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# Representing a Minor: A Shared Dilemma in Ontario and Massachusetts

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# Representing a Minor: A Shared Dilemma in Ontario and Massachusetts

## **Abstract**

This commentary considers what lawyers should do when confidential information from their minor clients indicates that the minor's instructions either present a substantial risk of harm to the minor or are irrational. The commentary then asks readers to decide whether and how their personal resolution should be generalized into the law of professional responsibility. The author compares current Ontario and Massachusetts law with a new Massachusetts proposal. The author strongly criticizes the proposal as violating the tenuous compromise between "client-directed" and "best-interests" or "substituted judgment" theories that appear to govern in both jurisdictions in favour of a rule that would direct lawyers to follow client instructions in most cases, no matter how harmful to the minor client.

## **Keywords**

Confidential communications--Lawyers; Legal ethics; Minors; Ontario; Massachusetts

## Commentary

# Representing a Minor: A Shared Dilemma in Ontario and Massachusetts

ANDREW L. KAUFMAN \*

This commentary considers what lawyers should do when confidential information from their minor clients indicates that the minor's instructions either present a substantial risk of harm to the minor or are irrational. The commentary then asks readers to decide whether and how their personal resolution should be generalized into the law of professional responsibility. The author compares current Ontario and Massachusetts law with a new Massachusetts proposal. The author strongly criticizes the proposal as violating the tenuous compromise between "client-directed" and "best-interests" or "substituted judgment" theories that appear to govern in both jurisdictions in favour of a rule that would direct lawyers to follow client instructions in most cases, no matter how harmful to the minor client.

Cet article se demande quel comportement devraient adopter les avocats lorsque des renseignements confidentiels provenant de leur client mineur indiquent que les instructions du mineur présentent un risque important de nuire à ce dernier, ou sont irrationnels. L'article demande alors au lecteur de décider si et comment sa résolution personnelle devrait être généralisée dans la loi de responsabilité professionnelle. L'auteur compare le droit en vigueur en Ontario et au Massachusetts à une nouvelle proposition au Massachusetts. L'auteur critique vigoureusement la proposition, disant qu'elle attaque le fragile compromis entre la théorie des « ordres du client » et celle du « meilleur intérêt » ou du « jugement de substitution », qui semblent prévaloir dans les deux juridictions, en faveur d'une règle qui ordonnerait aux avocats de suivre les instructions du client dans la plupart des cas, quels que soient les effets nuisibles sur le client mineur.

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\* Charles Stebbins Fairchild Professor of Law, Harvard Law School. I disclose that I was a member of the Massachusetts Supreme Judicial Court committee that recommended Massachusetts Rule of Professional Conduct 1.14 in its present form and that I am currently a member of that Court's Advisory Committee on Professional Ethics. This committee has recommended the proposed revision to Rule 1.14 that is discussed in this commentary. From the tenor of my remarks it will be no surprise that I am a dissenter with respect to that proposal, although I have not dissented from the proposal discussed in the Epilogue.

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## I. INTRODUCTION

### A. CASE #1:

Leslie Lawyer has been appointed to represent the interests of Juliette, who at age eleven was placed in foster care after her mother, with whom she had been living, was committed to a detoxification facility for treatment of alcoholism and heroin addiction. Juliette herself, with her mother's acquiescence, had become deeply involved with a group of middle school students who were experimenting with both drugs and alcohol. For that reason, the foster home chosen for placement by the government social service agency was several towns away.

Now, two years after the initial placement, Juliette wants to return to her mother's home. The social service agency is doubtful. The situation with respect to Juliette's mother is precarious. The agency believes that she is tending back to her old ways. Moreover, Juliette has been doing well in her foster home and in school. Even Juliette says that she has no complaints about her foster family. Her position is that she misses her mother and believes she belongs with her family. She wants Leslie Lawyer to do what is necessary to get a court to let her return home. Lawyer has a final conversation with Juliette before filing a motion with the court. Juliette lets down her guard and tells Lawyer that she really doesn't care about her mother at all. What she really wants is to hang out with her old friends. She hears that they are doing all sorts of exciting things without "getting caught." When Lawyer pursues the matter, Juliette confesses that she is talking about drink, drugs, and sex. And no, the social service agency doesn't know anything about her real reason for wanting to return to her mother. Lawyer does everything possible to advise Juliette about the dangers of that course of action. Juliette says she has thought of all that herself but has decided that returning to her mother is what she wants Lawyer to accomplish. Now what does Lawyer do?

