

Voices Lost and Found: Training Ethical Lawyers for Children[†]

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INTRODUCTION

The two leading models of child advocacy—attorney practice and guardian ad litem (“GAL”) practice—reflect society’s ambivalence about the empowerment of children.¹ In deciding what kind of advocate a child should have in a proceeding that affects the child, states choose the model that best answers some of the key questions about the child’s relationship with the state as *parens patriae*: Should a child’s wishes generally be respected? Should a child’s advocate take direction from the child, if the child is capable of making decisions? Or should the advocate have the option to override the child’s wishes if the child’s best interests require it?

The persistence of these two competing models implies not only an unresolved debate about child empowerment, but also a debate about how state domestic-relations law “intervenes” in the family.² This represents a second level of societal ambivalence about children having power—the difficult question of when it is appropriate for advocates to empower children in ways that conflict with parent power. Such ambivalence is reflected in a number of questions now part of the public debate: Should the parents be allowed to resolve disputes themselves? Is it not too intrusive to have the “state” step into family disputes by appointing another adult to look after the child’s interests and speak for the child? Why are the parents not allowed to represent their child’s interests before the court? Should the state’s appointed child advocate be given party status?³ Should that advocate be a full-fledged attorney? Or should the advocate be

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1. See Martha Minow, *Children’s Rights: Where We’ve Been, Where We’re Going*, 68 TEMP. L. REV. 1573 (1995).

2. See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985). Olsen aptly describes the popular myth that there is a choice between government “intervention” versus “nonintervention” in the family, analogizing with myths of the “free market” versus government regulation. She points out that the family as popularly envisioned could not exist without state regulation and enforcement, for example, of parental rights to custody, intestate succession, prenuptial agreements, and others. See *id.*

3. It should be noted that even in a state such as New York, where children are generally appointed attorneys (“law guardians”) to represent their interests in family-court proceedings, their status as full parties different family court proceedings has yet to be fully determined. See N.Y. FAM. CT. ACT §§ 241-249-a (McKinney 1983 & Supp. 1987); see also 2 LAW GUARDIAN REPRESENTATION STANDARDS (Committee on Juvenile Justice and Child Welfare, N.Y. State Bar Ass’n 1992) (setting forth the standards for law guardians in custody cases); LAW GUARDIAN REPRESENTATION STANDARDS (Committee on Juvenile Justice and Child Welfare, N.Y. State Bar Ass’n 1988) (setting forth the standards for law guardians in delinquency and child-welfare-related proceedings).

someone less “intrusive,” for example, a GAL who merely investigates for the court, or who does not necessarily take direction from the child in representing the child’s best interest?⁴ Perhaps one reason that many states have chosen a GAL model for child advocacy is because the idea of a child having an attorney in a proceeding involving the parents feels too “intrusive” on parental authority over their children.⁵

Given these two layers of public ambivalence about child empowerment, it becomes important to ask: How do child advocates represent children in this context? I assert that there exists another, third layer of ambivalence that can operate to disempower children: the ambivalence about children’s power and difference that advocates themselves bring to their relationships with child clients. Recent scholarship in the area of professional ethics for children’s lawyers, as well as the area often referred to as the “theoretics of practice,” demonstrate the need for child advocates to re-examine how they approach client relationships. Child advocates need to pay close attention to how they approach child clients as distinct individuals, as disenfranchised persons, and with clarity about what children should be able to expect from their advocates. Learning how to prevent the child’s representation from working to mute the child’s voice, before the advocate even begins to work under state constrictions of the attorney role or the GAL role, has important implications for law school ethics teaching and child-focused clinical programs.

Unlike many law schools, Indiana University School of Law-Bloomington (“IU”) is fortunate to have a new child-focused clinical program, as written about and directed by Professor Hill. Indiana is a state that has a long tradition of using GALs to advocate for children, and thus IU Child Advocacy Clinic (“IU Clinic”) students receive specialized training to practice under this particular model. While I support the recommendations of the recent Fordham Symposium on the Ethical Representation of Children, which called for widespread state adoption of the lawyer-practice model, I believe there is an important level of inquiry below the debate of which model is “best” for children.⁶ Instead I will focus on the way that any advocate should approach a representation relationship with a child, and argue that children can be disempowered long before the differences between the two practice models assert themselves.

4. See *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, 1314 (1996) [hereinafter *Recommendations*] (identifying two kinds of guardians: investigators for the court, and advocates for the child’s best interests).

5. See generally Olsen, *supra* note 2, at 859-60. As Olsen points out, “intrusiveness” is in the eye of the beholder: the risk thereof is present whenever parental expectations or hopes are not realized, and a child’s GAL or attorney can equally assert power on behalf of the child to frustrate parental intentions. I would argue that parents are more likely to experience a sense of lost authority with GALs, whose discretion is only checked by usually overburdened judges who tend to defer to a GAL’s recommendation. Though this risk of unfettered discretion may also be present with children’s attorneys, at least (theoretically) two checks are present there: the judge, and the adversarial process itself where the child’s attorney is treated as only one of several voices in the courtroom along with the parents’ attorneys.

6. See generally *Recommendations*, *supra* note 4.

I. ETHICAL ISSUES IN ADVOCATING FOR CHILDREN: TWO CASE STUDIES

To assist in examining how advocates approach child-client relationships, I draw upon two case examples from early in my law guardian practice.⁷ I invite the reader to give special attention to the uniqueness of each child client presented here (to the extent that this can be captured in a writing of limited size), the child's sense of her power to affect the ongoing court proceeding, and the challenges present for both the advocate and the child in discerning the characteristics of the advocate's role.

A. Sara

One of my first cases as a lawyer was representing a six-year-old named Sara. Sara was a fairly intelligent first-grader who lived with her mother and her boyfriend in a public housing development in town. Sara's biological father was a recovering alcoholic who was at different times in and out of treatment. The father lived four hours away with his new wife and two children, and he worked in construction. Sara's mother and father never married. According to the mother, the father had started up with another woman and physically abused her toward the end of their five-year relationship. The father left the house permanently when Sara was eighteen months old, after the mother obtained a protective order against him.

I was appointed as an attorney for Sara when her mother sought to cut off the father's court-ordered, twice-per-month visitation, which was supervised in town by a mutual friend. The father had made only two or three visits each year. However, he would call Sara now and then—for short periods he might call every other week, then he would not call for several months. During these calls the father would often promise that he would be at the next visit, but then he rarely showed or called to cancel. The phone calls, by both the mother's and Sara's accounts, were very difficult for the family—Sara would often be extremely shy, and the father and mother would then spend most of the time arguing about whether the mother was "brainwashing" Sara against him. According to the mother, Sara often wet the bed and had tantrums the morning after the calls. The child's teacher and social worker at school noted that Sara did seem to be fairly anxious after contacts with her father, but they were uncertain whether the anxiety came from the father's contact, the arguments that would break out between the parents, or a combination of the two.

At court, the mother's attorney unexpectedly offered a deal: she would forego several thousand dollars in back child support in exchange for the father's agreement to give up his visitation rights. The support amount was deemed by all as probably uncollectible, based on the father's sporadic work history. The

7. Both are actual cases, with identifying information changed, that I handled relatively early in my tenure as a court-appointed attorney ("law guardian") for children in upstate New York.

father, quite upset about the prospect of giving up his rights, reluctantly said he might agree, partly in order to avoid jail on a pending contempt citation for nonpayment. The judge and the parties awaited my recommendation on whether the court should accept the settlement.

