How #FreeBritney Exposes the Need to Disable the Model Rules of Professional Conduct

Heather Swadley*

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* Dr. Heather Swadley is a recent J.D./Ph.D. graduate. She currently practices law in the District of Columbia. She would like to thank Professor Susan DeJarnatt and her peer readers for comments on prior iterations of this manuscript.

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I. Introduction

For thirteen years, pop icon Britney Spears has been under a conservatorship of both her person and her estate.[1] Under California law, her father Jamie Spears completely controlled her assets, estate, business affairs, and personal life[2] until he was removed from her conservatorship on September 29, 2021.[3] After years of abuse and an

1. See Jon Caramanica, Britney Spears Takes On Her Conservatorship, N.Y. Times (July 23, 2021), https://www.nytimes.com/2021/07/01/arts/music/popcast-britney-spears-conservatorship.html [https://perma.cc/992C-WRCJ].

2. See Heather Swadley, 3 Disturbing Truths About Mental Health We Can Learn From the #FreeBritney Saga, The Financial Diet (June 29, 2021), https://thefinancialdiet.com/3-disturbing-truths-about-money-mental-health-we-can-learn-from-the-freebritney-saga/ [https://perma.cc/X6AX-KJZP]; see also Krystie Lee Yandoli, Here's a Timeline of How Britney Spears Got to This Point in Her Conservatorship, BuzzFeed (June 23, 2021, 5:52 PM), https://www.buzzfeednews.com/article/krystieyandoli/britney-spears-conservatorship-timeline [https://perma.cc/ND7F-NZUV].

3. See Stephanie K. Baer, Britney Spears Is Finally Free From Her Father's Control After More Than 13 Years, BuzzFeed News (Sept. 29,

incredibly popular social media movement dedicated to #FreeBritney, the world heard about Britney Spears' conservatorship in her own words on June 23, 2021.[4] The pop star recounted a humiliating chain of abuses, including the loss of financial freedom, and forcible sterilization through an intrauterine device that she is not allowed to remove.[5] The singer's conservatorship was only recently terminated after a change in legal counsel[6] and a lengthy legal battle.[7] Britney's treatment rightfully shocks

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2021, 8:38 PM), https://www.buzzfeednews.com/article/skbaer/britney-spears-free-jamie-conservatorship [https://perma.cc/27P8-UK98] (Jamie Spears had previously stepped down from the guardianship in August); see also Anastasia Tsioulcas, Jamie Spears Agrees to Step Down From Britney Spears Conservatorship, NPR (Aug. 12, 2021, 6:27 PM), https://www.npr.org/2021/08/12/1027223521/jamie-spears-steps-down-britney-spears-conservatorship [https://perma.cc/D2CN-JULM].

4. See Yandoli, supra note 2.

5. Stephanie K. Baer, Britney Spears Asked a Judge to End the Conservatorship That Sparked the #FreeBritney Movement, BuzzFeed (June 23, 2021, 6:52 PM), https://www.buzzfeednews.com/article/skbaer/britney-spears-conservatorship-hearing [https://perma.cc/P5ZG-56ZJ].

6. Joe Coscarelli et al., Britney Spears Can Hire a New Lawyer of Her Choice, Judge Rules, N.Y. Times (July 15, 2021), https://www.nytimes.com/2021/07/14/arts/music/britney-spears-conservatorship-lawyer.html [https://perma.cc/UY7T-88UX].

7. Anastasia Tsioulcas, Britney Spears' conservatorship has finally ended, NPR (Nov. 12, 2021, 5:16 PM), https://www.npr.

and dismays the world. Yet, Britney's case mirrors the ways in which the legal system fails disabled people[8] more generally. As National Women's Law Center attorney Ma'ayan Anafi stated: "What's different is that Spears has a platform to share it with the world."[9]

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org/2021/11/12/1054860726/britney-spears-conservatorship-ended [https://perma.cc/3485-PLGT].

8. I make the deliberate decision in this project to generally use "identity-first" as opposed to "person-first" language, i.e., disabled people, not people with disabilities. Although individual disabled persons and different disability communities differ in terms of preference, there is a strong case to be made that the arguments behind "person-first" language are flawed. First, many disabled persons view their disability as a major aspect of their identity, and thus, distancing disabled persons from their disability linguistically may be inimical to the process of self-identification for disabled persons. Second, the implicit assumption behind "person-first" language is that there is something dehumanizing about acknowledging that someone is disabled. This reinforces the problematic and pervasive narrative that disabilities are deficiencies in personhood or that having a disability makes someone less human. Therefore, for political reasons, I use the category disabled person; however, I acknowledge that the decision about how to self-identify as disabled is contentious and the prerogative of individual disabled people.

9. Emily Shugerman, Shocked by Britney's Forced IUD? Here's Why You Shouldn't Be, The Daily Beast (June 25, 2021, 3:37 AM), https://www.thedailybeast.com/

Disabled people—especially people with intellectual and developmental disabilities and mental-health disabilities—routinely face paternalism in the legal system. Non-disabled persons are presumed legally competent once they reach the age of majority.[10] Once a person reaches the age of eighteen, they may freely make major life decisions such as where to live or to contract without legal intervention—even if these decisions are not in the person's "best interest."[11] However, for persons the law deems incapacitated, usually on the basis of mental disability, the law implements a double standard.[12] For adults under guardianship, third parties may make all manners of decisions in pursuit of the disabled party's perceived best interest.[13]

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britney-spears-forced-iud-is-common-in-conservatorships [https://perma.cc/6ZQJ-MDU5].

10. Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination 15 (2018) [hereinafter Beyond Guardianship].

11. Id.

12. See Lucy Series, Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms, 40 Int'l J.L Psych. 80, 80–81 (2015).

13. Id. at 80.

Disabled people were once placed in abusive institutions under the guise of their "best interest."[14] Yet, even in a "post-institutionalization"[15] era, disabled people are routinely denied basic rights such as parenthood on the basis of their perceived best interest and the perceived best interest of their children.[16] Disabled people can be forcibly medicated and involuntarily committed in pursuit of their best interests.[17] Disabled people can be denied the right to choose their own sexual partners.[18] Moreover, disabled people are moreover often denied the right to choose

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14. See, e.g., Dennis B. Downey & James W. Conroy, Pennhurst and the Struggle for Disability Rights 5 (2020) ("Once thought to be progressive training facilities, institutions like Pennhurst became a nightmare, or a kind of 'purgatory' for the oppressed, the epitome of what was wrong in failed public policy in the treatment of individuals with mental disabilities.").

15. It is important to note that institutionalization continues despite the end of mass, state-sanctioned institutionalization. For instance, 14.5% of nursing home residents in New York are under 65, suggesting that many long-term residents are disabled rather than aging. See Younger people are increasingly trapped in nursing homes, Center for Disability Rights (accessed Sept. 19, 2021), https://cdrnys.org/blog/news/younger-people-are-increasingly-trapped-in-nursing-homes/ [https://perma.cc/B937–98EF].

16. See, e.g., Nat'l Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children 39–40 (2012).

17. See Lucy Series, supra note 12, at 83.

18. Id. at 84.

where they live or work—they are funneled into nursing homes or sheltered workshops by default.[19]

The legal community has been instrumental in guaranteeing fundamental rights of self-determination for some disabled people.[20] However, lawyers are often complicit in ableist practices—in fact, our[21] ethical rules sometimes require it.[22] Rule 1.14 of the Model Rules of Professional Conduct ("Model Rules") provides that lawyers may supplement their own judgment for a disabled client's when they think it is in their client's interest.[23] In Britney Spears's case, her former attorney

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19. See, e.g., Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. On the Judiciary, 115th Cong. 531–32 (2018) (statement of Elizabeth "Liz" Weintraub, Advocacy Specialist, Association of University Centers on Disabilities, Silver Spring, Maryland).

