of the pediatrician's words, body language, or professional conduct).

261. *See id.* at 2687.

262. *See Newman, supra* note 10.

263. *See id.*

264. *Id.*

professional standards.<sup>265</sup> These codes uniformly advise that unethical conduct includes physical abuse of a student, engaging in a sexual act with a student, or having an inappropriate physical relationship with a student.<sup>266</sup>

Although ethical codes do not prevent teachers from touching students, the National Education Association (NEA)—the leading professional organization for teachers—strongly advises teachers not to touch students.<sup>267</sup> In 2006, the NEA Office of General Counsel produced a publication entitled “Teach But Don’t Touch.”<sup>268</sup> The goal of the publication was primarily to provide teachers with concrete advice on avoiding false allegations of inappropriately touching students.<sup>269</sup> Teachers, the NEA suggests, should generally “[a]void physical contact with students.”<sup>270</sup> The NEA especially warns teachers to avoid kissing, hair stroking, tickling, frontal hugging, and bottom slapping of students.<sup>271</sup> Despite the title of the publication, the NEA did indicate that a high five for encouragement was acceptable.<sup>272</sup> Additionally, the NEA recognizes that early childhood students may need and desire physical contact, particularly for comfort, compassion, and love, and further advises that “an occasional hug is probably OK.”<sup>273</sup>

### 3. Social Workers

According to the Code of Ethics of the National Association of Social Workers (NASW), “[s]ocial workers should under no circumstances engage in

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265. See 505-6-.01, GA. PROF. STANDARDS COMM’N, THE CODE OF ETHICS FOR EDUCATORS (Jun. 15 2015), <http://www.gapsc.com/Rules/Current/Ethics/505-6-.01.pdf> (adopting the Georgia code of ethics to protect “the health, safety, and general welfare of students and educators, and assuring the citizens of Georgia a degree of accountability within the education profession”); Newman, *supra* note 10 (explaining that New York requires teachers to go through a certification process that includes training in child abuse identification and reporting).

266. See, e.g., GA. PROF. STANDARDS COMM’N, *supra* note 265.

267. Michael D. Simpson, *Teach But Don’t Touch*, NAT’L EDUC. ASS’N OFF. GEN. COUNS. (Sept. 2006), <https://www.kea.org/uploads/files/Legal/TeachButDontTouch.pdf> (warning against conduct that may give rise to allegations of improper student contact, such as being alone with a student, and advocating that teachers avoid physical force as punishment, be wary of troubled students and remain especially vigilant if holding certain teaching positions).

268. *Id.*

269. See *id.* (warning that false accusations of inappropriate conduct oftentimes leave long-lasting damage, even when teachers are exonerated). The NEA warns male teachers in particular, who are more likely to be accused of inappropriate conduct. See *id.* (noting that less than five percent of misconduct cases involve female teachers and male students).

270. *Id.* (advising that teachers should avoid physical contact as a general rule). However, the NEA notes the challenge of this approach, admitting that oftentimes the physical contact between teachers and students is the only form of compassion or affection students will ever receive. See *id.*

271. See *id.* (advising that in addition to avoiding physical contact, teachers should not flirt, tease, joke about sex, socialize with students as friends, communicate with students by e-mail, text, or cards unrelated to school, or share intimate details about their personal lives).

272. See *id.*

273. *Id.*



sexual activities or sexual contact with current clients, whether such contact is consensual or forced.<sup>274</sup> Additionally, social workers are discouraged from engaging in sexual behavior with former clients, or counseling those with whom they have had a previous sexual relationship.<sup>275</sup> Finally, social workers may not sexually harass their clients, whether by “physical conduct of a sexual nature” or by some other means.<sup>276</sup>

On the question of non-sexual touch, social workers, like pediatricians, have embraced a standards-based, open ended approach to touching a child patient or client. The Code of Ethics addresses platonic physical contact with clients, whether adults or children.<sup>277</sup> The Code recognizes that physical contact with a client may be appropriate, discouraging it only “when there is a possibility of psychological harm to the client as a result of the contact (such as cradling or caressing clients).”<sup>278</sup> Under the guidelines, when a social worker chooses to engage in “appropriate physical contact,” the worker is “responsible for setting clear, appropriate, and culturally sensitive boundaries that govern such physical contact.”<sup>279</sup> The NASW Code, in contrast to the AAP guidelines, does not itemize factors for consideration.<sup>280</sup>