I thought hard about what Sara had told me the day before at a playground near her house while we sat on the swings. It was the same thing she had told me while showing me her stuffed-animal collection on a previous visit: "Why can't I just keep visiting him?" I said to her, "But what about when your father promises to show up and he doesn't? Doesn't that make you sad?" She said, "Yes it makes me sad, but it's better that I get to see him *sometimes*."

B. Rosa

Rosa and her parents lived in a very small apartment near the center of town. Rosa was the middle child of three: a three-year-old boy, Rosa at age twelve, and a fifteen-year-old sister. Rosa was a very smart, tall, African American girl, with a good sense of humor. Her eldest sister was living in foster care, having been removed from her parents' home by the Department of Social Services ("DSS") on an emergency basis, following allegations of excessive corporal punishment. While all three had previously been represented by one law guardian in the fact-finding (adjudication) stage, the judge ordered that new law guardians be appointed for the dispositional hearing, one to represent the eldest child and the other (me) to represent the two youngest.

After the fact-finding hearing, the family court determined that the parents had punched the eldest child in the head during an argument. The source of the original allegations were the two eldest daughters, however Rosa had recanted her account prior to the fact-finding hearing. The court also found health and safety hazards in the home, based on the caseworker's testimony, including broken glass on the floor and food left out to rot.

From the beginning the parents, the caseworker, and the caseworker's supervisor were unable to work together. In DSS records and letters from the parents that I read, it was clear that the parents believed they were being subjected to discriminatory treatment due to their race and poverty by the white DSS caseworker and supervisor. The parents had not allowed the caseworker to enter the home for two months when they allowed me to visit with the children. Even though I was also Caucasian, they welcomed me as a potential new "ally" against DSS, someone who they hoped would take a "fresh look" at the situation. When I arrived at the house, I saw many of the same conditions that the caseworker had described, and some additional hazards.

When I sat down in the children's room to talk with Rosa, she spoke enthusiastically about how the family was going to "beat DSS." She asserted that her sister was now out of the house because she lied about what happened, and that the photos of her sister's split lip and black eye showed only self-inflicted injuries. She adamantly asserted that she never wanted to visit or have any contact with her again. Rosa also made it very clear that she wanted me to do everything possible to keep her and her brother at home after the upcoming dispositional hearing.

Later, after talking with the caseworker, Rosa's therapist, and staff at Rosa's school, I became increasingly concerned that Rosa was being pressured to advocate her parents' position in the case. In the next three meetings with Rosa at her school, Rosa and I discussed possible positions to take. At one of these meetings, I told her I was thinking of recommending that she and her younger brother should remain in their home, but that someone (not necessarily from DSS) should come to visit the home for the first couple of months. Rosa was furious, saying, "You are my attorney and you have to do what I say." I explained that I was concerned about the safety of her younger brother from what I saw on my visit. Anguished, she described a number of serious consequences from continuing to have DSS or anyone else monitoring the home. All were very heartfelt concerns. Some were very real (e.g., dealing with hostile caseworkers) and some were so unrealistic as to suggest the presence of some misinformation (e.g., that she would herself face criminal prosecution and jail).

I felt that this revelation, plus other information obtained from my talks with the teacher and counselor, indicated the need to do something to take the pressure off of Rosa in the proceeding. The counselor was very concerned that Rosa was next in line to be ejected from the house and shunned by her parents when she hit the rebellious teen years, as had her sister. However, New York attorneys are not mandated reporters, and I had received a clear direction from my client not to disclose what appeared to me to be excessive parental pressure bordering on emotional abuse.

The parents refused to allow me to see the youngest boy again, either in or out of the home, before the dispositional hearing. Though DSS had originally wanted to remove the children, at disposition DSS was going to recommend that the parents participate in parenting classes (which they had refused), that Rosa remain in counseling, that Rosa and her younger brother remain at home, that the caseworker visit the home once per month unannounced, and that Rosa's eldest sister remain in relative foster care. One way or another, the recommendation that I needed to make in Rosa's case was going to have to account for her ability to make decisions, her best interests, and her very strong feelings about the direction her representation should take.

II. ADVOCATE AMBIVALENCE ABOUT CHILDREN'S POWER

In both of the above cases, the children appeared to be asking me as their advocate to work for something arguably contrary to their best interests. Sara wanted to continue to have the possibility of a visit from her father, even when the father's inconsistency hurt her deeply. Rosa wanted the state out of her family's life, even though it appeared that she and her younger brother might well need additional services and monitoring.

A natural response for any adult faced with these fact patterns might be: "So what do they know? They're just *kids*." Another natural response would be to listen to what one's "*guts*" are saying, divorced from the role in which the person is approaching the facts: as parent, friend, GAL, attorney, or as a man or woman "in the street." It is precisely these two common responses that characterize the advocate's distinctive ambivalence about children's empowerment, and that

emphasize the need for advocates of either persuasion, GAL or attorney, to work with self-awareness beginning with the first client contact.

A. Perceiving the Child as "Other"

Law schools, clinical programs, and even child-focused clinical programs do not adequately prepare law students to handle cases such as those above. One reason is that such programs do little to teach students how to listen to clients who do not resemble the competent, relatively articulate adult. When the client is someone with different values, abilities, cultural experiences—someone who “speaks a different language”—law school preparation rarely helps a student try to see through the client’s eyes.⁸ Further, professional ethics courses have generally not treated the neglect of this as implicating ethical violations of duties of loyalty, diligence, and competence. Some deride such learning as politically correct “consciousness raising” that has little to do with representing a client.

Translating the “different languages” spoken by clients, however, is what lawyers do on an almost daily basis.⁹ Take for example the above case study of Sara. I met with her three times, with her parents several times, with her school social worker, teacher, and pediatrician each one time, after reviewing all the relevant assessments and documents regarding the child’s situation. Having done this, did I then convey all that I had learned from these sources to the judge word for word? Of course not. The recommendation that the judge heard from me probably constituted one medium-sized paragraph. That paragraph was my interpretation of Sara’s interests, but more importantly, it was Sara’s sole means of communicating with and participating in a proceeding that dramatically affected her life.¹⁰

As described in the rich legal literature referred to as the “theoretics of practice,” this kind of interpreting by lawyers can be either *silencing* or *empowering* for the client: *silencing* when the lawyer is unable to perceive the client’s different point of view and makes poor decisions based on a flawed conception of the client’s needs, and *empowering* when the lawyer can listen carefully enough to discover that, for example, the client may have other

8. See generally Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (discussing the relationship between a speaker’s particular way of speaking and a listener’s ability to listen).

9. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992). See generally Symposium, *Speeches from the Emperor’s Old Prose: Reexamining the Language of Law*, 77 CORNELL L. REV. 1233 (1992) [hereinafter Symposium] (discussing the role of language in legal discourse).