20. See, e.g., Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 587 (1999) (holding that the anti-discrimination provision in Title II of the Americans with Disabilities Act sometimes requires that people with mental disabilities be placed in community settings rather than institutions).

21. I use the "editorial we" and terms such as "ours" to demonstrate broad social ownership of the collective anxiety surrounding disability. Because ableism is such a pervasive apparatus, a disavowal of disability anxiety is impossible for anyone, disabled or nondisabled, or anywhere between.

22. See Model Rules of Pro. Conduct r. 1.14 (Am. Bar Ass'n 2021).

23. See id.

repeatedly undermined her attempts to end her conservatorship,[24] likely based on his mistaken belief that doing so would not be in the singer's best interest. Indeed, her attorney did not even inform her that ending her conservatorship was an option.[25]

This paper considers the ethical obligations of attorneys when interacting with disabled clients, arguing that the Model Rules should be altered to reflect the idea of "support-based" legal capacity embedded in the United Nations Convention on the Rights of Persons with Disabilities and becoming popularized within the disability community. Support-based models prioritize the expressed preferences of disabled people.[26]

Section II contextualizes this discussion within broader conversations about capacity and human rights law. Section III compares the Model Rules with the standards set out by the UN Convention on the Rights of Persons with Disabilities. Section IV discusses the practical implications of these differences through two hypotheticals. This paper concludes by proposing a new Model Rule 1.14 to bring the Model Rules in line with international human rights law and the needs of the disability community.

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24. Joe Coscarelli et al., Britney Spears's Courtroom Plea Spurs Questions for Her Lawyer, N.Y. Times (July 1, 2021), https://www.nytimes.com/2021/06/24/arts/music/britney-spears-lawyer-samuel-ingham.html [https://perma.cc/9VUZ-AVKS].

25. Id.

26. See Lucy Series, supra note 12, at 83.

II. Debates Regarding Capacity and Disability Rights

Disabled people have historically been denied their legal decision-making abilities through substituted decision-making or even forcible institutionalization.[27] Other people make important life decisions for disabled people, and this is facilitated by the U.S. legal system.[28] This section outlines the challenge to this approach exemplified by the UN Convention on the Rights of Persons with Disabilities. Section II.A discusses capacity-based conceptions of legal personhood, and Section II.B provides an alternative framework for understanding legal capacity. Section II.C outlines the disconnects between American disability law and the standards set forth by the Convention.

A. Capacity-Based Models of Legal Personhood

Legal personhood—which determines the scope of rights and duties under the law—is traditionally predicated on capacity.[29] The most prized form of legal personality is the responsible subject, who is responsible because they are "rational."[30] The responsible subject can sue and be sued, vote, hold property, and is generally granted the corresponding rights and duties of citizenship.[31] However, the responsible subject is

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27. See supra notes 14–19.

28. Id.

29. See Lucy Series, supra note 12, at 80.

30. Ngaire Naffine, Who are Law's Persons? From Cheshire Cats to Responsible Subjects, 66 Mod. L. Rev. 346, 362–65 (2003).

31. See id.

imagined as a subject who possesses a full range of capacities.[32] Under capacity-based ideas of personhood, if a person is deemed to lack "mental capacity," third parties may be given substantial latitude to make decisions on their behalf—to further their perceived "best interest."[33]

Capacity-based ideas of legal personality treat capacity as a fixed quantity that courts and mental health professionals can measure.[34] Incapacity justifies paternalistic interventions in the lives of disabled persons, such as guardianship laws that implement substitute decision-making.[35] The guardian acts as the legal representative of the disabled person.[36] Guardians may control some or all of the decisions in a person's life, including control of financial, health care, voting, marriage, socializing, and employment decisions.[37] Britney Spears, for example, was under both a guardianship of her estate and her person, giving her guardian substantial power over her everyday decisions.[38] Although ethical guidelines ostensibly exist to promote well-being and self-determination, many people under guardianship experience vulnerability

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32. See Lucy Series, supra note 12, at 81.

33. Id.

34. Id. at 82–84.

35. Id. at 84.

36. See Beyond Guardianship, supra note 10, at 102.

37. Id.

38. See, supra notes 1–8 and accompanying text.

as the result of the absolute power vested in another person by guardianship law.[39] Guardians frequently abuse their power.[40]

It is easy to suggest that people who lack mental capacity ought to be subject to substitute decision-making because of their profound disabilities. However, capacity itself is contentious. The idea of mental capacity itself contains normative commitments in that they reflect the judgment of the person deciding how a person with capacity would ideally act.[41] In many studies, researchers find assessors unable to distinguish between decisions that indicate incapacity and decisions that are merely unwise.[42] Indeed, many disabled people have successfully argued that they had mental capacity by attributing their decisions to other causes—for example, religious beliefs or a "challenging personality."[43] Empirical research therefore suggests that decisions about whether someone lacks capacity are fraught and value-laden.[44]

Moreover, guardianship atrophies mental capacity.[45] A disabled person's perceived best interest must therefore be balanced against the evils of guardianship—which include diminished "autonomy, individuality,

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39. Id.

40. Id.

41. See Lucy Series, supra note 12, at 82.

42. Id.

43. Id.

44. Id. at 87.

45. Beyond Guardianship, supra note 10, at 102.

self-esteem, and self-determination."[46] Some scholars even suggest that guardianship treats someone's property as more closely tied to their best interest than personal well-being.[47] People under guardianship frequently experience low self-esteem, social isolation, and decreased health outcomes—even when their guardianships are not abusive.[48]

Put simply, capacity-based ideas of legal personality deny people fundamental rights based on the idea that they lack capacity. Instead of making their own decisions, people under guardianship are subject to substituted decision-making.[49] The sections that follow question the necessity and prudential value of substitute decision-making, especially in legal representation.

B. Toward a Support-Based Model of Legal Personhood

Support-based models of legal personhood adopt a paradigm of "universal legal capacity."[50] The support-based model is endorsed by the United Nations Committee on the Rights of Persons with Disability.[51] Article 12 of the Convention on the Rights of Persons with Disabilities concerns equal recognition before the law and states: "States Parties shall recognize that persons with disabilities enjoy legal capacity on an

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46. Id.

47. Id.

48. Id. at 102–03.

49. Id. at 132.

50. See Lucy Series, supra note 12, at 80.

51. Id. at 80–81.

equal basis with others in all aspects of life."[52] This Article represents a radical departure from capacity-based models of personhood. Indeed, the Convention on the Rights of Persons with Disabilities Committee clarified their stance on equality before the law, jettisoning capacity-based approaches to legal personhood altogether in a General Comment.[53]

The 2014 General Comment clarifies the substance and content of the above provision, noting that many States' parties had previously misunderstood it.[54] The Comment notes that disabled peoples' legal capacity is frequently denied by law; however, the right to equal recognition implies universal legal capacity.[55] Legal capacity and mental capacity are "distinct concepts."[56] The Comment therefore boldly declares that denying a person legal capacity on the basis of their mental

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52. Convention on the Rights of Persons with Disabilities, art. 12, ¶ 2, Mar. 30, 2007, 2515 U.N.T.S. 3, available at https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf [https://perma.cc/UUQ2–3QSB].