### B. CASE #2:

Drew Attorney has been appointed to represent seven-year-old Paul in connection with a custody suit between his parents. Attorney has investigated the situation and believes that either would be an appropriate custodial parent, although, in Attorney's view, Paul would be better off with his mother at this age. Paul has consistently said that he prefers to live with his mother. Just before the final hearing, Paul tells Attorney that he has changed his mind and wants Attorney to side with his father with respect to the custody issue. He insists that he has just changed his mind, but after gentle insistence from Attorney, Paul admits that he has changed his mind only because his father has promised that he can have second helpings of ice cream whenever he wishes. But Paul says that he knows enough not to give the judge that reason. Now what does Attorney do?

THESE TWO EXAMPLES—and countless others like them—present lawyers in your jurisdiction and in mine with serious problems.<sup>1</sup> One is whether there is any definitive law in either jurisdiction that instructs lawyers what they should do in these situations. Another is whether there should be. A second way to look at these issues is quite personal. The first question then would be, “Normatively, what would I do in these situations?” The second question would be, “Do I think it wise to impose my solutions on all other lawyers?” If I understand the situation correctly, lawyers who are active in this field in Ontario have a good deal of discretion in responding to these situations, but some of the chief organizations that work in the field have adopted fairly rigid policies to guide lawyers employed by the organizations. And I understand that some organizations have adopted quite different policies from others.

At the present time, the situation in Massachusetts with respect to the governing law is quite similar. The Committee for Public Counsel Services (CPCS), a government organization providing legal services to indigent parents and children in child welfare cases, has adopted fairly detailed guidelines for lawyers in its Children and Family Law Program that confine somewhat the discretion currently permitted under the governing *Rules of Professional Conduct*.<sup>2</sup> Some private organizations serving the same community operate much more in the all-out child advocacy mode. A proposal currently pending before our Supreme Judicial Court has the potential, however, to alter the governing law substantially by removing a great deal of the discretion presently allowed. In my view, this is a step entirely in the wrong direction.<sup>3</sup>

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1. These examples and this comment deal primarily with situations where the lawyer is involved in proceedings involving the welfare of minor children. Different considerations apply when the lawyer is defending a child charged with a crime or charged with being a delinquent.
  2. Massachusetts, Supreme Judicial Court, Rule 3:07, *Rules of Professional Conduct*. These guidelines, as set forth in *Care and Protection of Georgette*, 785 N.E.2d 356 (Mass. 2003) [*Care and Protection of Georgette* (Sup. Jud. Ct.)], aff'g 768 N.E.2d 549 [*Care and Protection of Georgette* (App. Ct.)], at 364-65, discussed shortly in this comment, are as follows:
    - a) Child's counsel should elicit the child's preferences in a developmentally appropriate manner, advise the child and provide guidance.
    - b) If counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation, counsel shall represent the child's expressed preferences regarding that matter.
    - c) If a child client is incapable of verbalizing a preference, counsel shall make a good faith effort to determine the child's wishes and represent the child in accordance with that determination or may request appointment of a guardian ad litem/next friend to direct counsel in the representation.
    - d) If a child can verbalize a preference with respect to a particular matter, but counsel reasonably determines, pursuant to paragraph (b) above, that the child is not able to make an adequately

## II. THE BASIC RULE IN ONTARIO

The *Rules of Professional Conduct* of the Law Society of Upper Canada<sup>4</sup> tell lawyers that when “a client’s ability to make decisions is impaired because of minority ... the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.”<sup>5</sup> The catch, of course, is in the words “as far as reasonably possible.” The commentary to this rule points out that the “lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions” and refers to age, intelligence, experience, health, and the advice of others as factors affecting that ability.<sup>6</sup>

When the client “no longer has the legal capacity to manage his or her own legal affairs,” lawyers are then instructed that they “may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of ... the Office of the Children’s Lawyer.”<sup>7</sup>

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considered decision regarding the matter and if representing the child’s expressed preferences does not place the child at risk of substantial harm, then counsel shall represent the child’s expressed preferences.

