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Jillian Petrera
Pace University School of Law, jpetrera@law.pace.edu

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The Ethical Dilemma of a Special Education Lawyer: Who is the Client?

Jillian Petrera*

I. Introduction

A basic tenet of legal ethics requires lawyers to advocate their clients' interests.[1] Ordinarily, the client determines the nature and scope of the representation, and the lawyer merely uses special skills and training to achieve the goals defined by the client. Yet, this principle presents a significant dilemma for the special education lawyer: who is the client? On the one hand, there is the child, who not only needs assistance and protection, but also stands at the center of the dispute. On the other hand, there is the parent who possesses the fundamental right to decide their child's education.

Much of this dilemma can be attributed to the mounting concern for the rights of the developmentally disabled and the legal rights of children. Recent movements in the legal community reveal a desperate need for child advocacy and recognize that children, not attorneys, should direct the objectives and scope of legal representation.[2] The American Bar Association agrees. The *Model Rules of Professional Conduct* (Model Rules) instruct a lawyer to maintain a normal lawyer-

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* B.A., Fordham University (2005); Masters in Urban Education, Mercy College (2008); J.D. Candidate, Pace University School of Law (2011). The Author would like to express her gratitude to her family for their unyielding support during law school and throughout her life; and to Professor Don Doernberg, both for his insight on this topic and his continued support and encouragement.

1. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 2 (2009).

2. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children,* 64 FORDHAM L. REV. 1301 (1996) [hereinafter *Fordham Conference*]; *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 (2006).

client relationship with a client with diminished capacity, "whether because of *minority,* mental impairment or for some other reason."[3] Lawyers, however, continue to grapple with a number of questions that the Model Rules provide minimal guidance for: is the child the client; what is the role of the parent and the lawyer; and what is the appropriate course of representation?

Special education representation further complicates these issues. Since it is the parent who seeks legal representation, most, if not all, parents assume the role of the client. As the client, the parent wants to define the goals of the representation and views the lawyer's role as achieving those goals. While the child has immediate and lasting interest in the representation, she is barely involved in the representation. While the child's role in the representation is strengthened if she is the client, these issues are far from resolved. The representation must also respect and incorporate the parent's fundamental right to decide the child's education.

With a rise in the number of families seeking special education representation, these issues require prompt attention and, while client identification is ambiguous and problematic, it can be resolved by conscious choice. This Comment proposes recognizing the child, not the parent, as the client. Under this premise, a lawyer lacks the independent authority to decide what is best for the child. The parent, as the "natural guardian,"[4] has the authority to decide the child's best interests. As the client, however, the child actively participates in the representation and the lawyer's ultimate ethical responsibility extends toward the child, not the parent.

Part I of this Comment provides an overview of Model Rule 1.14 and its commentary. Part II analyzes parental rights under American jurisprudence and the Individuals with Disabilities Education Act (IDEA).[5] Part III discusses the need for child advocacy and the role of the child's lawyer in other proceedings involving children. Lastly, Part IV proposes that

3. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2009).
4. *Id.* R. 1.14 cmt. 4 (2009).
5. 20 U.S.C. § 1400 (2004).

the child is the client and discusses the roles of the parent and the lawyer in such a relationship.

II. The Major Source of Confusion: Model Rule 1.14

The Model Rules do not address a lawyer's dilemma in deciding whether to represent the parent or the child. Rather, Model Rule 1.14 instructs a lawyer to maintain a normal lawyer-client relationship with a client with diminished capacity when reasonably possible. While it explicitly refers to children as clients with diminished capacity,[6] it provides minimal guidance in determining the course of representation and the role of the parent. As a result, the lawyer is left to interpret, understand, and apply Model Rule 1.14.

Model Rule 1.14(a) provides that, "when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of *minority,* mental impairment or for some other reason, the lawyer shall, *as far as reasonably possible,* maintain a normal lawyer-client relationship with the client."[7] The Rule's commentary provides that "[a] normal lawyer-client relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."[8] In such cases, "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued."[9] Thus, when a child is capable of making decisions about important matters, a lawyer must abide by the child's decision. The Model Rules recognize, however, that a normal lawyer-client relationship with a child is not always possible.[10] Accordingly, the extent of the lawyer-client relationship with the child depends on whether such a

6. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2009).

7. *Id.* (emphasis added).

8. *Id.* R. 1.14 cmt. 1 (2009).

9. *Id.* R. 1.2(a) (2009).

10. "When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects." *Id.* R. 1.14 cmt. 1 (2009).

relationship is "reasonably possible."[11]

In determining whether a lawyer-client relationship with a child is "reasonably possible, the Rule and its commentary offers confusing and rather inconsistent guidance."[12] On the one hand, the Model Rules presume that "a child has the ability to direct his or her own representation."[13] A Comment to Model Rule 1.14 offers that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[14] On the other hand, Comment 4 to the Rule permits parents to make decisions on behalf of their child. It states that "[i]n matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor."[15] While the commentary recognizes that a normal lawyer-client relationship with a child is reasonably possible, it also encourages, but does not require, a lawyer to look to the parent in certain types of proceedings. When a lawyer should look to the parent and how much involvement the parent should have in the representation, however, is unclear and undefined.

Therefore, Model Rule 1.14 does not resolve the dilemma faced by a special education lawyer. While the Rule does not waver in its designation of the child as the client, parents may also have a role in the proceeding. Therefore, a much more

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11. *Id.* R. 1.14(a) (2009).

12. *Id.* R. 1.14(a) (2009). This phrase is bound to cause interpretative conflict. Although the ABA Rules offer definitions for "reasonable or reasonably," "reasonable belief or reasonably believes," and "reasonably should know," these definitions are to be used "in reference to a lawyer." *Id.* R. 1.0(h)-(j) (2009). There is no mention of what is reasonably possible in reference to the client or how a lawyer should determine what is reasonably possible. It appears that the American Bar Association left the phrase "reasonably possible" for the states to interpret.

13. Elizabeth Laffitte, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered,* 17 GEO. J. LEGAL ETHICS 313, 330 (2004) (citing Michael D. Drews & Pamela Halprin, Note, *Determining the Effective Representation of Child in Our Legal System*, 40 FAM. CT. REV. 383, 386 (2002) (footnote omitted)).

14. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 1 (2009).

15. *Id.* R. 1.14 cmt. 4 (2009).

complex discussion of the laws governing parental rights and special education is necessary.[16]

III. Parental Rights

Although Model Rule 1.14 is explicit in requiring a lawyer to maintain a normal lawyer-client relationship with a minor, its commentary encourages a lawyer to look to parents, as the natural guardians, in certain types of proceedings.[17] In special education proceedings, a parent's role in the representation must be decided and defined by their fundamental rights as parents and the laws governing special education. "Our jurisprudence historically reflect[s] . . . broad parental authority over minor children."[18] Parents, as natural guardians, have the authority to make decisions concerning the medical, moral, intellectual, and financial welfare of their children.[19] Parents also have the power to decide their child's education and participate in the special education process.

In 1925, the Supreme Court rejected the notion that a child is "the mere creature of the State." Rather, the Court asserted that parents "have the right, coupled with the high duty, to recognize and prepare their children for additional

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16. The Preamble to the Model Rules recognizes that "[m]any of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law." *Id.* Preamble ¶ 7 (2009).

17. *Id.* R. 1.14 cmt. 4 (2009).

18. *Parham*, 442 U.S. at 602.

19. The law places children in a position of dependency. Parents or guardians are thought to "possess what a child lacks in maturity, experience, and capacity for the judgment required for making life's difficult decisions." Parham v. J.R., 442 U.S. 584, 602 (1979) (leaving the decision to commit a child to a state mental institution largely up to the parent); *see also* Santosky v. Kramer, 455 U.S. 745, 747-48 (1982) (requiring 'clear and convincing evidence' in proceedings to terminate parental rights); Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish children from compulsory formal education beyond eighth grade); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("the custody, care and nurture of the child reside first with the parents"); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (fundamental liberty excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only).

obligations."[20] By 1972, "the primary role of the parents in the upbringing of their children [was] established beyond debate as an enduring American tradition."[21] In *Wisconsin v. Yoder*, the Supreme Court recognized that "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."[22] It held that the First and Fourteenth Amendments prevent states from compelling Amish parents to send their children to high school until they reach the age of sixteen.[23] Parental rights, specifically with respect to a child's education, thus became recognized as a deep-rooted societal interest.

Even when a child's freedom and liberty interest were at stake, parents retained the right to decide the upbringing and education of their children.[24] In *Parham v. J.R.*, minor children alleged that they had been deprived of their liberty without procedural due process by Georgia's mental health laws, which permitted parents or guardians to sign their minor children into mental hospitals.[25] "In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting," the Court concluded that the "precedents permit the parents to retain a *substantial, if not the dominant, role in the decision* . . . ."[26] It reasoned that the child's interest in not being committed is inextricably linked with the parents' interest in and obligation to the welfare and health of the child.[27] "[T]he parental role, [therefore], implies a substantial measure of authority over one's children."[28] This authority rests on an acknowledgment of parental rights and on the belief that parents can best determine the interests of their

20. *Wisconsin*, 406 U.S. at 232; *see also Prince*, 321 U.S. at 166; *Pierce*, 268 U.S. at 535.

21. *Wisconsin*, 406 U.S. at 232.

22. *Id.*

23. *Id.* at 234-35.

24. *Id.*

25. *Parham*, 442 U.S. at 590-91.

26. *Id.* at 604 (emphasis added).

27. *Id.* at 600.

28. Bellotti v. Baird, 443 U.S. 622, 638 (1979) (citation omitted) (invalidating a Massachusetts law requiring parental consent for abortions by unmarried minors).

children and are most likely to protect them.[29] Accordingly, a parent's right to decide and participate in the child's education is a key focus of special education law.

Congress reiterated the parent's right to decide how to educate their children through IDEA and its predecessor statute, the Education of All Handicapped Children Act. In 1975, the IDEA replaced the Education for All Handicapped Children Act in response to concerns from parents and educators over the exclusion of children with disabilities from school and the lack of support services for those children.[30] To protect children with disabilities, the IDEA aims to strengthen the parent's role in special education.[31] Several sections of the Act give parents decision-making authority and the right to otherwise guide their children's education.[32]

A parent's right to make educational decisions on behalf of his or her child is seen in the legislative intent behind the formation and revision of the IDEA. In the statute's original form, "Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies and formulation of the child's individual educational program."[33] As the Senate Report states:

> The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individual educational programs] to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized

29. *Parham*, 442 U.S. at 602-03.

30. *See generally* 20 U.S.C. § 1400 (2004).

31. *Id.* § 1400(c)(5)(B).

32. *See generally id.* § 1400.

33. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 208 (1982) (examining the legislative history behind the Education of All Handicapped Children Act and IDEA).

> planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided for handicapped children.[34]

Under the IDEA Amendments of 2004, Congress sought to elevate the role of the parents from protector to decision-maker, stating:

> Almost thirty years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.[35]

Based on this finding, the 2004 amendments to the IDEA allowed for increased parental involvement and decision-making authority at every stage of the special education process.

The parent's active role in the process heavily impacts the course of the representation, but it would be difficult to assess without first understanding the main stages of the process. The process begins with a referral for an evaluation from a parent, teacher, counselor, or some other school personnel.[36] Before the school district can evaluate the student, written parental consent for the evaluation must be obtained.[37] Once the student is evaluated, a team of qualified professionals, including the parent, reviews the results of the evaluation, and determines if

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34. *Id.* at 208-09 (citing Education for All Handicapped Children Act of 1975, S. Rep. No. 94-168, at 11-12 (1975), reprinted in, 1975 U.S.C.C.A.N. 1425, 1435); *see also* S. Rep. No. 94-445, at 30 (1975); 34 C.F.R § 300.345 (1981).

35. 20 U.S.C. § 1400(c)(5)(B) (2004).

36. 20 U.S.C. § 1414(a)(1)(B) (2004).