A social worker writing for *The New Social Worker*, a publication for professional social workers, provides additional guidance by addressing the ethical issue of boundary integrity, particularly focusing on child welfare social workers.<sup>281</sup> In the article, the author addresses the role of touch in serving clients.<sup>282</sup> The author acknowledges that workers must be able to earn the client’s trust, confidence, and respect in order to help the client and his or her family, which can be difficult given that child welfare workers remove children from homes.<sup>283</sup> The author further notes that some workers attempt to befriend clients to build rapport,<sup>284</sup> but suggests that this strategy may be problematic if the worker begins to cross boundaries.<sup>285</sup> The author also itemizes several factors that may indicate when a worker has blurred boundaries; for example, a “[w]orker [who] is warm-natured and enjoys physical connectedness with clients, such as hugging or embracing upon contact, kissing, rubbing the shoulder, hands, or face to provide comfort and support to the client.”<sup>286</sup> The

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274. NAT’L ASS’N OF SOC. WORKERS, CODE OF ETHICS § 1.09(a) (2008).

275. *Id.* at § 1.09(c)–(d).

276. *Id.* at § 1.11.

277. *See id.* at § 1.10.

278. *Id.*

279. *Id.*

280. *See id.*

281. *See* Handon, *supra* note 249.

282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.*

286. *Id.*

author is non-specific as to whether this list of factors concerns the caretaker as the client or the child as the client. The list, however, seems applicable in either instance.

#### 4. *Child Psychologists*

Professional ethical standards for psychologists that address physical contact with clients mention only the sexual touching of clients. With some exception, the standards explicitly prohibit engaging in “sexual intimacies” with clients, current or former.<sup>287</sup> Clinical programs training students to become psychologists acknowledge that non-sexual touch poses an ethical dilemma.<sup>288</sup> One writer frames resolution of the issue using the principles undergirding the American Psychological Association’s Ethics Code.<sup>289</sup> Therapists should only touch a client when doing so is in the client’s best interests and doing so is mutually acceptable.<sup>290</sup> Therapists should also not withhold touch simply out of fear.<sup>291</sup>

#### B. *Provide Training to Children’s Attorneys on the Appropriateness of Physical Contact with Clients*

Whether an attorney, jurisdiction, or organization adopts a policy on physical contact with juvenile clients, education and training on this topic must be required for those seeking to represent children. Working with juvenile clients is fundamentally different than working with adult clients.<sup>292</sup> Best practices and appointment standards routinely require training on children’s development and other disciplines concerning children.<sup>293</sup> As part of that training, the impact of touch on child clients and the attorney-client relationship must be explored. While many attorneys may not choose to have physical contact with their clients, many others do and will continue to touch their clients. Failing to mindfully focus attorneys on the matter is inconsistent with the norm of child-centric representation.

The content of this Article can serve as a blueprint for the substantive training material on the science of physical touch, benefits and drawbacks stemming therefrom, and professional rules and expectations regarding touch. Pedagogical techniques that might be employed include: (1) personal introspection on actual use of touch in the past, the effect on the child or attorney of that behavior, and

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287. See AM. PSYCHOL. ASS’N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS & CODE OF CONDUCT STANDARDS 10.05–10.08 (2010).

288. See, e.g., D. Kim Fuller, *Training Students on the Ethics of Touch in Psychotherapy* 8 ASS’N DIRECTORS PSYCHOL. TRAINING CLINICS (2006), [http://www.aptc.org/news/112006/article\\_one.html](http://www.aptc.org/news/112006/article_one.html).

289. See *id.*

290. See *id.*

291. See *id.*

292. See CALVIN ET AL., *supra* note 183, at 473.

293. See Renne, *supra* note 146, at 7.

whether and when to use touch in the future; (2) hearing from actual children regarding their perspectives on being touched by adults and, where previously experienced, by attorneys; (3) hearing from K-12 teachers, pediatricians, child psychologists, or social workers on their experiences and how they handle the issue in day-to-day practice; and (4) role play with actual children or actors.<sup>294</sup>

Organizations such as the NACC, NJDC, and ABA are well-positioned to design and offer this training, ideally collaboratively. Both their individual and collective efforts would reach a large number of children's attorneys. Additionally, these organizations can work with local jurisdictions to offer the training to attorneys seeking appointment in children's cases. Lastly, law school clinics and simulation courses may offer training to students.