10. The word “translation” comes from the Latin “*trans*” and “*latus*,” literally to “carry across.” See JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 233-34 (1990). James White, a scholar of law and literature, notes that readers of such a definition may make the epistemological mistake of seeing translation as merely transporting words from one mind to another, without noticing that meanings do not exist independently of words. Meanings “invariably change as part of the trip.” *Id.* at 234-35.

objectives that need attention besides simply "beating the rap" or maximizing a monetary award at trial.¹¹

[L]aw is a language foreign to the client, [therefore] . . . the meaning of the client's story will "inevitably" be transformed through the lawyer's representation; no sentence can be perfectly translated from one language to another. Yet if one feels a sense of loss in speaking through a translator, there can also be something gained. By speaking through a translator, one can be heard and understood in places where otherwise one is mute. The translator does not silence the speaker but rather seeks to enhance the speaker's voice by adding her own. The good translator does not alter the speaker's meaning without the speaker's consent, and may even collaborate with the speaker to produce a statement in the foreign language that is more meaningful than the speaker's original utterance. Thus, translation offers both an image of the constraints upon a lawyer's ability to represent fully his client's story and a model for recognizing and managing the inevitable changes in meaning in a way that may empower rather than subjugate the client.¹²

Lucie White wrote about this important connection between empowerment and interpretation in describing her representation of a public-benefits client, Mrs. G.¹³ Mrs. G. came to Ms. White's legal-aid office for help in contesting a decision by the welfare department that required her to pay back \$500 in benefits it claimed she wrongfully received. After Ms. White had interviewed Mrs. G. and counseled her about her options, Ms. White thought she and the client were in agreement about the strategy to pursue in the hearing. Ms. White would try to show not only that the caseworker had given her prior approval to keep the overpayment, but also that the client spent the overpayment only on "necessities." Unfortunately, much to Ms. White's dismay, she found out in the hearing that although her client wanted to avoid paying the benefits back, she had other objectives as well. When it came time for Mrs. G. to explain how her caseworker had given her wrong information, Mrs. G. fell silent. Later, when it was time for Mrs. G. to express remorse and list the "necessities" she purchased, Mrs. G. proudly described how she had used some of the money to buy her girls shoes—nice "Sunday shoes." After processing what went wrong, with appropriate self-skepticism and careful listening, Ms. White began to hear Mrs. G.'s unique voice rather than that of some stereotypic "poor person." While Mrs. G. wanted it noted that she had received prior approval from her welfare caseworker, she was reluctant to risk any future ill will from that caseworker by having her attorney blame the worker for the mistake. Similarly, while Mrs. G. did not want to have to pay the money back, she also did not want to lose her sense of dignity by having to express remorse for buying something she felt was important for her children's self-esteem. In sum, it was only after the hearing that Mrs. G. had finally become a complex client in her attorney's eyes, or rather, it was only later that her attorney began to see the goals of representation through the client's eyes.

11. See generally Symposium, *supra* note 9.

12. Cunningham, *supra* note 9, at 1299-300 (citations omitted).

13. See Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

Cunningham cites the need for improved lawyer training in being a good translator—that is “[one] who shows conscious awareness of shifts in meaning and who collaborates with the speaker in managing these changes.”¹⁴ James White, in further exploring the concept of lawyer as translator, notes the tendency for lawyers’ translations of client stories to include errors of “exuberance” and “deficiency.”¹⁵ Exuberance is found whenever there are meanings found in the translation that were not part of the original client story, while deficiency is seen whenever meanings from the original story get lost in the translation. However, he does not call for translation free of such errors. He would agree with most scholars of law, language, and social science that say that some “filling in” and “editing down” is inevitable.¹⁶ Instead, lawyers need to learn to be more *aware* when they are doing so.¹⁷ Adequately alerted to the possibility of translation errors, the lawyer can then begin what Cunningham describes as the development of the art and ethic of legal discourse, which he characterizes as an ongoing cyclic interaction with the client, “[a cycle] of creating meaning, only to discover its limits, returning anew to discover what aspects of the client’s experience were excluded, trying again, failing again, yet trying once more.”¹⁸

Scholars writing in this area rightly connect the ability to listen with respect for, and loyalty to, the client, elevating this to the level of ethical concern.¹⁹ It is hard enough to learn how to translate the stories of adults, as demonstrated in many of the similar practice accounts in the literature.²⁰ How could the theoretics of practice inform advocates who need to listen to and empower children? What is required are changes in how we work with the child to assemble her story, that is, how we interact with the child to learn about her situation from her point of view, and how we use information from other sources about the child’s interests and needs.

First, the child advocate must approach interactions with the child with the awareness that, in the same way an African American is not just a darker-skinned Caucasian, or a woman is not just a man with more hair and different genitalia,

14. Cunningham, *supra* note 9, at 1301.

15. WHITE, *supra* note 10, at 235.

16. *See id.*

17. *See id.* White instead describes the outcome of this process as the development of a sense of inadequacy in the lawyer, a failure to be seen as both “radical” and “felicitous”: “radical for it throws into question our sense of ourselves, our languages, of others; felicitous, for it releases us momentarily from the prison of our own ways of thinking and being.” *Id.* at 257.

18. Cunningham, *supra* note 9, at 1339.

19. White describes the translation process as “[recognizing] the other—the composer of the original text—as a center of meaning apart from oneself. It requires one to discover both the value of the other’s language and the limits of one’s own. Good translation thus proceeds not by motives of dominance or acquisition, but by respect.” WHITE, *supra* note 10, at 257.

20. *See, e.g.*, WHITE, *supra* note 10; Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1990); Cunningham, *supra* note 9; William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1990).

a child is not just a small adult.²¹ A child is a unique individual enmeshed in a complex interpersonal structure with aspects of dependency and autonomy.²² A child has her own desires and way of using language that may or may not make sense to an adult.²³ Thus many adults, as advocates or not, already approach the task of interviewing and developing a relationship with a child with some skepticism, already sensing a different view of the world. The child advocate must start with the child, even a very young child, as a source of knowledge, someone who is trying to tell a story to those with the patience and perception to listen.²⁴ A thorough study of how children develop and employ language, as carefully described by Anne Graffam Walker, Stephen Ceci, and others, is of course essential.²⁵ Similarly important, the diverse ways children can respond to adults who ask them questions bears close examination, because conversations with adults often entail more than merely the child's transfer of information.²⁶ These additional motives of the child, for example, to please, or to create distance, need to be included by the translator as part of the meaning of the story conveyed.²⁷

In the case examples above, the very fact that each child wanted something which did not appear to be good for them was an immediate sign of "otherness." With Sara, this required me to listen carefully for the characteristics of the value system that she was trying to describe to me. What would have helped might have been the exploration of common points of experience: Was she, for example, trying to explain that "it is better to have loved and lost than never to have loved at all"? Was she trying to say that she really expected little of her father, so when he did not show for visits it was really "no big deal"? Or is this an attempt to characterize her experience using adult meanings? Could it simply be that Sara hoped that her relationship with her father would improve over time? Similarly, with Rosa, it was hard for me to understand her position as anything more than the product of her parents' pressure. To this extent I was approaching her both as "other" and "subservient"—could I have worked harder to understand how she herself experienced DSS in her life? Should I have asked what it was like for her

21. See generally ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (2d ed. 1963); Joanne L. Benn & James Garbarino, *The Developing Child in a Changing Environment*, in *CHILDREN AND FAMILIES IN THE SOCIAL ENVIRONMENT* 99 (James Garbarino ed., 2d ed. 1992); James Garbarino, *The Child's Evolving Capacities*, in *CHILDREN'S RIGHTS IN AMERICA* 19 (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

22. See sources cited *supra* note 21.

23. See generally STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM* (1995); ANNE GRAFFAM WALKER, *ABA CTR. ON THE LAW, HANDBOOK ON QUESTIONING CHILDREN* (1994).

24. See JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS* (1997); Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1554-59 (1996). Ms. Peters describes in excellent detail the many considerations for interviewing a child client and investigating the child's interests.