37. *Id.* § 1414(a)(1)(D)(i)(I) & (ii)(I); 34 C.F.R. § 300.300(a) (2008).

the child is eligible for special education services.[38] If it is determined that the child is eligible for services, a team, which includes the parent, meets to discuss and develop the child's individualized education program (IEP).[39] The team determines what services are in the IEP, the location of those services, as well as any modifications to the program.[40] The IEP lists any special services the child needs to access the general education environment, including goals that the child is expected to achieve in one year.[41] At a minimum, the IEP is updated annually and the student is reevaluated at least once every three years.[42] If, at any time, the parents disagree with the IEP, the proposed placement, or any changes made to the IEP, they may exercise their due process rights under the IDEA by filing a formal complaint or requesting mediation.[43] If the parents and the school district are unable to reach a resolution, the parents may request an impartial hearing;[44] if the parents disagree with the decision of the impartial hearing officer, the parents have a right to appeal to the state and bring a civil action.[45]

One of the main purposes of the IDEA is "to ensure that the rights of children with disabilities and *the rights of their parents are protected*."[46] In fact, the IDEA does far more than protect a parent's role in special education; it requires a

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38. 20 U.S.C. § 1414(b)(4)(A); 34 C.F.R. § 300.306(a)(1) (2007).

39. 20 U.S.C. § 1414(b)(4) & (5); 34 C.F.R. §§ 300.306, .320 & .321(2007); 34 C.F.R. §§ 300.322 to .324 (2006).

40. *Id.*

41. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320.

42. 20 U.S.C. § 1414(d)(4) (2004); 34 C.F.R. § 300.324.

43. 20 U.S.C. § 1415(b)(5), (c)(2), (e) (2004); 34 C.F.R. § 300.506 (2007); 34 C.F.R. §§ 300.507 & .508 (2006).

44. 20 U.S.C. § 1415(f)(1)(B); 34 C.F.R § 300.510 (2007).

45. 20 U.S.C. § 1415(g), (i)(1)(B), (i)(2); 34 C.F.R. §§ 300.514 & .516 (2006).

46. 20 U.S.C. § 1400(d)(1)(B) (2004) (emphasis added); *see also* Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007). In 2007, the Supreme Court found that the IDEA grants parents independent, enforceable rights. *Id.* at 533. It reasoned that the grammatical structure of the IDEA's purpose . . . would make no sense unless "rights" refers to the parents' rights as well as the child's. *Id.* at 528.

parent's prior written consent.[47] A child cannot be evaluated or receive special education services without the parent's permission.[48] If a parent fails to respond or refuses to consent to an initial evaluation, the school district may, but is not required to, initiate due process procedures to have the child evaluated without parental consent.[49] Even if a school district is able to circumvent the parent's consent and the child is evaluated, parental consent is again required to initiate special education services.[50] At this time, if the parent refuses to consent or fails to respond to a request to provide consent to the provision of special education programs and services, the school district shall *not* provide the special education program and services and *cannot* use the due process procedures.[51] Therefore, a parent has substantial decision-making authority at the initial referral stage. If a parent does not want the child to receive special education and related services, the parent's decision is final.

Once a child with a disability is determined eligible for special education services, "parents work collaboratively with teachers, representatives of the LEA [local education agency], psychologists and other education professionals to develop[,]" review, and revise an IEP for the student.[52] As members of the IEP Team,[53] parents are equal participants in deciding their child's IEP.[54] They provide critical information, participate in discussions about the child's need for special education and related services and join in deciding the child's IEP.[55]

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47. 20 U.S.C. § 1414(a)(1)(D).

48. *Id.* § 1414(a)(1)(D)(i)(I), (II).

49. *Id.* § 1414(a)(1)(D)(ii)(I); 34 C.F.R. § 300.300(a)(3)(i) (2008).

50. IDEA further cautions that parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services. 20 U.S.C. § 1414(a)(1)(D)(i)(I); 34 C.F.R. § 300.300(a)(1)(ii).

51. 20 U.S.C. § 1414(a)(1)(D)(ii)(II); 34 C.F.R. § 300.300(b)(3).

52. Margaret M. Wakelin, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J. L. SOC. POL'Y 263 (2008).

53. 20 U.S.C. § 1414(d)(1)(B)(i).

54. *See* 34 C.F.R. §§ 300.321 (2007) & .322 (2006); 20 U.S.C. § 1414(d)(1)(B)-(D).

55. *Id.*

Various procedural safeguards in § 1415 of the IDEA protect a parent's status as an equal participant.[56] First, school districts must provide notice and ensure that one or both parents are present, or are afforded the opportunity to participate, at each meeting related to the evaluation, identification, and educational placement of the child.[57] Second, the IDEA provides parents with the opportunity for mediation and to present a complaint "with respect to any [disagreement] relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education."[58] If a resolution is not reached, the parents have the opportunity for an impartial due process hearing.[59] And, if the parents disagree with the hearing officer's findings of fact and decision, they have the right to appeal and thereafter sue.[60] The IDEA, therefore, provides extensive measures that protect a parent as the child's educational representative.

Based on this discussion, it is beyond dispute that parents possess a fundamental right to decide their child's upbringing and education. This right gives parents the authority to determine whether their child receives special education services and allows parents to participate in the special education process. Therefore, the dynamics of special education representation must incorporate a parent's right to decide their child's education.

IV. Representing Children

More than a decade ago, a group of children's advocates, legal ethicists, and other academics convened for the Fordham Conference on Ethical Issues in the Legal Representation of Children (Conference).[61] Focusing on child welfare cases, the

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56. 20 U.S.C. § 1415 (2004).

57. 20 U.S.C. §§ 1414(b)(1) & (e), 1415(b)(1); 34 C.F.R. §§ 300.322(a)(1), .501(a) & (b)(1)(i) (2006).

58. 20 U.S.C. § 1415(b)(5)-(6).

59. 20 U.S.C. § 1415(f)(1)(A).

60. 20 U.S.C. § 1415(g), (i).

61. Bruce A. Green & Bernandine Dohrn, *Foreword: Children and the*

Conference forged a consensus that "a lawyer appointed or retained to serve a child in a legal proceeding should serve as the child's lawyer."[62] In such cases, the court questions the parent's ability to act in the best interests of the child, and therefore, the role of counsel is to protect and represent the rights and interests of the child in controversy.[63] Special education representation, however, is not wholly different from these other areas of the law where children require legal representation.

