

Jose and Sarah's Story: The Usefulness of Roleplay in an Ethically-Based Evaluation of the Present and Future Family Court

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INTRODUCTION

Few participants in court proceedings involving families would deny that the family court "system" is flawed in both the processes employed and the results produced. Yet the awesomely complex task of systemic change daunts even seasoned professionals. How can participants in this system begin a meaningful evaluation which addresses a perspective neither too narrow to be comprehensive, nor too broad to be concretely constructive?

This Article proposes one starting point for a constructive ethical approach to evaluation of both the existing family court system as well as proposed systemic change. This approach focusses upon the concrete operation of professional roles as experienced by the professionals offering services as well as by the clients receiving them. In

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I am grateful to Mary Banach, Philip Genty, Martin Guggenheim, Jim Peters, and Myles Schneider for their helpful comments on previous drafts of this essay. I was most fortunate for the research assistance of Sondra Burling and Michael Beloff. Michele Hopkins provided invaluable assistance in the preparation of this manuscript and transcription of the roleplay. This research was made possible by funding from the State Justice Institute.

a hypothetical case study, professionals undertaking this approach in a group assume various identities, including both professional and client personalities. Experiencing however briefly or marginally a particular professional's ethical dilemma or a particular client's concrete disappointments in a professional relationship can ground systemic reformers in the day-to-day reality of the system they are examining. Such experiential exploration can also allow reformers to "pretest" proposed systemic reform by experiencing how that reform will concretely affect a given parent, child, or family.

This approach is an ethical analysis, because it focusses upon professional relationships and professional roles. The approach exposes the professional responsibility concerns of two disciplines involved in family court, in concrete terms, asking the professionals to examine what they profess and how they respond in attempting to serve their clients in a particular case.

This Article will outline this ethical approach to systemic evaluation and reform in the following steps. Part I articulates the interrelationship of ethical analysis and systemic reform.¹ Part II sets forth briefly the goals of one tool of ethical analysis, the roleplay.² Part III describes a sample roleplay undertaken at the Families in Courts National Symposium at the National Judicial College in Reno, Nevada in May, 1989.³ Part IV examines the sample roleplay in more depth in light of the ethical and legal duties of the professionals involved and the perceptions of the clients served.⁴ Part V evaluates the roleplay's strengths and limitations.⁵ Finally, Part VI suggests further avenues for study and other potential applications of a role-based analysis in systemic review and reform.⁶

I. PREMISES: THE INTERRELATIONSHIP BETWEEN ETHICAL ANALYSIS AND SYSTEMIC REFORM

Professionals working with families in our social services/family court system are not allowed to safeguard the absolute privacy and autonomy in the family at all times. Rather, whenever professionals

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1. See *infra* notes 7-11 and accompanying text.
 2. See *infra* notes 12-14 and accompanying text.
 3. See *infra* notes 15-18 and accompanying text.
 4. See *infra* notes 19-46 and accompanying text.
 5. See *infra* notes 47-48 and accompanying text.
 6. See *infra* notes 49-50 and accompanying text.

are called upon to serve families, those professionals must heed not only their client's wishes and directions, but also a variety of duties as state agents. Given the prevalence of governmental funding of social services⁷ and legal services,⁸ most, if not all, professionals working with families are bound by the legal requirements which accompany that funding and regulate aspects of their professional behavior.

In addition, professionals are bound by legal duties created by statute, case law and ethical mandates. This accountability to law and ethical codes creates for all professionals duties to the society at large which at times transcend the prerogatives of their individual clients. Thus any professional service to children and parents in the family court/social services system carries some degree of state intervention into the private lives of families.

Such incursions into family integrity,⁹ given our legal system's value on individual rights and privacy, must be carefully limited in ways understood and accepted by those subject to state power. In the case of state intervention by professionals, these careful limitations are found in established norms of professional competence and behavior as well as in applicable law. Ethical requirements thus play a central role in ensuring that state intervention by professionals remains within legitimate political bounds.

7. To receive federal funds under the Adoption Assistance Act of 1980, Title IV-B of the Social Security Act, state agencies serving children and families must submit a comprehensive plan for preventive and reunification services as well as provide services on a case-by-case basis. Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 622 (1982). Agencies are also required to provide services mandated by law and by needs assessments and the comprehensive plan. See NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 82-91 (1988) (listing minimum services to be provided by agencies).

Professional employees of these state agencies providing services to clients then remain accountable to the federal governmental agencies administering the funds. Many agencies additionally receive state and local funding, which is also accompanied by regulations and requirements for agency accountability.

8. In New York, for example, lawyers for children, called law guardians, are paid by the State Office of Court Administration, either through contract-based funding of a legal aid society for county-wide services or by individual compensation of members of a panel of law guardians designated by the judicial department of the county. N.Y. FAM. CT., §§ 243-48 (McKinneys 1983 & Supp. 1990). [hereinafter "NYFCA"].