53. Comm. on the Rights of Persons with Disabilities, General Comment No. 1 on Art. 12: Equal Recognition Before the Law, U.N. Doc. CRPD/C/11/4 (Apr. 11, 2014), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement [hereinafter General Comment].

54. Id. ¶ 3.

55. Id. ¶ 8.

56. Id. ¶ 13.

capacity is discrimination on the basis of disability.[57] In the Comment, the Committee argues:

> The concept of mental capacity is highly controversial in and of itself. Mental capacity is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon. Mental capacity is contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity.[58]

Two strands of argument run through this passage. First, the Committee is rejecting mental capacity as an immutable fact. C apacity is malleable. Second, because there is no objective way to measure capacity, legal capacity might be arbitrarily denied to persons on the basis of their perceived incapacity. Because disability frequently serves as a proxy for mental capacity, discrimination on the basis of disability is likely under a regime that considers mental capacity to be a prerequisite to legal capacity.

A shift toward universal legal capacity means that governments must not deny people legal capacity through substituted decision-making. Substituted decision-making is any system where:

> (i) legal capacity is removed from a person, even if this is in respect of a single decision; (ii) a substitute decision-maker can be appointed by someone other than the person concerned, and this can be done against his or her will; and (iii) any decision

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57. Id. ¶ 28.

58. Id. ¶ 14.

> made by a substitute decision-maker is based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences.[59]

Support-based paradigms avoid substituted decision-making by prioritizing the expressed preferences of disabled people and supporting them in enacting those preferences.[60] Support may be either formal or informal and may vary in intensity.[61] For some people, support means peer support or advocacy by other disabled people.[62] For other people, universal design and accessibility measures might be necessary, meaning that institutions such as banks might be required to provide information in accessible formats—ranging from braille to more accessible language.[63]

Regardless of form, support is intended to enable disabled people to enact their express preferences. As the Committee explains, "[t]his means that persons with disabilities must have the opportunity to live independently in the community and to make choices and to have control over their everyday lives, on an equal basis with others . . . ."[64] The onus is therefore placed on institutions like governments, courts, and financial

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59. Id. ¶ 27.

60. Id. ¶ 14.

61. Id. ¶ 17.

62. Id.

63. Id.

64. Id. ¶ 44.

institutions to rectify structural injustices, rather than on the individual, to navigate inaccessible services. Disabled people should not have to navigate a world that is not designed for them—rather, universal design ought to be incorporated at every step of the process.

C. The Current Status of Supported Decision-Making in the United States

The United States has not ratified the Convention on the Rights of Persons with Disabilities. In 2014, the Senate voted on the Treaty; however, the ratification effort fell five votes short.[65] Nonetheless, the National Council on Disability, an independent federal agency comprising disability experts who advise on matters of disability policy, compiled a report on the status of American disability law in relation to the Convention.[66]

The National Council on Disability identified substantial gaps in U.S. law pertaining to disability. Regarding Article 12, the Council notes that legal capacity is generally determined at the state level.[67] When challenged, these state laws are subject to rational basis tests per City

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65. Josh Rogin, Senate GOP Rejects U.N. Disabilities Treaty, Foreign Pol'y (Dec. 4, 2012), https://foreignpolicy.com/2012/12/04/senate-gop-rejects-u-n-disabilities-treaty/ [https://perma.cc/S7LC-KAUS].

66. See generally Nat'l Council on Disability, Finding the Gaps: A Comparative Analysis of Disability Laws in the U.S. to the U.N. Convention on the Rights of Persons with Disabilities (2008) [hereinafter Finding the Gaps].

67. Id.

of Cleburne v. Cleburne Living Center, Inc.[68] Per Cleburne, disability classifications are not suspect but rather need only be rationally related to a legitimate government interest.[69] Because rational basis scrutiny requires only that disability law be rationally related to a legitimate government interest, the Council notes that courts rarely subject state guardianship laws to much scrutiny.[70]

Some commentators argue that the Americans with Disabilities Act prohibits guardianship and substituted decision-making via the Title II Olmstead mandate.[71] In Olmstead, the Supreme Court held that the "unjustified placement or retention of persons in institutions" is a form of disability discrimination.[72] The Court further held that treatments and

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68. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (holding discriminatory zoning requirements prohibiting homes for people with mental disabilities from building in an area were not rationally related to a legitimate government interest).

69. Id. It is also noteworthy that Cleburne is one of the few instances where disability discrimination has failed the rational basis test.

70. See FINDING THE GAPS, supra note 66 at art. 12.

71. See, e.g., Leslie Salzman, Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans With Disabilities Act, 81 U. COL. L. REV. 158 (2010).

72. Olmstead v. L.C. by Zimring, 527 U.S. 581, 587 (1999).

services for qualified individuals with disabilities should be provided in settings "least restrictive of the person's personal liberty."[73]

Legal scholar, Leslie Salzman, uses the logic of Olmstead to argue that guardianship itself is a form of disability discrimination under the ADA.[74] The Olmstead Court concluded that the ADA prohibits the unjustified segregation and isolation of disabled people.[75] Guardianship of the person might be considered unnecessarily isolating, as people's decisions about when, where, and with whom to socialize with are taken away.[76] Guardianship of one's estate may be viewed in a similar light.[77] Moreover, guardianship is a state service or program and therefore is subject to the Olmstead mandate.[78] Probate judges are not always informed about their obligations under the ADA.[79] Salzman finds that judges do not tend to enact less restrictive forms of guardianship even when they are available.[80]

Contrary to Salzman's argument, however, the Olmstead decision allows for guardianship in situations where the person is deemed

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73. Id. at 599.

74. Salzman, supra note 71, at 162.

75. Olmstead, 527 U.S. at 587.

76. Salzman, supra note 71, at 188.

77. Id.

78. Id.

79. See id. at 175.

80. Id.

incapacitated.[81] Writing the opinion in Olmstead, J. Ginsberg stated: "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings."[82] The Olmstead mandate applies only to "qualified" individuals with disabilities, which means a person must meet eligibility requirements for the receipt of services in community settings as determined by a medical professional.[83] Therefore, being deemed incapacitated by a medical professional (something that often happens prior to guardianship hearings) is likely to justify guardianship under existing federal law.

Nonetheless, supported decision-making is gaining traction. By 2018, nineteen states had passed versions of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA).[84] The Uniform Act makes guardianship a last resort[85] and provides due process to people involved in guardianship hearings.[86] The Uniform Act would bring state laws in line with the demands of disability advocates.

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81. Olmstead, 527 U.S. at 601.

82. Id.

83. Id.

84. Unif. Guardianship, Conservatorship, & Other Protective Arrangements Act: Summary (Unif. Law Comm'n 2017), https://www.guardianship.org/wp-content/uploads/2018/04/UGCOPAA-Summary-Oct-2017.pdf [https://perma.cc/WZU5-JRCQ] (last visited Sept. 30, 2021).

85. Id. § 302(b)(4).

86. See id.

The disability community has strongly argued for solutions that transcend guardianship.[87] That said, the Uniform Act is not the law of the land by any means. For example, the last time that sixteen states revised their guardianship statutes was before the Reagan administration.[88]

Supported decision-making regimes are growing in popularity and gaining traction internationally.[89] Supported decision-making eschews substituted decision-making for a model that prioritizes disabled people's expressed preferences.[90] Supported decision-making models enable disabled people to live independent, self-determined lives that would not be possible under guardianship.[91] Nonetheless, U.S. laws and norms, especially regarding the Model Rules of Professional Conduct for lawyers, do not prioritize self-determination for disabled clients.[92] The section that follows outlines the ways in which the Model Rules undermine disabled clients' ability to interact with their attorneys on an equal basis.