If the child is not able to make an adequately considered decision regarding the matter and if counsel determines that pursuing the child’s expressed preferences would place the child at risk of substantial harm, counsel may choose one of the following options:

- i) represent the child’s expressed preferences regarding the matter;
- ii) represent the child’s expressed preferences and request the appointment of a guardian ad litem/investigator to make an independent recommendation to the court with respect to the best interests of the child;
- iii) inform the court of the child’s expressed preferences and request the appointment of a guardian ad litem/next friend to direct counsel in the representation; or
- iv) inform the court of the child’s expressed preferences and determine what the child’s preferences would be if he or she was able to make an adequately considered S 41 decision regarding the matter and represent the child in accordance with that determination.

See also CPCS Assigned Counsel Manual (Boston: CPCS, 1999) at c. 4, para. 1.6 [“1999 CPCS Standards”].

3. Massachusetts, Supreme Judicial Court’s Standing Advisory Committee on the Rules of Professional Conduct, Notice, “The Supreme Judicial Court’s Standing Advisory Committee on the Rules of Professional Conduct Invites Comments on Proposed Revisions to Massachusetts Rule of Professional Conduct 1.14” reprinted in “Notices from the Courts” Massachusetts Lawyers Weekly (19 February 2007) (QL) [“Proposed Revisions to Rule 1.14”].
4. Law Society of Upper Canada, *Rules of Professional Conduct*, online: <<http://www.lsuc.on.ca/regulation/a/profconduct>> [“LSUC, Rules”].
5. *Ibid.*, r. 2.02(6).
6. *Ibid.*, r. 2.02(6), Commentary.
7. *Ibid.*

I am not sure what is meant by the phrase “legal capacity to manage his or her own legal affairs.” Does any minor have such legal capacity? I assume that the answer must be “sometimes,” because otherwise the instruction to maintain a normal lawyer and client relationship as far as reasonably possible makes no sense. The commentary also suggests that the lawyer needs to decide whether the minor has the “requisite mental ability to make decisions about his or her legal affairs” and lays out the relevant factors to be considered.<sup>8</sup> My instinct is that in wording the test in terms of ability to make decisions instead of the particular decision actually to be made, the test is designed to minimize the ability of lawyers to substitute what they think the minor *ought* to do for what the minor *wants* to do. That is a noble end but the wrong focus. Any parent knows that the real issue so often is not whether the child has the requisite mental ability to make a reasonable decision but whether the child is exercising that ability. Often the answer is no. That is why the law sets an arbitrary age when it judges that people are old enough to be permitted to make their own mistakes and when they are not. That is what the concept of minority is all about. The real issue on which law and lawyers should be focused is whether the minor has exercised that ability and made an appropriate decision in *this* specific situation or sometimes, even more narrowly, in *this* specific aspect of the situation.

More importantly, when lawyers decide that a minor does not have sufficient capacity to make the necessary decision, they are told that they “may need to” have a representative appointed or to obtain the assistance of the Office of the Children’s Lawyer.<sup>9</sup> I am unsure whether “need to” is meant to refer to situations when the lawyer “must” take the action referred to as a matter of law or whether it is meant to indicate that there are times when lawyers should recognize that someone else should be involved in decision making. There is no explicit reference in the commentary to the child’s confidences, but implicit in the notion that the lawyer “needs to” involve someone else in decision making is the notion that the lawyer may “need to” reveal the child’s confidences to a third party, whether it is the Office of the Children’s Lawyer or the court that will appoint a litigation guardian. In both Cases that open this paper, revelation of such knowledge has the potential to defeat the wishes of the minor.