25. See generally sources cited *supra* note 23.

26. See generally sources cited *supra* note 23.

27. See generally sources cited *supra* note 23; see also *infra* notes 63-66 and accompanying text (discussing parental pressure and the book and movie *The Client*).

when the DSS caseworker would walk through the house and inspect? How did she perceive that the caseworker treated the parents, and her? How did she perceive that the court proceedings were affecting her? What was happening around the dinner table? How did she perceive that her parents handled contrary opinions from the children? What did her value system say should happen when family rules are broken? Of course, in each of the above cases, the child's sense of self as a person living in poverty, and in the case of Rosa, the child's sense of self as an African American being regulated by white caseworkers, should also have been explored.

While the advocate should look to the child client to ascertain the child's unique interests, needs, and view of the world, the advocate must also learn from the child's complex system of relationships.²⁸ This is especially important when the child is so young that he is unable to express any discernable needs or wants except in a reflexive fashion.²⁹ Some argue that the key to understanding the child is in knowing the child's psychological parent (or parents).³⁰ This is the person to whom the child forms an attachment through "day-to-day interaction, companionship, and shared experiences."³¹ Others argue that the most accurate picture of the child emerges from examining how they have developed as part of a "network of relationships."³² These scholars, concerned that the psychological model does not take adequate account of cross-cultural differences, directs the child advocate to examine the child's "network of stable and secure attachment relationships between the child and both its parents and other persons such as professional caregivers, members of the family, or friends."³³

After gathering information from Sara's and Rosa's teachers and counselors, I had a much better sense of the children and their needs. But how much more understanding might I have had if I had taken the more difficult step, to try and process this information further with my clients? This is consistent with Cunningham's description of the interpretation process as cyclical, where the good translator will continually check back with the client for help in using and gaining meaning from information provided by others. It might have helped me

28. See Peters, *supra* note 24, at 1540-41.

29. Some use the term "preverbal" to describe a child who may not be able to assist his advocate in discerning his interests. Certainly a child who cannot communicate with his attorney is incapable of forming a normal attorney-client relationship. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1995); *id.* Rule 1.14(b) & cmt. 2. It should be noted, however, even a preverbal child is constantly expressing wants and needs that can help give direction to the child's attorney, if the attorney has the patience to perceive them. See PETERS, *supra* note 24.

30. Of course, the child's psychological parent (or parents) may or may not be the child's biological parent (or parents). See Peters, *supra* note 24, at 1541 (citing JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973)).

31. *Id.* (quoting GOLDSTEIN ET AL., *supra* note 30, at 19).

32. *Id.* at 1550 (citing Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 368 (1996)).

33. *Id.* (quoting Davis, *supra* note 32, at 361 (quoting MARINUS H. VAN IJENDOORN & LOUIS W.C. TAVECCHIO, *The Development of Attachment Theory as a Lakatosian Research Program: Philosophical and Methodological Aspects*, in ATTACHMENT IN SOCIAL NETWORKS 1, 24-25 (Louis W.C. Tavecchio & Marinus H. van IJendoorn eds., 1987))).

understand both Sara's and Rosa's self-awareness and decisionmaking processes better, if I had returned later to consider with them the concerns raised by the caring adults in their lives.

B. Perceiving the Child as Inferior

In the previous section, I noted that adults naturally approach communications with children with some degree of guardedness, seeing the child's view as different from their own. The difficulties begin when that sense of "difference" comes infused with a lack of respect for the child's abilities as perceiver of the world.³⁴ Additional difficulties which prevent advocates from hearing children's voices can be traced to the broader sociolegal setting in which children are raised. This leads to the second challenge for the child advocate: she must understand a child as an individual whose power and autonomy is overwhelmingly restricted by a parent or guardian, and through them, the state.³⁵ The hardest part for advocates is to question how their awareness of the disempowerment and dependency of children shapes their ability to listen to what children have to say.³⁶ It is hard to imagine what childhood would be like without such restrictions, indeed, most would agree that children would be at serious risk of physical or psychological harm without having some limits placed on their behavior. Of course, I am not arguing that such restrictions be lifted, only that their omnipresence in children's lives be part of the understanding that a child advocate brings to the first meeting with the client.³⁷ Once the child learns to differentiate herself from others, usually she already knows that it is the "others" who make the important decisions.

The child's own sense of disempowerment is critical to understand, because the child advocate steps into this setting usually with a desire to further empower

34. See generally sources cited *supra* note 23.

35. See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1420-21 (1996). Some parents, myself included, might take issue with the extent of this restriction. To parents, of course, children feel like powerful beings, barely held back from harming themselves on a daily basis by the few restrictions we feel able to enforce. I am speaking here primarily of the way that state law and parental guidance confer on children a different legal status, which they experience as denying them adult-like autonomy.

36. In the above case examples, it would have been exceedingly easy to decide, after the initial interview, that both Sara and Rosa were clients unable to act in their own interests, whose wishes and perceptions of their situation should be discounted. Upon making such a determination, I would have been free under Rules 1.2 and 1.14 of the *Model Rules of Professional Conduct* to proceed to make decisions on my clients' behalf as a "de facto guardian." See *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.2 (1995); *id.* Rule 1.14; see also William A. Kell, "Ties That Bind?": *Children's Attorneys, Children's Agency, and the Dilemma of Parental Affiliation*, 29 *LOY. U. CHI. L.J.* (forthcoming Winter 1998) (manuscript at 3, on file with author).

37. Professor White discusses in great detail the history of how women, particularly minority women, have been disempowered, before she begins to analyze what occurred in her representation of Mrs. G. See White, *supra* note 13, at 6-19. Similarly, a child advocacy curriculum needs to include teaching about the history and current construction of the sociolegal structure that subordinates the child to her parents, and ultimately the state.

the child. Often the child will speak about her needs or her situation in what has been called the “language of disempowerment.”³⁸ Because she has learned that what she thinks and what she says matters little, the child is reluctant to speak her mind, often out of a sense that it would be a “waste of time.”³⁹ How often it is that children answer adult questions (e.g., “How did it go at school today?”) with silence, or with “I don’t know.” One reason might be due to their experience with the way that children’s words, once spoken, are no longer subject to their control—often it is an adult who ultimately acquires and wields control (“So the teacher gave you *how many* time-outs? Why?”).⁴⁰ As White describes in representing Mrs. G., when a person has never been allowed to exercise much control in her life, she learns to mute her concerns (who would listen or respond to them anyway?).⁴¹

With Sara it was easy to discount her view of what should happen because of the flip, almost playful way that she conveyed her wishes to me, as we talked on her backyard swingset. “Just tell the judge I want to see my dad,” she said, while inviting me to climb a tree. “But what if he decides that wouldn’t be good for you?” I countered. Sara responded, “Well, you tell him that’s not right.” I recall her tone as both slightly amused and slightly annoyed that I had suggested that the judge may not agree with her. Though her words were consistent in stating a preference, she conveyed them in almost a sing-song. I am sure I thought at one point: Why should I listen to her if she won’t treat this seriously? In retrospect it seems clear that at age six she was already very used to having people ignore her wishes—my inquiry probably seemed to be almost a game to her, because she believed I would probably go and tell the court whatever I wanted. With Rosa, it felt equally tempting to discount her as merely the puppet of her domineering parents—the way she seemed to repeat, without introspection, her parents’ positions even to her own detriment.⁴² Because I also believed the documentary evidence that I had examined, showing that she had been subject to excessive, emotionally abusive discipline, it would have been easy to fit her into the stereotype of some pitiful, confused child. Fortunately for Rosa, whenever a question arose about her authority to direct the goals of representation, she acted not with resignation but with rage. I am still unsure whether that rage reflected anger at having further confirmation of a world that would not listen to her, or whether she genuinely came to the attorney-client relationship expecting the same authority due an adult. It should be noted that both responses from the children, Sara’s silliness and Rosa’s anger, can often be dismissed by adults in

38. *Id.* at 32 (discussing procedural formalities that tend to repress voices not of the dominant culture).