In child welfare cases, the normal presumption that the parent acts in the best interests of the child does not apply.[64] While the parent has the right to decide the upbringing of the child, the Supreme Court cautions that parental autonomy is not absolute.[65] Under the doctrine of *parens patriae*, "the state has the right, indeed a duty, to protect children."[66] Thus, in some areas of decision-making, the interests of the child overcome the presumption that parents will make the best decision. For example, the state as the guardian of society's basic values may interfere to safeguard the child's health,[67]

Ethical Practice of Law, 64 FORDHAM L. REV. 1281, 1284-86 (1996).

62. *Fordham Conference*, *supra* note 2, at 1301.

63. Robyn-Marie Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CALIF. L. REV. 681, 694 (1987). The lawyer is "bound by, and [must] speak for . . . [the child]-client." *Id.*

64. *Id.* (presumption in favor of parental decision-making is rebuttable).

65. *See* Parham v. J.R., 442 U.S. 584 (1979) (decision to institutionalize is largely up to the parent); Bellotti v. Baird, 443 U.S. 622 (1979) (invalidating a Massachusetts law requiring parental consent for abortions by unmarried minors); Santosky v. Kramer, 455 U.S. 745 (1982) (requiring fundamentally fair procedures when the State moves to destroy weakened familial bonds by terminating parental rights).

66. *See generally* Lyon, *supra* note 63.

67. *See* Matter of Eli H., 22 Misc.3d 965, 970 (N.Y. Fam. Ct. 2008) ("Every parent has the fundamental right to raise his/her child, that right, however, is 'not absolute inasmuch as the State, as parens patriae, may intervene to ensure that a child's health or welfare is not being seriously jeopardized by a parent's fault or omission.'"); *see also* Matter of Shawndel M., 33 A.D.3d 1006 (N.Y. App. Div. 2006) (mother neglected her child, a diagnosed diabetic, by failing to provide her with adequate medical care); Matter of Miller v. Orbaker, 17 A.D.3d 1145 (N.Y. App. Div. 2005) (transferring custody to nonparent where parent indicated she would discontinue child's medication contrary to medical advice).

educational development,[68] and emotional well-being.[69] Even in cases where the parent is fit to make decisions on the child's behalf, a parent could still misrepresent, intentionally or unintentionally, the child's interests. "[I]nformation about children and their desires communicated to lawyers through parents undergoes two levels of emotional intellectual distortion. Children may be unable or unwilling to give their parents all the facts; parents may not fully relay information to the lawyers."[70] Therefore, "whatever right parents may have to serve as the sole legal spokesperson for their children [even in special education proceedings] cannot be based entirely on their ability to represent accurately their children's intentions and desires."[71]

Many jurisdictions already provide by statute for appointment of a child representative in child welfare cases and custody proceedings at the discretion of the judge.[72] The purpose of these statutes is to address the potentially adverse effects of divorce on the child and focus on the interests of the child.[73] Lawyers for children in custody proceedings find that "because of their position in the case, they often could uncover

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68. *See, e.g.*, Matter of William AA., 24 A.D.3d 1125 (N.Y. App. Div. 2005) (mother removed the child from public school because she disagreed with recommendation for a small classroom setting and did not enroll him in another school).

69. *See, e.g.*, Matter of LeVonn G., 20 A.D.3d 530 (N.Y. App. Div. 2005) (child's emotional condition was impaired or placed in imminent danger of impairment by the mother's unwillingness to pursue a recommended course of psychiatric treatment for him); Matter of Jonathan C., 195 A.D.2d 554 (N.Y. App. Div. 1993) (the child's physical condition was impaired by unreasonable infliction of excessive corporal punishment and emotional condition was impaired or placed in imminent danger of impairment by mother's failure to cooperate with recommendations of his therapist); Matter of Junaro C., 145 A.D.2d 558 (N.Y. App. Div. 1988) (mother failed to supply her child with adequate psychiatric medical care which placed her child in imminent danger of having his mental and emotional condition impaired).

70. David H. Neely, *Handicapped Advocacy: Inherent Barriers and Partial Solutions in the Representation of Disabled Children*, 33 HASTINGS L.J. 1359, 1363 (1962).

71. *Id.* at 1363-64.

72. Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1133-34 (1978).

73. *Id.*

different kinds of information and promote a constructive approach to resolve the dispute."[74] "Rather than increasing the scope and intensity of the controversy, many attorneys for children acted to mediate conflict and settle the dispute out of court."[75] Mediation by a lawyer in the special education context could very well lead to similar results, if the child is the client.[76]

Advocates and lawyers remark that "special education cases can generate as much emotional intensity as a bitterly contested divorce."[77] Lawyers representing a parent in a custody dispute often encounter situations in which the interests or desires of the client are at odds with the best interests of the child.[78] Similar circumstances can occur in a special education case. While the parents exceed minimum standards of parental fitness, they are caught up in the emotional dynamics of the dispute. They "experience anger toward the school officials, each other and even the child."[79] "They feel guilty, confused, frustrated, helpless, fearful, and

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74. *Lawyering for the Child*, *supra* note 72, at 1172-73.

75. *Id.* Moreover, "[t]he possibility of talking to all parties directly gives the child's attorney unique advantages in obtaining information about the parents and the child, since this information would rarely, if ever, be available to a parent's attorney." *Id.* at 1173.

76. *See generally* Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOT. L. REV. 35 (1997).

77. Peter W. D. Wright, *Representing the Special Education Child: A Manual for the Attorney and Lay Advocate* (Jan. 21, 2009), http://www.wrightslaw.com/advoc/articles/attorney_manual.html.

78. *See generally Lawyering for the Child*, *supra* note 72.

> Accusations of blame and unfitness are common since parents often use custody proceedings to vent bitter feelings or to gain leverage in the financial settlement. The result is a contentious, destructive, and often prolonged dispute that may seriously threaten the possibility of a workable arrangement for visitation between the child and the parent who ultimately is denied custody. Here the child's interests in the process and in the outcome of the proceeding are closely connected: children generally benefit from amicable contact with the noncustodial parent and suffer without it.