9. Joseph Goldstein, Anna Freud and Albert Solnit defined the phrase "family integrity" to encompass "three liberty interests of direct concern to children: "parental autonomy," the "right to autonomous parents," and "privacy." J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 9 (1979). Goldstein, Freud and Solnit consistently favor "a policy of minimum coercive intervention" into family integrity, noting that such a policy "accords not only with our firm belief as citizens in individual freedom and human dignity, but also with our professional understanding of the intricate developmental processes of childhood." *Id.* at 12.

Since democratic principles require that those subject to intervention accept that intervention as legitimate, it is crucial to understand how professional intervention is perceived by clients. Clients are best able to evaluate professional roles and relationships based upon the person-to-person manifestations of the professional role: what the professional professes to the client, and how the professional responds to the client in actual life circumstances.

Thus, client perceptions critically evaluate the exercise of a professional's ethical duties, or professional responsibility: what she professes and how she responds. Ethical analysis thus provides a bridge between the professional's lofty stated aspirations (her professions) and her concrete actions (her responses in concrete circumstances).

Clients can become confused, dissatisfied, and potentially harmed by professional service when professional roles become unclear or contradictory, i.e., when what the professional professes and how she responds are incongruent or contradictory. In many cases, clients may become confused by the actual parameters of the professional roles and professional boundaries.¹⁰ Because of the importance of the client's perception in the legitimacy of professional intervention, professionals must keep their professional boundaries clearly defined and their professions and their responses aligned.

In recent years, as more public attention has become focussed upon family services/family court systems, law reform efforts have often expanded professional duties in reaction to perceived failures by "the system" in public tragedies like New York's Lisa Steinberg case. Witness, for instance, the steady broadening of statutes requiring professionals to report confidential information which indicates that a child has been abused or neglected.¹¹ Well-intentioned reformers have sought to expand the availability of information necessary for timely state protection of maltreated children.

These same reformers have, perhaps unwittingly, complicated the work of professionals by paving widening inroads into a central feature of their professional relationships, i.e., client confidentiality. As each new piece of legislation expanding mandated reporting was

10. Goldstein, Freud, Solnit, and Sonja Goldstein, Esq., examine the dangers presented by professionals failing to stay within appropriate professional boundaries in the third volume of the *Best Interests* trilogy. GOLDSTEIN, FREUD, SOLNIT, & GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986).

11. See, e.g., Davidson, *Successful State Child Abuse Legislation—Creating a More Effective Legal Framework*, ABA NATIONAL RESOURCE CENTER ON CHILD ADVOCACY AND PROTECTION, CHILDREN AND THE LAW 1-17 (1988).

passed, professionals have tried to incorporate these new legal duties into their professional relationships and continue their day-to-day service, even when new legal demands conflicted sharply with existing ethical or legal duties.

When conflicts between or among legal requirements or ethical codes make a congruence between what she professes and how she responds impossible for the professional, systemic reformers must seek to realign the legal and ethical requirements. Then, the families, parents, and children whom the system is trying to serve can appreciate the role of the professional. This appreciation is a critical first step in developing a professional relationship of trust and understanding. Only then is the professional's involvement with the family a legitimate form of state intervention.

Therefore, would-be systemic reformers must consider the centrality of professional ethical issues in the system from two perspectives. First, do existing professional roles achieve congruence between what professionals profess abstractly and how they respond to their clients concretely? Second, do proposed reforms affect existing professional roles in a way that creates a dissonance between or among the professional's professions and responses? Ethical analysis thus provides systemic reformers with a guideline for evaluating both the existing system and also proposed systemic change.

II. ONE TOOL OF ETHICAL ANALYSIS: THE ROLEPLAY

How is such an ethical analysis undertaken? The roleplay described in Parts III and IV suggests one method for exploring individual professional-client relationships in a way that constructively criticizes existing professional roles and identifies areas for systemic reform.¹²

The roleplay seeks, overall, to illustrate how ethical analysis, i.e., an examination of individual professional roles and relationships, can shed light on systemic evaluation and proposed change through a process both interactive and engaging. The participants are asked to experience the system from the micro level for a brief encounter. As in all roleplays, the experience "involves realistic behavior under unrealistic conditions."¹³ Each participant "thinks, feels and acts at

12. See *infra* notes 15-46 and accompanying text.

13. M. SHAW, R. CORSINI, R. BLAKE, & J. MOUTON, *ROLE PLAYING: A PRACTICAL MANUAL FOR GROUP FACILITATORS I* (1980). This volume provides an excellent introduction to techniques of role playing. The volume also contains a useful annotated bibliography.

the same time; one is involved comprehensively and globally in the situation” created.¹⁴

In discussing a hypothetical case study, the roleplay described below undertakes ethical analysis in two interwoven steps, by asking participants:

1. To focus upon the concrete, day-to-day interactions between “the system” and families, parents and children from the client’s point of view—how do the clients perceive what the professionals professed and how they responded?
2. To examine the ethical difficulties faced by professionals in their day-to-day encounters with families from the professional’s standpoint—How does the professional herself evaluate her performance?