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8. *Ibid.*

9. *Ibid.*

But suppose the lawyers in those cases decide that although the client is not capable of making the necessary decision, they do not “need to” seek outside assistance. Then what? The rule does not address the standard of advocacy to guide the lawyer. Is it to be the child’s wishes, notwithstanding the lack of capacity? Is it to be the best interest of the child? Is it to be a form of substituted judgment for the child—that is, based on the lawyer’s knowledge of the child, what the child would choose if the child were making a rational decision?<sup>10</sup> A normative view on that question will be addressed later in this comment, but at the moment the answer in Ontario seems to be that in the absence of an explicit governing legal rule, the lawyer has discretion to adopt whatever standard of advocacy seems appropriate.

The role of the Office of the Children’s Lawyer has been described, at least in custody and access cases, in the following manner:

In custody and access matters, the goal of the lawyers is to independently represent children’s legal interests before the court and to assist the adult parties in resolving their dispute in the interests of the children. The Office of the Children’s Lawyer has defined the role of child’s counsel as the child’s legal representative, which includes acting as advocate for the child client so that the child’s interests are understood and communicated to the parties and to the court. Child’s counsel does not represent the best interests of the child, because that is the issue to be decided by the court.<sup>11</sup>

The advocacy role is described as understanding and communicating the child’s interests to the court, but not as urging the court to grant the child’s wishes. I realize that I may be reading too much into what is designed to be a summary for the public of a very complex issue, but that summary does contain some “wiggle room” for the exercise of discretion. My understanding, however, is that some organizations that operate in the field of child advocacy tend to operate with across-the-board standards—for example, the Canadian

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10. I should mention that I think that the best interest of the child standard and the substituted judgment standard, despite the different wording, often, but not always, merge into one another. When a very young child is involved, the substituted judgment notion that the lawyer is doing what the child would do if able to make an adequately considered decision is something of a fiction. The child has never had a value system and track record of judgments that the lawyer may use as a beacon. As the minor nears adult status, however, such a track record may well be discernable.

11. Rachel Birnbaum & Wilson McTavish, “Post-Separation Visitation Disputes: Differential Interventions” (2001), online: Department of Justice Canada <<http://www.justice.gc.ca/en/ps/pad/reports/2001FCY6.pdf>>.



Foundation for Children, Youth and the Law will most often advocate the child's legal rights and follow the child's instructions.

### III. THE BASIC RULE IN MASSACHUSETTS

The Massachusetts *Rules of Professional Conduct* also tell its lawyers that "as far as reasonably possible," they should "maintain a normal client-lawyer relationship."<sup>12</sup> But the Massachusetts rules then provide for the situation where such a relationship is not possible. Rule 1.14(b) states:

If a lawyer reasonably believes that a client has become incompetent or that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, and if the lawyer reasonably believes that the client is at risk of substantial harm, physical, mental, financial, or otherwise, the lawyer may take the following action. The lawyer may consult family members, adult protective agencies, or other individuals or entities that have authority to protect the client, and, if it reasonably appears necessary, the lawyer may seek the appointment of a guardian ad litem, conservator, or a guardian, as the case may be. The lawyer may consult only those individuals or entities reasonably necessary to protect the client's interests and may not consult any individual or entity that the lawyer believes, after reasonable inquiry, will act in a fashion adverse to the interests of the client. In taking any of these actions the lawyer may disclose confidential information of the client only to the extent necessary to protect the client's interests.<sup>13</sup>

A recent Massachusetts case, *Care and Protection of Georgette*,<sup>14</sup> considered the behaviour of a lawyer who represented a child in a care and protection hearing that had terminated the father's parental rights. The lawyer had advocated that the child not be returned to her father's custody in direct opposition to her expressed views. The intermediate appellate court stated that advocating a position contrary to the minor's wishes constituted ethical misconduct,<sup>15</sup> although it also found the conduct non-prejudicial because the evidence of the father's unfitness was overwhelming.<sup>16</sup> The Supreme Judicial Court disagreed with the intermediate court's views on the ethics issue as a matter of interpretation of Rule 1.14, but directed its Advisory Committee on

12. Massachusetts, *Rules of Professional Conduct*, *supra* note 2, r. 1.14(a).

13. *Ibid.*, r. 1.14(b)

14. *Care and Protection of Georgette* (Sup. Jud. Ct.), *supra* note 2.

15. *Care and Protection of Georgette* (App. Ct.), *supra* note 2 at 556, note 12.

