REPRESENTATION OF CLIENTS WITH DISABILITIES: ISSUES OF ETHICS AND CONTROL*

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* An earlier version of this article appeared in the Milbank Quarterly. *See* Herr, *Disabled Clients, Constituencies, and Counsel: Representing Persons with Developmental Disabilities*, 67 MILBANK Q. 352 (Supp. 2, Pt. 2, 1989). This material was also presented at a colloquium entitled "Rights of People with Disabilities" sponsored by the N.Y.U. REVIEW OF LAW & SOCIAL CHANGE in April 1989.

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INTRODUCTION

Few questions in disability law are more vexing than the proper allocation of responsibilities between lawyer and client. Through litigation, legislation, and regulation, advocates for persons with disabilities can influence who is served, by whom, and in what manner. By selecting certain clients and framing the issues that they pursue, lawyers can set the agenda for disability law and select certain policy issues for priority attention. For example, while social critics and treatment professionals initiated policies such as deinstitutionalization,[1] normalization,[2] and the provision of education to all handicapped children,[3] legal advocates enforced those policies in the judicial, legislative, and executive branches.[4] In sum, lawyers often screen the claims that the disability movement presses before Congress, state legislatures, administrative agencies, the judiciary, and the public at large.[5]

The legal profession's influence is felt not only at the macro level of class

1. Deinstitutionalization refers not only to the movement of residents from institutions, but also to the diversion of persons with disabilities from large residential facilities and the creation of community-based alternatives. *See* Willer, Scheerenberger & Intagliata, *Deinstitutionalization and Mentally Retarded Persons*, in INTEGRATION OF DEVELOPMENTALLY DISABLED PERSONS INTO THE COMMUNITY 3-4 (A. Novak & L. Heal eds. 1980). As a result, the census for public mental hospitals in the United States has dropped from 560,000 in 1955 to 125,000 in 1981. Shadish, Lurigio & Lewis, *After Deinstitutionalization: The Present and Future of Mental Health Long-Term Care Policy*, 45 J. OF SOC. ISSUES No. 3, at 1, 2 (1989) [hereinafter *After Deinstitutionalization*].

2. Nirje, *The Normalization Principle*, in CHANGING PATTERNS OF RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 231-40 (R. Kugel & A. Shearer rev. ed. 1976). To Nirje, its originator, the principle of normalization "means making available to all mentally retarded People patterns of life and conditions of every day living which are as close as possible to the regular circumstances and ways of life of society." *Id.* at 231. For further discussion of normalization, see *infra* note 48 and accompanying text.

3. *See generally* Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037 (1972) (advocating appropriate educational opportunities for handicapped children).

4. For a sample of the voluminous literature concerning the physically and mentally disabled and the law, see S. BRAKEL, J. PARRY & B. WEINER, THE MENTALLY DISABLED AND THE LAW (1985); S. HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE (1983); L. ROTHSTEIN, THE RIGHTS OF PHYSICALLY HANDICAPPED PERSONS (1984).

5. *See, e.g.*, Md. S.B. 475 (1990 legislative session, introduced Jan. 26, 1990) (proposed constitutional amendment to require that equality of rights shall not be abridged or denied because of a person's physical or mental disability; passed Senate unanimously on April 5, 1990, but denied a vote in House of Delegates) discussed *infra* note 141 and accompanying text.

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action suits and legislative proposals, but also at the micro level of individual case counseling. Disability law practitioners often exert considerable control not only over reform agendas, but over the very lives of their clients. Due to a variety of personality and professional factors, lawyers may dominate their clients and usurp decisions that are generally reserved to non-disabled clients. For many lawyers, the temptation to be paternalistic is acute when representing clients with developmental or other mental disabilities. Those clients may not only have certain expectations of how their lawyers should behave, but their lawyers may come to perceive themselves as behaving in ways that meet the clients' expectations. If the clients have cognitive limitations, the lawyers, in contrast, are expected to be wise and articulate. If the clients have narrow experience, their representatives are supposed to be worldly and sophisticated. If the clients are emotional and subjective, lawyers hold themselves out as analytical and objective. These images and stereotypes enhance the power of counsel to set the goals of representation, and to even confer "client" status on some persons with mental disabilities but not on others.

Even public interest lawyers may be tempted to impose their own goals and ideologies on others. The process of client-centered counseling is time-consuming.[6] Adequate consultation with disabled clients and their organizations may require extraordinary patience to understand and satisfy their complex concerns. In a few cases, some lawyers entirely short-circuit this consultation process. In one landmark "right to treatment" case for the mentally ill and mentally retarded, the lead plaintiff's lawyer would later unabashedly proclaim: "I played God. I never met [the named class action plaintiff] or his aunt. And I never needed to do so. I knew what needed to be done."[7] The lawyer achieved substantial gains for members of the plaintiff class, notwithstanding any psychological or political harm he may have caused by neglecting their views. But the scenario of a class action commander with decision-making authority becomes even more disturbing when one considers the possibility of a lawyer whose goals in conducting the litigation are neither benevolent nor consistent with the clients' interests. And other forms of legal representation are subject to less outside scrutiny than the class action, which at least requires that a judge approve any settlements or dismissals as fair, adequate, and reasonable.[8]

6. *See* D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974).

7. Seminar presentation of George Dean at University of Maryland School of Law, Seminar on Civil Rights of Persons with Disabilities, February 24, 1988. Mr. Dean was the lead counsel for the plaintiffs in Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced* 344 F. Supp. 373 (M.D. Ala. 1972), *and* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1305 (5th Cir. 1974). The author appreciates Mr. Dean's kind permission to quote his remarks, and acknowledges his important contribution to the case law.

8. Under FED. R. CIV. P. 23(e), the settlement or dismissal of a class action must be approved by the judge presiding over the claim. Furthermore, before approving the settlement or dismissal of the claim, the judge must determine that it is fair, adequate, and reasonable for

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This Article analyzes ways to further client-centered legal representation of clients with mental disabilities.[9] Theoretically, clients with physical disabilities already enjoy the benefits of such representation, and like any other client can expect to participate actively in an attorney-client relationship guided by norms of informed consent.[10] Application of those norms of representation becomes problematic if the client becomes incompetent during the course of representation or was marginally competent from the start. Section I examines the traditional allocation of responsibilities between attorney and client in cases absent any competence issues. Section II identifies the ethical guidelines intended to aid the attorney in representing the client with a mental disability. Section III considers the problems of, and possible solutions to, individual representation of clients with mental disabilities. Section IV explores the problems and options presented when the attorney seeks to represent a class of disabled individuals, whether in a judicial class action or in legislative advocacy. Finally, since such attorney-client relationships are rarely bi-polar, Section V suggests some roles for disability organizations in improving disability law practice.

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all class members; *see generally* Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709 (1989) (examining the appropriateness of applying client-centered norms to class actions, especially when the class members are passive or reticent).

9. "Client with a mental disability" refers to an individual with mental retardation or mental illness (or both disabilities), or an individual who is regarded by others as having one or both of those disabilities. Mental retardation is defined as significantly subaverage intellectual functioning and impairment of adaptive behavior manifested during the developmental period. AMERICAN ASS'N ON MENTAL RETARDATION, MANUAL ON CLASSIFICATION IN MENTAL RETARDATION 11 (H. Grossman rev. ed. 1983). Developmental disability includes, but is not limited to, mental retardation. Developmental disability is defined under federal law as a severe mental impairment, that is manifested before age 22 which is likely to continue indefinitely, results in substantial functional limitations, and requires support for an extended period of time. 42 U.S.C. § 6001(7) (1988). Because mental illness is a more elusive term, some legal commentators prefer to focus on mental illness as "crazy behavior." *See, e.g.*, Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 529 (1978). Others describe it as "the label often attached to certain kinds of aberrant behavior." Gerard, *The Usefulness of the Medical Model to the Legal System*, 39 RUTGERS L. REV. 377, 380 (1987). For the medical profession's compendium of mental disorders, see AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. rev. 1987).

Legal definitions of disability or handicap show how broad and elastic the terms can be. For example, for purposes of anti-discrimination protection, Congress defines a handicapped person as a person who "(i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such impairment." 29 U.S.C. § 706(7)(B) (1988). Thus, Congress conferred legal protection not only on currently handicapped persons, but those who were formerly handicapped or were mistakenly treated as if handicapped.

10. For definitions of informed consent, see C. LIDZ, A. MEISEL, E. ZERUBAVEL, M. CARTER, R. SESTAK & L. ROTH, INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY 4 (1984) ("basic premise of the ethical doctrine of informed consent is that the patient is an autonomous person who is entitled to make treatment decisions based on relevant, factual information and perhaps advice provided by a doctor or other care-provider"). On the application of such doctrine to the lawyer-client relationship, see Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

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I.
ALLOCATION OF RESPONSIBILITIES: THE TRADITIONAL BI-POLAR MODEL

The legal profession's conventional rule is that the client has the last word on ends and the lawyer has effective control over means. Although the client is to set the objectives of representation, the lawyer retains considerable latitude in determining the strategies and tactics by which to pursue those objectives. This traditional model of the attorney-client relationship assumed that the client would be best served by a trusting delegation of decision-making power to the lawyer.[11] Although the newer client-centered approaches encourage clients to participate in weighing alternatives and determining means,[12] many lawyers are skeptical of participatory models and many clients choose not to question their lawyer's methods.[13]

The traditional model assumed the decision-making context of a single autonomous client coming to a law office and expressing her needs and interests to a single attorney. Under the American Bar Association's Model Code of Professional Responsibility [hereinafter the Code], the attorney was duty-bound to represent the client zealously, subject to discipline for intentionally failing to "seek the lawful objectives of his client through reasonably available means permitted by law . . . ."[14]

Because clients control major decisions, such as acceptance of a settlement or waiver of affirmative defenses or substantial rights, the lawyer's authority to make decisions without the client's input appears to be narrow and technical. The Code expressly confines the matters reserved to the lawyer to the details of legal representation "not affecting the merits of the cause or substantially prejudicing the rights of a client . . . ."[15]

For the client with a mental disability, this bi-polar model may not work. As a result of economic, cultural, and social forces, persons with mental disabilities rarely came to law offices and lawyers were infrequent visitors to the institutions where those potential clients were isolated from the rest of society. On those rare occasions when lawyer and potential client met, problems of communication and unclear expectations often hindered the formulation and pursuit of the client's goals.

For example, in one recent case, an attorney delayed filing a medical malpractice claim because he believed the client, who had recently been released from the state mental hospital, was too confused and too frantic to discuss and pursue the complex issues involved. When the suit was eventually filed and a

11. D. ROSENTHAL, *supra* note 6, at 28. On the legal profession's tendency toward "greater paternalism than the general public would prefer," see Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 61 (1981).

12. *See* D. BINDER & S. PRICE, *supra* note 6.

13. D. ROSENTHAL, *supra* note 6, at 14-15, 151-53.

14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1982).

15. *Id.* EC 7-7.

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jury verdict in favor of the disabled client entered, an appellate court threw out the jury verdict on the ground that the suit had been filed beyond the two-year statute of limitations and the client had not been sufficiently "deranged" to suspend that time limit.[16] The court assumed that the attorney for a truly disabled client would have been obligated to press for his client's institutionalization or guardianship, thus betraying an ignorance of contemporary disability policy and the ethical duties imposed on a lawyer for a person with mental disabilities.[17] On the other hand, if the attorney had sought third-party support and assistance early in the counseling process, the attorney and client might have achieved a more effective working relationship. Identifying interested third-parties might not only clarify what the client wants and can reasonably expect to accomplish, but can offer emotional support to the client and practical guidance to the attorney. In contrast, the bi-polar approach to lawyer's service to the client might prove incomplete or ineffective.[18]

Even conscientious lawyers face numerous unresolved ethical and practical problems inherent in making their services available to people labeled as mentally ill or mentally retarded. For example, the lawyer derives her authority as the agent of another. The agency relationship assumes the principal's capacity to make decisions. What level of competence should a lawyer require before accepting a person with mental disabilities as a client in her own right? Once an attorney-client relationship is established, what action should the attorney take if the client's goals or the means to achieve those goals seem to be at war with the client's interests? What if the client is so vacillating as to make representation difficult, if not impossible? Perhaps even more commonplace, how should the lawyer react to the client who is overly dependent on the lawyer and essentially seeks to cede all decisions to the presumably more experienced counsellor?

Potential financial difficulties may add another layer of issues for the disability law practitioner. Many prospective disabled clients are poor or lack control over their assets; as a result, lawyers will often look to third-parties for payment. But those third-parties, whether relatives, guardians, or constituency organizations,[19] may have interests that conflict or at least diverge in some respects from those of the person with mental disabilities. Thus, the

16. Cobb v. Nizami, 851 F.2d 730 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 1177 (1989).

17. *See id.* at 733; *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1983) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.")

18. *See, e.g.*, Michigan Ass'n for Retarded Citizens v. Wayne County Probate Judges, 79 Mich. App. 487, 261 N.W.2d 60 (Ct. App. 1977); State *ex rel.* Memmel v. Mundy, 75 Wis. 2d 276, 249 N.W.2d 573 (1977).

19. The term "constituency organizations" refers to the organized supporters of disability rights, such as mental health associations, self-help groups, associations for retarded citizens, protection and advocacy organizations, and some professional organizations who exert advocacy leadership in the mental disability field.

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ethically sensitive lawyer faces complex issues in deciding what duties are owed the disabled client. When such clients have difficulties articulating personal interests, the lawyer must consider the allocation of responsibilities between disabled clients, their organizations, their friends and other personal representatives, and the lawyer herself.

II.
ETHICAL CODES AND VISIONS OF NORMALIZATION

The legal profession's ethical codes have offered little guidance on how to represent a client with a mental disability. The codes permit a lawyer to be the partisan champion of her client's expressed wishes, or the benevolent protector of the client's best interests. For example, the controversy over the attorney's role in civil commitments has raged for nearly two decades between the "client-centered-expressed interests" model and the "best interests" model.[20] But the Code of Professional Responsibility[21] and the newer Model Rules of Professional Conduct[22] have been silent on that controversy. Indeed, the codes of the organized bar foster confusion about the lawyer's proper roles and the scope of the aid lawyers should offer clients. Exacerbated by the disabled client's poverty, physical isolation, or unusual legal problems, this lack of clear ethical guidance may lead some lawyers to shun mentally disabled clients.[23] Even worse, such imprecision may contribute to substandard legal representation and a failure to attend to clients with mental disabilities.[24]

A. Code of Professional Responsibility

The Code of Professional Responsibility offers only a broad statement on the lawyer's assumption of additional, but largely undefined, responsibilities

20. *See* Schwartz, Fleischner, Schmit, Gates, Costanzo & Winkeklman, *Protecting the Rights and Enhancing the Dignity of People with Mental Disabilities: Standards for Effective Legal Advocacy*, 14 RUTGERS L.J. 541, 570-72 (1983) [hereinafter *Protecting the Rights*].

21. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1982).

22. MODEL RULES OF PROFESSIONAL CONDUCT (1983). In many jurisdictions, the model rule pertaining to the client under a disability was adopted verbatim. *See, e.g.*, Rules of Professional Conduct and Related Comments, Rule 1.14 (adopted by Order of the D.C. Ct. of App., March 1, 1990), *reprinted in Bar Rep. Supp.* 27-28 (Feb./Mar. 1990); Maryland Lawyers' Rules of Professional Conduct, Rule 1.14, 2 Md. Rules 510-11 (1990).

23. Jackson v. Indiana, 406 U.S. 715, 737 (1972) (noting paucity of litigation on behalf of persons with mental disabilities). The Social Security Administration disability claims review structure, for example, has been widely criticized as cumbersome and subject to "unhealthy political control." *See* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 55 (April 2, 1990). This perception may make some lawyers reluctant to represent disabled clients in pursuing these claims.

24. *See* Brode v. Brode, 278 S.C. 457, 461, 298 S.E.2d 443, 444 (1982) (improper appeal by attorney for guardian *ad litem* opposing sterilization after the guardian had adopted position that sterilization of child with mental retardation was necessary, and attorney had failed to inform court of that change in position). On role confusion as a cause of routine or ineffective assistance of counsel, see State *ex rel.* Memmel v. Mundy, 75 Wis. 2d 276, 281-85, 249 N.W.2d 573, 576-78 (1977); NEW HAMPSHIRE BAR ASS'N, ADVOCACY IN CIVIL COMMITMENT, GUARDIANSHIP AND OTHER PARENS PARTIAE PROCEEDINGS 34 (1984).

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for the disabled client. Those responsibilities should vary "according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding."[25] Thus, the lawyer was said to have "additional responsibilities" for a client whose mental or physical condition "renders him incapable of making a considered judgment on his own behalf."[26] In the relatively straightforward case of a person adjudicated incompetent acting through a guardian or "other legal representative," the lawyer is required to look to such representatives for direction.[27] In the harder cases of a questionably competent client or a client incompetent in fact but without a representative, the rules simply fail to give any meaningful guidance. They condone a form of *de facto* guardianship, acknowledging that the lawyer "may be compelled in court proceedings to make decisions on behalf of the client."[28] The lawyer was simply admonished to "consider all circumstances then prevailing and act with care to safeguard and to advance the interests of his client."[29] Thus, the Code, in effect, told lawyers to act prudently while leaving to their discretion how the client's interests were to be defined and safeguarded.

Although bowing toward client participation,[30] the Code left the lawyer considerable freedom in deciding to rely on the client's judgment or to override it as well as to obtain the appointment of a legal representative for an "incompetent" or to assume decision-making authority herself in the absence of a duly qualified guardian. With its broad generalizations and ill-defined categories, the Code's provisions served as little more than a warning flag to the underlying ethical pitfalls. Practitioners and scholars alike agreed that these provisions were "vague," "lacking in substantive guidance," and offered "little guidance for the representative in a commitment proceeding."[31]

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25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-11 (1982). As examples of these varying responsibilities, this ethical consideration cites "the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies." *Id.* The Code is silent as to how those responsibilities vary, and how the term "incompetent" is to be defined or recognized.

26. *Id.* EC 7-12.

27. *Id.* As a decision-making surrogate, the guardian or other legal representative was expected to make "those decisions which are normally the prerogative of the client to make."

28. *Id.*

29. *Id.* In an even more opaque manner, EC 7-12 cautions: "But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent." For most lawyers this admonition is far from obvious. The tasks and personal client decisions forbidden to lawyers may not be crystalized in law. The dichotomy between "competent" and "legally incompetent" obscures gradations of ability and the many circumstances in which an individual can lack basic decision-making abilities but still have not been adjudicated incompetent.

30. "If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid." *Id.*

31. Comment, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1543-44 (1975); Perlin & Sadoff, *Ethical Issues in the Represen-*

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The Code's vagueness is due, in part, to the unnecessary grouping of disparate conditions and statuses under the rubric "disability." Yet the problems confronting a lawyer for a client mute as a result of profound mental retardation are obviously different from those of an elderly client confused as a result of illness or bereavement. In the former case, the client has no hope of "recovery" to a competent state and no history of expressed wishes that can guide a lawyer.[32] In cases of treatment refusal, the critical issues are whether the adult patient is competent to decide for herself, and whether wrongful assumptions of incompetence by courts or care providers will be corrected by lawyers and legislators.[33] In the more contentious matter of a child client too young to provide effective guidance to a court-appointed attorney, Guggenheim has suggested that this appointment power should be sparingly used to avoid compromising parents' rights.[34] Other commentators, while recognizing that the lawyer has great discretion in representing disabled clients, acknowledge the difficulties in identifying the client under "an emotional or mental disability" and determining the client's rights and duties affecting the legal representation.[35] Luban would justify a lawyer's paternalism in advancing such a client's interests over the client's desires only when there is a definitive causal account of how the person came to be incompetent or the individual is unable to articulate a rational motive for her behavior.[36]

Viewed as a whole, these criticisms reveal the difficulties with a single

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tation of Individuals in the Civil Commitment Process, 45 LAW & CONTEMP. PROBS. 161, 162 (1982).

32. *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). For cases of mentally competent but physically disabled persons whose refusal to accept life-sustaining treatment was judged competent, see Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986), and State v. McAfee, 259 Ga. 579, 385 S.E.2d 651 (1989). *See also* A. MEISEL, THE RIGHT TO DIE 171-201 (1989) (general discussion of the meaning and effect of incompetence). In arguing for the appointment of a guardian *ad litem* to articulate the interests of the nonverbal individual, Mickenberg called for more legal scholarship to determine the legitimate representative of the noncommunicative client and the goals of representation when third parties compete as the client's spokesperson. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 STAN. L. REV. 625, 629-31 (1979). As a practicing attorney and the director of two of the nation's earliest legal advocacy projects for persons with developmental disabilities, Mickenberg was responsible for pioneering class actions and individual cases for such persons. For further discussion of the guardian *ad litem's* role, see *infra* notes 73-77 and accompanying text.

33. *See* State v. McAfee, 259 Ga. 579, 385 S.E.2d 651 (1989) (competent adult patient's right to refuse treatment in the absence of conflicting state interests); Anna & Glantz, *The Right of Elderly Patients to Refuse Life-Sustaining Treatment*, 64 MILBANK Q. 95 (Supp. 2, 1986).

34. Guggenheim, *The Right To Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984).

35. Patterson, *An Analysis of the Proposed Model Rules of Professional Conduct*, 31 MERCER L. REV. 645, 660 (1980); *see also* Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CALIF. L. REV. 816, 827-31 (1974) (inadequacy of representation due to attorney role uncertainty).

36. Luban, *Paternalism and the Legal Profession*, 1981 WISC. L. REV. 454, 479, 482. Luban puts forward as the test of competency that the client's belief be connected to "real facts by some recognizable inferential process." *Id.* at 479.

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broad ethical rule. It is important to acknowledge the elusiveness of concepts of incompetency and the heterogeneity of the "disabled" population subject to disability, juvenile, and elder law. There are tremendous obstacles to constructing coherent attorney roles in even narrow contexts and greater difficulties across disabling conditions.[37] The distance separating the representation of the self-sufficient, competent adult client from the representation of a Nicholas Romeo[38] or a Peter Mills[39] is vast.

More important than the problem of vagueness in the Code, the disability rights movement has raised expectations that lawyers would defend their disabled clients' rights with zeal and vigor, adopting adversary roles whenever necessary.[40] Although those expectations were no more than the general norm for attorney-client relationships involving nondisabled clients,[41] attorneys in commitment or guardianship proceedings before the 1970s often acted as if their role was to be an *amicus curiae* rather than the client's partisan.[42] But legislation[43] and case law[44] ratified the lawyer's obligation to fulfill the adversary role. Lawyers who did not could face criticism and even discipline.[45] Thus, the Code of Professional Responsibility no longer reflects the state of the law or the realities of the mental disability law practice.

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37. *See, e.g.*, M. PERLIN, 2 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 805-22 (1989); J. REGAN, TAX, ESTATE AND FINANCIAL PLANNING FOR THE ELDERLY § 1.06 (1985); Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV 565, 588-89 (1976).

38. *See* Youngberg v. Romeo, 457 U.S. 307 (1982). Nicholas Romeo was a profoundly mentally retarded man subject to institutional and self-inflicted abuse. The Court held that involuntarily committed persons with mental disabilities have due process liberty interests that require the state to provide minimally adequate training to ensure safety and freedom from undue restraint.

39. *See* Mills v. Board of Educ. of the Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972). Peter Mills was a child described as having a "behavior problem." The Board of Education failed to provide publicly supported education for children who had been labeled as behavioral problems, mentally retarded, emotionally disturbed or hyperactive. The court held this to be a denial of due process and the defendant's own regulations.

40. S. HERR, S. ARONS & R. WALLACE, JR., LEGAL RIGHTS AND MENTAL-HEALTH CARE 9-21 (1983). On the nature and future of the disability rights movement, see Scotch, *Politics and Policy in the History of the Disability Rights Movement*, 67 MILBANK Q. 380 (Supp. 2, Pt. 2, 1989).

41. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1982) ("A lawyer should represent a client zealously within the bounds of the law").

42. Cohen, *The Function of the Attorney in the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 448 (1966).

43. Of the four states that have legislatively addressed the issue of the appropriate advocacy stance, all have favored the adversarial advocate who vigorously asserts the client's wishes over the best interests approach. AMERICAN BAR ASS'N COMM'N ON THE MENTALLY DISABLED, INVOLUNTARY CIVIL COMMITMENT: A MANUAL FOR LAWYERS AND JUDGES 9-10 (1988).

44. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078, 1097-1100 (E.D. Wis. 1972).

45. *See, e.g.*, Mass. Bar Ass'n Comm. on Professional Ethics, Formal Op. 80-4 (1980) (attorney in civil commitment proceeding must act as the client's advocate and cannot initiate guardianship proceedings against the client).

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B. Model Rules of Professional Conduct

The newer Model Rules of Professional Conduct [hereinafter the Rules] attempt to bring the practice of representing the disabled client closer to the traditional attorney-client relationship. The Rules contain a new and separate rule on representing a client with a disability.[46] Rule 1.14(a) states: "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[47] Although broad, this principle is both commendable and noncontroversial. The Rules are described as "rules of reason" to be interpreted with reference to the purposes of legal representation and of the law itself; therefore, it is understandable that Rule 1.14(a) should be hedged with the caveat "as far as reasonably possible." Indeed, this Rule meshes nicely with the "normalization principle," a theory widely accepted in the human services field which holds that a person with a disability should be afforded, as far as possible, culturally normative ends through culturally normative means.[48] Thus, disabled clients, like their nondisabled counterparts, are entitled to counsel who are diligent, competent, and communicative.[49]

Regardless of the degree of her impairment, the client with a disability is

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46. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14 (1983).

47. *Id.* Rule 1.14(a).

48. *See* W. WOLFENSBERGER, NORMALIZATION: THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES (1972). Legal commentators have also embraced the philosophy and principle of normalization in drafting legislation and seeking other law reforms. *See* B. SALES, D. POWELL, R. VAN DUIZEND & ASSOCIATES, DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES (1982) [hereinafter DISABLED PERSONS]. This publication, produced by the Developmental Disabilities State Legislative Project of the American Bar Association's Commission on the Mentally Disabled, identified normalization as a guiding principle for legal reform: *"Developmentally Disabled Persons Should Be Provided With As Normal An Environmental [sic] And Experiences As Possible.* There should be the fullest opportunity for normalizing experiences in which programs and services assist developmentally disabled persons to become fully integrated into the general society." *Id.* at xiv.

49. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.3, 1.4 (1983). The commentary to Rule 1.4 on communication with a client permits reasonable adaptations for a client with an impairment. *Id.* Rule 1.4 comment. Thus, a lawyer may delay sharing information with a client who "would be likely to react imprudently to an immediate communication." The attorney may also withhold information, such as a client's psychiatric diagnosis, when the "examining psychiatrist indicates that disclosure would harm the client." In addition, this commentary contains a cross-reference to Rule 1.14 that acknowledges that keeping a client fully informed to "participate intelligently in decisions concerning the objectives of the representation" may prove "impracticable, for example, where the client is a child or suffers from a mental disability." *Id.*

Unfortunately, by coupling the status of a child with that of a person with mental disability, this comment may contribute to lawyers' stereotyped view of persons with mental disabilities as child-like. The consequence of such stereotypes and myths is the undermining of the respect normally accorded an adult client and an increase in the frequency of condescending behavior.

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to be treated with "attention and respect."[50] Even if legally incompetent, the client "often has the ability to understand, deliberate upon, and reach conclusions affecting the client's own well-being."[51] An attorney should therefore maximize the client's decision-making opportunities, striving for a normal attorney-client relationship in as many respects as possible.[52]

Rule 1.14(b) departs from this vision of normalization. A lawyer may "seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[53] Although this rule was improved during the amendment process to make such action discretionary rather than mandatory,[54] the rule contains no definitions, standards, or examples to guide the lawyer's discretion. The comment is also silent on the types of client impairment that would justify this extraordinary intervention.

The comment is equally unhelpful in circumstances where revelation of the client's condition to the courts or other third-parties may expose the client's confidences. Disclosures of a client's disabilities can have stigmatizing and other adverse consequences, such as a judicial finding of incompetence or even an involuntary commitment.[55] Although the comment makes a passing reference to such adverse impacts on the client's interests, it simply concludes that the "lawyer's position in such cases is an unavoidably difficult one."[56]

In summary, the professional codes do not provide much aid to effective, client-centered lawyering. While sympathetic to the lawyer's predicament, the drafters' suggestion that the lawyer turn to "an appropriate diagnostician" for guidance too narrowly conceives the dilemma. The problem is ethical and not clinical. Clients with mental disabilities who cannot rely on their lawyers to

50. *Id.* Rule 1.14 comment ("The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect.").