A description of a specific example of this sort of roleplay follows.

III. BRIEF DESCRIPTION OF RENO ROLEPLAY

The following roleplay was conducted in May, 1989, at the invitational conference entitled “Families in Courts: A National Symposium,” co-sponsored by the National Council of Juvenile and Family Court Judges, the National Judicial College, the National Center for State Courts and the American Bar Association and funded by the State Justice Institute. The symposium’s mission statement noted its five goals: 1) To “focus on better serving families in the legal system;” 2) to “promote consistent and informed decision-making;” 3) to “review matters related to coordination within and beyond court systems and court services;” 4) to “develop consensus on a national level as to what the issues and problems are;” and 5) to “identify some promising approaches for improving the legal system’s response to families.”

Approximately fifty professionals from around the country participated in the symposium: trial and appellate judges, court administrators, probation officers, social services providers, academics, researchers, legal practitioners, personnel from the cosponsoring agencies, and other experienced professionals.

This symposium focussed on systemic evaluation and proposed reforms; the following roleplay was presented as part of a dual topic panel entitled “Issues in Judicial Authority and Interdisciplinary Ethical Dilemmas.”

14. *Id.* at 2.

A. *The Hypothetical and Preparation of Participants*

Five hours prior to the presentation, each of the participants received a handout in one of four different colors. Each of the four handouts contained an identical description of Sarah and Jose's case and in addition the assignment of a particular role: Sarah, Jose, Jack (Sarah's foster care caseworker) or Ellen (Jose's attorney).

The hypothetical read as follows:

Sarah and Jose's Story

This termination of parental rights proceeding was initiated by City Department of Social Services (DSS) against Sarah Suarez with respect to her son, Jose. The petition alleged that despite DSS efforts to help her, Sarah had for one year permanently neglected Jose by failing to plan for his future. Specifically, DSS alleged that she (1) failed to secure adequate housing, (2) failed to attend counseling, and (3) failed to stay away from her abusive paramour.

Ellen Stein was assigned as Jose's lawyer under a state statute directing counsel to "represent the child" in the proceeding.¹⁵ The DSS attorney called Jack Ellis, who has worked with Sarah since Jose's placement, to testify against Sarah.

The Lawyer's Code of Professional Responsibility is in force in the jurisdiction.¹⁶ Jack belongs to the National Association of Social Workers and also subscribes to the Code of Ethics of the National Federation of Societies for Clinical Social Work.¹⁷

At the time of the proceeding, Jose was a developmentally normal ten year old. Sarah placed Jose in foster care with City DSS two and one-half years before the proceeding began. At that time she abandoned her apartment in order to get away from her abusive boyfriend, Peter. Sarah and Peter had lived together for five years and Sarah told DSS that Peter beat both her and Jose. Peter,

15. See, Butz, *Reporting Child Abuse and Confidentiality in Counseling*, 66 SOC. CASEWORK 83, 84 (1985) (all 50 states have professional reporting requirements for cases of suspected or known child abuse).

16. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1989).

17. *Code of Ethics of the National Association of Social Workers*, reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 159 (R. Gorlin ed. 1986). See also *Code of Ethics of the National Federation of Societies for Clinical Social Work*, reprinted in CODE OF PROFESSIONAL RESPONSIBILITY 169 (R. Gorlin ed. 1986).

according to Sarah, was also a crack addict. Sarah was three months pregnant when she placed Jose in care.

When Jack introduced himself to Sarah on the day of Jose's placement, Sarah expressed doubts about whether she could ever trust a social worker not to betray her. Jack explained that his concern, like all social workers, was for his client first and foremost. He also explained that he had a duty to keep her confidences and secrets. "My main goal is to help you work towards Jose coming home," Jack emphasized.

Jack and Sarah quickly developed a constructive working relationship, and began weekly counseling sessions to help Sarah plan for Jose's return. Jack believed that with regular counseling, Sarah could accept her breakup with Peter and develop an independent life for herself, Jose and her new baby. Sarah and Jack agreed that before Jose could return home, Sarah must (1) get permanent housing; (2) continue in weekly therapy with Jack; (3) have no contact with Peter; and (4) visit Jose regularly.

During the first six months of Jose's placement, Sarah moved from shelter to shelter while she looked for a new home. She saw Peter occasionally, and for one month lived with him again, until she felt it was dangerous to her unborn baby to stay with him any longer. She discussed these issues freely with Jack, who helped her reach the decision to leave Peter the second time.