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87. See, e.g., BEYOND GUARDIANSHIP, supra note 10, at 4.

88. Benjamin Orzeske & Diana Noel, Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act, Presentation at the National Conference on Guardianship (October 20–23, 2018), https://www.guardianship.org/wp-content/uploads/2018/09/UGCOPPAAct_presentation.pdf [https://perma.cc/6E5F-2GG4].

89. See id. at Subsection II.B.

90. Id.

91. Id.

92. See id. at Part III.

III. The Ethical Attorney and the "Incompetent" Client

Returning to the case of Britney Spears, Britney Spears acquired a new attorney.[93] However, that attorney's hands might have been tied regarding the dissolution of her guardianship. If he deemed her to have "diminished capacity," the Model Rules of Professional Conduct would have required him to act in Britney's perceived best interest rather than respect her wishes.[94] The ethical rules that bind attorneys frequently conflict with the self-determination and independence of clients with "diminished capacity." Although ethical rules vary by state, this paper concerns itself with the Model Rules of Professional Conduct. This section discusses some of the ways in which rules of professional conduct fail to comport with the shift toward supported decision-making within the disability rights community and international examples of best practice.

A. Model Rule 1.14: Client with Diminished Capacity

Model Rule of Professional Conduct 1.14(a) requires lawyers to maintain normal lawyer-client relationships "as far as reasonably possible"[95] when dealing with clients. Presumptively, clients are to be treated as capable of making their own decisions per the Model Rules of Professional Conduct.[96] However, Rule 1.14(b) makes a series of

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93. See Coscarelli, supra note 6.

94. Model Rules of Pro. Conduct r. 1.14 (Am. Bar Ass'n 2021).

95. Id. § 1.14(a).

96. Id.

exceptions for clients who suffer from "a diminished mental capacity."[97] Per the Comment accompanying Rule 1.14, "severely incapacitated person[s]"[98] may not have any power to make legally-binding decisions.[99] Nonetheless, lawyers are required to take into account all clients' preferences to the extent that they can have weight in legal proceedings.[100] The Comment likens incapacitated clients to children in custody proceedings who might have a preference regarding where to live that ought to be taken into account.[101]

While the Model Rules require disabled people to be treated with "attention and respect"[102] and to "accord the represented person the status of client,"[103] the relationship between the Rules and capacity has been fraught. Rule 1.14 outlines three situations in which lawyers may make decisions for their clients. First, if the client has diminished capacity, and a lawyer has reason to believe that the client is at risk of substantial harm unless they act, the lawyer can and ought to take protective action.[104] Second, a lawyer may disclose a client's condition in an attempt to seek the appointment of a legal representative such as a

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97. Id. § 1.14(b).

98. "Severely incapacitated person" is not defined by Model Rule 1.14.

99. MODEL RULES OF PRO. CONDUCT r. 1.14 cmt. 1 (AM. BAR ASS'N 2021).

100. Id.

101. Id.

102. Id. at cmt. 2.

103. Id.

104. Id. § 1.14(b).

guardian.[105] Finally, in emergency situations where a client is in danger of "imminent and irreparable harm," a lawyer may take action even if that person has not established an attorney-client relationship.[106] It is important to note that these exceptions apply only if a client is deemed to have diminished capacity. Therefore, the Model Rules arguably only justify substituted decision-making for disabled people.[107] Yet, the rules provide little guidance to attorneys who might have preconceived ideas of their client's "best interests" and their ethical obligations to further those interests.

The American Bar Association recognizes that capacity is fluid, that our understandings of capacity are evolving, and that recent legal developments call the term capacity itself into question.[108] Writing for the Commission on Law and Aging, Sabatino and Wood discuss how the ABA recognizes that substitute decision-making may diminish clients' capabilities further, enforce a singular standard for capacity, and lead

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105. Id. § 1.14(c).

106. Id. § 1.14, cmt. 9.

107. The term disabled as used here is broad and encompasses people incapacitated as the result of, e.g., age, as well as individuals with intellectual and developmental disabilities.

108. See Charlie Sabatino & Erica Wood, The Ten Commandments of Mental "Capacity" and the Law, 40 Am. Bar Ass'n Comm'n on Law and Aging: Bifocal (Sept.–Oct. 2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-40/issue-1-september-october-2018/10-commandments/.

lawyers to err in making decisions for their clients.[109] However, instead of jettisoning the problematic category of mental capacity, Sabatino and Wood argue for a "big picture" approach that asks whether a client has the capacity to make a certain decision.[110] While this is undoubtedly a step in the right direction, this approach still relies on problematic and variable ideas about mental capacity to take away the autonomy of disabled people. People with impairments that diminish mental capacity are part of the disability community, either by function of a permanent or disability or age-related impairments. The Model Rules only question the ability of clients with diminished capacity to make decisions—meaning that the same decisions made by non-disabled persons would not be subject to the lawyer's scrutiny.[111] This double standard creates potential for ableist lawyers to deny their clients' capacities to make legal decisions. Because the attorney is the arbiter of their clients' capacities, and lawyers are not immune to bias, allowing lawyers to exert this type of power over their clients' risks denying people the fundamental right to adequate counsel.

However, even if an attorney did not intend to be ableist, the Model Rules create an "ethical minefield" for even the most sympathetic attorneys.[112] The following section discusses some of the ethical challenges inherent to representing disabled clients.

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109. Id.

110. Id.

111. See Model Rules of Pro. Conduct r. 1.14 (Am. Bar Ass'n 2021).

112. Henry Dlugacz and Christopher Wimmer, The Ethics of Representing

B. Navigating the "Ethical Minefield:" Representing Disabled Clients

Representing clients with diminished capacity presents attorneys with an "ethical minefield" under the Model Rules.[113] Dlugacz and Wimmer outline a hypothetical to demonstrate the potential problems that arise during such representation.[114] Ms. X is sixty-eight and lives in a one-bedroom apartment. She has no children but has an estranged half-brother and other family members.[115] She was diagnosed with schizophrenia and paranoia but developed severe reactions to the medication prescribed by her doctor.[116] Due to the reactions, Ms. X ceased taking her medication and does not view herself to be mentally disabled.[117]

Recently, Ms. X's apartment has become dilapidated.[118] Her electricity is frequently cut off due to failure to pay her bills.[119] She was referred to the City's Adult Protective Services (APS) by her neighbors.[120] As of late, she is the subject of guardianship proceedings because she

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Clients with Limited Competency in Guardianship Proceedings, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331, 332 (2011).

113. Id.

114. Id.

115. Id. at 332–33.

116. Id. at 333.

117. Id. at 333–34.

118. Id. at 333.

119. Id.

120. Id.

is engaging in hoarding behaviors and failing to take her medicine or consult with her psychiatrist.[121] Ms. X hired an attorney to oppose her guardianship proceedings—what are her attorney's ethical obligations?[122] The Model Rules would require that Ms. X's attorney consider whether she has diminished capacity.[123] Her attorney would likely find that she has diminished capacity due to her diagnosis of schizophrenia and paranoia. Therefore, under Model Rule 1.14, Ms. X's attorney would be faced with a dilemma.[124] Should the attorney zealously represent Ms. X's stated preference of not being placed under guardianship or substitute their judgment for that of Ms. X?