Id. at 1131-32.

79. Wright, *supra* note 77.

remorseful."[80] In both types of proceedings, the interests of the child are at the center of the dispute and it is often the child who suffers. Special education lawyers, therefore, suggest that a lawyer approach a special education case as one would approach a messy custody or divorce proceeding.[81] And, since lawyers in such proceedings represent the child, a lawyer in a special education proceeding, should also represent the child. When the child is the client, a lawyer is in a better position to mediate the conflict between the parents and the school district. The child is also given a voice in the proceedings.

Children in both child welfare proceedings and special education proceedings are in an incredibly disempowered state.[82] In abuse and neglect proceedings:

> They have been violated and hurt by the people who are supposed to love and protect them. They have had their private lives and stories publicized and repeated by those who promised to keep it secret. They have been moved from person to person and from place to place and now find themselves in a courthouse with no clear reason as to why or what may occur. These children need someone to ensure that their voices are heard both inside and outside of the courtroom.[83]

Similarly, children with learning difficulties and behavior problems are academically, emotionally, and mentally scarred. They have poor self-concepts relating to their school functioning.[84] They feel lonely, segregated, and victimized (e.g.,

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80. *Id.*

81. *Id.*

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

83. *Id.* at 2058.

84. *See* Jean Cheng Gorman, *Understanding Children's Hearts and Minds: Emotional Functioning and Learning Disabilities* (Jan.-Feb. 1999), *available at* http://www.ldonline.org/article/Understanding_Children's_ Hearts_and_ Minds:_Emotional_Functioning_and_Learning_Disabilities.

physical assault, removal of possessions).[85] These students also need to express their thoughts and concerns and experience success in school.[86]

Movements for the representation of children in legal proceedings have been met with some opposition. Some commentators argue that a lawyer-client relationship with the child casts the parent as the enemy.[87] Others argue that the role of the lawyer is not to decide the best interests of the child. Courts and commentators, however, "have often and overwhelmingly rejected the idea that a lawyer should act in what the lawyer determines is the client's 'best interests.'"[88] Indeed, the most obvious role of the parent throughout the course of representation is to decide what is in the best interests of the child-client. This Comment does not seek to supersede the parent's role as decision maker. Rather, the main purpose of this Comment is to provide a role for the parent *and* the child in the representation. As such, the parent should remain an integral part of the representation.

V. Understanding and Applying Model Rule 1.14

A. *The Child as the Client and the Role of the Parent*

Model Rule 1.14 and this Comment recognize the child as the client.[89] Therefore, when a lawyer-client relationship with

85. *Id.*

86. "50% of children under age fifteen who committed suicide in Los Angeles County over a three-year period had been diagnosed as learning disabled." *Id.*

87. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L. J. 805, 829 (2006) ("The defining characteristic of the child protection movement is its anti-parent stance.").

88. Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM. L.Q. 329, 340 (1999).

89. A lawyer-client relationship with the child furthers the purpose and intent behind Model Rule 1.14. The rule purposely includes a flexible standard that formulates a lawyer's responsibility to maintain a normal lawyer-client relationship with a client with diminished capacity in terms of "as far as reasonably possible." Elizabeth Laffitte, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered,* 17 GEO. J. LEGAL

the child is reasonably possible, a lawyer should mediate the conflict between the parent and school district while advocating the child's wishes.[90] And, even when a normal lawyer-client relationship is not fully possible, the child should remain an active participant in the representation. "[C]hildren as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."[91] The same can be said of a child's ability to offer opinions concerning their education. A child "often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the [child's] own well-being."[92] While a lawyer is ultimately guided by the child's wishes, a lawyer may also consult with the child's parent.[93] Only where the parent's decision is clearly adverse to the interests of the client will a lawyer consider other options in protecting the interests of the client and putting the client's interests first.[94]

Although a normal lawyer-client relationship with a child will not be possible in all instances, the Model Rules never suggest viewing the parent as the client. Rather, the Rules advise a lawyer to *look to* the parents as the natural guardian in certain types of proceedings in which a lawyer is representing a minor.[95] Comment 3 of Model Rule 1.14 reminds a lawyer that the utmost duty remains with the individual

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ETHICS 313, 319 (2004) (citing A.B.A. CENTER FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT, 1982 – 1998 at 125 (1999)). Such a standard is necessary in special education representation. The flexible nature of the rule allows a lawyer to take into consideration the child's wishes, values, and goals, where the client is not fully capable of making decisions about important matters. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt 1 (2009). If a normal lawyer-client relationship is not possible when a client is very young, the lawyer still has the opportunity to develop such a relationship as the child grows and matures.

90. *See id.* R. 1.2(a) (2009).

91. *Id.*

92. *Id.* R. 1.14 cmt. 1 (2009).

93. *Id.* R. 1.14 cmt. 4 (2009).

94. *Id.* R. 1.14(b) (2009).

95. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 4 (2009).

client.[96] "[A] lawyer must keep the client's interests foremost and, except for protective action . . . must look to the client, and *not* family members to make decisions on the client's behalf."[97] Accordingly, a lawyer's ethical responsibilities protect the child-client, not the parent.

While the parent is not the client, the parent does play a major role in the representation and maintains substantial authority in making decisions on behalf of the child. A lawyer can and should look to the parent to direct the course of representation on behalf of the child, especially when a lawyer-client relationship with the child is not possible. And, in accordance with parental rights, the IDEA, and the Model Rules, the parent possesses significant authority to decide the child's education. In cases where the parent's decision appears detrimental to the child's education or the parent's decision conflicts with the client's wishes, however, the parent's decision is not determinative.[98] Since the child is the client, a lawyer's ethical responsibilities remain with the child, not the parent. The purpose is not to remove the parent from the representation. Rather, everyone is involved in the representation if the child is the client.

1. Confidentiality of Information

Confidentiality presents a difficult situation for a lawyer whether the parent is the client or the child is the client. Model Rule 1.6 prohibits a lawyer from revealing information related to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.[99] Absent one of the exceptions, the Rule prohibits a lawyer from sharing information with the non-client. Deciding to represent the child as the client, however, furthers the purpose behind the

96. *Id.* R. 1.14 cmt. 3 (2009).