16. *Ibid.* at 552-55.

the Rules of Professional Conduct (“the Committee” or “the Advisory Committee”) to study the subject and recommend changes to the rule designed to give greater guidance to lawyers for minors.<sup>17</sup>

The Advisory Committee has submitted a recommendation to the Supreme Judicial Court, and, following its usual practice, has circulated its recommendation for public comment.<sup>18</sup> The Committee has recommended only relatively insubstantial changes in the text of governing Rule 1.14(a) and (b). A divided Committee has, however, written a new Comment 9 to address specifically the responsibilities of lawyers for minors,<sup>19</sup> and the comments to the rules have the force of law in Massachusetts. That new proposed Comment 9 provides as follows:

- [9] Where the client with diminished capacity is a minor, several different situations need to be considered.
- (a) Counsel should follow the child’s expressed preferences if the lawyer reasonably determines that the child is able to make an adequately considered decision whether or not the lawyer considers the preference to pose a substantial risk of harm to the client. A child is capable of making an “adequately considered decision” when the child is able to understand, deliberate upon, and reach conclusions about matters affecting the child’s own well-being. A child is not deemed incapable of making an adequately considered decision solely because the child’s preference poses a substantial risk of harm to the child.
  - (b) If the child expresses a preference but the lawyer reasonably believes that the child lacks sufficient ability to make an adequately considered decision and if the preference places the child at risk of substantial harm, counsel may ask for appointment of a guardian ad litem or next friend. The lawyer should then continue to represent the child’s expressed decision.
  - (c) When the child is incapable of verbalizing a preference, the lawyer must make a good faith effort to determine the child’s preference and advocate for that position or request appointment of a guardian ad litem or next friend to direct the lawyer.

The Advisory Committee has now come down firmly on one side of a long-standing debate in the profession over appropriate lawyer conduct when a minor client has diminished capacity. Briefly put, one extreme in the profession believes that it is bad policy to allow lawyers to substitute their judgment for their client’s judgment, even for a client with substantially diminished mental capacity, and that even when the diminished capacity is extreme, the most the

17. *Care and Protection of Georgette* (Sup. Jud. Ct.), *supra* note 2 at 359 ff.

18. “Proposed Revisions to Rule 1.14,” *supra* note 3.

19. “Proposed Revisions to Rule 1.14,” *ibid.*, Comment 9 [“Comment 9”].

lawyer should do while urging the client's expressed preference is to find someone else to act on behalf of the client rather than make judgments themselves about what to do on behalf of the client. Such lawyers are very reluctant to reveal a client's confidences even to save the client from danger posed by the incapacity. At the other extreme are lawyers who believe that it is sometimes necessary to substitute their judgment in such situations in the best interest of their clients. They believe, in the words of Comment 2 to the present Rule 1.14, that "the lawyer often must act as de facto guardian" when there is no guardian or legal representative,<sup>20</sup> and further that the best interests of the client with diminished capacity may well require the revelation of confidential information.

Current Rule 1.14 and its comments seek an accommodation between these very different attitudes toward lawyering for those with diminished capacity. On the one hand, the lawyer is instructed in Rule 1.14(a) to maintain a normal client-lawyer relationship as far as possible. On the other, the lawyer is given a carefully regulated permission to take protective action that may involve the disclosure of confidential information when the client is reasonably believed to be incompetent or unable to make adequately considered decisions, but only when the client is at risk of substantial physical, mental, or financial harm. Thus, the autonomy of a client, even a young child whose instructions to the lawyer are bizarre and irrational, is "saved" from protective action by the lawyer if the contemplated conduct relating to the representation does not present the risk of substantial harm. When there is a risk of substantial harm, however, the lawyer is given discretion to exercise judgment with respect to needed protection and to choose among possible protective mechanisms.

The first and perhaps the most important thing to note about the Advisory Committee's proposed new Comment 9 is the centrality of its definition of "an adequately considered decision."<sup>21</sup> The term is not defined to relate to the particular decision with respect to which the minor has expressed a preference. It is defined in terms of the child's ability to "reach conclusions about the child's own well-being," that is, it asks whether the child is able in general to understand, deliberate, and make decisions. But the crucial judgment the lawyer should be asked to make is not whether in general the client is capable of

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20. "1999 CPCS Standards," *supra* note 2, r. 1.14, Comment 2.