51. *Id.*

52. *Id.* The comment identifies "maintaining communication" as a particularly important aspect of that relationship.

53. *Id.* Rule 1.14(b). For a detailed critique of this rule and a proposal for its revision to bar disclosure of the client's disability in commitment and like proceedings, see Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests-Advocacy Dilemma?*, 49 MO. L. REV. 493 (1984).

54. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(b) (Discussion Draft 1980).

55. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 comment (1983). On the harms of plenary guardianship and the argument for its abolition, see Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 655 (1981). *See also* Ass'n of the Bar of the City of New York, Comm. on Professional and Judicial Ethics, Formal Opinion No. 1987-7 (1987) (lawyer who concludes, as a last resort, that she must disclose her client's disability in a conservatorship proceeding should seek *in camera* submission of client's confidences and maintenance of court file under seal).

56. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 comment (1983). This comment suggests that the lawyer "may seek guidance from an appropriate diagnostician." It is unclear, however, whether the guidance to be sought is on the ethical issue or merely the identification of the client's impairment and its likely duration. A dilemma is also presented when the lawyer decides not to seek a guardian's appointment, but perceives a need to act against the client's express wishes. AMERICAN BAR ASS'N AND THE BUREAU OF NAT'L AFFAIRS, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:601 (1984).

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preserve their confidences when their conduct is not criminal, fraudulent, or suicidal may be reluctant to trust lawyers at all. Further, the codes permit the paternalistic domineering lawyer to exert unwarranted control over clients who have only mild degrees of disability or only suspected forms of impairment. Since the American Bar Association [hereinafter ABA] defines disability in terms of functional limitations — an impaired ability to make adequately considered decisions in connection with representation[57] — lawyers may broadly classify many of their clients as "disabled." According to the ABA's Annotated Rules, a client's disability may stem not only from "insanity or retardation," but from "minority, senility, illiteracy, lack of education, fear, anger or other emotional factors, physical or mental stress, alcohol or drug addiction."[58]

To some attorneys, as with some physicians,[59] a client's decision that accords with the professional's judgement may be seen as a well-considered decision. Conversely, disagreement with the lawyer may be viewed as evidence of the client's irrationality, stress, or impaired decision making. Although Rule 1.14(b) requires that the attorney reasonably believe that the client cannot act in her own interest, the rule does not require that the attorney also believe that this inability is caused by mental disability rather than by inexperience, folly, stubbornness, or simple mistaken judgment. Indeed, the professional codes do not demand a searching inquiry into the causes of the client's poor choices. The Rules define an attorney's belief to be reasonable when "the circumstances are such that the belief is reasonable."[60] Given these sweeping definitions, the vagueness of the matter in question, and the subjectivity of many clients' interests, the average lawyer may feel ill-equipped to represent the client with a mental disability.

III.
REPRESENTING INDIVIDUALS WITH DISABILITIES

A. Ascertaining the Client's Interests

Lawyers are trained to represent the expressed wishes of their clients rather than to divine their best interests. Since the client's wishes are of primary concern, the lawyer's initial task is to ascertain the client's objectives and to frame the scope of legal representation to be provided.[61] But a lawyer's duty to abide by the client's decisions is qualified by Rule 1.14 when the client

57. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1983).

58. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 158 (1984).

59. Mental health professionals may also choose to overlook the incompetency of persons willing to sign forms that purport to document express and informed consent to voluntary hospitalization. *See* Zinermon v. Burch, 110 S. Ct. 975 (1990) (deprivation of liberty foreseeable when a person requesting treatment for mental illness is given voluntary admission forms to sign despite incapacity for informed consent and state officials "take their apparent willingness to be admitted at face value and [do] not initiate involuntary placement procedures").

60. MODEL RULES OF PROFESSIONAL CONDUCT terminology [8] (1983).

61. *Id.* Rule 1.2(a).

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appears to be "suffering [from a] mental disability."[62]

In approaching such a client or prospective client, the lawyer needs an analytical framework to consider and resolve a series of issues. Can the client express a coherent wish as to the purposes of the legal representation? If not, is the problem one of communication or competency? If there is a communication problem, the lawyer may need an "interpreter," that is an individual who knows the client's idiosyncratic or distinctive way of communicating. If the problem is the individual's competency to make "adequately considered decisions," the lawyer may need to consult a clinician as to whether the client can be trained (or restored) to this level of competence.

If the would-be client lacks that present ability, the lawyer must consider whether the problem is one of information or capacity. Information deficiencies may be remedied by educating or training the client, such as in programs to render a criminal defendant competent to stand trial through instruction as to the roles of lawyer, judge, and jury.[63] Resolving capacity problems, however, can prove far more complex. If the problem is long-term or permanent, or if the legal matter requires urgent attention and treatment approaches to attain or restore competence would take too long, the lawyer must identify an appropriate surrogate decision maker, and select the least restrictive form of protective action suited to the client's circumstances. The lawyer must weigh the pros and cons of the protective service options, the risks of the contemplated legal action, and the type of legal assistance to be rendered (*i.e.*, information and referral, counseling, negotiation, administrative adjudication, litigation, or other assistance).

B. Direct Representation and the Presumption of Competence

In most cases, the client is quite capable of speaking for herself.[64] Indeed, the law embodies a presumption of competence. An individual is presumed

62. *Id.* Rule 1.2 comment.

63. Luckasson & Ellis, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 459-60 (1985). The mentally retarded defendant may be rendered competent through an individualized program of habilitation to fill knowledge gaps on the roles of trial participants or to improve communications skills. *Id.* at 459 n.249. The more commonly encountered problems of competence to stand trial arise out of the defendant's mental incapacity to understand the nature of the proceedings and to assist counsel to present a defense. *See, e.g.*, Drope v. Missouri, 420 U.S. 162, 171-72 (1975).

64. For persons with physical disabilities or mild mental impairments, this principle is self-evident. For persons with more severe forms of mental retardation, greater difficulties are presented in their exercise of self-determination. *See* K. GRUNEWALD & T. WALLNER, INTEGRITY AND THE MENTALLY RETARDED ADULT (1977) (Swedish National Board of Health and Welfare, Stockholm, policy guidelines):

> Many mentally retarded people are linguistically handicapped. However, their wishes and views can be expressed with other means than words, views which should be heeded just as if they had been expressed in writing or speech. If there are no serious objections, the mentally retarded person should be allowed to attend therapeutic and habilitation conferences concerning him. If the mentally retarded person does attend the conference, the language used there should be as simple as possible.

Id. at 10-11.

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legally competent until the contrary is proven in a court of law.[65] The typical proceeding to adjudicate incompetency is a guardianship action before a probate or family court judge. The judge must review evidence of the individual's alleged incapacity to protect personal or financial interests, and, if necessary, appoint a guardian to safeguard those interests. The guardian, as the incompetent person's legal representative, may thereafter instruct counsel and sue in the name of the ward.

A person may be incompetent in fact but not incompetent in law if no one has instituted a guardianship action. Whether for reasons of expense, inconvenience, ideology, or inertia, the arguably incompetent client may lack a guardian or other authorized legal representative. The lawyer who comes in contact with such a prospective client must initially determine if the individual is competent to be a client. Surprisingly, there is virtually no case law, ethical opinion, or legal commentary on this subject. In practice, the lawyer has an unfettered discretion to refuse to accept persons with mental disabilities as clients.[66] If the lawyer does agree to represent the client, the lawyer may do so either directly or through a third-party proxy, such as a family member or close friend (acting with the client's approval), or a judicially appointed guardian.

C. *Full Guardianship*

The lawyer may be tempted to place decision-making authority in a "full guardian," a proceeding in which the client is found to be totally incompetent and is deprived of all civil rights. But the concept of full guardianship has been criticized as outmoded, overused, and harmful. Some scholars would limit full guardianship to situations of profound and irreversible mental or cognitive incapacity where many decisions will have to be made for an individual over time (*e.g.*, an individual who is "severely brain damaged, comatose, profoundly mentally retarded, or occasionally if the person is chronically mentally ill").[67] A lawyer may also directly represent such individuals without the interposition of a guardian if appointed to do so in civil commitment or guardianship proceedings or if challenging the actions of a natural or duly appointed guardian.[68] But these situations can be uncomfortable, forcing lawyers to act as investigators and *de facto* guardians filling a decision-making vacuum.

65. S. HERR, S. ARONS, & R. WALLACE, JR., *supra* note 40, at 23.

66. *See, e.g.*, Tennessee State Bar Ethics Comm., Formal Ethics Opinion No. 81-F-10 (1981) (attorney declined to prepare wills on the basis of client's suspected incompetency); *see also* Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

67. S. BRAKEL, J. PARRY & B. WEINER, *supra* note 4, at 379; Frolik, *supra* note 55, at 653-55.

68. *But see* Washburn *ex rel.* Baby Jane Doe v. Abrams, No. 83-CV1711, 8 MPDLR 112 (N.D.N.Y. Jan. 20, 1984) (lawyer fined for attempting to act as guardian *ad litem* and harassing natural guardian); Weber v. Stony Brook Hosp., 60 N.Y.2d 208, 209, 456 N.E.2d 1186, 1187, 469 N.Y.S.2d 63, 64 (1983); *see also* Vitiello, *Baby Jane Doe: Stating a Cause of Action Against the Officious Intermeddler*, 37 HASTINGS L.J. 863 (1986).

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D. Less Restrictive Alternatives to Guardianship

One defect in Rule 1.14(b) is its emphasis on the appointment of a guardian and its lack of specificity as to the "other protective action" that an attorney might undertake. Full involuntary guardianship should be regarded as a measure of last resort. While guardianship is the only protective action specifically singled out in the professional codes, it does have significant drawbacks. A guardian's appointment, as the comment correctly notes, may be "expensive or traumatic for the client."[69] Guardianship may also divest clients of important personal and civil rights, may stigmatize them as globally incompetent, and may reduce their self-esteem and zones of autonomy. The lawyer has a substantial ethical and legal duty to investigate other less restrictive alternatives suited to the client's needs, especially when proposing to have a guardian appointed for one's own client.

Unfortunately, many attorneys may be unaware of the alternatives to guardianship for a client with substandard decision-making abilities. Lawyers are also likely to be unaware of advances in habilitation and treatment that might minimize barriers to normal attorney-client interaction. Furthermore, they may not realize that many clients recognize their own limitations and would have no objection to the offer of voluntary protective or supportive social services.[70] The following discussion analyzes some of those less drastic options and discusses their possible uses, advantages, and disadvantages.

1. The Next Friend

A plaintiff who is a minor or under a mental disability may sue through her "next friend." Although the client under the disability is the real party in interest, the next friend sets representation goals and guides counsel. This procedure is economical, convenient, and non-intrusive. Next friends can be relatives, personal friends, concerned professionals, or other interested citizens. Since rules of civil procedure generally do not specify qualifications, the plaintiff's lawyer names the next friend, subject only to judicial review in contested cases.[71] No preliminary judicial proceeding is required and no determination of legal incompetency results from the designation of a next friend.

One potential drawback of this model is the large degree of attorney control it allows.[72] Other than the checks provided by the adversary process, there is no test to assure that the client lacks the capacity to control the litigation or that the next friend faithfully reflects the client's goals and value preferences.

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69. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 comment (1983).

70. *See* Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111 (1981).

71. *See* FED. R. CIV. P. 17(c).

72. *See, e.g.*, Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 907 (3rd Cir. 1985) (lawyer for the plaintiff class also served as plaintiff's next friend and guardian *ad litem*).

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2. *Guardian* Ad Litem

Unlike a next friend who is named by the plaintiff's attorney, a "guardian *ad litem*" [hereinafter GAL] is appointed by the court. The GAL is a limited guardian who protects the interests of a disabled or allegedly disabled person during the course of litigation. Thirty-six states provide for such appointments, with the GAL being responsible for all decisions in the ward's legal proceeding.[73] Federal courts also have the discretion to appoint a GAL when an incompetent person does not have a general guardian or other authorized representative.[74]

In theory, a GAL provides the attorney with an objective decision maker who can make legally binding decisions on the client's behalf and is accountable to the court for those actions. Appointment of a GAL relieves the attorney from acting in the undefined role of *de facto* guardian. However, the attorney for the disabled client is often appointed the GAL, thus eliminating any constraint on the attorney's control.[75] This dual responsibility may create confusion for the attorney as she tries to obtain all possible assistance from the client and pay respect and attention to the client's known preferences while trying to decide what is in the overall best interests of her client. Appointment of a GAL is usually limited to the most serious cases subject to judicial review; for example, an appointment might be made in such situations as refusals of treatment and withdrawals of life-sustaining medical care, nutrition, or hydration.[76] There is no provision for GAL appointment for the informal negotiations or administrative proceedings that constitute the vital core of advocacy for persons with mental disability.[77]

3. *Powers of Attorney*

A legally competent person may confer a "power of attorney" that authorizes a specified "attorney in fact" to make various types of decisions on her behalf. Although powers of attorney generally require that the individual be competent, so-called "durable powers of attorney" can survive an individual's disability and provide directions for the individual's chosen decision maker.[78] Like "living will" statutes that authorize certain medical treatments or their withdrawal should the patient become incompetent, statutes permitting durable powers of attorney can empower a surrogate decision maker to direct the

73. S. BRAKEL, J. PARRY & B. WEINER, *supra* note 4, at 389.

74. *See* FED. R. CIV. P. 17(c).

75. *See, e.g.*, South Carolina Bar Ethics Advisory Opinion 83-14 (1983) (lawyer representing a mentally ill person in an involuntary commitment may also serve as GAL, provided no conflicts in dual roles).

76. Baron, *Assuring 'Detached but Passionate Investigation and Decision': The Role of Guardians Ad Litem in Saikewicz-Type Cases*, 4 AM. J.L. & MED. 111 (1978); *see, e.g.*, Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990).

77. Mickenberg, *supra* note 32, at 631-37; Herr, *The Future of Advocacy for Persons with Mental Disabilities*, 39 RUTGERS L. REV. 443, 446-50 (1987).