39. *Cf. id.* at 6-19 (discussing studies that show people tend to value feminine speech habits less than male speech habits).

40. Emily Buss notes that where adults’ answers tend to show only concern about possible revelation of wrongdoing, children’s answers also show a tendency to try to protect others (for example, parents) from negative consequences. See Emily Buss, “You’re My What?” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 *FORDHAM L. REV.* 1699, 1715 (1996).

41. See White, *supra* note 13, at 32-33.

42. See Kell, *supra* note 36 (manuscript at 11-13).

a society that devalues these traits in women.⁴³ As noted by White, similar dismissive treatment is often given to angry reactions of African American women in our society.⁴⁴

In sum, adopting the concept of lawyer-as-translator in child advocacy instills an important sense of both caution and promise in the development of client relationships. As translator, the child advocate must diligently seek to hear the child's story, both as told and as observed, according to what the story means to the child. This process must include awareness of oneself as a contributor of meaning, and similarly, as someone whose very concept of oneself as an adult may have distanced the child as "other" and "inferior." While children's developing abilities to perceive, communicate, and affect the world may not always be able to determine what the "truth" of their situation is, such abilities can consistently point in the direction of the truth or to the meaning of the situation *to the child*. Such information is of course highly relevant to the determination of the child's best interest, and if the child is capable of making decisions, the attorney should utilize this information in taking direction from the client. What follows then, after the child advocate and client come to an adequate understanding of the advocate's role and its ethical limitations, are several additional challenges for the investigation by the child advocate: learning about the child as an individual, as a child disempowered, and as a child in context.⁴⁵

43. See DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND* 224-28 (1990).

44. See White, *supra* note 13, at 43.

45. See Peters, *supra* note 24. The following are several suggestions consistent with this process:

1. The advocate should meet the child in the environment where she is most comfortable (usually her home). If the child feels comfortable doing so, meeting the child in her room is often the most comfortable setting. Then future interviews should also occur in other environments, consistent with the child's comfort (e.g., the noncustodial parent's house, her school, a relative's house, a playground, or other appropriate setting).

2. With the client's consent, interviews should be tape-recorded and reviewed with others in the firm, possibly assisted by professionals in other disciplines. In the context of clinical representation, Clark Cunningham describes in detail the many insights gained from reviewing such recordings with students, identifying possible meanings, and rechecking the translation later in follow-up client interviews. See Cunningham, *supra* note 9, at 1311. However, it should be noted that in some jurisdictions, the potential benefits of recording need to be weighed against the disadvantages of the recording being potentially discoverable. See, e.g., IND. CODE ANN. § 31-17-2-12(b) (West Supp. 1997) (authorizing discovery of GAL reports and recommendations by the parties). Generally such a recording would be protected by the attorney-client privilege, but such a privilege would need to be specifically delineated by state law for GALs.

3. The advocate should continually check back with the client to process information obtained and determine how this has affected the advocate's developing conception of the client's story, interests, and needs.

4. When not emotionally damaging for the child, the advocate should look for opportunities to have the child accompany the advocate to court dates and important meetings related to the child's interests. Emily Buss points out that the child's presence at the proceeding or anywhere that key decisions are being made can prompt important communications and understandings between the child and the advocate. See Buss, *supra* note 40, at 1756.

*C. Going with the "Guts": Developing a Critical
Understanding of the Different Models of Child Advocacy*

While state-chosen practice models may restrict advocates to some extent in the decisions they make in representing clients, ultimately most advocates follow their intuition. This is not necessarily undesirable—there are many fine child advocates who have, over the years, developed an excellent sense of how to work ethically and intelligently for the betterment of their child clients. The problem

The conceptual framework of lawyer-as-translator has additional implications for the preparation of child advocates in law school clinical programs. The following are several programmatic components that should be included:

1. An interdisciplinary curriculum and faculty is needed to constantly bring in different professional perspectives, to assist students in the formation of client relationships, and to help students develop their skills at listening and translation.

2. Following a thorough investigation, with the fullest possible participation by the child client, the student child-advocate should formulate a set of "preliminary recommendations." Unless somehow it would present a risk of harm (to the child, the student, or others), these preliminary recommendations should then be shared verbally with each of the affected parties (preferably in person). The responses by the child and the parties, some probably highly emotionally charged, should then be included in the formulation of final recommendations for the court. Interdisciplinary faculty would be essential to discuss critically the student child-advocate's basis for the preliminary recommendations, to determine the best way to convey them to the child, and to process feedback from the child and other affected parties. This requirement of sharing recommendations with those affected challenges students to be ready to defend the design and integrity of their analysis, and encourages them to consider the different meanings and effects their recommendations may have on other affected parties. This discourages the tendency of many GALs and some children's attorneys to have their recommendations shared with the court and the parties on a "drive through" basis. This occurs when the child's advocate is unnecessarily vague about her position until the day of court, when the advocate's recommendations are first revealed. Under this approach, the advocate whisks into court, gives recommendations with potentially dramatic effects for the family, and then disappears after court (with possibly only minimal follow-up with the child, especially if the child disagrees with the recommendations). This I refer to as "drive through" advocacy, but some parents rightfully experience it more as "drive by."

3. "Grand rounds" should be used to share information about cases and seek input from other students. Interdisciplinary faculty should assist students in recognizing how this requires interpretation of information gained in their investigations, and all should be encouraged to ask skeptical, provocative questions about the presence of any stereotypes or assumptions. (Thanks to Diane Geraghty of the Civitas Clinic for the idea of "grand rounds.")

4. Selected works of fiction should be added to the curriculum to shake up student perceptions about parents and child-family relationships, particularly in contexts that may be unfamiliar (e.g., different cultures, socioeconomic statuses, alternative family forms, the possibility for and effects of drug addiction, and domestic violence). Care should be taken to avoid preaching to the students or pressing them to adopt any particular view as the "right" one. *See, e.g.,* DOROTHY ALLISON, *BASTARD OUT OF CAROLINA* (1992); MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* (Bantam Books 1993) (1969); ROSELLEN BROWN, *BEFORE AND AFTER* (1992); DAVID LEAVITT, *FAMILY DANCING STORIES* (Minerva 1990) (1985); GLORIA NAYLOR, *THE WOMEN OF BREWSTER PLACE* (1983).

comes when the advocate departs from the framework of her appointed role in pursuit of a "gut" feeling about what the child needs, leaving either the child, the advocate, or both unclear about whether she is serving as the child's GAL or attorney. There are at least three reasons why an advocate may depart from her appointed role's ethical framework. She might be unclear about the dramatic differences between the roles of GAL or attorney. On the other hand she might be aware of these differences, but find them overly constraining in the pursuit of her own adopted version of "zealous" child advocacy. Finally, an advocate may sincerely seek to explore and improve upon the different guidelines within what she believes are the bounds of the applicable ethical codes. Whatever the cause of this departure, the resulting confusion further works to disempower the child client, by leaving the child in the dark about what to expect from the advocate, while leaving the advocate operating unconnected to a consistent ethical framework.