97. *Id.* (emphasis added).

98. *See id.* R. 1.14(b) (2009); *see also id.* R. 1.6 (2009).

99. *Id.* R. 1.6(a) (2009). Model Rule 1.6 is mandatory; a violation of a lawyer's ethical obligation to keep client confidences could result in discipline. *See id.,* Scope (2009).

confidentiality rules. It protects the child's involvement in the representation and provides the lawyer with comprehensive information in order to be effective.[100]

The confidentiality of a client's statements to a lawyer is at the core of the lawyer-client relationship, and therefore, at the center of an effective advocacy system.[101] The purpose and intent behind the confidentiality rules, however, are clearly frustrated when the parent is the client. While communication with the parent-client is fully protected, any and all communication with the child is subject to disclosure. Where the parent permits the lawyer to meet privately with the child, the lawyer must inform the child that anything said during the meeting must be revealed to the parents upon request.[102] Alternatively, the parent-client may insist on being present during the meeting. In either situation, the lawyer is "unable to communicate fully and frankly with the child."[103] Rather, there is a strong "belief that [the child] will be less than forthcoming with the truth if not given protection from disclosure of

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100. *See* Mandelbaum, *supra* note 82. "The need for confidentiality has been argued through a three-step syllogism. First . . . lawyers must be able to represent their clients effectively. . . . Second, lawyers need full information in order to be effective. Third, clients may not fully disclose all of the information in their possession unless confidentiality is guaranteed." *Id.* at 2057.

101. *Id*. *See also* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2009). "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship." *Id.*

102. *See generally id.* R. 1.4 (2009); *see also* Gerald F. Glynn, *Multidisciplinary Representation of Children: Conflicts over Disclosures of Client Communications*, 27 J. MARSHALL L. REV. 617, 646 – 47 (1994).

> [I]t is often professionally and legally advantageous to have some private communications with the child client. Professionals will want to have communications with the child-client without the parents present to evaluate the child's behavior outside the presence of the parent and to challenge the perceptions provided by the parent. Legally, the parents' presence could destroy any confidentiality or privilege. Courts treat parents like any other third party present during a conversation.

Id.

103. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2009).

professional-client communications."[104]

As the client, the parent also decides whether to involve the child in the representation. A lawyer could be forced to represent the child's interest without ever laying eyes of the child. In that case, the lawyer's ability to effectively represent the needs of the child is severely limited. The lawyer is unable to recognize, facilitate and maximize the child's capabilities because the lawyer has no authority or ethical obligation to see the child or meet with the child.

A lawyer is more effective in advocating the interests of the child when the child is the client. A lawyer-client relationship with the child allows the lawyer an opportunity to meet the child, and under the protection of the confidentiality rules, the child is more likely "to communicate fully and frankly with the lawyer."[105] Even if the child is not capable of actively participating in the representation, the lawyer gains a wealth of information simply by observing the child for a moment.[106]

A lawyer-client relationship with the child also empowers the child. Children having difficulty in school are in a disempowered state.[107] They have likely been the target of a "steady diet of insults and embarrassment."[108] And, prior to the representation, the child probably has had little opportunity to be heard.[109] As the client, the child makes decisions about the case "in an informed and fully participatory manner."[110] The decision could be as simple as deciding to meet privately with the lawyer or having the parents present during the meeting.

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104. Glynn, *supra* note 102, at 626.

105. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2009).

106. Every child should be seen except in those rare instances where it is physically impossible for the lawyer to see the child. The lawyer should always "lay eyes" on the client. *See Fordham Conference*, *supra* note 2, at 1312.

107. *See* Mandelbaum, *supra* note 82, at 2058.

108. *R. Cary Westbrook,* The Journey Begins, excerpt from Learning Disabilities and College: Strategies for People that Rock Our World, *http://www.ldonline.org/firstperson/7005.*

109. *See generally* 20 U.S.C. § 1414 (2004).

110. Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1690 (1996).

The decision, however, is left to the child-client, not the lawyer or the parents.[111]

While legal representation of a child is most effective when a child's statements are protected under the confidentiality rules, strict adherence to the Rules is not possible in all cases.[112] A lawyer's ethical obligation to preserve child's confidences requires a determination of the child's capacity and judgment to participate effectively in matters and decisions affecting the child's life through his or her legal representation.[113] When a normal lawyer-client relationship with a child is reasonably possible, the representation can be carried out while fully complying with Model Rule 1.6.[114] Even when a child's capacity to participate in the representation is limited, a lawyer should attempt to keep the client's confidence whenever possible.[115] "Nevertheless, to expect [lawyers] to keep a child's confidences at all times and to hold [lawyers] to this

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111. Pursuant to Model Rule 1.2 and its commentary, the client decides the objectives of the representation and the lawyer acts as "impliedly authorized to carry out the representation" of the child-client. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2009); *see also id.* R. 1.4 (2009); Elizabeth Caufman & Larence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1778 (1995) ("[A] central developmental task of early adolescence is the establishment of an 'individuated' sense of self – a self that is not completely bound in the child's bond with his or her parents, but that has nevertheless internalized their values and standards."); Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357 (2006). "While peer pressure has been identified as a significant force, so too is the influence of parents, especially on matters of a serious or long-term nature." *Id.* at 394-95.

112. The working group on confidentiality at the Conference on Ethical Issues in the Legal Representation of Children recognized that "a rigorous application of [Model Rule 1.6] . . . may do more harm to the relationship between attorney and client and in the end may be contrary to the effective representation of the child." Mandelbaum, *supra* note 82, at 2055. Without a clear test to determine when the rule should apply, Randi Mandelbaum, a participant of the working group on confidentiality, found that lawyers must determine the child's capacity "before determining what confidentiality obligations are due to the child." *Id.* at 2056. This Comment agrees with those findings and applies some of the rationale to special education proceedings.

113. *Id.* at 2056.

114. *Id.* at 2062.