Dlugacz and Wimmer outline a four-part normative framework that solves this problem.[125] However, it differs from the model prescribed by Rule 1.14. Dlugacz and Wimmer argue that: (1) autonomy should be paramount; (2) attorneys should respect the choices of competent clients; (3) when a client's capacity is limited, the attorney should only intervene in the short-term to facilitate autonomy in the long-term; (4) attorneys should constantly doubt their determinations.[126] These principles are

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121. Id.

122. See id. at 333–34.

123. See MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2021).

124. Dlugacz and Wimmer, supra note 112, at 334–43

125. Id.

126. Id.

similar to but distinguishable from the Model Rules of Professional Conduct, per the authors' admission.[127]

First, the Model Rules adopt a means-end distinction.[128] Clients are to decide the ends of representation, whereas the attorney can generally decide the means of achieving those goals.[129] However, the means-end distinction is not always congruent with autonomy and may make even representation more difficult.[130] For example, a client experiencing paranoia may suspect her attorney of undermining her if the attorney makes decisions without including her.[131] Ideally, to preserve autonomy, clients ought to be consulted tactically to the extent practicable.[132] Yet, the Model Rules do not currently require this.

Moreover, commentators note that determining whether a client has diminished capacity is difficult. As noted earlier, the lines between unwise and incapacitous[133] decisions are often blurred.[134] An attorney representing Ms. X, for example, may view her hoarding behaviors as evidence of limited capacity, whereas she might simply be a person

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127. Id. at 343.

128. Id. at 344–45.

129. Id.

130. Id. at 345.

131. Id.

132. Id. at 346.

133. While a person may be incapacitated, a decision is incapacitous.

134. See Lucy Series, supra note 12, at 80.

who enjoys living in cluttered spaces.[135] Attorneys representing disabled clients must be careful not to project their own ideas about their client's best interest onto the situation when determining whether they have diminished capacity. As argued previously, judgments about whether someone is incapacitated frequently confuse the ideas of capacity and wisdom, leaving disabled people unable to make decisions their attorneys deem to be "unwise."[136] Rule 1.14 allows for substitute decision-making when attorneys believe their client to have "diminished capacity," giving attorneys significant latitude to substitute their judgment for that of their clients'. The concentration of power in the hands of the attorney rather than the client risks undermining clients' autonomy in significant ways.

The Model Rules give attorneys confusing guidance when they are representing people in guardianship hearings. For example, should an attorney zealously represent their client in their pursuit to avoid guardianship? Or should they substitute their judgment about their client's best interests in the face of perceived harm? As discussed in Part II.C, many states' guardianship laws do not require guardianship to be the least restrictive alternative, and many of these statutes have not been updated since at least the 1980s.[137] Therefore, attorneys representing clients in this context must advocate for their clients' autonomy more aggressively than they might need to if these statutes were in line with

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135. See Dlugacz and Wimmer, supra note 112, at 346.

136. See Lucy Series, supra note 12, at 82.

137. See supra note 85, and accompanying text.

current best practices. Yet, the Model Rules might suggest that these clients' expressed preferences should not be zealously represented in situations when the attorney perceives that the client might be in harm's way.[138]

Even in the most progressive states, attorneys defending against a guardianship proceeding have conflicting obligations to their clients. Attorneys are required to promote the interest their client seeks—frequently avoiding guardianship altogether. However, they also must keep clients with diminished capacities' best interest in mind[139]—hence, the "ethical minefield" discussed above.

As Dlugacz and Wimmer note, what seems good to a client at any given moment may not be the action that facilitates long-term autonomy interests.[140] However, this paper argues that attorneys ought to exercise caution when making decisions that go against their clients' expressed preferences, especially during guardianship proceedings. Nonetheless, Dlugacz and Wimmer rightfully note that the current rules create ethical conundrums for attorneys representing their clients in guardianship hearings.[141]

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138. Cf, Model Rules of Pro. Conduct r. 1.14 cmt. 5, (Am. Bar Ass'n 2021) ("If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken . . . then paragraph (b) permits the lawyer to take protective measures deemed necessary.").

139. See Dlugacz and Wimmer, supra note 112, at 356.

140. Id.

141. See id. at 346.

It is particularly problematic that attorneys who are representing disabled clients in guardianship hearings are given conflicting advice. Guardianship hearings are a situation where clients need zealous representation to promote due process and prevent injustice. Most guardianships are permanent.[142] Moreover, courts routinely fail to take advantage of less restrictive alternatives. The National Council on Disability's study found that ninety-four percent of guardianship positions are granted, and few put any form of limitation on the guardian's authority.[143] The stakes are therefore high for clients facing a guardianship proceeding.

However, it is difficult for attorneys to zealously defend their clients' long-term interests in maintaining their autonomy during guardianship hearings while adhering to the Model Rules. The Model Rules would have attorneys be complicit in stripping their clients' autonomy when they think it is in their client's best interest.[144] Yet, the Model Rules do not instruct attorneys about resolving conflicts between short-term harm prevention and long-term consequences like the loss of autonomy through guardianship. Section C discusses how the lack of access to attorneys in guardianship proceedings further complicates this issue.

C. Lack of Access to Attorneys

The plight of disabled people seeking to avoid unnecessary paternalism is exacerbated by the unavailability of counsel in

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142. See generally BEYOND GUARDIANSHIP, supra note 10.

143. Id. at 86.

144. See MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2021).

guardianship proceedings. Guardianship creates a form of "civil death"—a person frequently loses their right to hold property, manage their affairs, and even vote.[145] Nevertheless, some states do not even allow counsel in guardianship hearings.[146] Even where attorneys are allowed, it is uncommon for people facing guardianship proceedings to have access to counsel. According to a national study of guardianship hearings, only one-third of people are represented by attorneys in guardianship hearings.[147] Most guardianship hearings last less than fifteen minutes, and twenty-five percent of hearings last less than five minutes.[148]

Even in states that recognize that disabled people have the right to counsel in guardianship proceedings, attorneys do not always zealously represent their clients because of conflicts in ethical rules.[149] The right to counsel may even be qualified in some circumstances. For example, some states allow courts to appoint attorneys or require the person subject to guardianship proceedings to bear the burden of legal and expert fees associated with challenging their status.[150] The lack of access to attorneys creates a system in which people under guardianship

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145. See generally BEYOND GUARDIANSHIP, supra note 10, at 17.

146. Id. at 85.

147. See id.

148. Id.

149. Id. at 88.

150. Id.

are unaware of their rights, as Britney Spears was.[151] Moreover, it creates a fertile ground for due process violations.

Even though due process violations are rampant in guardianship proceedings, federal courts will generally not accept appeals to ongoing guardianship cases.[152] Because there is no right to appeal, or even have counsel who zealously promotes disabled clients' interests, well-intending lawyers may trap their clients into permanent guardianships by substituting their own opinions about the disabled person's temporary best interest for the expressed preference of the disabled person.[153] Given the exigencies of the current system, the Model Rules ought to take a firmer stance on the autonomy of disabled clients in guardianship proceedings—the system is already stacked against them. Section IV proposes changes to the language of Rule 1.14 to facilitate this shift.

IV. Implementing Support Through Changing Model Rule 1.14

As discussed throughout this paper, the law imposes a double standard on the representation of disabled clients that does not apply to

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151. See supra notes 1–7 and accompanying text.