78. *See, e.g.*, MD. EST. & TRUSTS CODE ANN. § 13-601 (1987).

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provision of legal services, protective services, housing, financial matters, and habilitation plans.

Powers of attorney are advantageous because they give persons who become temporarily or permanently incapacitated through age or mental disorder some control over their own futures. Courts and attorneys benefit from having a declaration of the client's desires in an instrument of limited or unlimited time duration. As a contract tailored to the needs of the individual, the power of attorney permits the disabled individual to entrust her affairs to an agent — often a friend or family member — familiar with the individual's preferences.

But durable powers of attorney have their limitations. First, many people are reluctant to plan ahead for some future and often unforeseeable incapacity. Second, should a person so plan, it is difficult to draft a document that encompasses all contingencies and anticipates the person's future desires in the context of as yet unknown circumstances. Third, a durable power of attorney cannot be invoked by people suffering life-long incompetence and is thus unavailable to a large class of individuals such as persons with severe mental retardation.

4. Representative Payees

Various administrative agencies are empowered by statute to appoint representatives for persons with mental disabilities receiving entitlement benefits. The Social Security Administration can designate a "representative payee" to receive and manage the beneficiary's payments.[79] "Protective payees" can perform similar functions for other state or federal benefit programs, such as welfare benefits.[80] Under the Education for All Handicapped Children Act, a "surrogate parent" can approve individualized educational plans and assert the rights to special educational services for pupils whose parents are deceased or unavailable.[81] A common feature of these appointments is their restricted purpose, relative informality, and limited cost. They provide the representative with a clear statutory mandate to protect the person with mental disabilities' interests, which may include enlisting counsel for administrative or judicial appeals to secure rights and benefits, without burdening the person with an incompetency finding.

These representatives are not panaceas, however. Representative payees, such as employees of institutions and nursing homes, may have conflicts of

79. 42 U.S.C. § 405(j)(1)-(2) (1988) (Secretary can make Social Security payments to representative of beneficiary when Secretary establishes by an investigation that it is in beneficiary's best interest to do so); *Id.* § 1383(a)(2) (representative payees for Supplemental Security Income beneficiaries).

80. *Id.* § 606(b)(2) (Aid to Families with Dependent Children) (permitting payments with respect to dependent children to be made to non-relatives who are interested in or concerned for the welfare of such children); 45 C.F.R. § 234.70 (1990) (requiring standards to be established for selection of protective payee).

81. 20 U.S.C. § 1415(b)(1)(B) (1988).

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interests with the beneficiary.[82] Disabled, homeless beneficiaries may be bullied or exploited by their representatives. Unable to obtain funds without a representative, a client who discharges a representative may be forced to turn to other potentially unscrupulous characters.[83] Local education agencies are often slow to appoint surrogate parents and reluctant to train them to be vigorous advocates.

5. Institutional Custody: The Illusion of Protection

Some courts and lawyers assume that placing the client in an institution offers an appropriate form of protective action.[84] However, it is a questionable assumption that the head of the institution can serve as an adequate guardian for the client's legal interests. Although state hospital superintendents have traditionally possessed *in loco parentis* power for patients in their custody, the historical record of abuse of this power and the modern skepticism toward such authority militate against the patient's attorney turning to a superintendent for marching orders.[85]

A facility providing care and services does, however, have a professional obligation to assist clients to exercise their rights to the extent that they are able, including making appropriate referrals to legal and other independent advocates. Furthermore, according to the Accreditation Council on Developmental Disabilities, the facility should assume that an individual with developmental disabilities is "capable of exercising individual rights unless legally determined incapable of doing so."[86] If such a legal determination is made, the agency or the state may be obligated to secure an authorized surrogate to represent the individual's interests, protect civil rights, and preserve human dignity.[87] Unfortunately, due to inertia and the potential conflicts of interests between the administrator's convenience and the resident's expressed wishes, the agency may do little to secure outside legal and personal advocacy services for their residents.

6. Nearest Relatives

Looking to concerned next-of-kin to protect the interests of a person with

82. *See, e.g.*, Vecchione v. Wohlgemuth, 377 F. Supp. 1361 (E.D. Pa. 1974), 426 F. Supp. 1297 (1977), *aff'd* 558 F.2d 150 (3d Cir. 1977), *cert. denied*, 434 U.S. 943 (1977) (state required to return Social Security checks appropriated for patients' institutional care).

83. Briggs v. Sullivan, 886 F.2d 1132, 1133, 1136 (9th Cir. 1989) (policy of withholding payments while Title II or XVI beneficiaries lacked representative payees preliminarily enjoined).

84. *See, e.g.*, Cobb v. Nizami, 851 F.2d 730, 732, 734 (4th Cir. 1988) (majority opinion assumed that insane persons would need to be institutionalized or have a guardian appointed for them), *cert. denied*, 109 S. Ct. 1177 (1989).

85. *See* D. ROTHMAN & S. ROTHMAN, THE WILLOWBROOK WARS: A DECADE OF STRUGGLE FOR SOCIAL JUSTICE (1984).

86. ACCREDITATION COUNCIL ON DEVELOPMENTAL DISABILITIES, STANDARDS FOR SERVICES FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES 9 (1987).

87. *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

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mental disabilities has both pragmatic and theoretical appeal. By relying on a close family member, the lawyer gains the advice of someone who is familiar with the client's values, has emotional and social bonds to the client, and likely has an investment in securing the client's best interests.[88] Most jurisdictions, however, do not permit family members to give consent for disabled relatives who are over the age of majority.[89] Accordingly, the most prudent course may be for counsel to seek the concurrent consent of the client and a concerned family member[90] when representing a client who is partially competent and can articulate her ultimate goals in the case but experiences difficulty in evaluating alternatives proposed by the lawyer.

Regardless, ethical problems abound. Concurrent consent is not legally binding if a court should later find that the client was incompetent. There may be conflicts between the goals, interests, and values of the client and the client's family members, or even between family members. The professional literature and case law contain frequent reminders of the serious conflicts of interest that can arise between the person with a disability and her family, especially where institutionalization, control of financial resources, or other life-determining choices are at issue.[91] If family members have isolated or emotionally distanced themselves from a child with disabilities or an adult family member, those conflicts can jeopardize the health, liberty, and even life of the family member.

7. Citizen Advocacy and Self-Advocacy

When family members are not available, the lawyer might seek the support and advice of a citizen advocate or self-advocacy group as a means of validating the partially competent client's communication and assessing her goals. Citizen advocacy is designed to offer a client with a mental disability a mature, effective "citizen volunteer representing, as if they were his own, the interests of another citizen" and to fill needs for practical or emotional support.[92] Although such volunteers may not have a specific mission in aiding

88. The United States Supreme Court in Parham v. J.R., 442 U.S. 584 (1979), recognized this fact and upheld the parent's role as natural guardian and proxy decision maker for the minor subject to hospitalization.

89. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 569. Some states, however, create a limited exception that permits substituted consent by a family member for a disabled relative's medical or dental care. *See, e.g.*, MD. HEALTH-GEN. CODE ANN. § 20-107 (d)-(f) (1987).

90. *See* AMERICAN ASS'N ON MENTAL DEFICIENCY, CONSENT HANDBOOK 2 (H. Turnbull ed. 1977).

91. *See, e.g.*, Association for Retarded Citizens of N.D. v. Olsen, 561 F.Supp. 473, 484 (D.N.D. 1982), *aff'd in part and remanded in part*, 713 F.2d 1384 (8th Cir. 1983); Guardianship of Phillip B., 139 Cal. App. 3d 407, 188 Cal. Reptr. 781 (Ct. App. 1983); *see also* R. BURT, TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS 144-68 (1979).

92. W. WOLFENSBERGER, CITIZEN ADVOCACY FOR THE HANDICAPPED, IMPAIRED, AND DISADVANTAGED: AN OVERVIEW 11 (1972).

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legal advocacy, their support role does encompass protecting their protégée's rights and locating professional back-up services.

"Self-advocacy groups," on the other hand, are membership organizations led by and composed of persons with disabilities which aim to assist their members in asserting their rights, making choices, and assuming responsibilities as full participants in society.[93] These groups refer their members to lawyers and can provide both the lawyer and client with ongoing training and consultation services to increase the client's competence in the context of an attorney-client relationship. Self-advocacy groups can also offer peer support for clients facing the unfamiliar, anxiety-provoking, and often protracted business of pursuing a legal matter.

Although these two approaches have great promise, they may not be available in all communities. It addition, use of such channels may introduce delays when legal action must be swift and certain.

8. Protective Services

Professionally staffed protective services are frequently organized on a private basis, often in affiliation with non-profit collective advocacy groups. By way of illustration, the Maryland Trust for Retarded Citizens [hereinafter the Trust], a subsidiary of the state association for retarded citizens, provides personal trust and visitation services for over two hundred disabled clients whose families have paid a lump-sum membership fee. Should the Trust's social worker uncover an abuse of a client's legal rights, she would then request, and the Trust's board would authorize, counsel to take necessary legal action on behalf of that individual.

Many states have adult protective services laws that are intended to give incapacitated adults a case manager and access to a coordinated system of health and social services. These laws are designed to allow the person with mental disabilities to "live safely and humanely in the community without more restrictive legal intervention" such as commitment or guardianship.[94] Typically, these laws may offer a wide range of services, including legal and personal advocacy services. Thus, the case manager can serve as a conduit for channeling legal services to the client. If the client accepts protective services voluntarily, few problems will arise.[95]

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93. *See* N. MCTAGGART & M. GOULD, CHOICES AND EMPOWERMENT TOWARDS ADULTHOOD: A SELF-ADVOCACY MANUAL FOR STUDENTS-IN-TRANSITION (1988).

94. S. BRAKEL, J. PARRY & B. WEINER, *supra* note 4, at 391.

95. For a proposal that a moratorium be placed on involuntary services with resources diverted to voluntary assistance programs, see Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111, 1131 (1981). From civil liberties and legal profession perspectives, however, it is questionable whether an attorney-client relationship should or can exist if the person with mental disabilities actively and knowingly objects to the imposition of such a relationship. *Cf.* Tennessee State Bar Ethics Comm., Ethics Opinion 84-F-73 (1984) (criminal defendant may refuse to have legal representation unwillingly imposed, although lawyer may obtain an adjudication of the defendant's competence to appear *pro se*), *reprinted in* AMERICAN

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9. Other Surrogate Decision Makers

Proxy decision-making boards present a newer model of providing surrogates for the incapacitated person lacking other representation. New York State has had two such experiments. The Consumer Advisory Board [hereinafter the Board] was created under the Willowbrook decree, a federal class action for over 5200 mentally retarded residents.[96] As one of its duties, the Board recruited surrogates for residents without guardians or interested relatives. The Board members and their designees were authorized by the federal court to provide *in loco parentis* representation to individual class members as part of the due process safeguards in planning community placements.[97]

More recently, the New York State Commission on Quality Care for the Mentally Disabled has formed Surrogate Decision-Making Committees. These panels, composed of advocates, attorneys, family members, and medical personnel, are empowered to authorize medical treatment for institutionalized mental patients and residents of mental retardation facilities. This innovation has been hailed as a method of obtaining quick, inexpensive, and responsible proxy consent when the client is incapable of giving informed consent.[98] By analogy, such publicly sanctioned committees could offer an attorney the missing informed consent and thereby supply the lawyer with the necessary direction should substantial and sustained legal assistance be necessary. Institutionalized clients thus gain an independent decision maker equipped with the expertise to evaluate the risks and benefits of possible professional interventions. Conscientious legal practitioners might also welcome the advice of proxy review panels as sounding boards when difficult ethical decisions arise.

Two questions remain unanswered. First, it is unclear whether the legal profession, which is less sensitive to the requirements of informed consent than the medical profession,[99] would accept such a check on its decision-making role. Second, it is unknown whether decision making by committee would be timid or political when legal controversy might result.[100]

BAR ASS'N AND THE BUREAU OF NAT'L AFFAIRS, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 801:8113 (1985).

96. New York State Ass'n for Retarded Children v. Carey, No. 72 Civ. 356/357 (E.D.N.Y. April 30, 1975) (consent decree para. W.3).

97. New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27 (2d Cir. 1979), *cert. denied*, 444 U.S. 836 (1979).

98. Sundram, *Informed Consent for Major Medical Treatment of Mentally Disabled People: A New Approach*, 318 NEW ENG. J. MED. 1368 (1988).

99. *See* Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 275 (1985); Spiegel, *supra* note 10, at 48-50 & 139.

100. *See* Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1143, 225 Cal. Rptr. 297, 304-05 (Ct. App. 1986) (hospital ethics committee criticized for approving physician's decision to force-feed a mentally competent, physically disabled woman through nasogastric tube). *But see* N.Y. MENTAL HYG. LAW § 80.05(d) (McKinney 1988); N.Y. PUB. OFF. LAW § 17 (McKinney 1988) (state must provide legal representation and indemnification for Surrogate Decision-Makers sued in their official capacity).

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10. De Facto Guardianship

The classic example of the legal profession's insensitivity to the special requirements of representing persons with mental disabilities is the "*de facto* guardianship." *De facto* guardianship, authorized by the profession's ethical codes, permits the lawyer to make decisions for a client who is clearly incompetent but has not been so adjudicated.

As stated in a comment to the Rules, "[i]f a person has no guardian or legal representative, the lawyer often must act as *de facto* guardian."[101] No further explanation is given. Arguably, though, this position is broader than the earlier Code provisions which appeared to limit the availability of that power to the lawyer "compelled in *court proceedings* to make decisions on behalf of the client."[102] Courts have upheld such *de facto* guardianship in cases where liberty is at stake, such as criminal, quasi-criminal, or civil commitment matters where the very nature of the adversary proceedings present reliable guides for the attorney's position.[103] Nevertheless, lawyers may choose to adopt a narrower view of *de facto* guardianship, one where they may not usurp the client's role and decide what suits to file and to settle.

Since the Code's ethical considerations directed the lawyer to elicit "all possible aid" from even an incompetent or partially competent client, the lawyer could eschew *de facto* guardianship in favor of a joint enterprise model. In such a model, the lawyer, or some third-party working with the lawyer, must patiently tutor the client to understand and make critical choices. The advantage to the client is that the lawyer must struggle to simplify the choices, clearly explain the options, and act in good faith for the client.