After the baby, Emmie, was born, Jack convinced DSS to place Sarah in a battered women's shelter which provided a short term apartment in which Sarah and Emmie could remain until Sarah found permanent housing. Sarah cared well for Emmie and visited Jose biweekly. Sarah continued to attend her weekly counseling regularly.

A year before the proceeding began, a year after Emmie was born, Jack successfully helped Sarah find an apartment. After Sarah and Emmie moved into the apartment, Sarah began for the first time missing counselling with Jack and visits with Jose. A month later, Sarah called Jack in hysterics, saying, "You're the only person I can trust. Can I tell you something in confidence?" Jack said yes. Sarah said that Peter was living with her and starting to hit the baby. "Don't tell anyone," Sarah pleaded.

After Sarah and Jack had spoken extensively about Peter's reappearance, Jack offered to help Sarah again find alternative housing. He also informed her that he would have to check to see if what she said gave him a duty, on Emmie's behalf, to report to DSS, that

Emmie was in danger. Sarah began to cry angrily, telling Jack that he had lied to her and that he was only interested in "covering himself." Sarah hung up.

After reviewing his legal duties under the state mandated reporting law, Jack reported Sarah's news to DSS. He tried to reach Sarah to tell her that he had to report it, but he could not contact her. Based upon Sarah's statement to Jack, DSS went to the home and placed Emmie in foster care in a foster home separate from Jose.

Thereafter, the relationship between Sarah and Jack completely broke down. Sarah missed all counseling appointments and visited Jose monthly, but refused to speak with Jack during or after the visits. Jack learned from another DSS worker that Sarah left her apartment and moved back into the shelter. Jack offered Sarah a referral for a different counselor, but Sarah refused all counseling, saying, "You're all the same. No one will help. No one can keep secrets. Leave me alone."

When Ellen met Jose, Jose refused to speak with her, saying that no one could keep secrets. Ellen explained that lawyers are required by law to keep their clients' statements confidential. Ellen also said that her job was to help Jose get what he wanted, if she could. Jose grew to trust Ellen and told her that he wanted to go home and live with Sarah and Peter as a family. He told Ellen that Sarah said that she and Peter were getting back together. He told Ellen to tell no one of Sarah and Peter's reunion and plans. Jose called Peter "Daddy."

Meanwhile, Jose's foster parents, with whom Jose got along very well, said that they would like to adopt Jose. All the social workers whom Ellen met, including Jack and the social worker who consulted with Ellen, told Ellen that if Sarah had been reunited with Peter, Jose's best interests were clearly to be adopted by his foster parents.

Ellen's review of the DSS record showed that Jack suspected that Sarah had been reunited with Peter, but had only the one phone call and Sarah's history to support that suspicion. It also revealed that Jack had stopped offering Sarah services after the move to the new apartment, except for the one offer of alternative counseling.

On that basis, Ellen vigorously cross-examined Jack during the hearing, presenting as her theory of the case that Peter had not returned and that Jack had provided inadequate services. The court dismissed the termination proceeding.

Jack tried thereafter to provide services to Sarah, who refused them all. Ellen repeatedly asked Jack to provide the services, but

Jack would not engage Sarah again. Eventually, planning came to a complete halt. Two years later Sarah's parental rights to Jose were terminated. By the time the termination proceeding had ended, Jose had begun exhibiting aggressive behavior which made his foster parents hesitant to adopt him. Jose's future is as yet unclear.

Those participants assigned to be Ellen received the following instructions:

You are Ellen Stein. As you read the following fact scenario, evaluate the following:

1. Your professional relationship with Jose;
 2. your professional relationship with Jack.
- How do you, as Ellen, look back on this case?

Similarly, those participants assigned to be Jack received instructions:

You are Jack Ellis. As you read the following fact scenario, evaluate the following:

1. Your professional relationship with Sarah;
 2. your professional relationship with Ellen.
- How do you, as Jack, look back on this case?

Participants assigned to be Sarah were instructed:

You are Sarah Suarez. As you read the following fact scenario, explore your feelings on two issues:

1. Your professional relationship with Jack;
 2. your relationship with Jose.
- How do you, as Sarah, look back on this story?

Finally, participants assigned to Jose were instructed:

You are Jose Suarez. As you read the following fact scenario, explore your feelings on two issues:

1. Your professional relationship with Ellen;
 2. your relationship with Sarah.
- How do you, as Jose, look back on this story?

Participants were asked to read the handout and complete the instructions before the beginning of the panel that afternoon.

B. The Presentation

Due to time constraints, the roleplay and the accompanying presentation were allotted thirty minutes, with the roleplay consuming approximately twenty minutes of that time. The description of the roleplay appears below.

Throughout the presentation, I was sitting at a microphone at the front of a small amphitheater/classroom. The audience lights were

lit, so that I could see each participant's face. All participants could see each other.