As to confusion for the child, Emily Buss has very aptly covered the field in her delightfully entitled analysis, "*You're My What? The Problem of Children's Misperceptions of Their Lawyers' Roles*."⁴⁶ As mentioned earlier, children usually respond to adult requests for information based on how they believe that information will be used.⁴⁷ Buss therefore highlights the critical importance of the initial contacts with clients for conveying clear expectations—as to confidentiality, loyalty, and other ethical duties owed to the client. Otherwise, the advocate can easily become in the child's mind just one of many adults in his life who promise to help but will do so only on their own terms. Buss argues that the guidelines of Model Rule 1.4 requiring communication with clients requires special efforts to communicate the meaning and characteristics of the advocacy relationship to the child in terms he can understand.⁴⁸ When a child does not fully understand the advocate's role, the child's communications and efforts to work with an advocate cannot contribute to their empowerment.⁴⁹

However, the potential for role confusion may be equally great for the adult advocates. The reason for this is that the GAL and attorney roles appear similar, and practitioners under either role can sometimes end up advocating for the same outcome for the child.⁵⁰ These surface similarities in fact smooth over sharp

46. Buss, *supra* note 40.

47. *See id.*

48. The only exception, Ms. Buss would argue, is the very young child who cannot communicate. In this situation, she argues, the attorney role would of course be meaningless because the client could not provide any direction to the representation. *See id.* at 1752. *But see supra* note 29.

49. *See id.* at 1762.

50. *See* Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341 (1987). Few child-focused clinical programs introduce students to both of the different practice models of attorney and GAL. Where child clients are served, the clinic must usually represent them according to the practice model that the state has chosen for them. Given limits on curriculum time, most if not all of the available reading and classroom time in general-practice clinics must be spent on preparing for, or processing, the existing caseload according to the one practice model that will be used in the litigation.

In contrast, a clinical program seeking to prepare students for child advocacy should not be

differences that have serious ramifications for the kind of advocacy relationship that the child client experiences.⁵¹ In cases such as Sara's and Rosa's, the child's sense of empowerment and the actual outcome of the representation undoubtedly were dependent upon the practice model used. As to the surface similarities, children's attorneys and GALs are apparently both *advocates*, but for whom? And how do they advocate for their "clients"?⁵² Both are *investigators*, but of what, and for what purpose? Both act as *interpreters* of information they find in their investigation—but how is this done, and for what purpose? Finally, both make claim to being "*client-centered*," but to what end? Does the concept of client-centeredness include, for example, guarantees of client confidentiality?

Much of the difference between the two roles lies in their respective approaches to professional ethics. Each role has its own set of rules for resolving difficult ethical dilemmas.⁵³ To illustrate, we again take up the cases of Sara and Rosa, to see how their representation and sense of empowerment may have been

limited to its current caseload in what it teaches. Such programs would examine current cases for learning opportunities about the state's particular model of child advocacy, but would also have students look critically at what kinds of outcomes for children are possible under the alternative model. Otherwise, students who do not have the chance to compare and evaluate these models may then go on to represent child clients, and they can fall prey to the surface similarities between GAL and attorney practice. There are thankfully a number of exceptional programs that are child-focused and do teach about the different models. A very incomplete list would include the University of Michigan's Child Advocacy Law Clinic and the Civitas Program at Loyola.

51. They also implicate substantial issues of professional ethics that can form the basis for malpractice actions. See, e.g., *In re Jaime TT.*, 599 N.Y.S.2d 892 (App. Div. 1993); *Marquez v. Presbyterian Hosp.*, 608 N.Y.S.2d 1012 (Sup. Ct. 1994).

52. Some argue that the guardian relationship with the child subject of a litigation is nothing like an "attorney-client" relationship. As described later in this Response, I would agree that that relationship bears little resemblance to an "attorney-client" relationship, but lawyers do not hold a monopoly on the term "client," since it is used in so many other kinds of professional relationships. A similar point of confusion comes from the use of the term "represent" to describe the actions taken on behalf of the child by the attorney or the GAL. I use the terms "client" and "represent" with GALs out of professional respect for the role GALs play, but I would not want the term to serve as another surface similarity which confuses the two practice models.

53. Attorneys are of course required to comply with either the *Model Rules of Professional Responsibility* or the *Model Code of Professional Responsibility*, depending on which ethical framework their state has adopted. Transgressions are subject to disciplinary action by professional boards of review set up by the state.

Ethical guidelines for GALs, on the other hand, are to be found in two possible sources: the National Uniform Standards and possibly individual ethical frameworks adopted by each state. There appear to be no professional ethical overseers other than the agency that the GAL works for, or the judge that appointed the GAL in a particular case.

Professor Hill, in setting up ethical guidelines for the students of the IU Child Advocacy Clinic who will serve as GALs, has adopted the National and Indiana GAL guidelines, but also the *Model Rules* for attorneys to the extent consistent with the GAL role. As I understand it, the points of "inconsistency" are identified clearly and discussed on a regular basis with the students, so to this extent, the IU program is making efforts to acquaint law students with the different ethical guidelines that govern the two models.

different depending on the practice model, attorney or GAL, the state chose for them.

1. Differences as Advocates

Attorneys are required to take direction from their clients as to the goals of representation.⁵⁴ When the attorney determines that the client has some form of disability that might impair his or her judgment or ability to communicate with the attorney, then the attorney is required to maintain as much as possible a regular attorney-client relationship.⁵⁵ GALs, on the other hand, are loyal to either the child's best interests or to the judge who appointed them.⁵⁶ Ultimately the GAL is subject to the appointing authority, so for example, the GAL must arrange services for a child if the judge orders it, even if this is contrary to the child's wishes or the GAL's sense of the child's best interests. This major difference in loyalty for the two models underlies most if not all of the differences in practice hidden by the other surface similarities.⁵⁷

For Sara, the fundamental inquiry for her attorney would be to determine her ability to make informed decisions in setting the goals of representation. This may have taken more than three visits, and may have required gathering information about her decisionmaking capacity from her teacher or counselor. If the attorney determined that she was capable of making decisions (hereinafter referred to as the child being "unimpaired"⁵⁸), then the attorney's direction would have clearly been chosen: to oppose the settlement and seek ways to effectuate visitation with her father. If the attorney believed this result would not be in the client's interest, it would certainly have been proper to counsel the client⁵⁹ about this concern, but ultimately the attorney would have had to defer to the child's

54. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1995) ("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."). For purposes of this writing, I will be using the *Model Rules*, although there are important differences in those states that have adopted the *Model Code*.

55. See *id.* Rule 1.14.

56. See sources cited *supra* note 3. For purposes of this Response I will use the Indiana GAL Standards as an example, though there are important differences in other state jurisdictions. See CODE OF ETHICS (Indiana Office of GAL/CASA 1995).

57. Consistent with the concept of lawyer-as-translator described earlier, devotion to learning about the client's perception of her needs may solve some of the problems associated with conflicts between the attorney's control over legal tactics and the client's control over the goals of representation. As noted by White, *supra* note 13, and Cunningham, *supra* note 9, often this is an unnecessary conflict, indicating that the attorney has not yet learned enough about his client's needs or objectives before proceeding to identify the appropriate legal remedy. When attorneys listen carefully to clients, in many if not most cases, an attorney will not choose a legal tactic that would be contrary to the client's sense of appropriate objectives.

58. See *Recommendations*, *supra* note 4. It is interesting to note that while this term is commonly used in the scholarship on ethical representation of children, its pejorative connotations appear not to have been examined. Though I use it here, the term highlights the potential for adults to stigmatize and dismiss children as legitimate persons and sources of information.

59. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1.

wishes. If Sara wanted the court apprised, the attorney would be required to make her wishes clear to the court, and if needed, to present evidence in support of her position. Similarly, if the court determined that Sara's best interests required that the surrender be accepted, then Sara's attorney would have counseled her client about her options and sought an appeal, if Sara desired it.