De facto guardianship permits the busy lawyer to defend the client in an incompetency proceeding or a civil commitment hearing without conceding the validity of the state's case against the client. It also enables representation in the preliminary stages of a criminal case to proceed without forcing the client to undergo competency evaluations when the lawyer might otherwise be able to have the criminal charges dismissed outright. But the potential disadvantages of *de facto* authority are substantial. The rule has no clear legal bounds, imposes no constraints on lawyer overreaching, and creates few incentives to enhance client competency or autonomy.

11. Limited Guardianship

In its various manifestations, "limited guardianship" is an increasingly favored means of tailoring the guardian's powers and restricting the ward's freedom only to the extent essential to the disabled person's well-being.[104] For

101. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 comment (1983).

102. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1982) (emphasis added).

103. *See, e.g.*, People v. Hill, 67 Cal. 2d 105, 60 Cal Rptr. 234, 429 P.2d 586, *cert. denied*, 389 U.S. 1009 (1967).

104. On international acceptance of the principle of limited or partial guardianship, see A.

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example, "conservatorship" is a voluntary proceeding in which the court must find that the conservatee is incapable of managing her personal affairs, but is capable of making the decision to appoint a conservator. Similarly, modern guardianship statutes express a preference for honoring the consent of the person with mental disabilities to the appointment of a guardian of her person, provided that person had sufficient mental capacity at the time the consent was executed.[105] Modern statutes also typically require the court to consider the least restrictive form of guardianship appropriate under the circumstances, thereby assigning to the guardian "only those duties and powers which the individual is incapable of exercising."[106] Rather than imposing a plenary guardian to control all decisions over the ward's personal and financial affairs, the court should have the flexibility to establish a guardianship over the person or her estate. Creating temporary or emergency guardianships are other ways of limiting guardianship powers.

Limited guardianship thus reflects the normalization theory. No more decision-making power than is justified by the client's demonstrated mental or functional limitations is allowed. The limited guardian can also impose some accountability over the attorney, without stripping the client of all independence of action. However, the check may be more theoretical than real where the court tends to ratify the attorney's choice of guardian, where guardianship is a *pro forma* matter, or where periodic review of the guardian's actions is seldom undertaken.

In summary, the lawyer can exercise enormous power over the individual client with a mental disability. The lawyer who chooses to exercise such power faces difficult choices in the form of multiple protective devices; potential infringements of plenary guardianship on individual liberty, autonomy, and confidentiality; and competing duties between serving the client's wishes and sparing the client from possible harm. A lawyer who believes the client is about to make a seriously injurious decision must decide when persuasion becomes manipulation and when the failure to invoke some form of protective action becomes unconscionable neglect.

WARD, THE POWER TO ACT: THE DEVELOPMENT OF SCOTS LAW FOR MENTALLY HANDICAPPED PEOPLE 31-42 (1990) (Scottish Society for the Mentally Handicapped) ("The tailoring of guardianship powers, if granted, to the needs of each individual is of fundamental importance to any code of guardianship based not on control and restriction, but on enhancing the rights, interests and quality of life of the mentally handicapped person." *Id.* at 31).

105. *E.g.*, MD. ANN. CODE MARYLAND RULES R77 a.2. (Michie 1990). Rule R77 a.2. states:

> Rule R77. Proceedings. a. Consent.
>
> . . . .
>
> 2. Disabled Person. A person may consent in writing to the appointment of a guardian of his person and may designate a guardian of his person and/or property, provided that such person had sufficient mental capacity at the time the consent or designation was executed. If the person designated is otherwise qualified, the court shall appoint that person as guardian of the person and/or property, unless the court determines that such decision is not in the best interest of the disabled person.

106. DISABLED PERSONS, *supra* note 48, at 462.

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Clients may make untutored choices or yield their decision-making powers unconditionally because no one has taken the time to improve their capacities and opportunities for becoming a participatory client. Both the legal profession and the disability rights movement must pay more attention to minimizing the barriers that the client with a mental disability faces in entering and maintaining a normal attorney-client relationship. Failure to assist disabled individuals in developing attorney-client relations can lead to underenforcement of established constitutional and statutory rights, a dearth of common law actions to compensate the victims of abuse, and a systematic underrepresentation of the poorest and most impaired.[107] It is important to bear in mind that the majority of individuals with mental illness or mental retardation are neither litigious nor ethically problematic clients. They are simply individuals caught up in complex legal and bureaucratic mazes who often need good lawyers to help them to find their way out.

IV.
REPRESENTING CLASSES OF INDIVIDUALS WITH DISABILITIES

A. Problems of Goal-Setting and Control

Compared to the difficulties of representing a disabled individual, the ethical challenges in representing whole classes of disabled individuals can be numbing. Examples abound. Over 5209 persons were housed in Willowbrook when that litigation was filed. The individuals who were institutionalized ranged from those with profound retardation to those with normal intelligence. It was the responsibility of the lawyers to help shape the policies that determined which class members had priority in leaving a destructive institution for decent community alternatives.[108] In another case, this one involving Saint Elizabeths Hospital, a class action decree mandated less restrictive alternatives for its patients but was implemented in a way that initially increased the number of homeless persons on Washington's streets.[109] During the lengthy *Pennhurst* case, some of the parents of those mentally retarded plaintiffs rejected the class' articulated goal of institutional closure and claimed that the plaintiffs' lawyers paid inadequate attention to individual differences.[110] The dissenting parents obtained party intervenor status to seek different forms of relief and some parents pressed their claims against transfers to community

107. *See* Schwartz, *Damage Actions as a Strategy for Enhancing the Quality of Care of Persons with Mental Disabilities*, 17 N.Y.U. REV. L. & SOC. CHANGE 651, 660-66 (1989-1990).

108. *See* New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975). On the implementation history of this case, the inability to "reform" the institution and the slow pace of transfers to community placement, see D. ROTHMAN & S. ROTHMAN, *supra* note 85.

109. Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975).

110. Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (subsequent history omitted).

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living arrangements in individual appeals.[111] Although the Pennhurst School was ultimately closed, a parent or advocate could obtain review by an "independent neutral retardation professional" of the professional judgment to move a resident to a community arrangement or another institution.[112] Class action lawyers in such cases must not only reconcile minority views, but they must also find guidance from a class of individuals that is presumptively incompetent.

The ethical problems of representing similarly situated persons with mental disabilities are not confined to judicial arenas. For example, when the use of aversive behavior conditioning is debated in legislatures or regulatory agencies, most advocates for persons with mental disabilities argue passionately that such techniques should be banned, while other advocates argue with equal passion that the continuing use of such techniques is essential.[113] Since public interest lawyers often pick their clients, the lawyers often become principals in grand controversies rather than simply the agents.

Paradoxically, lawyers often receive more direction in class action litigation and legislative advocacy than in individual disability cases. As repeat players in the various disability fields, they develop a sense of constituency. They are responsive to a broader clientele and body of supporters that may include past and potential clients, consumer groups, allied professional groups, advocacy organizations, and their own legal peers.[114] In "impact" cases, they are likely to consult with, or hear from, the affected constituency. Consumer groups may decide to join or intervene in the lawsuits. Professional groups may weigh in with *amicus curiae* briefs or offers of expert assistance. The constituency may help to produce a "war chest" to pay the cost of experts, discovery and lawyers, or to provide other negotiation leverage. In short, the lawyer engaged in class or systemic advocacy is subject to scrutiny over the goals and means being pursued and is under some pressure to collaborate with other advocates and constituency organizations.

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111. *See* Halderman v. Pennhurst State School and Hosp., 612 F.2d 131 (3d Cir. 1979) (motion to intervene by Pennhurst Parents-Staff Association and six Pennhurst residents for purposes of appeal denied); Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 94 n.2 (1984) (noting that the Pennhurst Association motion to intervene was granted by the court below and that the Association was one of the petitioners before the Supreme Court); Halderman v. Pennhurst State School and Hosp., 707 F.2d 702, (3d Cir. 1983) (transfer of 12-year-old profoundly retarded resident to a more beneficial community placement denied since parents' rights to determine child's upbringing received insufficient consideration).

112. *See* Halderman v. Pennhurst State School and Hosp., No. 74-1345, Final Settlement Agreement (E.D. Pa. April 5, 1985).

113. *See* Herr, *The Law on Aversive and Nonaversive Behavioral Interventions*, in AVERSIVE AND NONAVERSIVE INTERVENTIONS: CONTROLLING LIFE-THREATENING BEHAVIOR OF THE DEVELOPMENTALLY DISABLED (1990).

114. For a helpful distinction between "one-shotters" and "repeat players" among classes of litigants, see Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Settings and Limits of Social Change*, 9 L. & SOC'Y REV. 95 (1974). Although most disabled litigants are "one-shotters," disability organizations and their regular counsel have a stake in being "repeat players" and investing in campaigns for new rules that serve their long-term interests.

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B. Class Action Representation

Class actions often precede and help create a factual record for legislative reform. *Mills v. Board of Education*[115] and *Pennsylvania Association For Retarded Children v. Pennsylvania*[116] provided the equal protection rationale and conceptual underpinning for the Education for All Handicapped Children Act.[117] Similarly, the institution reform cases, such as *Wyatt v. Stickney*[118] and Willowbrook,[119] paved the way for Medicaid standards and the Developmental Disabilities Assistance and Bill of Rights Act.[120] That Act required the creation of protection and advocacy programs to secure the rights denied at the Willowbrook, Partlow, and Pennhurst institutions, and to prevent future human and legal rights abuses. The right to treatment and the right to habilitation cases also imposed new costs on the states that often prompted them to discharge residents and close units rather then upgrade facilities to meet legally enforceable standards.[121]

However, some class actions have failed due to overambitious aims and scant factual investigation.[122] Others were guided by counsel committed to goals different than integration and least drastic interventions.[123] Because such actions have the potential for significant adverse impacts on persons with mental disabilities — binding precedents on class members and negative fiscal or policy consequences on non-party persons with mental disabilities — the disability rights movement cannot afford lawyers who operate as loose cannons.

Resolving conflicts between class members and their representatives can pose difficulties that are ethically troublesome and even intractable.[124] Orga-

115. 348 F. Supp. 866 (D.D.C. 1972).

116. 343 F. Supp. 279 (E.D. Pa. 1972).

117. Education for All Handicapped Children Act, Pub. L. No. 94-142, § 3, 89 Stat. 774 (1975) (codified at 20 U.S.C. §§ 1411-1420 and scattered sections (1988)).

118. 344 F. Supp. 387 (M.D. Ala. 1972), *modified in part*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

119. *See* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973), *consent decree approved sub nom.* New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (1975).

120. 42 U.S.C. §§ 6000-6081 (1988); Standards for Intermediate Care Facility Services in Institutions for the Mentally Retarded, 39 Fed. Reg. 2220 (1974) (codified in 42 C.F.R. § 449.13 (1990)).

121. *After Deinstitutionalization, supra* note 1, at 2.

122. *See, e.g.*, Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th. Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975) (limited factual investigation and ultimate voluntary dismissal of statewide, multi-institution right-to-treatment suit).

123. *See, e.g.*, McEvoy v. Stevens, No. 74-2769-M(T) (D. Mass. July 12, 1977) (interim consent decree stressing institutional repair rather than less restrictive placements); McEvoy v. Stevens, No. 74-2769-T, slip op. at 2 (D. Mass. July 12, 1977) (Motion to Intervene as Plaintiffs-Intervenors) (existing plaintiffs' counsel did not intend to advance the rights of residents to habilitation in the least restrictive settings); Behavior Research Inst. v. Leonard, No. 86E 0018-G1 (Mass. Probate & Family Court, Bristol Co., June 4, 1986) (advocacy of drastic, aversive behavioral techniques).

124. Rhode, *Class Conflicts in Class Action*, 34 STAN. L. REV. 1183, 1242-43 (1982).

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nizational plaintiffs seldom discharge class action counsel. Even if they did, the discharged counsel may still be able to represent some named plaintiffs or another faction involved in the suit.[125] Dissident class members may also seek to intervene on the grounds that their interests are not adequately represented by the existing parties. However, courts have interpreted "interest" to mean a legally protected interest, not merely a policy preference. Thus, in a statewide suit to close state schools for the retarded, the United States Court of Appeals for the Fifth Circuit rejected the Parent Association for the Retarded of Texas and two class members as would-be intervenors because they did not seek vindication of a legal right but rather sought to advocate a particular policy.[126]

Alternative solutions might include the creation of subclasses of plaintiffs or individualized grievance and hearing mechanisms at the litigation's remedial stage. Some class action lawyers may prefer to ignore or paper over differences between class members hoping that the legitimacy of their overall goals and the process of individualized treatment will produce benefit for the class as a whole. Other lawyers who view themselves as client-centered may create consultation groups or steering committees to obtain direction in making critical strategic decisions, especially those involving non-legal considerations. If class members are too disabled to participate in that process, such groups might consist of former institutional residents or members of constituency organizations such as associations for retarded citizens or mental health associations.[127] Clearly, such groups are imperfect proxies for institutionalized plaintiff classes. But as the size of the classes increase, so does the risk that the class remedy may be less desirable than individually tailored solutions or generate unintended policy consequences.[128]

C. *Governmental Representation*

Litigation by the United States to remedy patterns of civil rights violations often does not take into account the views of persons with mental disabilities or their organizations. The interests of the federal government are often at odds with those of persons with disabilities, as reflected in the Justice Department's resistance to their attempts to intervene in suits brought under the

125. *See, e.g.*, New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) (lead plaintiff organization discharged its counsel; these lawyers, however, remained in control of the case as counsel to another plaintiff organization and as representatives of the client class).

126. Lelsz v. Kavanagh, 710 F.2d 1040, 1046 (5th Cir. 1983) (intervenors advocated institutional preservation with improved conditions as an alternative to the plaintiffs' proposed relief of closure of the institution).

127. *See* Brewster v. Dukakis, 520 F. Supp. 882 (D. Mass. 1981), *vacated and remanded*, 675 F.2d 1 (1st Cir. 1982) (advocacy project funded through attorneys' fees collected in deinstitutionalization civil-rights case after appellate court rejected funding under consent decree).