21. Comment 9, *supra* note 19.

making adequately considered decisions, but whether the client is able to do so in the circumstances of the particular decision that needs to be made.

But even if the definition of an adequately considered decision were altered to relate to the particular situation, the definition itself is, in my opinion, dangerously wrong. Even a very young child may well be able to understand a matter affecting his or her well-being, think about it (deliberate), and say "I want to do X" (reach a conclusion). Any parent has seen a child reach a terrible decision in that fashion. But proposed Comment 9(a) tells the lawyer to follow the expressed preference, no matter how irrational and self-destructive that conclusion may be, just so long as the child can think about the matter and reach a conclusion—even if the lawyer concludes that the child is unable to appreciate the consequences of the decision. To ensure that lawyers get the point, the proposed comment tells them that a child is not to be deemed incapable of reaching an adequately considered decision just because the child's preference poses a substantial risk of harm. Thus, the proposed comment clearly tells Leslie Lawyer in Case #1 and Drew Attorney in Case #2 to obey the clients' instructions: in Case #1 because the client has made an adequately considered decision, and in Case #2, perhaps for the same reason, but also because the decision seems not to pose a substantial risk of harm.

Moreover, the Committee's proposal removes from the comments to the Court's present rule the language that sometimes a lawyer may have to act as a *de facto* guardian.<sup>22</sup> The extreme tilt toward protecting the autonomy of children, no matter how irrational the advocate considers a decision, makes this removal necessary because it is difficult to imagine that a person acting as a guardian would ever actively assist a minor to engage in self-destructive conduct. It is naive to assume that such a complete deference to a child's whims will not do harm because someone else in the picture—such as a relative, a social worker, a judge—will step in to save the minor. Often, as in Cases #1 and #2, the lawyer will be the only one who will have the confidential information necessary to save the child from the consequences of the child's instruction. It is also no answer that lawyers often argue the "irrational" preferences of adult clients. There is a reason for Rule 1.14, and it is that the substantive law has carved out minors as a group who need special protection from the consequences of some of their decisions. The special nature of

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22. Massachusetts, *Rules of Professional Conduct*, *supra* note 2, r. 1.14, Comment 2.

minors' diminished capacity often results in an inability to engage in the quality of thinking needed to give appropriate instructions to their lawyers. If this proposed comment is adopted, a lawyer who believes that it is immoral to advocate a destructive position on behalf of a young (or perhaps not-so-young) child must engage in a form of civil disobedience if he or she is unable to decline representation of children in situations likely to present this issue. I expect that the vehicle for such civil disobedience will be a creative interpretation of what constitutes an "adequately considered decision." Perhaps a promise to allow seconds of ice cream routinely will be viewed as creating the substantial risk of obesity, now being seen as a major threat to children.

Proposed Comment 9(b)<sup>23</sup> goes even further to flesh out the proposal's adherence to an extreme version of the lawyer's role. It tells the lawyer that when a minor expresses a preference but cannot meet even the minimal requirements of the Comment 9 definition of an "adequately considered decision," the lawyer has an option to seek a guardian. Whether the lawyer exercises that option or not, the lawyer is then told to urge—not only to disclose to a tribunal, which would be entirely appropriate and should even be required, but to urge—the expressed preference of the minor who cannot make an "adequately considered decision." That conclusion has a certain Alice in Wonderland quality. Only the most uncompromising adherence to a notion of "my client right or wrong, competent or incompetent" justifies such a conclusion. If the lawyer decides not to ask for appointment of a guardian or next friend, presumably the lawyer is left free, and perhaps is even required, to represent the child's expressed decision.