### *C. Adopt Formal Policies on Physically Touching Clients*

In this section, three different proposals for policies are offered along with justifications and critiques. These proposals include a bright line prohibition, a flexible factor-based standard, and a presumptive approach. All lawyers and entities dedicated to legal representation of children should consider formal adoption of one of these proposed standards. Additionally, local jurisdictions tasked with appointing attorneys to children's cases should enact a policy.<sup>295</sup>

Many factors may influence which policy is embraced, including the culture of the representing organization, the experience level of the attorneys, the personal comfort of the attorneys with touch, the attorney training offered, and the characteristics of the population represented. For these reasons, this Article avoids recommending a particular approach, but does identify strengths and weaknesses of the various approaches.

#### *1. Proposal 1: Bright Line Prohibition*

Sample Language:

*Attorneys are instructed not to initiate physical contact with their clients, except for traditional means of greetings and leave-takings. If a client initiates contact, the attorney should briefly respond as appropriate and terminate the contact as soon as possible. The attorney should not thereafter initiate touch.*

Several justifications support a categorical prohibition. First, a simple numerical comparison of the drawbacks and benefits itemized earlier may rationally lead to the conclusion that attorneys should almost never touch their

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294. See, e.g., *supra* notes 10, 38 and accompanying text.

295. The ABA Model Rules of Professional Conduct could also endorse a particular policy, either in a specific rule provision or commentary language. Attempts to specifically address juvenile clients in the ABA rules have not been successful to date.

clients. A straight tally suggests that the drawbacks outweigh the benefits.<sup>296</sup> To the extent that children's attorneys are especially mindful of not harming their clients, then the possible risk of harm weighs against the behavior.

Second, a bright line rule is consistent with both traditional and more modern, collaborative approaches to lawyering. The traditional approach to lawyering, which is also called an authoritarian or attorney-directed approach, is characterized by the lawyer identifying the range of solutions based on his or her training and experience, determining what is in the client's best interests based on the attorney's superior judgment, and controlling the client's choices.<sup>297</sup> Clients are viewed as unable to solve legal problems.<sup>298</sup> Non-legal concerns are not considered and creation of an interpersonal relationship is unnecessary. While this mode of lawyering is out of vogue by professional standards, it stands to reason that some lawyers consciously or unconsciously, partially or fully, embrace and employ this approach.

Lawyers today may adopt a collaborative approach to working with clients.<sup>299</sup> Under the collaborative or participatory form of lawyering, the lawyer directs or fosters good decision-making, allowing the client to make choices. The attorney identifies possible solutions based on legal and non-legal concerns, communicates the range of options to the client, helps the client identify her objectives, and emotionally and socially supports the client's decision.<sup>300</sup> Although the collaborative lawyer will side with the client, the lawyer can permissibly advise the client on potentially bad choices and may even try to persuade the client to take a particular course of action.<sup>301</sup> While this approach focuses more on non-legal concerns and relationship formation than the traditional approach to lawyering, it too does not necessarily recommend or require touching one's client.

A bright line rule manifests a strong risk management approach to representation, which protects the lawyer professionally. By completely avoiding this particular form of non-verbal communication, even though it might be helpful, lawyers can be fairly certain that they will not suffer negative professional repercussions. A lawyer can avoid the possibility that a nonsexual touch will be misinterpreted as sexual, thus avoiding allegations of sexual abuse. Further, a lawyer can avoid allegations that relationship boundaries have been crossed, and criticisms that the lawyer is treating the client in a non-professional manner.

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296. Compare *supra* Part I.C.1-4, with Part II.B.1-6.

297. See COCHRAN, JR. ET AL., *supra* note 219, at 102.

298. See BINDER ET AL., *supra* note 219, at 4.

299. See COCHRAN, JR. ET AL., *supra* note 219, at 103. This approach is a variation of the client-directed approach to lawyering and on a continuum of theories sits between the traditional approach and the client-directed approach.