128. *See, e.g.*, Souder v. Brennan, 367 F. Supp. 808 (D.D.C. 1973) (nationwide enforcement of Fair Labor Standards Act and related litigation may have reduced vocational activities and led to increased idleness among residents in some mental health and mental retardation facilities).

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Civil Rights of Institutionalized Persons Act.[129] Yet those suits may result in inadequate decrees that do not vindicate a right to placement outside of institutions or provide effective monitoring of rights related to institutional conditions.[130] As with class actions which require judicial approval of a settlement or dismissal as fair, reasonable, and adequate, the adequacy of representation of the residents' interests by the United States should be subject to judicial hearing and oversight. In cases with such far-reaching impacts, the legal process needs to have a wider range of perspectives.

D. Representation in the Legislative Process

Lawyers for disability constituencies can use legislative advocacy to aggregate diverse interests and preserve fundamental rights. Compared to other types of lobbyists, lawyer-lobbyists may have advantages in providing instant legal analysis, being perceived as more independent and trustworthy sources of information, and being able to counter antagonistic pressure groups and legislators.[131] Despite the Reagan Administration's hostility to entitlements and detailed regulation, advocates for people with disabilities defeated efforts to weaken special education requirements. To reverse some unfavorable Supreme Court results,[132] these advocates convinced Congress to permit anti-discrimination actions against any part of a federally assisted program,[133] to

129. 42 U.S.C. § 1997 (1988); *see* United States v. Connecticut, No. N-86-252 (D. Conn. Dec. 22. 1986); Dober v. Meese, No. N-86-195 (EEB) (D. Conn. Sept. 15, 1986); United States v. Massachusetts, No. 85-0632-MA (D. Mass. April 28, 1986) (intervention as of right and permissive intervention denied).

130. *See* United States v. Massachusetts, No. 85-0632-MA, slip op. at 3 (D. Mass. Apr. 28, 1986) (U.S. not asserting rights to minimally adequate treatment and training or to placement in community settings). The Justice Department was also criticized by Congress for "its failure to diligently pursue enforcement of the rights of institutionalized persons . . . ; for retreating and changing positions in suits previously filed; as well as taking a very narrow and limited view of its interpretation of court opinions articulating patients' rights." *Care of Institutionalized Mentally Disabled Persons: Joint Hearings Before the Subcomm. on the Handicapped of the Sen. Comm. on Labor and Human Resources and the Subcomm. on Labor, Health and Human Services, Education and Related Agencies of the Sen. Comm. on Appropriations*, 99th Cong., 1st Sess. 141 (1985) (staff report), *quoted in* United States v. Massachusetts, No. 85-0632-MA, slip op. at 15 (D. Mass. April 28, 1986); *see also* Dinerstein, *Absence of Justice*, 63 NEB. L. REV. 680 (1984).

131. D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 378-79 (1988). On the importance of lobbying by public interest lawyers, Luban notes: "Taking the pressure-group theory at face value, we can see that if no lawyers were around to lobby for outsider groups, pressure-group politics would not be merely in danger of undemocratic legislative failures — it would become one long, uninterrupted embodiment of undemocratic legislative failure." *Id.* at 378-79.

132. *See e.g.*, Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986) (enforcement of antidiscrimination laws for handicapped newborns limited); Grove City College v. Bell, 465 U.S. 555 (1984) (definition of federally assisted program limited for purpose of civil rights protection).

133. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified at 29 U.S.C. §§ 706, 794 and other scattered sections (1988)).

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authorize attorneys' fees in special education cases,[134] and to erect child abuse protections for imperiled newborns.[135] The passage of the Fair Housing Amendments Act of 1988[136] and the pending reform of the Medicaid program for the developmentally disabled[137] speak to the viability of federal legislative strategies. The landmark Americans with Disabilities Act, passed by wide margins in both houses of Congress, and extending broad anti-discrimination protection to persons with physical or mental disabilities is more evidence of the success of these lawyer-lobbyists.[138]

In the face of the United States Supreme Court's unreceptiveness to many federal disability rights claims, advocates have secured state constitutional protections in Massachusetts[139] and Connecticut[140] and have sought similar specific equal protection provisions in Maryland for persons with physical or mental disabilities.[141]

Coalitions for persons with disabilities have demonstrated increasing clout and sophistication. This heightened political capacity has not only been used for substantive gains, but has changed methods of delivering advocacy services to persons with mental impairments. The passage of the Protection and Advocacy for Mentally Ill Individuals Act of 1986[142] is a reminder of those dynamic possibilities in even quiet times.

In summary, attorneys must be aware that the needs of individual clients may conflict with the interests of constituencies. An attorney has definable duties to a client: loyalty, competence, and communication. The attorney-client relationship entails a delineated scope of representation, a standard of care (whose violation can give rise to a legal malpractice action), and profes-

134. *See* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified at 20 U.S.C. § 1415(f) (1988)).

135. *See* Child Abuse Prevention and Treatment Amendments of 1984, Pub. L. No. 98-457, § 127(a), 98 Stat. 1749 (codified at 42 U.S.C. §§ 1501-1515 (1982 & Supp. V 1987)).

136. Pub. L. No. 100-430, 102 Stat. 1619 (to be codified as amended in scattered sections of 42 U.S.C. §§ 3613-3614 (1988)) (extending coverage to persons with mental disabilities).

137. *See* Medicaid Home and Community Quality Services Act of 1989, S. 384, 101st Cong., 1st Sess., 135 CONG. REC. 13, 1348-1356 (introduced on Feb. 8, 1989 by Sen. Chafee and 41 original co-sponsors); Medicaid Community and Facility Habilitation Amendments of 1989, H.R. 854, 101st Cong., 1st Sess., 135 CONG. REC. E297-02 (introduced on Feb. 6, 1989 by former Rep. Florio and 10 other original co-sponsors).

138. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 327.

139. *See* MASS. CONST. art. 114; *see* Crane, Howard, Schmidt & Schwartz, *The Massachusetts Constitutional Amendment Prohibiting Discriminations on the Basis of Handicap: Its Meaning and Implementation*, 16 SUFFOLK U.L. REV. 47 (1982).

140. CONN. CONST. art. 1, § 20.

141. The text of proposed art. 42 to the Maryland Declaration of Rights states: "Equality of rights under the law shall not be abridged or denied by the State because of an individual's physical or mental disability." Md. S.B. 475 (1990 Session) (introduced Jan. 26, 1990); *see supra* note 5; *see also* Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier*, 20 LOY. L.A.L. REV. 1249, 1279-96 (1987).

142. 42 U.S.C. §§ 10801-10851 (1988).

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sional responsibilities (whose breach can lead to disciplinary sanctions).[143]

When a client instructs counsel to pursue the client's present interests and advantages, counsel is obliged to put the client's specific interests before those of any constituencies. The conflict between clients and constituencies may not be felt as strongly where clients and counsel have weak or non-existent ties to disability groups. However, in the face of a lack of pre-existing ties with clients and the pursuit of broader or long-term interests, constituencies may organize for political or law reform goals. Such groups may identify clients willing to espouse those goals and may ask to participate in the suit as parties, *amici curiae*, or by locating expert witnesses. But the realms in which these groups are the primary players are not only judicial, but legislative, regulatory, and political. In essence, constituencies as repeat players may be willing to invest in changes in the rules.[144] But although they may exercise persuasion over certain litigants, unless those groups become co-parties they lack veto power over the lawful goals that a lawyer and a disabled client may pursue.

V.
STRENGTHENING DISABILITY LAW PRACTICE

A. Strengthening the Client's Capacity To Be a Client

Lawyers often overlook how intimidating they and the legal process can appear to poor or undereducated persons. Although specialized legal advocacy projects emphasize the need to maintain personal relationships with "devalued people" in order to foster ethical integrity and personal identification between lawyer and client,[145] in the rush of practice most lawyers have little time to assist with their clients' personal growth. The client with mental disabilities may be uniquely in need of skills and assertiveness training to function as a participatory, and not nominal, client.[146] Empirical and anecdotal evidence show that clients who actively participate in the conduct of their cases are better representatives of other similarly situated class clients and more likely to get better results in their own cases.[147]

How then is such participation likely to occur? In part, raising expectations that lawyers will be and should be responsive and sensitive to disabled

143. *See, e.g.*, State *ex rel.* Nebraska State Bar Ass'n v. Walsh, 206 Neb. 737, 294 N.W.2d 873 (1980).

144. Gilhool, *The Uses of Courts and of Lawyers*, in CHANGING PATTERNS OF RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 155, 160-62 (1976).

145. *See Protecting the Rights*, *supra* note 20, at 572-73.

146. Adults with mental retardation, for example, may benefit from training in conversational skills in order to ask and answer questions. Effective procedures for such skills training include modeling, self-monitoring, instruction, shaping, behavior rehearsal, verbal prompting, feedback, and social reinforcement. Schloss & Wood, *Effect of Self-Monitoring on Maintenance and Generalization of Conversational Skills of Persons with Mental Retardation*, 28 MENTAL RETARDATION 105 (1990).

147. D. ROSENTHAL, *supra* note 6, at 169; *see also* D. BINDER & S. PRICE, *supra* note 6, at 153; Chilar,*Client Self-Determination: Intervention or Interference?*, 14 ST. LOUIS U.L.J. 604 (1970); Grosberg, *supra* note 8, at 719-22.

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clients can become a self-fulfilling prophecy. In an ever competitive market for lawyers, constituency groups can help prospective clients become better "shoppers" for legal services by sharing information about which lawyers provide not only good results but decent, human interactions. The groups can arm potential clients with outlines of what to expect when seeking a lawyer's services.[148] They can train reluctant clients to make their own decisions by clarifying the choices presented and the values that underly alternative choices. If the client is unwilling or unable to face legal counselling on her own, organizational leaders or trusted friends can offer to act as supportive intermediaries or interpreters.

For some clients with cognitive or emotional limitations, the process of communication must be made simple, deliberate, reassuring, and concrete. Frequent face-to-face contact for clients with mental retardation may be needed to develop rapport and to offset the problems of clients who quickly forget information.[149] An individual institutionalized for many years, for example, may be unable to respond to the abstract question, "do you want to live in the community?" After visiting possible group home or supervised apartment placements, the same individual may be able to express a meaningful decision to her lawyer. For the lawyer to honor the client's wishes, the lawyer must first be able to discern those wishes, or find solutions to deficiencies in the client's communication, comprehension, or competency.[150]

B. Sensitizing the Lawyer to Disabled Clients' Needs

Good lawyers recognize that effective representation of disabled and nondisabled clients is similar. Both types of clients need opportunities to make their own mistakes[151] and patient counseling to help them avoid tragic errors. If clients with disabilities are to obtain responsible representation, they will need a cadre of seasoned, highly skilled, and ethically sensitive lawyers to handle their more complex legal problems.[152] In both traditional and clinical

148. Although this idea has not been attempted in the legal field, an organization of Maryland self-advocates has printed instructions to their members describing "what to expect when a person visits a doctor, information to bring to the appointment, questions to ask, and other important information." *How To Talk To Your Doctor*, 1 ADVOCATES' VOICE 1, 2 (1990) (a national publication for self-advocacy groups published by the Association for Retarded Citizens).

149. Mississippi Protection and Advocacy Sys. v. Cotten, No. J87-0503(L), slip op. at 22 (S.D. Miss. Aug. 7, 1989). Clients institutionalized as mentally ill require similar "regular, frequent access" to legal advocacy agencies to overcome the "combined effects of medication, mental illness, and the passive characteristics of institutionalized people" that inhibit the development of an attorney-client relationship. Robbins v. Budke, No. 89-971-M Civil, slip op. at 16 & 24 (D.N.M. May 21, 1990).

150. For an analytical framework to resolving those issues, see *supra* text accompanying notes 61-63.

151. *See* D. LUBAN, *supra* note 131, at 353.

152. *Id.* at 353-54. Due to the paucity of lawyers for such clients, attorneys representing commitment petitioners or state facilities may be obligated to initiate challenges to arguably inappropriate patient confinement. D. WEXLER, *Inappropriate Patient Confinement and Appropriate State Advocacy*, in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC

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legal education, future lawyers can learn to appreciate the hierarchy of preferred representational solutions to problems of aiding impaired individuals or class clients.[153] Direct representation of the client's expressed wishes is clearly the optimal approach from ethical and pragmatic perspectives. It is consistent with the Model Rules' concept of "a normal client-lawyer relationship" with the disabled client and maintaining a relationship of alliance rather than of antagonism.[154] The lawyer avoids becoming judge, jury, and ultimate decision maker in her client's case.[155]

From time to time, it will be difficult to apply this norm in practice. A seriously depressed or disturbed client who states on the eve of a hearing that she wants to fire the lawyer if some unobtainable goal in another type of proceeding is not sought presents such a difficulty. The lawyer would certainly be justified in trying to persuade the client not to carry out the threat of discharge and to persist with the previously agreed scope of representation. Indeed, to abandon the client at the first capricious or irrational utterance could pose a risk of malpractice if the client's claim were thereby compromised by the absence of representation and the lawyer did not attempt to convince the client of the reasonableness of the lawyer's professional judgment or otherwise protect the client's interests.[156] If the lawyer were not to take into account the real difficulties that disability — and the accompanying stigma and devaluation — can pose for the client, effective representation and professional judgment could not be exercised.[157] For lawyers already in practice, continuing

AGENT 347, 366 (1990). Wexler argues that: "unless a state is permitted to assert unconstitutional patient confinement, a largely indigent, uneducated, and lawyerless population of involuntarily committed mental patients will be denied access to the courts in matters of considerable constitutional concern." *Id.* at 366 (citation omitted).

153. Luban refers to four "successively weaker conceptions of representation or acting in the name of others" which he termed direct delegation (acting on actual wishes of the class), indirect delegation (acting on the wishes of the class selected representative), interest representation (acting on the wishes of named clients selected by the lawyers), and best-world representation (acting on the lawyer's own conception of what is best for the class). Because of their lack of political mobilization or cognitive limitations, the direction of class actions for persons with mental disabilities generally resembles the last two categories. D. LUBAN, *supra* note 131, at 351-52. On other possible solutions to class conflicts, see *Developments in the Law—Class Actions*, 94 HARV. L. REV. 1244 (1981); *see also* Grosberg, *supra* note 8, at 768-90; Rhode, *supra* note 124, at 1247-62.

154. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1987); *see also supra* notes 47-52 and accompanying text.