The final paragraph of the proposed comment is also troublesome and, in addition, it seems to contradict Comment 9(b). There will not be many times when a lawyer is going to be able to determine the preference of a child who is unable to verbalize. However, when such a situation arises, a lawyer may be tempted to "determine" that an uncommunicative child's preference coincides with the lawyer's judgment concerning the child's best interest in order to avoid seeking the appointment of a guardian or next friend. But since the Committee's proposal is so dead set against allowing lawyers to substitute their judgment for that of the minor, it seems odd that the Committee is advocating

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23. Comment 9, *supra* note 19.

for the lawyer to make a strong effort to determine the preference of a minor incapable of verbalizing it.

#### IV. RISK OF SUBSTANTIAL HARM

The current Massachusetts rule and the various recommended proposals all condition the lawyer's ability to take protective action on behalf of the minor when there exists a risk of substantial harm posed by the minor's desired course of action. Why is that? Why should a lawyer be instructed to follow even the most thoughtless or irrational instructions of the minor just because the risk of harm is not "substantial"? Isn't the essence of "incompetence" lack of capacity to make decisions? If the minor lacks capacity to make decisions, why should the lawyer be instructed to follow them anyhow?

The answer to that question may shed some light on the larger controversy regarding decisions that do pose danger. I think a good part of the answer relates to the focus of the lawyers' rules on lawyers and not on clients. The focus is on what is good for lawyers—perhaps even what is best for lawyers—and not what is good or best for clients. If the latter were the focus, would the rule be that we should let minor, incompetent children make irrational decisions just so long as there is no risk of "substantial harm," whatever that means? As parents, is that the way we behave with our minor children? But, we are told, lawyers are not parents. They have a different role to play. They are advocates, sometimes advisors, but not guardians. I suggest that this answer begs the question, and begs it in a way that makes life more comfortable for lawyers.

I think there is no avoiding the fact that sometimes the very trust that we encourage our minor clients to put in us requires us to act in a guardian-like capacity. The very confidential information we want clients to give us puts us in a position where we need to safeguard our minor clients. It is too abstract to say that minors have rights and that lawyers exist to safeguard their rights. The whole law of minority is based on the notion that minors do not always have the rights of those of full capacity. The issue is whether the minor should have a right to have a lawyer argue for a position that is the product of the very reason the law has determined that the minor lacks competence. As comfortable as the lawyer might be if the answer were yes, my conclusion is that a focus on the minor would indicate that the answer is no. We should not be helping our

minor clients do things based on irrational or immature decisions. No fiduciary should do that for an incompetent minor.

## V. GUIDANCE

The task that Massachusetts has set for its Advisory Committee is indeed daunting. Even the “clarification” that the Massachusetts Supreme Judicial Court wants is of uncertain meaning. Clarification may be viewed in terms of the ability of lawyers for minors to read a rule or comment and know exactly what they should do in situations like Cases #1 and #2. Clarification may mean only that the rule makes clear what the possible courses of action are, but that lawyers must still make important choices. If we return to the initial phrasing of our problem, each person involved in drafting a rule to guide lawyers has (at least) two difficult questions to answer: (1) “What course of action would *I* follow in a particular situation?” (2) “Should I draft a rule that would impose my solution on *all* lawyers or should I leave lawyers with some discretion?”

I take sides in this issue with those who urge the importance of the latter question. A strong body of opinion in the legal community sees the essence of lawyering as obeying a client’s instructions so long as they are within the bounds of the law. Moreover, many lawyers are uncomfortable with making decisions relating to a client’s competence and making choices for an “incompetent” client when they are not trained to do so. They wish to restrict their activity to the “traditional” lawyer role. Others, however, while they may share in the unease of these lawyers, are made more uneasy following instructions from a client whom they have reason to believe does not, because of a “disability,” sufficiently understand the ramifications of those instructions. While I have stated the choices as if they were clear in each of a whole range of cases, the fact is that for many lawyers it will not be clear whether a particular client falls into the category that necessitates a choice being made at all.

And so as a drafter, my reaction is that I do not want to impose my will on lawyers facing these most difficult decisions and say either that you must or must not urge the minor client’s instructions. I would assure clarity by making it clear that the lawyer has discretion to pick from a number of options the one that seems most appropriate in a given situation. I believe a drafter has to be very careful in attempting to legislate greater clarity by prescribing specific action in stylized fact situations, such as the direction to counsel in the

proposed Massachusetts comment<sup>24</sup> to urge the client's position even if the client is unable to make an adequately considered decision. One possibility, of course, is that lawyers who are precluded from following their own moral sense of what is right and wrong in their lawyering will simply abdicate the field.