300. See Henning, *supra* note 34, at 315.

301. See *id.* at 316.

Before discussing criticisms of a categorical prohibition, it is worth mentioning that a strong ban may actually promote children's healthy development and advance the formation of attorney-child client relationships. An attorney who chooses not to touch a child under any circumstance avoids the possibility that touching the child will contribute to negative social or emotional effects. An attorney who chooses not to touch children as a means of fostering quality relations may help children better understand boundary setting and role differentials among interested adults. Lastly, by eliminating this form of non-verbal communication, an attorney may deepen the relationship by relying on a wider array of relationship-building methods, such as contextually appropriate verbal communication, face-to-face visits, and active listening.<sup>302</sup>

Notwithstanding the justifications for adopting a bright line rule, several critiques of such a strong prohibitive approach can be raised. First, a bright line ban may undermine the actual representation of children. Gaining the trust of a child client early on in the course of representation is essential and can be quite challenging.<sup>303</sup> A confluence of factors work against establishing rapport and trust: the attorney is a stranger intervening in the child's family life and the child is immature. Removing appropriate touch from a lawyer's toolbox of strategies for connecting with clients may be inadvisable, excessively risk averse, and ethically irresponsible. For example, poor attorney-client relationship formation may prevent an attorney from learning valuable information from the client. The child may distrust the attorney or be too stressed to communicate. If touch could ameliorate barriers to gathering vital information, then it should be tried. Thus, on balance, not using touch appropriately may lead to more negative outcomes for the child than the risk posed to either the child or attorney by touching.

Next, a child client may view a lack of touch by the attorney as unnatural, or in the most extreme, as a form of punishment. A young client understands when an adult, including a lawyer, is unable or uninterested in connecting with the child. An attorney who noticeably avoids touching a client, or draws back from a client initiating touch, might signal to the client a lack of interest or even a dislike or punishment of the client. This can be particularly troubling if an attorney is inconsistent in using touch. If an attorney offers positive feedback by touching her child client, a sudden lack of touch may be viewed as punitive. For these reasons, a child might negatively react to a lawyer who does not touch the child.<sup>304</sup>

Finally, given that children generally are in the developmental phase of life and that many court-involved children have therapeutic needs, not touching a client may pose negative emotional harms to the child that have earlier been

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302. See Dinerstein et al., *supra* note 248, at 758–66. Imagine a relationship in which lawyers connect with their clients by conveying empathy and emotional support, including sympathy and approval. *See id.*

303. See Pattison, *supra* note 16, at 5.

304. This does not mean that an attorney should over-correct and unnaturally attempt to touch the client.

identified. To the extent that a lawyer endeavors not to affirmatively harm a client, and maybe is even concerned with affirmatively helping a client develop, then a lawyer may want to appropriately touch the client in a pro-social manner.<sup>305</sup>

## 2. Proposal 2: Flexible Policy

### Sample Language:

*Attorneys should make considered decisions about whether to touch a particular client in a particular instance by evaluating relevant factors from those identified herein and determining on balance whether the potential benefits of the touch outweigh the potential harms. Relevant factors may include:*

- (1) Child's characteristics (age, race, gender, sexual orientation, abuse history, mental health status, culture, personality, demeanor, apparent preference);*
- (2) Attorney's characteristics (age, race, gender, sexual orientation, personality, comfort level with touch, naturalness of using touch, level of training on the use of touch);*
- (3) Attorney-client relationship characteristics (stage of relationship, then-existing quality of the relationship, likely efficacy of alternative verbal and non-verbal forms of communication, impact of touch when coupled with other forms of communication);*
- (4) Touch characteristics (spontaneity, lawyer versus child initiated, type of contact, bodily location, duration, frequency, communicative intent or purpose);*
- (5) Previous instances touching client (child's response, attorney's comfort level); and*
- (6) Any other unidentified case, attorney, or child-specific factor.*

The application of a case-by-case, factorial standard rather than a bright line prohibition is consistent with best practices in client counseling for children's lawyers. Attorneys are advised that a client-centered, holistic approach is the ideal mode of representation for children.<sup>306</sup> The client-centered model is

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305. Lawyers who embrace client-centered and holistic forms of representation, discussed in the next section, may want to adopt this approach.