155. Blinick, *Mental Disability, Legal Ethics, and Professional Responsibility*, 33 ALB. L. REV. 92, 115 (1968); *see also* Spiegel, *supra* note 10, at 76-77 (harms to the client of portraying the client falsely to others or using the client as a means to serve the lawyer's conception of the public interest).

156. In resolving such a case in the Clinical Law Office of the University of Maryland School of Law, the student-attorney and the author ultimately convinced the client not to forfeit his claim to unemployment benefits. The client, a homeless man with a history of schizophrenia, decided that the chance of obtaining those benefits and having his "day in court" to air his grievance with his former employer were worth pursuing. Following the hearing, he expressed great satisfaction that he had presented his testimony and confronted his employer in this administrative hearing. He eventually gained benefits and a home.

157. *See* Iowa Comm. on Professional Ethics and Conduct, Formal Op. 79-58 (Sept. 6,

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legal education courses alone, detached from the demands of practice, will not suffice to hone that judgment.[158] They will need the support of peers, constituency groups, legal advocacy projects, experts, and the community of disabled clients to become able lawyers for otherwise able clients.

C. *Roles of Disability Organizations*

Organizations of and for persons with disabilities can improve disability law practice in a variety of ways.[159] The groups can train their members to be more assertive and effective clients. They can sensitize lawyers to the needs of clients and the value of obtaining consultative help. If general practitioners do not adequately fill those needs, then disability organizations can develop referral plans to recommended practitioners or create group legal service plans to protect members' interests. They can honor lawyers who model ethical behavior by publicizing examples of good practice for underrepresented or devalued people. In significant cases, these organizations can — and should — serve as co-parties with persons with mental disabilities when their interests are congruent and their participation as clients would advance litigation goals.[160] Such organizational plaintiffs can provide counsel for the individual client, continuity of control, and financial support to sustain protracted lawsuits.[161]

The Association for Retarded Citizens [hereinafter ARC] exemplifies a disability organization engaged in the legal process which is capable of meeting those needs.[162] When lobbying and political pressure-group tactics failed

1979) (lawyer for a disturbed client may pursue a social security claim when lawyer believes the disability prevents the client from exercising the best judgment); *see also* Webster Groves School Dist. v. Pulitzer Publishing Co., No. 89-2559 (8th Cir. Mar. 27, 1990) (handicapped child may be stigmatized and humiliated if sensitive information regarding his disability made public; privacy interests of child classified as handicapped under the Education of the Handicapped Act outweighs newspaper's right of access to courtroom); Williams v. Wilzack, No. 140 (Md. Ct. App. May 29, 1990) (lawyer and client not permitted to attend entire proceedings before clinical review panel; lawyer given forty-five minutes and client five minutes notice that a review of forcible medication under non-emergency circumstances would be held).

158. On the high degree of routinization, domination of clients, and the shaping of clients to existing expectations in legal services offices, see M. LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE 120-22 (1980).

159. For convenience, these organizations are hereinafter referred to as disability organizations. For a list with addresses of 57 national organizations for persons with mental or physical disabilities, see L. ROTHSTEIN, *supra* note 4, at 422-24.

160. *See, e.g.*, Mental Health Ass'n of Minn. v. Schweiker, 554 F. Supp. 157 (D. Minn 1982), *aff'd in part and modified in part*, 720 F.2d 965 (8th Cir. 1983), *on remand*, Mental Health Ass'n of Minn. for Retarded Citizens v. Heckler, 620 F. Supp. 261 (D. Minn. 1985); Kentucky Ass'n for Retarded Citizens v. Connecticut, 510 F. Supp. 1233 (W.D. Ky. 1980), *aff'd*, 674 F.2d 582 (6th Cir. 1982); Michigan Ass'n for Retarded Citizens v. Smith, 475 F. Supp. 990 (E.D. Mich. 1979), *aff'd*, 657 F.2d 109 (6th Cir. 1981).

161. *See, e.g.*, Georgia Ass'n for Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981), *aff'd*, 716 F.2d 1565 (11th Cir. 1983) (inflexible policy of not providing more than 180 days of education for any handicapped child violated Education for All Handicapped Children Act), *vacated and remanded*, 468 U.S. 1213, *on remand*, 740 F.2d 902 (11th Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), *vacated and remanded*, 855 F.2d 794 (11th Cir. 1988) (prevailing party entitled to costs with interest on the award from the date judgment entered).

162. Founded in 1950 as the National Association for Retarded Children, the Association

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to initiate better treatment for the disabled, ARC's leaders turned to the courts. Early cases were selected to attack the most blatant, widespread abuses. The victories and revelations in these cases served as building blocks to federal legislation and more refined, subtle cases. Represented by public interest lawyers in class actions, they fought for such essentials as the right to a publicly supported education for all children regardless of the degree of disability[163] and the right to habilitation for institutionalized persons committed to state custody.[164] ARC's approach was built on pragmatic, incremental legal reform.

ARC's first wave of litigation yielded great benefit to persons with retardation and other disabilities.[165] As the issues became more complex and controversial, and the federal courts less receptive to activist judicial roles, ARC experienced mixed results both as plaintiff[166] and *amicus curiae*.[167] When a case was lost and the probability of reversal on appeal was low, the national organization would urge its local affiliate, sometimes successfully, not to petition for certiorari review. In this way, the creation of unfavorable precedent at the Supreme Court level was sometimes avoided.[168] ARC increasingly turned to the state courts and legislatures as alternative forums after weighing the costs and benefits of federal litigation. Given its standing as a representa-

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for Retarded Citizens of the United States has some 160,000 members and 1300 local and state affiliates. It conducts an active governmental relations program through its Governmental Relations Office in Washington, D.C. and its chapters across the country. In the judicial arena, the ARC Legal Advocacy Committee screens and recommends state and federal cases, principally on the appellate level, in which ARC will participate. Telephone interview with Alan Abeson, Executive Director of ARC (April 9, 1990).

163. *See, e.g.*, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) (when state provides public education to some children, it cannot deny it to retarded children generally); Maryland Ass'n for Retarded Children v. Maryland, Equity No. 100-182-77676 (Cir. Ct. Baltimore Co., May 31, 1974) (right to free public education for all retarded children in Maryland), *reprinted in* R. BURGDORF, JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT 182 (1980).

164. *See, e.g.*, New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

165. Roos, *The Law and Mentally Retarded People: An Uncertain Future*, 31 STAN. L. REV. 613, 624 (1979). According to Dr. Philip Roos, a psychologist, former executive director of the National Association for Retarded Citizens, and an expert witness in numerous test cases: "By creating direct legal control as well as by catalyzing change without direct sanction, [the initial litigation] has reduced the grosser violations of constitutional rights, and has led to new statutes, regulations, and 'preventative' administrative programs." *Id.* at 624.

166. *Compare* Association for Retarded Citizens of N.D. v. Olson, 713 F.2d 1384 (8th Cir. 1983) (district court did not err in exercising jurisdiction and the state has duty to provide appropriate treatment and services in least restrictive appropriate setting for all committed mentally retarded citizens) *with* Society for Goodwill to Retarded Children v. Cuomo, 832 F.2d 245 (2d Cir. 1987) (issues moot because of defendants' agreement to voluntarily comply with earlier court order).

167. *See, e.g.*, Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (under the eighth amendment, offenders with mental retardation not categorically precluded from being executed for a capital offense); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (mental retardation not a suspect classification, but zoning regulation invalidated as applied).

168. *See, e.g.*, Lelsz v. Kavanagh, 807 F.2d 1243 (5th Cir.) (en banc), *cert. dismissed*, 483 U.S. 1057 (1987).

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tive for all persons with mental retardation, ARC was prepared to advocate for controversial causes if the stakes were high enough. For example, through amicus briefs, clemency petitions, and limited abolitionist legislation, ARC mobilized to spare persons with mental retardation from the death penalty.[169]

Disability organizations can reach out to prospective clients in ways that lawyers do not. These groups are not under the same constraints of time, economics, or traditional ethical perspectives that may prevent lawyers from soliciting disabled clients. With their volunteer networks and organizational missions, they can aid vulnerable individuals and groups otherwise powerless to identify violations of rights and secure access to counsel and the courts. Under prevailing case law, an association of or for persons with mental disabilities may have standing in its own right to obtain judicial relief from injury to itself, or in the absence of such injury, as the representative of its members.[170] For instance, a federal district court has held that the Spina Bifida Association of America and the Association for Persons with Severe Handicaps have standing to sue a hospital charged with the discriminatory withholding of medical treatment based on disability or socio-economic status.[171] On a practical level, such organizations can also recruit members to become test case litigants or named plaintiffs in class actions. Through this process, they have played a significant role in urging the creation of legal rights to habilitation, psychiatric treatment, freedom from involuntary servitude in mental institutions, free appropriate public education, and other basic freedoms.[172] As a result, disability organizations have made issues visible that policy makers previously ignored.

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169. ARC worked towards the passage of the following statutes: Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7001, 102 Stat. 4181, 4390; GA. CODE ANN. § 17-7-131(j) (1989) (person with mental retardation found guilty of murder may not be sentenced to death); MD. ANN CODE 27, § 412(f) (Michie Cum. Supp. 1989) (same). ARC has also filed *amicus curiae* briefs in the following cases: Penry v. Lynaugh, 109 S. Ct. 2934 (1989); State v. Arthur, 296 S.C. 495, 374 S.E.2d 291 (1988) (execution of mentally retarded offender barred on grounds of unknowing waiver of right to jury trial; prosecutor subsequently did not seek the death penalty). ARC took these courageous actions despite the public relations risks of furthering stereotypes of criminality and dangerousness long but erroneously attached to all persons with mental retardation.

170. *See* Washington Ass'n for Retarded Citizens v. Thomas, No. C-78-163 (W.D. Wash. March 26, 1979), *aff'd*, 667 F.2d 1033 (9th Cir. 1981) (ARC had standing to bring "a right to habilitation" claim against five state institutions since it alleged facts which would constitute actual injury to its members); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (organization promoting equal housing through counselling and referral services has standing in its own right to sue realty company charged with "racial steering"); NAACP v. Button, 371 U.S. 415, 428 (1963) (association charged with violating state anti-solicitation laws had standing to challenge the statute on its own behalf because "it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail").

171. *See* Nimz, *Johnson v. Sullivan*, 4 ISSUES IN L. & MED. 123 (1988) (discussing Johnson v. Sullivan, No. CIV-85-2434 (W.D. Okla. June 22, 1987)).

172. *See* THE LEGAL RIGHTS OF PERSONS WITH MENTAL RETARDATION (L. Kane, P. Brown & J. Cohen eds. 1988); THE MENTALLY RETARDED CITIZEN AND THE LAW (M. Kindred, J. Cohen, D. Penrod & T. Shaffer eds. 1976).

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D. Roles of Legal Advocacy Organizations

Federally funded agencies for the protection and advocacy of persons with developmental disabilities[173] and of recipients of mental health services[174] exist in every state to seek legal, administrative, and other remedies for these populations. To fulfill this mandate, these agencies should develop standards, guidelines, and state-specific manuals for representing persons with developmental disabilities or mental illness in common types of specialized proceedings.[175] For instance, the quality of representation in civil commitment processes, right to refuse medication hearings, and guardianship matters varies widely between states and within many states.[176] To prevent ineffective representation in such processes, legal advocacy groups can advise private counsel who are unfamiliar with disability issues and monitor patterns of individual representation.[177] If representation is glaringly ineffective or a sham, there are judicial precedents for undoing the harms to clients or changing the system for delivery of legal services.[178]

Public interest lawyers can also reduce the access barriers that separate potential clients with disabilities from the justice system.[179] In collaboration with self-advocacy groups and other supporters of clients' rights, the public interest lawyers have litigated to create advocacy projects in institutions,[180]

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173. 42 U.S.C. § 6042 (1988).

174. Under the Protection and Advocacy for Mentally Ill Individuals Act of 1986, grants are provided to advocacy systems for the developmentally disabled to engage in similar protection of the rights of persons institutionalized in mental health facilities. 42 U.S.C.A. § 10805 (West Supp. 1990).

175. For execellent early examples of such manuels, see E. KERNS, O. SCHUB, G. SIEDOR, S. SITTER, S. SMITH, W. WINTER & L. GANSKI, MANUAL ON LEGAL RIGHTS AND RESPONSIBILITIES OF DEVELOPMENTALLY DISABLED PERSONS IN ILLINOIS (1980); S. SCHWARTZ & D. STERN, A TRIAL MANUAL FOR CIVIL COMMITMENT (rev. ed. 1979).

176. *See* Andalman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43 (1974); Elkins, *Legal Representation of the Mentally Ill*, 82 W. VA. L. REV. 157 (1979); *see also* Ky. H.B. 511 § 20 (passed by Gen. Assembly March 9, 1990) (appointed private counsel given statutory preference over representation by public advocate system). By denying the alleged person with mental disabilities access to the more specialized, and often more vigorous public counsel, the Kentucky statute appears to be a step backward.

177. The ABA Commission on the Mentally Disabled and the Commission on Legal Problems of the Elderly are developing training modules on alternatives to guardianship for lawyers and other professionals. Through the State Justice Institute, they will also distribute their findings on the best practices for monitoring and enforcing guardianship orders. Telephone interview with John W. Parry, Staff Director, ABA Comm'n on the Mentally Disabled (April 18, 1990).

178. *See* Michigan Ass'n for Retarded Citizens v. Wayne County Probate Judges, 79 Mich. App. 487, 261 N.W.2d 60 (Ct. App. 1977); State *ex rel.* Memmel v. Mundy, 75 Wis. 2d 276, 249 N.W.2d 573 (1977); State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 115, 125-26 (W. Va. 1974) (where attorney in civil commitment hearing "represents" client without meeting or consulting with him, commitment invalidated on grounds of ineffective assistance of counsel who failed to "represent his client as zealously as the bounds of ethics permit").

179. *See* Coe v. Hughes, No. K-83-4248 (D. Md. April 4, 1985) (consent decree).