A corollary of this view is unease when I am told that particular organizations with responsibilities as child advocates will almost always follow one course of action or another—that they will almost always urge the child's instructions or almost always advocate their view of the child's best interests. I know that for myself, either fear of subjecting the child to real danger by urging the child's wishes or self-doubt about my views of the child's best interest, would lead me to rebel against instructions that I must pursue a particular course of action in child advocacy cases if I wish to work for that organization.

## VI. EPILOGUE

The Massachusetts Supreme Judicial Court published the recommendations of the Advisory Committee and invited comment from interested parties.<sup>25</sup> Its invitation was accepted by child advocacy organizations, the CPCS, bar associations, individual lawyers, and judges, including the judge responsible for court administration issues, who pointed out the budget implications of an increase in guardianship appointments. The commentary was extensive, and it both supported and opposed the thrust of the Committee's recommendations. Subsequent to the Chief Justice's Ninth Colloquium, the Committee took account of the comments it had received, and it revised and circulated a new proposal.<sup>26</sup> The heart of the revised proposal is contained in its Comments 6 and 7. Comment 6 closely follows Comment 6 of the American Bar Association's *Model Rules of Professional Conduct*.<sup>27</sup> Comment 7 is unique.

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24. *Ibid.*

25. "Proposed Revisions to Rule 1.14," *supra* note 3.

26. Massachusetts, Supreme Judicial Court, "Notice Inviting Comment: Proposal Revisions to Massachusetts Rule of Professional Conduct 1.14," online: <<http://www.mass.gov/courts/sjc/prop-rev-prof-cond-114.html>>.

27. American Bar Association, *Model Rules of Professional Conduct*, r. 1.14, Comment 6. It provides:

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments



They provide:

[6] In determining whether a client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a client is unable to make an adequately considered decision regarding an issue, and if achieving the client's expressed preferences would place the client at risk of a substantial harm, the attorney has four options. The attorney may:

- i. advocate the client's expressed preferences regarding the issue;
- ii. advocate the client's expressed preferences and request the appointment of a guardian ad litem or investigator to make an independent recommendation to the court;
- iii. request the appointment of a guardian ad litem or next friend to direct counsel in the representation; or
- iv. determine what the client's preferences would be if he or she were able to make an adequately considered decision regarding the issue (a "substituted judgment" determination) and represent the client in accordance with that determination.

However, there may be circumstances where some of the options identified above will be inappropriate or unwarranted. Such circumstances will often arise in the representation of clients in criminal, delinquency and youthful offender, civil commitment, and similar matters.

Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.<sup>28</sup>

For the most part, the revised comments treat minors and adults with diminished capacity in similar fashion. The definition of what constitutes an adequately considered decision is left to the multi-factored discussion in Comment 6 instead of the narrowly focused and inconsistent definition in former Comment 9, which has now disappeared. A new Comment 7 offers guidance to lawyers faced with a Rule 1.14 problem. The Committee explains:

In its earlier proposal, the Committee had included the appointment of a guardian ad litem as a solution to many problems where a minor is involved. Judges and

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and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

28. *Supra*, note 26.

practitioners pointed out that the limited resources and time available make the appointment of a guardian ad litem impractical in many circumstances. For this reason, the Committee agreed to follow the suggestions of several of the commentators to spell out several alternatives available to counsel, including as one option a request for the appointment of a guardian ad litem, but noting that there are situations in which some of the alternatives are not appropriate.<sup>29</sup>

One member of the Committee, who is the Bar Counsel of the Board of Bar Overseers, dissented.<sup>30</sup> She would have preferred the original version of the rule and comments. The Committee has circulated its new proposal for comment. It still remains to see what the Committee, whose membership has recently changed somewhat, will finally recommend and what the Supreme Judicial Court will do. A great deal is at stake for all persons with diminished capacity and for their lawyers.

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29. *Ibid.*

30. See "Separate Dissenting Statement of Constance V. Vecchione," *ibid.*