In preparing for the roleplay, I asked the participants to indicate by raising their colored handouts which character they had been assigned to portray. I was also able to see at a glance that the four parts were well distributed across the room.¹⁸

I asked the participants to take three vacations during the next twenty minutes. First, I asked them to take a vacation from their professional lives. For the next twenty minutes, they were no longer judges, probation officers, social workers, lawyers, administrators, or bureaucrats. Each participant was simply the person she had been assigned to be in Sarah and Jose's story. Second, I asked them to take a vacation from the symposium. They were no longer in Reno, at the Judicial College, and no longer discussing the weighty, troubling issues that had preceded the presentation. Third, I asked them to take a vacation from the "system" and from a "systemic point of view." For twenty minutes, they had no duties to look any further than the immediate concerns of the character they were portraying.

With that, I asked the participants to take fifteen seconds to "en-role," i.e., to focus on being their assigned person. After fifteen seconds of silence, we began the roleplay.

I told the participants that I would ask them in turn about their evaluations (in the case of the professionals) and their feelings (in the case of the clients) about the others in the case. I explained that since time was short, I encouraged them to be as forthcoming as possible as quickly as possible. I also asked them to speak always in the first person, saying, "I think" or "I feel," instead of "Sarah thinks" or "Jack feels."

As facilitator of the roleplay, I attempted to keep my input relatively small, phrased in the form of reflective feedback (reframing what the character had expressed) or questions focussed on eliciting further comments from each character on the different aspects of his or her relationships. As each character began to express emotion,

18. This suggested a potential extension of the roleplay which was impossible in Reno due to the time limits, but promising for other circumstances. After each character's viewpoint is aired, the facilitator might ask each person to converse with a neighbor character for five minutes "in role." One might well expect, for example Sarah and Jack to have a stormy or stonewalled interaction; Sarah and Jose to have a tense, uncomfortable interaction or a sad, warm, painful talk; Sarah and Ellen to have a distant conversation; and soon. If the neighbor is the same character, the facilitator can either ask them to discuss their joint feelings, or ask them to switch interlocutors.

I found myself underscoring that emotion to see how strong those feelings were.

What follows are excerpts from an edited transcript of the Reno roleplay:

Facilitator: There are no wrong or right answers about how Sarah feels, so let me ask Sarah, how do you feel about Jack?

Sarah #1: I'm angry as hell at Jack, he ripped my kid off. He broke his promise to me.

F: What promise did he make, Sarah?

Sarah #1: He made a promise that he'd help me out and that my relationship with him was more important than anything else; and it wasn't true. He didn't follow through with that promise, he took my kid away.

F: How do other Sarahs feel?

Sarah #2: That son of a bitch. He promised me that he'd help me . . . He promised he'd keep quiet and he betrayed me, and he seduced me into this whole situation where I lost my children. He's no good. I don't have any use for him anymore. I won't have anything to do with him or anyone else like him.

F: Other Sarahs? Is there any other part to Sarah?

Sarah #3: I wish he could have helped me more.

F: What could he have done for you?

Sarah #3: Helped me get rid of Peter, who I loved and hated both.

F: And what could he have done?

Sarah #3: Given me some . . . better answers.

F: He found you a house though, didn't he, an apartment?

Sarah #3: Yeah, but he didn't want me to be with Peter.

F: So he didn't understand that you really loved Peter too, right?

Sarah #3: Yeah.

Sarah #4: They caused me to give Peter up, too. They caused me to move out.

F: So he made things worse?

Sarah #4: [W]hen he told me that his main goal was to help me, that his main goal was to help me keep my kids, but in the end he betrayed me and took the kid away.

F: So Jack said that he was going to help, and what he professed to you was that he was going to help and that you were the only thing that was important to him, but when it came to the crunch the way he responded was he sold you down the river.

Sarah #4: He covered his own butt.

F: He covered his own butt and he made it worse for you.

Sarah #5: He's just part of the whole Anglo system. He just doesn't give a damn about anybody who speaks Spanish.

F: But they always say they're trying to help you, right?

Sarah #6: He made up the rules as he went along. He never told me what the real score was.

F: And when did you feel that the most?

Sarah #6: When, all of a sudden, he calls the social worker and tells her that my kids are in danger.

F: But he told you he was going to do that, didn't he? Didn't he tell you that you had to figure that out?

Sarah #6: He told me the day before.

F: Okay, well, let me just ask you, Sarah, just to switch for a second, how are you feeling about Jose right now? [silence]. I realize that it's just after the termination proceeding and I know that it's been really difficult, but how do you feel? Tell me what you feel about Jose.

Sarah #6: I'm still his mother.

F: Will anyone else ever be his mother?

Sarah #6: No.

Sarah #1: I think I could make it right if I had my son back. I will never give up that belief that he's my boy and if he came home to me things would be better.