180. *See* Brewster v. Dukakis, 520 F. Supp. 882 (D. Mass. 1981), *vacated and remanded*,

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procedures for meaningful access to such prospective legal clients,[181] and legal defense funds for persons with mental disabilities.[182] In addition, these lawyers have organized pro bono representation projects for homeless persons, and developed a literature on how to represent vulnerable clients in unconventional settings.[183]

In egregious cases, advocacy groups can defend client self-determination and welfare from lawyer overreaching or neglect. There are many "whistleblowing" roles open to such groups. They can seek court appointment as counsel to a person with mental disabilities to remove unscrupulous lawyer-guardians. In impact litigation, they can work with steering committees to discharge lawyers who do not meet the needs of persons with mental disabilities.[184] Advocacy organizations may also raise claims of ineffective assistance of counsel or challenge due process violations that turn judicial proceedings into empty exercises.[185] And if necessary, leaders of advocacy organizations can file grievances or press for ethics opinions from bar groups on unresolved issues of practice.

E. Consultation with Experts

Attorneys in complex cases and law reform matters have an obligation to consult with disability experts to satisfy several ethical concerns. Although their advocacy may affect future generations, attorneys and their clients have limited incentives and information for farsighted action that may not advance

675 F.2d 1 (1st Cir. 1982) (advocacy project funded through attorneys' fees collected in deinstitutionalization civil-rights case after appellate court rejected funding under consent decree).

181. *See* Mississippi Protection and Advocacy Sys. v. Cotten, No. J87-0503(L), slip op. at 3 (S.D. Miss. Sept. 29, 1989) (final judgment adopting procedures to ensure that P & A attorneys or advocates have "access to and the most effective communication possible with" the developmentally disabled residents of the state-operated Boswell Retardation Center); *see also supra* note 152 and accompanying text.

182. Through the generosity of Mary Sweazey, a chaplaincy student who suffered retaliation for reporting violations of mental patients' rights, the DeWaal/Herr Fund for the Rights of Persons with Mental Disabilities was established at the University of Maryland School of Law. Ms. Sweazey chose to donate the proceeds of a case settlement that arose from her claims of the state hospital's unjust interference with her training program. The resulting fund will defray the costs of future litigation and other legal advocacy efforts on behalf of persons with mental disabilities. See Memorandum of understanding between Ms. Sweazey and the University of Maryland School of Law, on file with the Author.

183. *See* Bennett, *Heartbreak Hotel: The Disharmonious Convergence of Welfare, Housing and Homelessness*, 1 MD. J. OF CONTEMP. L. 27 (1990); Herr, *Helping the Homeless: An Introduction for Lawyers*, 1 MD. J. OF CONTEMP. L. 1 (1990).

184. *See* Northern Cal. Psychiatric Society v. City of Berkeley, 223 Cal. Rptr. 609, 178 Cal. App. 3d 90 (Ct. App. 1986).

185. *See* Chalk v. State, 443 So. 2d 421 (Fla. Dist. Ct. App. 1984) (violation of patient's due process rights when counsel prohibited from presenting closing argument and where counsel should have been allowed to cross-examine psychiatrist as to education and experience); Quesnell v. State, 83 Wash. 2d 274, 517 P.2d 568 (1973) (guardian *ad litem* may not waive jury trial without patient's consent).

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present objectives.[186] Experts can at least expose and explain those issues and the different technical solutions which are possible. Furthermore, predicting the consequences of policy choices is always a risky business, and experts may reduce that uncertainty by identifying the intended and unintended consequences of those choices as well as alternative strategies of policy implementation.[187] Experts familiar with family dynamics and other pressures to institutionalize the family's disabled member may also be able to recognize conflicting interests between persons with mental disabilities and their representatives.[188] Clinical experts, often with backgrounds in psychology or psychiatry, are helpful in assessing an individual's capacities in general, and as a legal client in particular, to provide any meaningful assistance or sense of direction to counsel.[189] As expert witnesses or consultants, they can devise methods for overcoming barriers to communication with clients who have had limited opportunities to "learn that the possibility of justice exists."[190]

F. Consultation with Family Members and Friends

In most cases, the friends and family members of the disabled client should be consulted where the disabled client's intentions and desires are unclear. There is intuitive appeal to the idea of the attorney eliciting all relevant information from the client's intimate and familial associates, particularly if the client is a child or severely impaired in cognitive or communicative skills.[191] One commentator has even urged judicial enforcement of such a

186. On the problem of predicting the implications of class actions for, and representing the interests of, future generations, see D. LUBAN, *supra* note 131, at 347.

187. *See* M. LIPSKY, *supra* note 158, at xii-xiv (decisions of street-level bureaucrats become the public policies they implement; they may also impose costs on clients who unsuccessfully assert their rights); D. ROTHMAN & S. ROTHMAN, *supra* note 85, at 130-33 (attorneys' lack of awareness of political obstacles to dismantling Willowbrook and need for political expertise by experts on court-appointed Willowbrook Review Panel).

188. Although Luban, for simplicity of argument, chooses to ignore the "important question of whether the [Pennhurst State School] parents and guardians have interests conflicting with those of the inmates," that question is often critical for the lawyer representing a class of persons with mental disabilities. D. LUBAN, *supra* note 131, at 343 n.5; *see also* Mickenberg, *supra* note 32, at 628-29 ("In certain cases [citing cases of institutionalization, sterilization, and denial of life-saving treatment], the interests of the parent/guardian will conflict with the interests of the retarded persons and may even trample on the retarded person's rights").

189. *See* Clark v. Clark, 40 O.R.2d 383 (Lanark Co. Ct., Ontario, 1982) (20-year-old man diagnosed and instutionalized at age 2 as severely retarded and with cerebral palsy held mentally competent on the evidence of a psychiatrist, psychologist and a ten-member multidisciplinary team, despite his inability to speak); *In re* Clark, 38 O.R.2d 427 (1982) (same case; interlocutory relief denied).

190. Mississippi Protection and Advocacy Sys. v. Cotten, No. 87-0503(L), slip op. at 23 (S.D. Miss. Aug. 7, 1989) (testimony of clinical psychologist that frequent personal contact between institutionalized client and advocate needed to overcome client's inability to use the legal system).

191. *See* Parham v. J. R., 442 U.S. 584 (1979)(deference due parental wishes in hospitalization proceedings); *see also*, Note, *Parental Rights and the Habilitation Decision for Mentally Retarded Children*, 94 YALE L.J. 1715, 1724-29 (1985); *supra* notes 88-91 and accompanying text.

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duty to consult.[192] But even an *ex parte*, informal judicial review of the consultative steps may impose undue rigidity and deter clients from authorizing contacts with, and disclosures of privileged information to, friends and family members.

In class actions, where disabled class members may not even be aware of the proceedings or are incapable of understanding even simple notice, family members may be the most convenient source of polling data on the individual class member's likely desires. If those views are ignored, class action attorneys can be criticized for betrayal of the majority of clients.[193] However, it seems harsh to flatly state, as one commentator has, that "what the attorneys did was wrong"[194] when real and substantial conflicts of interests between guardians and wards exist,[195] when future generations of persons with mental disabilities may suffer if leaders of institutions delay the creation of community-based systems of care, when the attorneys' decision can be justified on a "best-world representation" basis, and when more direct representation methods are unavailing.[196]

G. Consultation with Peers

Lawyers will inevitably turn to their own peers in developing ethical standards of disability practice that command their allegiance. At a minimum, this will require elaboration and commentary on the broadly stated Rules to explore the nuances of representing clients with different types and degrees of disability. Further scholarship, both conceptual and empirical, is needed to determine modes by which clients with mental disabilities can control or at least influence their attorney's actions. On the simplest level, co-counsel arrangements can offer some checks on misinterpretation of client's preferences and on manipulative or coercive lawyering. Although an imperfect means of increasing accountability, the staffing of important cases by teams of lawyers can heighten scrutiny and self-evaluation. Lawyers will thus be forced to consider, debate, and justify representational options and competing theories of

192. Neely, *Handicapped Advocacy: Inherent Barriers and Partial Solutions in the Representation of Disabled Children*, 33 HASTINGS L.J. 1359, 1392-94 (1982).

193. Rhode, *supra* note 124, at 1211-12 (this occurred when a post-remedy survey showed that only nineteen percent of the parents and guardians of Pennhurst residents wanted the court-enforced remedy of institutional closure).

194. D. LUBAN, *supra* note 131, at 342.

195. *See* U.S. COMM'N ON CIVIL RIGHTS, MEDICAL DISCRIMINATION AGAINST CHILDREN WITH DISABILITIES 60 (U.S. Govt. Printing Office 1989) (widespread denial of medical treatment to handicapped newborns and need for more oversight on behalf of such newborns); Krasik, *The Role of the Family in Medical Decisionmaking for Incompetent Adult Patients: A Historical Perspective and Case Analysis*, 48 U. PITT. L. REV. 539, 552-554 (1987) (range of conflicts between family members and adult incompetent patients canvassed).

196. D. LUBAN, *supra* note 131, at 352. Best-world representation refers to the attorney's attempt to "create the best possible world for present and future members of the client class" by discerning the value preferences of class members based on the attorney's good faith judgment of what is best for the group over the long term. Best-world representation assumes that neither the class nor a subsection thereof can articulate the group's interests.

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the case. Methods for ongoing consultation include the recruitment of co-counsel, "of counsel," intervenor counsel, amici counsel, or the informal solicitation of the views of knowledgeable practitioners or academics.[197] Disability lawyers can also obtain technical assistance and consultation on ethical matters from Legal Services Corporation back-up centers, specialized public interest law firms, relevant bar association committees and services,[198] and centers for the study of ethics such as the Hastings Center.[199]

Lawyers affiliated with disability groups frequently provide on-call assistance to other lawyers with ethically troubling cases.[200] Perhaps the most reliable method of peer accountability is the organization of specialized legal representation projects. Through their mission statements, hiring and promotion decisions, and case handling practices, such projects self-consciously focus on the ethical responsibilities of their staff.[201] A program's mission can "provide a clear direction and a continued focus for advocates, clients, and the community," thereby enhancing the likelihood of "consistent, thoughtful, and effective" representation that is attuned to individual client differences and to the institutional and historical context of disability law.[202] Peer review within

197. In Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990), 21 "amicus groups" filed in the Supreme Court on behalf of the Cruzan family and 33 on behalf of the State's position defending Nancy Cruzan from termination of nutrition and hydration. Each side presented legal briefs and ethical perspectives upon which to fashion arguments on the pros and cons of constitutionalizing a so-called right to die. On the complexity of such issues, see the five Supreme Court opinions issued in *Cruzan*; see also Mayo, *Constitutionalizing the 'Right to Die'*, 49 MD. L. REV. 103 (1990).

198. The American Bar Association, through its Standing Committee on Ethics and Professional Responsibility, issues opinions on proper professional conduct. The ABA ETHIC-Search provides ethics research assistance to interested callers. *See* ABA MEMBER'S GUIDE 25-26 (1990). The ABA Commission on the Mentally Disabled "promotes the delivery of competent legal services to mentally disabled persons" and has addressed ethics issues through its publications and the work of its staff. *Id.* at 27-28. Many state bar associations have ethics committees that provide so-called "Ethics Hotlines" (telephone consultations for attorneys who need quick and informal advice on handling an ethical problem) as well as written ethics opinions. Such associations may also have committees that focus on the delivery of legal services to handicapped persons and that could, if requested, arrange consultations with lawyers experienced in that area of practice. *See, e.g.*, Maryland State Bar Ass'n, 95 *Programs and Reports* 146, 169 (1990).

199. The Hastings Center, founded in 1969, is a non-profit, inter-disciplinary organization that carries out educational and research programs on ethical issues in medicine, the life sciences and the professions. As part of this mission, its staff frequently consults with physicians, activists and policymakers on disability law related issues and "how lawyers can help instead of hinder." Wolf, *Maybe Together . . . : A Lawyer Among Allies*, 19 HASTINGS CENTER REPORT inside front cover (March/April 1989 No. 2); *see generally* Callahan, *Morality and Contemporary Culture: The President's Commission and Beyond*, 6 CARDOZO L. REV. 347 (1984) ("concern about the personal behavior of physicians and other health care providers matches a more general concern about professional ethics in law, business, engineering, and the military").

200. As chairperson of the ARC Legal Advocacy Committee, the author receives about ten such calls a year. Lawyers affiliated with the National Association for Rights Protection and Advocacy have similar experiences.

201. The Mental Health Law Project in Washington, D.C. and the Center for Public Representation in Northampton, Massachusetts are notable examples of projects ethically sensitive to clients with mental disabilities.

202. *Protecting the Rights, supra* note 20, at 560-61 & 570-72.

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such organizations offers greater assurance of competent representation than the remote prospect of *ex post facto* regulatory policing.[203]

CONCLUSION

A lawyer for a client or class of clients with disabilities need not — and should not — play God in making decisions for clients.[204] The vast majority of such clients are quite capable of making their own decisions regarding representation goals. For the minority who are not, there are a variety of solutions that avoid plenary guardianship. With patience and appropriate help, some clients can overcome a temporary incapacity, a gap in knowledge, or a lack of training to become a participatory client. In other cases, the traditional bi-polar relationship between a disabled client and counsel is insufficient to guard the client from domination by lawyers, "solutions" based on insufficient information, or subjection to the lawyer's biases. Even in the ideally balanced attorney-client relationship, the lawyer may not — and need not — take account of the affected present and future interests of other persons with mental disabilities who are not clients thereby endangering them. Narrowly tailored, least restrictive forms of protective action and more activist roles for disability rights organizations can counter some of those risks. On the individual level, intensive counseling and contact — both legal and interdisciplinary — with the client with a disability may be essential if that client is to develop enough trust in the lawyer and the legal system for an effective attorney-client relationship to exist. On the systemic level, disability organizations in conjunction with the legal profession and experts on disability can improve disability law practice to prevent patterns of substandard representation and to discover new frontiers for group representation.

The ethical standards of the organized bar will not resolve the problems identified in this Article. Existing professional codes are too abstract and ambiguous to ensure that the client with a disability receives diligent legal representation faithful to the client's objectives and consistent with the normalization principle. To attain those ideals, lawyers need more specific guidelines and more consultation with disability organizations, experts, and the client's trusted friends on how to best represent clients with significant impairments. They will also need a healthy measure of humility, awe, and humor as they adapt conventional professional responsibilities to unconventional clients or circumstances. Without those changes and adaptations, whether individuals with disabilities gain the possibility of justice will remain a matter of chance.

203. *See* Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 292-93 (1986).
204. *See supra* text accompanying notes 7-8.

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