On the other hand, if instead Sara had had a GAL appointed for her, the issue about her decisionmaking abilities might have been considered by the GAL, but this would in no way have been required. In fact, a disincentive to do so might have existed if Sara's wishes conflicted with the GAL's sense of her best interests. Sara's GAL would be free to give whatever weight was appropriate to her wishes, whether or not she was impaired, and free to arrive at his own determination of her best interests. The criteria used would be a combination of the GAL's own criteria, any guidelines from the GAL-sponsoring agency supervising the GAL, and the state statutory guidelines, if any, for determining the child's best interests in the particular proceeding. While most GALs would likely want to make the child's wishes known to the court, they would have discretion not to do so. They could, alternatively, share this information in a qualified fashion, if the GAL determined Sara's best interests required it.⁶⁰ Unless the court's later determination of Sara's best interests conflicted with the GAL's determination, the GAL would not pursue an appeal even if Sara wanted him to. It would of course be possible that the court would find that the surrender should not be accepted, and that visitation should continue. The GAL could seek to appeal this result, even over the child's objections. It should be noted that if Sara's attorney had determined that she was impaired, there would still be critical differences between the GAL and attorney approach. The *Model Rules* would still require him to maintain, as much as reasonably possible, the attorney-client relationship.⁶¹ Only if Sara appeared so impaired as to require the appointment of a GAL could her attorney then assume the role of de facto guardian and make decisions according to her best interests.⁶²

As to Rosa, the two advocates would follow the same approach described above regarding the issue of Rosa's ability to make decisions, with the attorney required to determine the issue, but not the GAL. The presence of parental pressure only makes this inquiry more difficult for the attorney, because of the tendency to find older children able to make decisions.⁶³ Should excessive parental pressure operate to disqualify a child from decisionmaking due to impairment? Recall the book and movie, *The Client*, when the eleven-year-old child had information he did not want to disclose after receiving a death threat from the Mafia.⁶⁴ Would we deem this threat as significantly impairing his decisionmaking ability? If so, even with an older child, it appears that the *Model*

60. The GAL might well find such nondisclosure to be in her interest if, for example, the GAL believed Sara's relationship with her mother would be harmed by the disclosure.

61. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2; *id.* Rule 1.14.

62. See *id.* Rule 1.14(a)-(b) & cmts. 1-2.

63. See *id.* Rule 1.14 cmt. 1; see also Kell, *supra* note 36 (manuscript at 19, 23-24); Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99 (1983).

64. JOHN GRISHAM, *THE CLIENT* (1993); *THE CLIENT* (Warner Brothers 1994).

Rules would allow for the appointment of a guardian, or in the absence of such an appointment, the child's attorney could serve as de facto guardian.⁶⁵ Would this be appropriate for adults under a similar threat? The question of what to do with parental pressure and child-client decisionmaking has never adequately been addressed in the literature or in law. The question again, highlights the second level of ambivalence about children's power—should we assume that for purposes of decisionmaking, their parents can exert total control over children because of their emotional or economic dependency? Is it possible and desirable for a child, assisted by a skilled advocate, to develop a position diametrically opposed to her parent?

If the attorney found Rosa to be unimpaired, and Rosa did not change her position after being counseled about her possible interests, then the attorney would need to oppose continued DSS involvement or seek to withdraw. Similar to Sara's case, following Rosa's directives as to the goals of representation would likely require that the attorney inform the court about her wishes, through testimony or in camera interview, and submit evidence or call witnesses in support. Likely the attorney would also see the need to have a new lawyer appointed for the young brother, because of the brother's potential conflict of interest with Rosa. Again, the issue of appeal would be decided by Rosa after being counseled about her options. If the attorney found her to be impaired regarding the decision to appeal, again, he would need to continue a normal attorney-client relationship as much as possible, and only seek the appointment of a GAL if he determined that she could not act in her own interest.⁶⁶

Rosa's GAL would again be able to give whatever weight he felt was appropriate to Rosa's wishes, even if he believed she was unimpaired, in determining Rosa's best interests. Unless the court determined the presence of a conflict, the GAL would not be prevented from making a determination of best interests that balanced any disparate interests between Rosa and her brother. Again the GAL would determine the best interests of both children according to his own criteria, the GAL sponsoring program's criteria, and any state statutory guidelines. Rosa's possible participation in the proceeding would be determined according to her best interests, though many GALs might find that an in camera interview with the judge or some other involvement might appropriately address Rosa's apparently strong desire to be involved.

65. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(b) & cmt. 2.

66. See *id.* Rule 1.14(b).

2. Differences as Investigators

Attorneys must act diligently and investigate thoroughly the client's situation.⁶⁷ This ethical guideline and others have been interpreted to mean that the attorney needs to follow the client's directions as to how the investigation shall proceed, for example, which witnesses to talk to, and what documents should be reviewed.⁶⁸ Similarly, Model Rules 1.1 and 1.2 together have been interpreted to require the lawyer to assemble facts that support the client's position and discount opposing positions.

GALs, on the other hand, must present all evidence bearing upon the child's best interests.⁶⁹ This begs the question: "Best interests according to whom?" The answer is a point of debate in the literature on GALs.⁷⁰ The problem for the GAL is that the judge's determination of the child's best interests is, in effect, the GAL's client, but practically speaking, the GAL is not able to meet the client until the judge has heard the evidence and determined what the child's best interests are. So in practice, the GAL investigates and reports on all information that is relevant to the best-interest determination that she believes the judge will make, after hearing all the evidence. From my experience with GALs, most take the investigatory role quite seriously and try to give the judge as much information as possible, even if some of it does not support the GAL's vision of the child's best interests. To the extent that a GAL investigates and assembles information to support only her position regarding the child's best interests, it should be noted that this approach differs little from the attorney's in its "inclusiveness." The only difference is whether the client has an opportunity to participate in the shaping of that vision.

The investigation of Sara's and Rosa's cases probably would have initially proceeded in similar fashion, whether the practice model were GAL or attorney. Later though, the attorney's determination of the issue of the child's impairment would have potentially changed the direction of the investigation toward seeking

67. *See id.* Rule 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[R]elevant factors [used to determine whether the attorney has the requisite knowledge and skill to represent a client] include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, [and] the preparation and study the lawyer is able to give the matter . . .

Id. Rule 1.1 cmt. 1. "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge." *Id.* Rule 1.1 cmt. 2. "Competent handling of a particular matter includes inquiry into and analysis of factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. . . . [It] also includes adequate preparation." *Id.* Rule 1.1 cmt. 5.

68. *See id.* Rule 1.1; *id.* Rule 1.2.

69. *See, e.g.,* IND. CODE ANN. § 31-17-6-3 (West Supp. 1997) (requiring a guardian to "represent and protect the best interests of the child").

70. *See* Linda D. Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases*, 64 FORDHAM L. REV. 1999, 2001 (1996).

support for the child's position. With a GAL, Sara or Rosa could have helped direct the investigation if their wishes were consistent with the GAL's determination of their best interests. If not, as might be likely in each case, the GAL would continue to utilize the child as an important source of information (and probably as someone in need of protection from the jurogenic effects⁷¹ of the proceeding), but with a status possibly more comparable to a witness rather than a client. Again, the GAL's client would continue to be the child's "best interests."