152. See Beyond Guardianship, supra note 10, at 87.

153. Arguably, this is a reason for introducing a right to counsel into guardianship proceedings. However, as noted above, even if people secure counsel, the ethical rules surrounding advocacy for disabled clients create significant ethical dilemmas for attorneys representing such clients that might end up undermining their autonomy in the long-term. Nonetheless, this is beyond the scope of this paper.

non-disabled clients. Non-disabled clients enabled to behave wantonly, without regard to their own best interest, and attorneys have little recourse to intervene in these situations.[154] Yet, disabled people are routinely subject to substitute decision-making regimes, and the Model Rules reinforce the idea that substitute decision-making is acceptable.

This paper suggests that legally binding, formalized supported decision-making agreements between lawyers and their clients ought to be implemented. The Model Rules of Professional Conduct should require such agreements. Creating contractual boundaries between attorneys and prospective clients would clarify the parameters of attorney intervention and allow attorneys to zealously pursue their client's best interest and expressed preferences simultaneously.

A. What Should Supported Decision-Making Look Like?

Supported decision-making puts the person with a disability in charge of their own decisions.[155] Supported decision-making arrangements vary in degrees of formality and explicitness; however, such agreements involve people selecting trusted advisors to serve as "supporters."[156] Supporters agree to help disabled people understand, consider, and communicate their decisions—but the ultimate decision-making authority

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154. Cf. MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2021).

155. Supported Decision-Making: Frequently Asked Questions, ACLU (Aug. 25, 2019), https://www.aclu.org/sites/default/files/field_document/faq_about_supported_decision_making.pdf [https://perma.cc/Q5N4-QZ5J].

156. See Lucy Series, supra note 12, at 80.

rests with the disabled person.[157] Attorneys are arguably in an ideal position to serve as supporters. They are people with whom clients develop confidence and are able to provide advice regarding outcomes. An attorney can help disabled people understand the ramifications of their decisions, make their decisions, and communicate and enact their decisions through legal processes.

Support may take a variety of forms but generally includes tools such as plain language explanations, time to discuss choices, helping the disabled person create pro-con lists, role-playing activities to understand choices, bringing supporters to important appointments to help the person remember, record, and discuss their options, and other necessary steps.[158]

Some states create formalized contracts between supporters and disabled people. For example, Texas allows people with disabilities to sign formal, legally binding documents allowing supporters to take certain actions on their behalf while setting restrictions on what the supporter may do and how they take action.[159] The Texas form consists of a checklist that states the scope of support—for example, can the supporter help the disabled person in obtaining food, clothing, and shelter?[160] However, the contract also emphasizes that supporters

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157. ACLU, supra note 155.

158. Id.

159. Id.

160. See Supported Decision-Making Agreement, Texas Law Help (Apr. 14, 2021), https://texaslawhelp.org/sites/default/files/

are not allowed to make decisions for people who seek these arrangements.[161] Instead, supporters are limited to helping people access information, understand their options, and communicate their preferences to others.[162] The explicit documentation helps ensure that supporters do not overstep their boundaries and creates meaningful expectations on both sides of a partnership. This paper proposes that the Model Rules and corresponding commentary should be changed to encourage the creation of formalized supported decision-making agreements.[163] Texas could serve as a model for how this should be carried out.[164]

Making supportive agreements legally binding and part of forming the attorney-client relationship would be an important step toward ensuring zealous representation of clients with disabilities. Attorneys who sign

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supported_decision-making_agreement_2019_3.pdf [https://perma.cc/2878-ABKA].

161. Id.

162. Id.

163. Model language will be proposed in Section IV.C.

164. Supported decision-making has been gaining traction on a global level as well. For example, the Province of British Columbia in Canada allows disabled people to make supported decision-making arrangements with others even if they are legally incapacitated. The law has been cited as an example of best practice by the Convention on the Rights of Persons with Disabilities Committee. See Province of British Columbia Representation Agreement Act, R.S.B.C. 1996, c 405 (Can.).

such agreements may be less likely to support autonomy-stripping measures such as guardianship for their clients.

B. What About People Who are "Too Impaired"?

A common concern about supported decision-making is that some people are "too impaired" to benefit from supported decision-making. Severely cognitively impaired people might be subject to manipulation by family members and other people seeking to control their assets. Therefore, lawyers must act to prevent such individuals from suffering grave harm. The Convention on the Rights of Persons with Disabilities Committee shares this fear, stating that a balance must be struck between preventing undue influence and respecting expressed preferences.[165]

Undue influence certainly raises concerns to which lawyers should be attuned, and cognitively disabled people, in particular, are likely to be subjected to undue influence.[166] Yet, on some level, the critiques of mental capacity raised in Subsection II.B still remain true. First, it is incredibly difficult to determine whether someone is deciding to do something because they are incapacitated or merely unwise.[167] The law does not prevent the latter category of decision-making for anyone but disabled persons.[168] A lawyer may also interject their own perspectives on capacity when deciding whether their client lacks capacity—such

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165. General Comment, supra note 53, at ¶ 22.

166. Id.

167. See supra Part III.B.

168. Cf. MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2021).

as a lawyer who enjoys clean spaces thinking Ms. X was incompetent because she kept her house in disarray. [169] To some extent, disabled people's decision-making is held to a far more stringent standard than non-disabled people—they may face more pressure to make the "right" decision. However, making mistakes, even grievous ones, is allowed for all other categories of citizens. Presuming that disabled people cannot make decisions for themselves often creates "self-fulfilling prophesies" where their decision-making abilities atrophy.[170]

Although attorneys are arguably in the best position to recognize undue influence, they must constantly scrutinize their own impressions.[171] Oftentimes, attorneys might be more likely to perceive undue influence where it does not exist due to their own implicit biases.

Fundamentally, the argument that certain people are simply too impaired to make their own decisions ignores the ways in which society is set up to keep people from making autonomous decisions. For example, disabled people are frequently placed in institutional settings where their behavior is heavily monitored.[172] Twenty-three percent of individuals with intellectual and developmental disabilities lived in large congregate care facilities in 2016.[173] This has been shown to

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169. See supra Part III.B.

170. See generally Heather Swadley, Toward a Support-Based Theory of Democracy, 93 Res Phil. 971 (2016).

171. See Dlugacz and Wimmer, supra note 112, at 343.

172. See supra notes 9–18 and accompanying text.

173. U.S. Dep't of Health and Hum. Serv., Reduce the proportion of people

atrophy decision-making capacities.[174] Yet, the Pennhurst Longitudinal Study, which examined adults with every category of disability, revealed that previously institutionalized individuals (even those with "severe" impairments) thrive in their communities when given the appropriate supports.[175]

The fact that capacity is malleable, capacity is difficult to measure, and that support actually enables people to live autonomously should give lawyers serious pause. The Model Rules presume that clients with diminished capacity ought to be held to a different standard than non-disabled clients. This paper suggests otherwise. Disabled people can and do make their own decisions in a variety of settings, and supportive arrangements can assist people in making those decisions autonomously. The Model Rules of Professional Conduct, specifically section 1.14, should be modified to support lawyers in representing clients who are far too frequently subjected to substitute decision-making models. Disabled clients should be involved in their own representation to the same extent as other clients.

WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES WHO LIVE IN INSTITUTIONAL SETTINGS WITH 7 OR MORE PEOPLE, DH-03 (accessed Mar. 11, 2021).

174. See generally Marinus H. van IJzendoorn et al., Children in Institutional Care: Delayed Development and Resilience, 76 MONOGR. SOC. RESH. CHILD. DEV. 8 (2011).