306. See PETERS, *supra* note 214, at 120–46 (arguing for the child-in-context—a highly contextualized and child-centric mode—as the preferred paradigm for juvenile representation); see also *Fordham Conference Recommendations*, *supra* note 7, at 1301 (advising a client-directed

grounded in the “perspective that legal problems typically raise both legal and non-legal concerns for clients, that collaboration between attorneys and clients is likely to enhance the effectiveness of problem-solving, and that clients ordinarily are in the best position to make important decisions.”<sup>307</sup> “Hallmarks” of a client-centered approach include: (1) seeking out potential non-legal consequences; (2) asking clients to suggest potential solutions; (3) encouraging clients to make important decisions; (4) providing advice based on client values; and (5) acknowledging clients’ feelings and recognize their importance.<sup>308</sup>

The holistic approach is one of the many current offshoots of the client-centered approach.<sup>309</sup> Holistic representation has been endorsed for use by children’s attorneys in conjunction with zealous representation.<sup>310</sup> Holistic representation takes into consideration both the client’s legal and non-legal issues by coordinating efforts with other professionals, such as social workers.<sup>311</sup> This form of representation avoids the tendency of a lawyer to myopically focus on a client’s legal issues without recognizing that the legal issues are interconnected with other issues in the client’s life.<sup>312</sup> Lawyers practicing holistically may use non-legal resources to achieve their client’s legal goals, as well as represent a client on multiple and intersecting legal issues.<sup>313</sup>

A case-by-case, multi-variable methodology recognizes that very few child clients and situations are the same. It allows for a highly nuanced approach to the question, which in turn will foster the ideal response for a particular situation and child. A decision on whether to touch must be considered at each particular junction. An attorney should not presume that if an attorney touched the client on one occasion, then it is appropriate on any occasion. This host of itemized factors stands in stark contrast to the simpler standards set out by the American Academy of Pediatrics (AAP) and the National Association of Social Work (NASW).<sup>314</sup> Though the AAP does not itemize factors that must be considered, it does identify several factors relevant for consideration, including the child’s

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approach); *UNLV Conference Recommendations*, *supra* note 14, at 593, 609 (advising client-directed and holistic approaches).

307. See BINDER ET AL., *supra* note 219, at 3.

308. See *id.* at 9–11.

309. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370–71 (2006). Some child welfare lawyers employ the collaborative approach to counseling with their clients, which is also an off-shoot of client-directed lawyering. See *id.* at 374. The lawyer-as-friend approach is another model derived from the client-centered approach, but it has never achieved widespread acceptance. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Attorney-client Relation*, 85 YALE L. J. 1060, 1065–66 (1976).

310. See Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 334 (2003).

311. See Kruse, *supra* note 309, at 420–21.

312. See *id.*

313. See *id.*

314. See generally Am. Acad. of Pediatrics, *supra* note 250; NAT. ASS’N OF SOCIAL WORKERS, CODE OF ETHICS (2008), <https://www.socialworkers.org/pubs/code/code.asp>.

culture, religion, age, developmental stage, and preferences as well as the pediatrician's preference.<sup>315</sup> The proposal herein captures the AAP factors, but expands upon them to recognize that the propriety of a touch may depend on the characteristics of the touch and the client's general touch experiences with attorneys.

Employing a multi-factored standard is not without its drawbacks. First, as with many other standard approaches to resolving issues, individuals may weigh factors differently in determining the outcome, thereby creating subjective decisions and a lack of predictability and uniformity. Arguably, if attorneys reached widely variant conclusions after considering the same scenario, it is reasonable to err on the side of caution and determine that the touch should not occur. While the goal may not be to adopt one uniform approach, too much viewpoint diversity is undesirable. Even though a consensus view on the practice may never develop, consideration of other cases cannot serve as guiding precedent.

Further, consideration of a wide range of factors does not facilitate quick decision-making and, in the extreme, can lead to decision-making paralysis, resulting in an absence of touch where it might have been particularly helpful. This standard requires consideration of the factors each time the attorney contemplates using touch. Thorough analysis of each factor on each occasion may take time, and the pivotal moment may pass. As the relationship develops and the attorney comes to know the client, the analysis may occur more quickly, but the moment still may be lost.