3. Differences in Interpretation

It is with interpretation that the differences between attorney and GAL are particularly stark. Unfortunately, as described in Part II.A *supra*, this is where law school education can be especially poor in preparing students to represent clients. In practice, both attorneys and GALs can easily fall prey to their own biases and experiences in interpreting the results of their investigation. What helps is that as lawyers we are bound by our ethical code, which requires diligent interviewing, investigatory work, and ongoing communication with the client.⁷² Most importantly, the code requires undivided loyalty to the client, by requiring attorneys to take direction from the client as to the objectives of representation.⁷³

But what of GAL practice? GALs in most jurisdictions have similar charges to be diligent investigators, and many programs (law-school-based or otherwise) include listening-skill development in their GAL-training regimen. GALs serve as interpreters as well, but with different loyalties, and without any code of ethics to direct their attention to their clients' interpretations of their needs and interests. My concern is that students learning to be lawyers by being GALs may develop good listening skills, but possibly less acute abilities as translators.⁷⁴ This is because of the broad discretion enjoyed by GALs and the deference they are customarily given by the court (and usually at least one of the parties). In addition, one of the persons who might authoritatively disagree with the GAL's position, and be disadvantaged by it, is really given no recourse if the GAL is a poor listener and interpreter. Children like Sara and Rosa are examples—their disagreement with the GAL's position can be easily dismissed by the GAL as indicating that they are unable to make decisions in their best interests.

An attorney representing Sara or Rosa would be ethically required to check out his interpretation of the results of the investigations, and to resolve reasonable disputes of fact in the direction of the unimpaired client's position. A GAL appointed for Sara or Rosa, on the other hand, could proceed after investigation

71. "Jurogenic effects" refers to the harm "that flows from [a child's] contact with the legal system." *Report of the Working Group on the Allocation of Decision Making*, 64 *FORDHAM L. REV.* 1325, 1327 (1996).

72. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3; *id.* Rule 1.4.

73. See *id.* Rule 1.2.

74. There is an important relationship between listening and interpreting, in that poor interpretation naturally shapes how any additional information is received and processed. Some might say that the GAL experience has the risk of teaching students more about *judging* than lawyering, and more about treating the child as a *witness* rather than as a client.

with his own sense of the child's best interests. Again, there would be no requirement to collaborate with the client on this interpretation, and in fact there might possibly be a disincentive to do so in each case, if the GAL thought Sara's or Rosa's interests conflicted with their wishes.

4. Differences in Client-Centeredness

As mentioned earlier, the attorney's client is the child, and the guardian's client is the court's determination of the best interests of the child. An attorney must communicate with her client, specifically, keeping the client informed about her case in language she can understand.⁷⁵ With the caveat of Model Rule 1.14, the attorney must make it clear to the client that she expects the client to make informed decisions regarding the goals of representation.⁷⁶ In addition, the attorney is prevented from disclosing client communications to others except as directed by the client.⁷⁷

A GAL informs the client about her case but only when it is consistent with her best interests.⁷⁸ At worst, a guardian may advise the client as a bystander, and at best, as someone whom the guardian is trying to shepherd protectively through a proceeding. Oftentimes, especially with young children, the guardian chooses not to inform or advise at all, based on concerns that this would be emotionally burdensome for them.⁷⁹ Finally, except as to nonparties, the GAL is under no obligation to protect client confidentiality, unless disclosure might harm the child's best interests.

One dramatic difference between the GAL and attorney roles as to client-centeredness would be the different guidelines as to confidentiality. This reflects the substantial difference in weight the two models give to the values of loyalty (more the attorney's concern) versus protection of the client from harm (more the

75. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(a).

76. See *id.*; *id.* Rule 1.14. An earlier point bears repeating here, that practicing under either model requires the attorney to make clear what kind of advocate the child can expect. At a minimum this must include where the advocate's loyalties lie, what the child can expect as to confidential communications, and a pledge of honesty in interactions with the child. All of the above information must be conveyed to the child in language he can understand.

77. See *id.* Rule 1.6.

78. See, e.g., sources cited *supra* notes 3, 56.

79. See Glenn Stone, *Collaborative Pedagogic Efforts on Behalf of Children in Custody Disputes*, 73 IND. L.J. 659 (1998). The extent to which a child's understanding, knowledge of, and appreciation for a given proceeding will affect the child is hotly debated in the research literature. From my practice the most determinative factor of the child's emotional stress during such a proceeding is the degree to which the child believes he or she is responsible for the outcome. This is particularly true when the child feels a sense of loyalty to each parent. In this and similar situations I believe the child benefits most from assurances that (1) the child will be heard if he wants to be heard, and (2) the judge is going to make the decision based on what she thinks is best for the child, after hearing from everyone.

It should be noted that, strangely, the *Model Rules* suggest that the attorney may withhold information from a client if she believes its disclosure would cause the client to act imprudently. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt. 4. This paternalistic portion of the commentary seems at odds with the clear message of Model Rules 1.2 and 1.4(b), which emphasize the importance of the client exercising informed choice.

GAL's concern). Here, for example, Rosa's attorney, if he felt concern for Rosa's emotional health, might have wished to have the power to reveal a client communication that would have alerted the judge to a harmful situation. Unfortunately, Model Rule 1.6 already makes this choice for the attorney against disclosure. The GAL is of course more uninhibited in using information gained in client communications to protect the child. One might ask however whether Rosa would have been as forthcoming with what was happening for her if she had known that her advocate could disclose it without her consent.⁸⁰

While the child may be left disempowered by his confusion about his advocate's role, the child advocate's own confusion, distortion, or revision regarding her role can equally serve this function. Thus, for example, an attorney whose "guts" say that in either Sara's or Rosa's case their wishes should not be honored can choose to inquire only nominally about the child's decisionmaking abilities, and quickly come to a determination of her impairment. Because the child's wishes are so contrary to her best interests (and the advocate's perception of them), the reasoning goes, this clearly indicates impaired decisionmaking. Similarly, a GAL who wants the child to feel comfortable talking about difficult subjects may work only half-heartedly to help the child understand the limits (or lack thereof) regarding confidentiality, hoping that if she must later disclose information to protect the child, the child will understand. It should be clear that each role has its own ethical guidelines, criteria for making decisions, and promises that can reasonably be made to the child client. Advocates cannot approach these guidelines as flexible-to-fit merely because they are uncomfortable with the attorney or GAL role and wish to have the option of a hybrid. The only way to clear up child confusion about the advocate's role successfully is to be clear to oneself what each role requires. This requires that the advocate not rush through the ethical framework of each of the practice models in pursuit of one's "gut" feeling about what is right for the child.

CONCLUSION

Societal ambivalence about children's empowerment, with respect to the state, and with respect to their parents, need not leave children at the mercy of ambivalent advocates. Empowering children means that advocates must learn how to listen to and see them for what they are: unique individuals growing up in a society that tends to devalue their input. In approaching children as clients, advocates need to remain aware of how their own conception of themselves as adults beckons them to discount children as sources of information, and they need to ignore the seemingly automatic adult tendency to apply only adult meanings to the child's experience. With the great potential for confusion about what a child advocate does, adults who take on roles as attorneys or GALs need to take the time to explain what these roles mean in language the child can understand. But the advocate must also not lose sight of the critical differences between the two roles, and not hurry through their vastly different ethical frameworks to embrace some intuitive result. If the intuition was the best

80. See Buss, *supra* note 40.

outcome for the child, it will be waiting there after the advocate, GAL, or attorney takes the time needed to create the client relationship with the child in keeping with the applicable ethical guidelines. But equally likely, by proceeding carefully through the ethical framework, the advocate and client may together develop a new intuitive result for this child, as well as an improved intuition for future child clients.