175. See generally DOWNEY AND CONROY, supra note 14.

C. Proposed Language

This paper proposes that the Model Rules of Professional Conduct be changed to bring them in line with international norms and identifies best practices within the disability community. The Convention on the Rights of Persons with Disabilities provides a model for how this could work.[176] Currently, Model Rule 1.14 reads:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about

176. See Convention on the Rights of Persons with Disabilities, supra note 52.

> the client, but only to the extent reasonably necessary to protect the client's interests.[177]

This paper proposes amending Rule 1.14 to read:

> (a) A lawyer shall maintain a normal client-lawyer relationship with a client irrespective of their mental capacity. If a lawyer believes that a client needs additional support to develop or communicate their preferences, the lawyer and client shall institute a supported decision-making agreement that outlines the scope and contours of the lawyer's representation.
>
> (b) A client's expressed interests are to be respected, irrespective of a lawyer's views regarding whether their decisions are wise. If the lawyer believes that the client is in serious risk of substantial physical, financial, or other harm or acting under the undue influence of another, the lawyer is authorized to express these opinions and provide the client with information in an accessible manner about their options. The ultimate decision-making authority rests with the client.
>
> (c) A lawyer shall maintain a client's confidences, irrespective of their mental capacity.
>
> (d) When a client's expressed preferences cannot be ascertained, a lawyer shall act in the way that best preserves their client's long-term interest in autonomy.

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177. MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2021).

(e) A lawyer shall zealously represent the client's interests, irrespective of the client's perceived or actual mental capacity.

This wording would constitute a radical revision of Rule 1.14. However, such revision is necessary to ensure that the rights of disabled people are zealously protected by their lawyers. The proposed language creates an affirmative obligation on the part of attorneys to institute supported decision-making agreements with their clients. No doubt, this proposal will face objections from well-intentioned people afraid of disabled people putting themselves in precarious situations. Disabled clients may not make decisions that comport with their attorney's judgment; however, it is vital that they be allowed to do so. However, disabled people should be allowed to make the full range of decisions available to non-disabled people, including the ability to make bad decisions. To act otherwise has the tendency to value disabled people's property over their personhood.[178]

V. Hypotheticals

At this point, professional responsibility professors would likely bring up several hypotheticals in response to this paper's proposed solution. Supported decision-making, it might be argued, is good in theory but rarely in practice. This paper seeks to refute the logic underlying these types of hypothetical (and actual) scenarios In what follows.

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178. See Beyond Guardianship, supra note 10, and accompanying text.

A. "The Unabomber"

Theodore Kaczynski committed several heinous atrocities and evaded capture for more than a decade.[179] He was a highly intelligent person with higher-than-average functional capacities.[180] However, evidence suggested that Kaczynski was mentally ill.[181] He was highly paranoid and, according to some accounts, was schizophrenic.[182] His attorneys thought that an insanity defense would be difficult to prove and instead felt like his strongest defense was that he was mentally incapacitated.[183] Proof of incapacity would have negated mens rea and also could be used as a mitigating factor during sentencing.[184] Given that Kaczynski faced severe penalties up to the death penalty, his legal counsel thought that avoiding the death penalty should be the primary goal at trial.[185]

However, Kaczynski did not view himself as insane.[186] He objected to his lawyers' characterization of his mental status and thought that examination by a mental health professional would invade his privacy

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179. Joel S. Newman, Doctors, Lawyers, and the Unabomber, 60 U. MONT. L. REV. 67, 68 (1999).

180. Id.

181. Id.

182. Id. at 71–72.

183. Id. at 68.

184. Id.

185. Id.

186. Id.

in an unacceptable manner.[187] He moreover believed that a mental health diagnosis would be personally repugnant—he could not bear being deemed a "sickie."[188] Even though Kaczynski agreed with his legal team's assessment of the defenses available to him, he preferred to risk the death penalty instead of submitting to the humiliation of a public probe into his mental health status.[189]

Kaczynski's decision created an ethical dilemma for his attorneys. Should they violate their obligation of loyalty to their client, or should they maintain loyalty, knowing that it would inhibit their opportunity to zealously defend their client's interests?[190] Kaczynski exhibited signs of competence—he had lived in the world, was highly intelligent, and had evaded capture for years.[191] His views were pathological, but it was unclear that they were the result of lapses in reason.[192] His legal counsel could accept Kaczynski's right to make a decision that by all accounts was unreasonable, unwise, and would likely lead to his death, or they could have him deemed incapacitated by the court and potentially save his life.[193] Kaczynski's lawyers (after several court-appointed changes)

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187. Id.

188. Id.

189. Id. at 69.

190. Id.

191. Id.

192. Id.

193. Id.

ultimately went against his wishes, and the judge denied Kaczynski's motion to represent himself.[194]

What would the Model Rules say about Kaczynski's situation? What would support-based models say? Kaczynski's lawyers likely acted in accordance with the Model Rules, even though Rule 1.14's guidance is exceedingly unclear. The lawyers perceived that Kaczynski's capacity was diminished by way of his mental health condition and that he was at risk of "substantial physical, financial or other harm" in the absence of their actions.[195] However, Kaczynski's lawyers not only violated their client's trust; they violated Kaczynski's self-determination. It is highly possible and probable that Kaczynski viewed death to be a more desirable option than, e.g., life in a mental health institution. While there is some discomfort associated with letting clients make bad decisions, to some extent, attorneys must allow their clients to do so. For example, clients are perfectly entitled to reject reasonable settlement offers in the face of a riskier trial.[196] The consequences are less grievous; however, the point stands that the Model Rules generally allow clients wide latitude to make bad decisions—unless they are disabled. This paper's proposed language merely seeks to make the

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194. Id. at 79.

195. MODEL RULES OF PRO. CONDUCT r. 1.14(b) (AM. BAR ASS'N 2021).

196. See MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983) (maintaining that clients should have control over the "objectives" of litigation).

Model Rules' treatment of disabled persons congruent with its treatment of non-disabled persons.

The support-based model of personhood would argue that Kaczynski has a right to decide which outcome he prefers.[197] Although Kaczynski's logic seems foreign or even unthinkable to many, it is his prerogative to make his own decisions regarding the ends of representation. Model Rule of Professional Conduct 1.2 emphasizes that clients have control over the "objectives" of litigation.[198] At the very least, Kaczynski should be entitled to make that decision. However, as other parts of this paper assert, arguments exist for allowing clients to be more involved in strategy beyond merely stating their preferences.

Had Kaczynski's lawyers treated him as a co-equal participant in his criminal proceedings, perhaps, Kaczynski's paranoid tendencies might have quelled somewhat. While it would be onerous and unnecessary to solicit Kaczynski's input about every decision or motion filed, disabled clients such as Kaczynski ought to be able to dictate strategy where such strategy affects their lives in significant ways. Although Kaczynski's decision is not the decision most people would make, this was also not his attorneys' decision to make.

If Kaczynski's attorneys had followed the proposed framework, they would have maintained a normal attorney-client relationship with Kaczynski. They would have respected his preference to go to trial, even though they thought it would be unwise. Although this might seem to

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197. Cf. General Comment, supra note 53, at ¶ 4.

198. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

be an unpalatable outcome to some, allowing disabled clients to make these types of decisions is necessary to preserve autonomy and avoid discriminating against disabled clients.