### 3. Proposal 3: Advisory Guidelines

Sample Language:

#### *PROHIBITIONS*

- (1) *An attorney should not touch a child during their first meeting, with the exception of appropriate greetings and farewells.*
- (2) *An attorney should not touch a child who verbally or non-verbally evidences a desire not to be touched.*
- (3) *An attorney should not touch a child who has allegedly been abused.*
- (4) *An attorney should not touch a child who evidences sexually suggestive behavior.*
- (5) *An attorney should not touch a child who experiences serious emotional disturbances.*

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315. See generally Am. Acad. of Pediatrics, *supra* note 250, at 1686, 1687–88.



*PERMISSIONS*

- (1) *An attorney may touch a child who initiates physical contact.*
- (2) *An attorney may touch a child aged newborn to four years when appropriate in the context.*
- (3) *An attorney may briefly touch a child aged five years or older on the child's hand, arm, or shoulder.*

The touchstones for fashioning the presumptions were first to avoid harming the child and second, to maximize the benefits to the child. This prioritization is consistent with the Latin maxim “first, do no harm,” and the medical bioethics principle of non-maleficence.<sup>316</sup> Consequently, these proposed presumptions are mostly phrased in the negative with the aim of preventing harm to the child.<sup>317</sup> The last several proposals are written in the affirmative, reflecting that touch may provide benefits to the child. Beyond emphasizing harm avoidance, the slate of proposed presumptions reflects concerns such as the child's age, background, or temperament; the stage of the attorney client relationship; or characteristics of the attorney. Each proposal is reiterated below with brief commentary.

*a. An Attorney Should Not Touch a Child During Their First Meeting, with the Exception of Appropriate Greetings and Farewells.*

During the initial client meeting, it is vital that an attorney begin to develop rapport with the client. Touch can help to do this; however, at this point, the attorney is a stranger to the child and touching the client before getting to know each other may be off-putting or awkward for the child. Additionally, because this is the first meeting, the attorney may not yet know of factors in the child's background, such as the child's family culture or history of abuse, which would render any kind of touch inappropriate. For these reasons, physical contact in the first meeting is strongly discouraged. The one exception may be touch as a means of greeting and departing. Shaking hands when meeting and leaving clients older than three years may be appropriate, as it is consistent with American cultural norms governing professional relationships.

*b. An Attorney Should Not Touch a Child who Verbally or Non-verbally Evidences a Desire Not To Be Touched.*

For a variety of reasons, a child may not want to be touched.<sup>318</sup> When a child manifests such a desire, dignity and respect for the child dictates that the attorney

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316. See Kimani Paul-Emile, *Patients' Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462, 473 (2012).

317. For example: “An attorney should not touch a child during their first meeting, with the exception of appropriate greetings and farewells.” See *infra* Part III.C.3.a.

318. See *supra* Part II.B and accompanying text.

should not touch the child. A child may also expressly tell the attorney that the child does not want to be touched. However, this may not always be the case. Thus, an attorney should be on the lookout for non-verbal cues from the child that may mean “don’t touch,” such as turning or pulling away from attorney-initiated touch, ducking the attorney’s touch, not reciprocating the attorney’s touch, or tensing up during the touch. Once a child has signaled “hands off,” the attorney should not touch the child unless and until the child patently exhibits a desire to be touched. For example, a child who once pulled away from the attorney’s touch might later initiate a touch. At this point, the attorney may reciprocate. If the child is verbal, the attorney should expressly ask the child if the child is accepting of the touch.

*c. An Attorney Should Not Touch a Child who Has Been the Victim of Abuse.*

This guideline captures the concern that children who have been abused may be revictimized by another person’s touch. Thus, touching such a child client should be avoided, unless the attorney has some professional recommendation that it would not be harmful to the child. For example, the child’s therapist might indicate that some forms of touch would help the child to learn that adults are not to be feared, which in turn may help the child better work with the attorney.

*d. An Attorney Should Not Touch a Child who Evidences Sexually Suggestive Behavior.*

This presumption avoids amplifying problems a child may be having with developing sexuality or inappropriate sexual behavior. For example, an attorney should not touch a four year old who acts in a sexually suggestive manner or a teenager who acts in an overtly sexual manner with the attorney. In both instances, attorneys should avoid behavior that could even remotely be interpreted as sexual. This protects the child from emotional confusion and the attorney from abuse claims.