F: So how did it screw up then? How did it all screw up? [silence]. It's unfathomable . . . Any other feelings, Sarah, besides being mad?

Sarah #7: The system made me choose between Jose and Peter. I had to make a choice and I made my choice, and now my focus is on my daughter and Jose is lost to me.

F: So you might just have to give up on Jose if that's the way they're going to put it.

Sarah #7: They made me choose. He's still my son but they made me pick someone and my choice is Peter because he gave me a home, he gave me food to eat and he gave those to my daughter as well.

F: So why would they make you choose like that? Why would Jack do something like that? [silence]. It doesn't make any sense. I don't know what this Jack guy is about.

F: All right, cut. Jack, you're looking back at your relationship with Sarah. What are you thinking? . . . I'm asking you to evaluate your professional relationship with Sarah.

Jack #1: I did everything that I could do as a social worker in this case to see that Sarah took charge of her own life. She just continually refused to do it despite all the extra effort that I put into this case. I found her an apartment; I made it real clear to her that staying with Peter was destructive. She couldn't see that and refused to see it. Over and over again I told her. I helped her

to do this. I wanted her to take charge of her life. Ultimately, when it came down to where her actions were destroying the child, where my duty by law was to report this, I had to. I had no choice in the matter. Even if I didn't want to do it I had to do it to protect that child and because it's my duty. This was her responsibility and she's still refusing to accept the fact that she's in charge of her life. She wants to put the blame on somebody else.

F: What else could Jack have done?

Jack #2: First of all, if I were Jack I'd say why in the devil didn't I go to medical school as I'd thought of doing rather than going into this field of social work? But more importantly, if it was something that I had to do over again, I would have said that I should have made it a little bit clearer to her in the beginning that I would try to keep her confidences, but if it got to a certain point, and then explain what that point was, I'd have to unload and tell her up front, and if she couldn't accept it, she couldn't accept it. But I could not mislead her because then I destroyed the situation . . . And I let it go at that and I fouled it up. That's the way it turned out.

F: But what would have happened Jack if you had said in the beginning, "Sarah, you can tell me all of your confidences, but as soon as someone else is involved down the river you go and . . ."

Jack #2: No, no, I wouldn't have said it that way. It's not as soon as someone else is involved. I would make it very clear I'd have kept her confidences until it got to that point, where it was in this very case, where a child could be in danger or a child could be beaten or Peter could have come back . . . but when it gets to the point where I'm under a duty to disclose, under the law I'm going to have to disclose. And I think looking back on this, she was at such a state at this point, and I had her confidence at that point, I think I could have gotten her to go along with me at that point and we would have had a better result.

F: But you would have had to say that at the beginning . . . when she didn't trust you. How would [you] ever get her to trust [you] if [you] told her right at the beginning that [you] wouldn't keep her confidences?

Jack #2: I think I would be able to get her to trust me. I have faith in my ability.

F: Any other Jacks? Disagree, agree?

Jack #3: I have no faith in my ability to give that hopelessly ambiguous promise to my clients. I can't keep confidences, I'm not allowed to, and I can't expect people to trust me, particularly with the cultural and racial distinctions that I have with so many of my clients. I don't know what to do, I feel miserable.

F: Okay Jack, let me ask you—what do you think about your

professional relationship with Ellen. How do you evaluate that? [silence]. Do you feel miserable about that too?

Jack #1: When Ellen was cross examining on the stand, she was doing her job and I was doing my job. I don't feel particularly miserable about what she was doing. There was a record, these are the facts, this was a courtroom presentation. If you don't like that kind of situation, you don't have courts involved with children. She was doing her job, I was doing mine. I'm not mad at her for that.

F: Do all the Jacks feel that way? Ellen beat you up on the stand. Did you like that?

Jack #4: I didn't mind Ellen beating me up on the stand, but I did mind that Ellen seemed to have taken a particular perspective of keeping Jose with Sarah and I felt caught in the middle of that. On the one hand, it was my job to protect Jose and it was Ellen's job to do the same, but she really double crossed me.

F: So you really had the same goals, and yet there she is beating you up in the courtroom, saying you didn't do your job and you found this lady an apartment.

Jack #4: Manipulating the facts. If she really believed that I didn't do my job, then that's funny, but I don't think that's what she believed.

F: Because you know that she wanted you to do the same thing. She was goading you to offer services after she'd made you look sort of inadequate in the courtroom.

F: Ellen, what do you think about Jack? What do you think about what you did in the courtroom? . . .

Ellen #1: I did my job, I represented my client. We were undermined by Jack's inability to do his job and that's unfortunate. But at least I did what my client wanted me to do and I postponed, at least for a while, the destruction of his family.

F: Ellen? Any other Ellens? [silence].

Ellen #2: I'm mad at myself for not keeping in better contact with Jack and keeping track of the case and waiting until it was too late to do something about it.