B. Sesha Kittay

Sesha Kittay is the severely disabled daughter of a leading disability scholar and philosophy professor, Eva Feder Kittay.[199] Sesha does not communicate verbally, and she cannot walk.[200] According to doctors, she has "no measurable IQ."[201] According to her mother, Sesha needs continuous care and cannot be left alone.[202] Sesha currently resides in a care home.[203] In Eva Kittay's words, "no accommodations, anti-

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199. Leslie Garisto Pfaff, This Mother Knows Best, Sarah Lawrence Magazine (2016), https://www.sarahlawrence.edu/magazine/finding-courage/features/this-mother-knows-best.html [https://perma.cc/G4CD-N9AS].

200. Id.

201. Eva Feder Kittay, People with Disabilities are at a Disadvantage when Scarce Medical Resources are Being Allocated, Stat (Apr. 29, 2020), https://www.statnews.com/2020/04/29/people-disabilities-disadvantage-covid-19-scarce-medical-resources/[https://perma.cc/Z8BV-9QH3].

202. Pfaff, supra note 199.

203. Eva Feder Kittay, "Caring for the long haul: Long-term care needs and the (moral) failure to acknowledge them," 6 Int. J. of Feminist Approaches to Bioethics 66, 69 (2013).

discrimination laws, or guarantees of equal opportunity can make [Sesha] self-supporting or independent."[204]

Sesha seems to be a prime candidate for guardianship. She is unable to communicate her decisions verbally, and she lacks the capacity to make reasoned decisions.[205] One might think that the Model Rules are appropriate in cases such as Sesha's. However, this paper argues that even people who are profoundly incapacitated could benefit from a change in the model rules that clarifies attorneys' roles in guardianship proceedings.

First, it is important to note that Sesha's case is atypical rather than the norm. Most disabled people can communicate their preferences in one way or another, as evidenced by formerly institutionalized persons' abilities to integrate into their communities when provided with proper support.[206] Second, there is likely a disconnect between the interests of a client like Sesha's and the interests of her prospective guardians. A diligent attorney ought to be attuned to such conflicts. Attorneys must constantly be reminded that they are tasked with pursuing their clients' interests rather than the interests of the guardians and that working with guardians may undercut important avenues of self-determination for their clients.[207] For example, while many guardians might favor a more

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204. Eva Feder Kittay, The Ethics of Care, Dependence, and Disability, 24 Int'l J. Juris. & Phil. L. 49, 56 (2011).

205. See Pfaff, supra note 199.

206. See generally Downey & Conroy, supra note 14.

207. See generally Beyond Guardianship, supra note 10.

hands-on approach advocating in their ward's perceived best interest, supportive decision-making would consider Sesha's preferences. A client like Sesha may not be able to convey those preferences verbally. Nonetheless, attorneys can look for other clues to intuit the decisions Sesha might make for herself.

Indeed, the Convention on the Rights of Persons with Disabilities Committee foresaw this issue when drafting the General Comment on Article 12.[208] The Comment implies that professionals working with the disability community ought to be attuned to "diverse, non-conventional methods of communication, especially for those who use non-verbal forms of communication to express their will and preferences."[209] For example, Sesha might not verbally communicate her desires and may not fully understand the goals of litigation and its consequences. However, that does not mean she cannot communicate her preferences in other ways—she may simply communicate them in a way that most attorneys are not trained to understand. For instance, Sesha might express a preference for a preferred living arrangement through non-verbal behaviors. The support-based paradigm would require attorneys' due diligence to how non-verbal clients express their desires and preferences.[210]

Moreover, the proposed rule language offers an important corrective by instituting a presumption in favor of measures that preserve

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208. General Comment, supra note 53, at ¶ 17.

209. Id.

210. Id.

long-term autonomy when a client cannot communicate their expressed preferences.[211] Guidance about autonomy should be consistent with the lived experiences of disabled persons, paying particular attention to any tendency to undermine their ability to live independently in the community. Historically, disabled people have been forcibly segregated from their communities.[212] In other words, I have suggested that a presumption in favor of integrating people into their communities while providing adequate supports can enhance long-term autonomy.[213] I also argue that most, if not all, disabled people, irrespective of the severity of their disabilities, can benefit from being given varying degrees of independence and community integration.[214] The Pennhurst Longitudinal Study—showing that previously institutionalized persons studied benefitted from community integration when provided with adequate supports—regardless of the severity of their disabilities supports this conclusion.[215] By treating autonomy and independence as legally cognizable interests that clients with diminished capacity possess,

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211. See supra, Section IV.C.

212. See generally Downey & Conroy, supra note 14.

213. See generally Heather Swadley, The Politics of Naïve Integrationism: Community Integration for Disabled People and the Promises of Olmstead (2021) (PhD Dissertation, University of Pennsylvania) (ProQuest).

214. Id.

215. See Downey & Conroy, supra note 14.

lawyers will be less likely to promote solutions like guardianship that unnecessarily strip people of their autonomy.

In cases like Sesha's, the proposed rule changes to Part IV.C would provide three distinct benefits. First, the proposed rule would clarify that the lawyer's duty is to the client—that they should not cooperate with family members seeking overly restrictive forms of guardianship that would not enhance the disabled person's long-term interest in autonomy. Second, the proposed rule would require lawyers to do due diligence to determine their clients' preferences. For example, since people do not share the same preferences—a shrewd attorney should know whether the client would rather live with other disabled people or prefer to live a life integrated in her community. Finally, in cases where clients truly cannot decide the aims of litigation for themselves, the proposed rule would make preservation of autonomy the default, as opposed to historically restrictive guardianship arrangements. This change is important given the historical tendency to view capacity as fixed rather than malleable, thereby unnecessarily stripping disabled people of their autonomy.

VI. Conclusion

Under the status quo, representing disabled clients in guardianship hearings presents an ethical minefield for lawyers. Lawyers are frequently called upon to substitute their ideas of what is best for their clients for what their clients want. The Model Rules do not provide sufficient guidance to attorneys facing these dilemmas. Nor do the Model Rules protect the long-term autonomy of disabled people. Indeed, one

might argue that it is impossible for an attorney to zealously represent their client's interest in a guardianship proceeding if they disagree with their client's position. These ambiguities perpetuate an unjust system in which disabled people are often needlessly stripped of their self-determination and independence.

This paper proposes a new language for Model Rule 1.14. Instead of treating diminished capacity as an excuse for lawyers to override their clients' preferences, the proposed language requires lawyers to attend to their clients' expressed preferences. Next, this Model Rules give disabled people the right to set the terms of their representation in line with supported decision-making contracts proven effective in places like Texas and British Columbia.[216] Finally, the proposed Model Rule provides clarity in cases where clients cannot clearly express their preferences. The proposed rule implements a presumption toward enhancing the client's long-term autonomy—an important corrective to the historical tendency to needlessly strip disabled clients of their autonomy. In these ways, the proposed rule is sensitive to the concerns of the disability community while also clarifying the duties of lawyers to their disabled clients.

In the case of Britney Spears, the proposed changes to Model Rule 1.14 would have clarified her attorney's ethical obligations to her. Her stated preference was that her guardianship be terminated.[217] The justice system should be designed so that she would receive

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216. See supra, Section II.A.

217. Coscarelli, supra note 6.

zealous representation in the adversarial context that determined whether she was free to live the life she chooses, regardless of her attorney's perception of her capacity. Nonetheless, the implications of the #FreeBritney movement reach beyond Britney Spears herself—all too frequently, disabled people experience the injustices of the guardianship system without the platform that Britney has to change her circumstances. This paper argues that the Model Rules of Professional Conduct be brought in line with best practice endorsed by the disability community. Doing so would not only have freed Britney but would also ensure that other disabled people receive the same opportunity to make their own decisions.