115. *Id.*

standard as a rule is impossible and unfair to both the child client and the lawyer."[116] In cases where the child is unable to participate or to understand fully the concept of confidentiality, a lawyer should turn to the parents to determine the child's best interest.[117] In accordance with Model Rule 1.14, the lawyer looks to the parents while keeping the child-client's interest foremost.[118]

While adhering to the rule of confidentiality with a child may be challenging at times, a lawyer-client relationship with the child offers the most effective representation. Regardless of the child's capacity, a lawyer-client relationship ensures the child's active participation in the case and provides the lawyer with the full information. When the child is competent, the lawyer treats the child-client as the lawyer would an adult and advises the child fully and candidly about the case.[119] Even when a child's capacity to participate in the representation is limited, the obligation of confidentiality is so fundamental to the lawyer-client relationship that it is critical for lawyers representing impaired children to attempt to keep their clients' confidences whenever possible.[120]

2. Conflicts of Interest

In most cases, the parent's decision regarding the child's education will align with the child's wishes and a lawyer can advocate accordingly. In some cases, however, the parents and the child will disagree. There is also concern that a parent's interest will interfere with a lawyer's representation of the child.[121] Ordinarily, when a conflict arises a lawyer must

116. *Id.*

117. MODEL RULES OF PROF'L CONDUCT R.1.14 cmt. 4 (2009).

118. *Id.* R. 1.14(b), (c) (2009). When taking protective action for a child unable to act in her own interests, the lawyer is impliedly authorized to reveal information about the client. *Id.*

119. Federle, *supra* note 110, at 1691.

120. Mandelbaum, *supra* note 82, at 2062. For purposes of this article, an impaired child includes "a baby, a nonverbal child, and a child with severe intellectual or emotional deficits or both." *Id.* at 2054.

121. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009). "Concurrent conflicts of interest can arise from the lawyer's responsibilities to another

withdraw from the representation unless the lawyer obtains the informed consent of the client and the third party. Conflicts, however, cannot always be waived by consent and, in matters involving children, obtaining an effective consent from the child can be a problem.[122] To avoid such conflicts, the Model Rules "encourage lawyers to presume there is or at some point will be a conflict between the parties."[123] The purpose of a conflicts analysis is to provide the most effective representation by discussing certain conflicts and using that knowledge to determine which lawyer-client relationship offers the best position for all the parties involved.

One of the major concerns in a conflicts analysis is that both the parent and the child possess "independent, enforceable rights."[124] Under the IDEA, when a dispute arises with the school officials, both the parents and the child have a right to contest any aspect of a proposed program of special education.[125] In other words, a lawyer can represent the parent, the child, or both.[126] Deciding to represent both parent and child, however, can present a conflict and does little to clarify the course of the representation. Indeed, a lawyer must consider the desires and expectations of all the interested

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client, a former client or a third person or from the lawyer's own interests." *Id.* R. 1.7 cmt. 1 (2009). *See also* Neely, *supra* note 70, at 1395. The opposite could also occur where a mature child feels that they need to go to a residential school and the parent wants the child to stay at home. Furthermore, a parent may try to hinder a child's future by placing the child in a position of dependency rather than independence. *See also* Glynn, *supra* note 102. "There are many instances where the parents' desired outcome may differ from those by the child." *Id.* at 626. In the most extreme cases, a parent may seek to commit the child to a mental health facility or send the child away to a residential school while the child wishes to stay at home with family and friends. Nancy J. Moore, *Conflicts of Interests in the Representation of Children,* 64 Fordham L. Rev. 1819, 1845 (1996).

122. *See* Moore, *supra* note 121, at 1820.

123. Guggenheim, *supra* note 87, at 829. Otherwise, "[i]f a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation." MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 4 (2009).

124. Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007) (finding that the IDEA grants parents "independent, enforceable rights").

125. 20 U.S.C. §§ 1400-1491 (2004).

126. Moore, *supra* note 121, at 1825 n.31.

parties (including the lawyer).[127] A lawyer must also decide who directs the representation and "what to do if the clients disagree during the course of the representation . . . ."[128]

While a lawyer should refrain from representing both the parent and child, conflicts may still arise. If the course of the representation is not clearly defined, the parent may assume the role of the client. Generally, the parent retains a lawyer regarding a dispute with the local school district over the child's interests. "[T]he parent [is] fully expecting not only to select and compensate the lawyer, but also to play a significant role in directing the course of the representation."[129] The lawyer, however, may consider the child to be the client. In this case, a lawyer could be forced to withdraw from the representation.[130]

While some commentators suggest that "[i]f the lawyer represents the parent alone, then standard conflicts analysis simply does not apply, regardless of any disagreements or other conflict of interests between parent and child," such a conclusion does more harm than good in special education proceedings.[131] If a conflict arises between the parent and the child, a lawyer for the parent is required to represent the parent's decision—no matter what. Therefore, it is true that if the parent is the client, no conflict would arise. However, this is not because the parent and child agree, but because the lawyer's ethical responsibility forces the lawyer to avoid the child's wishes, values, and goals all together. This is not the type of representation that should occur in special education cases where the child is a party whose interest requires protection and advocacy.

Deciding to represent the child does not cure the representation of a potential conflict.[132] Given the nature and

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127. *Id.* at 1824-25.

128. *Id.* at 1824.

129. *Id.*

130. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (2009).

131. Moore, *supra* note 121, at 1824.

132. *Id.* at 1844-54. When the child is the client, the parent assumes the role of an interested third person; "that is, a person who typically not only hires and pays for the lawyer to represent the child, but also expects to be an

extent of special education representation, however, a lawyer-client relationship with the child is the best alternative for dealing with potential conflicts. If a conflict arises, the child's interests are protected, not ignored. Moreover, a lawyer-client relationship with the child allows the lawyer to use the ethical standards of the legal profession to "reduce the uncertainty and conflict inherent in [the] representation by [allowing] the lawyer [to] communicate with the child, caretakers and outside consultants, mediate client conflicts and negotiate with adverse interests."[133] If resolution of a conflict is not possible, it is the parent and not the child that is capable of obtaining independent representation to settle the dispute.