F: Ellen?

Ellen #3: I'm sorry that I had to make this tough choice. I'm not sure that I made the right decision in assessing what was best for my client, even though he expressed to me that he wants to stay with Sarah. I say I knew my job, but I had a lot of doubts whether I really was acting in his best interests. He was getting along well with the foster parents. That might have been, in the long run, what was better for him. But I'm not the judge, I'm just his lawyer. That's what he said he wanted.

F: Ellen?

Ellen #4: I'm quite concerned about Jack's whole role in this, particularly in view of the fact that Jack did not reveal at the outset, apparently, that there were certain limitations and confidential communications that he would make, thus creating a situation where no matter what was decided by the court, the services Jack was to provide couldn't be rendered because Jack had bought the confidence by misleading the client. I'm concerned about Jack staying in the system. I'm concerned I'll have to deal with Jack again and I'm concerned that the system that we're working with doesn't encourage social workers to provide services to people like that.

F: So it's almost like you and Jack had the same job, but he kind of blew it for you both. You both wanted to get the family back together.

Ellen #4: That's the way I feel.

Ellen #5: I feel more concerned about Jack after hearing the Jacks in this room say that he reported it only because he is required to and not because he thought it was a good thing. Nobody owned that situation. "I was doing my duty to report," Jack said in this room three times, and I'm even more concerned that he doesn't believe that that's a good idea.

F: What exactly . . . Ellen, what was your job? Ellen over here says "I don't know, I feel that I was going for wishes, but I think I should have gone for best interests instead because now we didn't get either." What do you all think?

Ellen #6: I would think Jose is ten years old, his background, his preferences, I don't think I would have thought about. I think I would have you consider withdrawing from the matter. It would be really tough to not have the court know that this man was back with the mother.

F: [I]t's kind of difficult and you're not sure about it.

Ellen #1: But I know as a lawyer that you have to prove things, and you have to separate fact from fiction and after all when I looked at that record I could not really prove with a preponderance of the evidence to my satisfaction that Peter had gotten back together with Sarah. As long as I couldn't prove that, I had in good conscience to follow the dictates of what Jose wanted.

F: All right, and let's move to Jose. What was your relationship with Jose? How do you feel about it now?

Jose #1: Well, I must be no good. My lawyer couldn't get me to go home as I wanted to and . . .

F: Oh, I'm sorry. Are you Jose? [Jose nods].

F: Okay. I'm sorry. I want to stop you for a second because I want to hear how your lawyer thinks she did for you. So, let me ask Ellen how she feels she helped Jose, little Jose over there. Nice

tie Jose is wearing [laughter]. Ellen, how do you feel you helped Jose?

Ellen #3: I gave Jose the best shot in court; he told me what he wanted, he was there, and he heard the testimony and the results afterwards. I couldn't pull it off. I did my best to try to do what my client wanted.

F: How did other people feel? Did Jose get everything he should have from you?

Ellen #1: No, I created an annuity because I'll get to represent him now in delinquency hearings [laughter].

F: Good for business. Bad for society, good for business. Anybody feel bad? Any of you Ellens' feel bad about Jose?

Ellen #2: Yeah, I feel real bad because this case just kept getting worse and worse and worse. Nothing was resolved in a positive way . . . Jack just kind of left her out there, she has her house, okay fine, . . .

F: What about you, Ellen?

Ellen #3: I certainly think the social worker, the foster parents were doing their jobs, they fulfilled their responsibilities, but as an advocate one of the other roles is to see what is in the best interests for the child and undoubtedly I just followed his orders and did not really assess the case. I failed, I think.

F: Ellen, I actually see two things that you said that you'd do, that you professed that you'd do: One was you said that you'd keep his confidence and you really did; it never came out about Peter and Sarah. But you also said you'd try to help them get him home and that certainly never happened, so I can see how you'd feel a little ambivalent. Well, let's go to you, Jose, what do you think?

Jose #1: Well, I just must not be any good because my lawyer couldn't get it so I could go home and my mom didn't want me and I'm very angry and I'm very depressed.

F: Uh-huh.

Jose #1: It must be all my fault.

F: Jose?

Jose #2: I feel angry with the situation because I was lied to. Ellen said she was going to get me back home, but here I am two years later I'm still with the same foster parents, my mother's rights over me have been terminated, I don't know where I'm going from here. I'm very unhappy. I have a lot of conflict with my foster parents. So, the system doesn't work and no one really cares. All Ellen did was put on a show and make it look like she cared, but in actuality she never carried out the promise.

F: Yeah, and that's what your mom did, too. She said she cared, but she didn't come through. And then these foster parents said that they were going to adopt you, but they didn't come through.

Why trust anybody? Jose?