*e. An Attorney Should Not Touch a Child who Experiences Serious Emotional Disturbances.*

Children who have serious emotional issues may have more of a need to be therapeutically touched than other children in order to decrease stress and alleviate symptoms. However, unless the attorney is fully educated about the nature and extent of the child’s emotional status, touch should be avoided. This perspective avoids any misunderstandings about the attorney’s intent and prevents the creation of other emotional problems.

Attorneys working with children experiencing serious emotional disorders may not be able to avoid touch. Ideally, an attorney will never be in the position of having to discipline a child client, but there may be instances in which an attorney may need to restrain or redirect a child to control the child. For example, if a child is physically acting out and may potentially hurt his or

herself, the attorney may need to use some physical touch to restrain or redirect the child's behavior. Touching the child for this reason may negatively impact the child, but that impact is outweighed by the need to physically protect the child or another.

An attorney working with a child who has a serious emotional problem should determine as soon as possible whether the child has a mental health therapist. Consistent with the therapist-patient confidentiality, the attorney should consult the child's therapist for education and training on the appropriate use of touch, including as a means of discipline or control.

*f. An Attorney May Touch a Child who Initiates Physical Contact.*

A child who initiates physical contact likely either needs or expects to be touched. The child might find it unnatural or punitive if the attorney does not appropriately respond to or reciprocate the touch. Thus, a child who welcomes touch should be supported. An attorney, however, should be sensitive to the possibility that the child is inappropriately touching the attorney, or that the child's need to be touched is inappropriate or evidence of an emotional problem. In those circumstances, the attorney should exercise restraint to avoid harming the child.

*g. An Attorney May Touch a Child Aged Newborn to Four Years When Appropriate to the Context.*

Science indicates that the youngest of child clients benefit both physically and emotionally from physical contact. Young children who are insufficiently touched can be underweight, suffer developmental delays, or develop attachment disorder. Usually children receive enough contact from their parents or primary caregiver, but they can also benefit from the touch of other interested adults.

Because of their physical immaturity, young children often need to be functionally touched. Young children need adults to help them with most aspects of daily living, including eating, drinking, dressing, walking, using the bathroom, and maneuvering through their environment. They also need a comforting touch when things are not going well; words are often insufficient. For these reasons, it is hard to be around small children without touching them. Moreover, particularly for infants, carrying or cradling the child may be the best or only way to assess how the child is faring in its environment, and an attorney in this instance may be remiss in not doing so.

*h. An Attorney May Briefly Touch a Child Aged Five Years or Older on the Child's Back, Hand, Arm, or Shoulder.*

Assuming that the attorney has not identified any reasons why touching the child client would be harmful to the child, this guideline permits an attorney to initiate limited forms of contact that may facilitate the representation. While strangers do not often intentionally touch each other, the limited form of touch

authorized—with respect to both location on the body and duration—is the socially acceptable type most likely to occur between strangers.

#### IV. CONCLUSION

Academics, policy-makers, and practitioners have identified best practices for the representation of children. All of the standards acknowledge the importance of the attorney-client relationship.<sup>319</sup> Some proponents go further and recommend standards guiding its formation and concretely suggest verbal and non-verbal means for providing effective representation.<sup>320</sup> Strikingly absent from this material is conversation concerning the role of physical touch in the attorney-child client relationship. Anecdotal information reveals that some attorneys do touch their clients, often uncritically. This information is not surprising given that human touch is instinctual, a powerful means for creating relationships and promoting human development, and socially acceptable in a wide variety of circumstances. This Article explores the complexities surrounding the issue including the benefits and drawbacks of touch for the child, for the attorney, and for the legal representation. It concludes that children's attorneys and legal organizations should train attorneys on issues surrounding touch of child clients and adopt formal policies guiding behavior on the matter to ensure that children benefit from, and are not harmed by, the practice.

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319. See Dinerstein et al., *supra* note 248, at 757; *Standards for Attorneys Representing Children*, *supra* note 5.

320. See Dinerstein et al., *supra* note 248, at 757–66.