3. Terminating the Representation

One of the purposes behind Model Rule 1.14 was to "formulate an intermediate position" between refusing to represent a client with diminished capacity, withdrawing from the case, and seeking the appointment of a guardian ad litem.[134]

> In the absence of Rule 1.14, a lawyer whose client becomes incompetent would have no choice but to withdraw, not only because a lawyer who continues the representation would be acting without authority, but also because the lawyer would be unable to carry out his responsibilities to the client under the Rules . . . .[135]

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active participant and decision-maker in the course of the representation." *Id.* at 1844.

133. *See generally* Neely, *supra* note 70, at 1405.

134. Elizabeth Laffitte, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 GEO. J. LEGAL ETHICS 313, 313 n.3 (2003) (referencing Email from Geoffrey Hazard, Law Professor and Promulgator of Model Rule 1.14, University of Pennsylvania, to Elizabeth Laffitte (Feb. 24, 2003) (on file with author)).

135. *Id.* at 313 (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404 (1996)).

If the parent is the client, however, the lawyer is unable to act as an intermediary. The lawyer's only option is to withdraw from the representation if a conflict arises.

The Model Rules permit a lawyer to "withdraw from representing a client [when] . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[136] However, a decision to withdraw from the representation leaves the child, the party of interest, without legal assistance and protection. Furthermore, the lawyer's duty to preserve forever the confidences and secrets of the parent-client, unless waived, precludes the lawyer from notifying the proper authorities or requesting a guardian ad litem to protect the interests of the child.[137] Since the child is the party of interest in special education law, it would be difficult, if not almost impossible, to require a lawyer to ignore entirely the interests of the child.

With the child as the client, however, a lawyer has several options in protecting the child's interests as well as her own. Model Rule 1.14 and its commentary are clear that a lawyer is not to decide the best interests of the child.[138] Instead a lawyer is to advocate the child's decisions or the decisions made by the parent on behalf of the child. However, "[w]hen [a] lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, [a] lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad

136. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2009).

137. *See* N.Y. RULES OF PROF'L CONDUCT Preamble ¶ 2 (2010); *see also id.* R. 1.6(b) (2010).

138. The comment to the Rule offers several factors that should guide the lawyer's decision to take protective action, including "the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 5 (2009).

litem, conservator or guardian."[139] Thus, when a lawyer who reasonably believes that the parent's decisions place the child in substantial harm, the lawyer may take protective action.

A decision to take protective action, however, should not be taken lightly. Two useful measures to consider beforehand include using a reconsideration period to permit clarification or improvement of circumstances or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.[140] Under Model Rule 1.14(c), a lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client when taking protective action pursuant to paragraph (b), but only to the extent reasonably necessary to protect the client's interests.[141] After consulting with other services, agencies, and professionals, a lawyer may be better equipped to evaluate, counsel, negotiate, and advocate for the child's needs. A lawyer may also be able to use such information to coordinate efforts with the parents.

If these intermediate measures fail, a lawyer is not forced to abide by the parent's decision. In cases where a lawyer feels compelled to seek further protection, a lawyer may seek the appointment of a guardian ad litem to protect the interests of the child. Within the language of the IDEA, "if a judicial decree or order identifies a specific person or persons . . . to act as the 'parent' of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the 'parent' for purposes of this section."[142] Thus, an educational guardian appointed by the court as a parent preempts any other possible "IDEA Parent," including the birth or adoptive parent, from making educational decisions.[143] The Model Rules prefer that a lawyer advocate the least restrictive action on behalf of the client; however, the Rules entrust the

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139. *Id.* R. 1.14(b) (2009).

140. *Id.* R. 1.14 cmt. 5 (2009).

141. *Id.* R. 1.14(c) (2009).

142. 20 U.S.C. § 1401(23) (2004); *see also* 34 C.F.R. § 300.30(b)(2) (2006).

143. Janet Scotland et al., *Special Education Decisions for Children in Foster Care: Everyone Has a Role*, 26 A.B.A. CHILD LAW PRACTICE, No. 2, 2007 at 22.

evaluation of the circumstances to the professional judgment of the lawyer.[144]

B. *A Clear and Defined Course of Representation*

A decision to treat the child as the client must be conveyed to the parents before the start of the representation. Unless a lawyer clearly states that she is not representing the parent or also representing the parent, "the parent's reasonable expectations and reliance may form the basis of any attorney-client relationship despite the intent of the lawyer."[145] Therefore, a lawyer must determine at the outset the identity of the client, the lawyer's role, and the identity of the decision maker, and relay those decisions to the parents in a detailed retainer agreement.[146]

The retainer agreement should clearly state that the child is the client.[147] To avoid a conflict of interest between the interested parties, the retainer agreement should also outline the lawyer's role as an advocate for the child and the duties involved in that role.[148] Most importantly, the retainer should describe the allocation of decision-making.[149] Since the child's statements, and not the parents, are protected under the confidential rules, the retainer agreement should also explain in detail, but also in a manner understandable to all the parties, whether and to what extent the child's communications will be kept in confidence.[150] If the parents do not agree to these terms, a lawyer should decline the representation.[151]

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144. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 7 (2009).

145. Kim Brooks Tandy & Teresa Heffernan, *Representing Children with Disabilities: Legal and Ethical Considerations*, 6 NEV. L.J. 1396, 1402 (2006); *see also* Moore, *supra* note 121.

146. When a lawyer is retained, the lawyer should seek to resolve uncertainties at the time of the lawyer's retention. *See Fordham Conference*, *supra* note 2, at 1308 (1996).

147. *Id.*

148. *Id. See also* Wright, *supra* note 77.

149. *Id.*

150. *Id.*

151. "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest

VI. Conclusion

The Model Rules of Professional Responsibility alone do not provide clear guidance for the role of the special education lawyer. Rather, the role of counsel derives from interplay of the federal and state rules, rights, and laws governing special education. Abiding by the lawyer's ethical mandate to recognize the child as the client and incorporating the parent's right to decide the child's education offers the best course of representation. It is the most effective way of abiding by the state Rules of Professional Conduct, upholding parental rights, and keeping the interests of the child foremost. This Comment, however, presents only the initial discussion of a lawyer-client relationship with the child in special education cases. Additional recommendations and practice standards are still necessary to clearly and explicitly define the relationship.

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and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded." MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 1 (2009). *See also id.* RR. 1.2(c), 1.3 cmt. 4, 6.5 (2009).