Jose #3: I think that you all left me like a balloon without strings. I read everything about Jose, everything was about everybody else, but almost nothing was about me. My mother had a social worker. I had a lawyer, but I only saw her once. Somebody said I went to court, but I don't think that happened.

F: What do you have to do with it? . . . What are you like? You're twelve years old.

Jose #3: I'm worried about whether my mother is okay without me because I think she needed me. The fact that she had a baby sister kind of upsets me. I think that's why she doesn't want me anymore.

F: Ever since [Emmie] came around it's just not the same anymore, is it?

Jose #3: Well, you know, she had a social worker, but I never saw a social worker. She had a therapist. I never had anybody. Nobody's talked to me all these years except the foster parents.

F: But what about that lawyer, though? She said she'd keep her promise and she kept it. She never told anybody. [silence]. At least she kept her promise. She didn't lie to you. [silence]. Or did she lie to you? Is she just like all the rest?

Jose #4: She is just like all the rest. Not one adult that I had to deal with did anything right by me. So I'm mad, I'm really mad. It's not a matter of keeping promises. I don't know what she did with the stuff I told her. I thought she was going to be a really nice lady, I really did. I confided in her, I told her how I felt and I thought I was going to be able to get back to my mother. Now my mother doesn't seem to care, the people I was with don't like me anymore. So I had my own lawyer. Big deal. What'd she do for me? I don't know what's gonna happen to me.

F: The thing about you, Jose, is that you are the only one who really kept your promise because your mom said to you "Don't tell anybody about Peter," "Don't tell anybody who's going to let anybody know" and you swore Ellen to secrecy and sure she kept that promise, but now you got nothing.

Jose #4: I don't know if she kept that promise or not.

F: That's true.

Jose #4: I don't know if she kept that promise. I know I didn't get back to my mother.

This section went on for about twenty minutes from the first questions to Sarah to Jose's last comments about her.

At the end of this section, I asked the participants to take a few seconds to "de-role." I asked them to repeat after me, "I am not [the assigned role]; I am [the participant's real name]." After a group murmur, we moved on.

In the remaining ten minutes, I briefly summarized material found in Parts IV and VI of this essay.

IV. THE ROLEPLAY EXAMINED: THE PROFESSIONAL'S DILEMMAS, THE CLIENT'S ALIENATION

Jose and Sarah's story was designed to highlight professional dilemmas facing two particular professionals: The social worker forced by subpoena or mandatory reporting laws to reveal confidential information, and the lawyer for children who believes that her representation does the client more harm than good. The roleplay was designed to illustrate how statutory and ethical demands on two conscientious professionals who had each developed careful trusting relationships with their cooperative clients led to a very sad and painful outcome for the family involved.

As we see in our individual discussions of their vantage points, none of the major actors, Sarah, Jack, Ellen or Jose, acted in a totally unjustifiable way.¹⁹ All four characters had admirable goals. Both clients saw confidentiality as central to their professional relationships. Both professionals tried to remain true as long as possible to that confidentiality. Both clients trusted the professionals at first to help the family become reunited. Both professionals worked hard towards the goal of Jose and Sarah's reunion. Yet, all of the major characters were frustrated by the confidentiality issues in their relationships. None of them realized their professional or personal goals, despite their individual good intentions.²⁰

19. Unfortunately, there was one "villain" in the roleplay, namely, Peter. One participant suggested after the roleplay that Peter be assigned a voice, in order to avoid the caricaturing and stereotyping of his role. The decision whether or not to have Peter "represented" in the roleplay again depends upon the goal of the roleplay. If the roleplay seeks only to explore the points of view of those engaged in the system, his exclusion might be justified. On the other hand, Peter's critique of the system could potentially be the most powerful of all, as an outsider. For groups whose time, numbers, and interests allow, including Peter as a character could well be a very effective addition.

20. The following sections describe my versions of the points of views of the four major characters. These were the perspectives that the hypothetical was designed to illustrate. The actual running of the roleplay and comments on the roleplay revealed several additional and very perceptive perspectives which had not been intentionally incorporated into the fact pattern.

The richness of case studies, even hypothetical ones, thus, often lies in their ability to replicate the thickly forested ethical jungle of professional practice. This also suggests that facilitators designing hypotheticals must remain alert to the unanticipated lessons embedded inadvertently in teaching tools of their own design, but not totally within their complete control!

A. Sarah

Sarah was, in many ways, an ideal client. She valued the professional relationship. She attended therapy regularly and visited her child regularly. She was honest and insightful about her concrete needs. She expressed from the outset honest reservations about the professional relationship she was entering, and trusted in the confidentiality and client-centered relationship that was promised. When she called Jack in crisis, she made clear her expectations that the promised confidentiality would be maintained.

Sarah was in a unique position to evaluate Jack's professional effectiveness. From Sarah's point of view, what did Jack profess? Sarah's responses in the roleplay and in the hypothetical suggest that Jack professed three essential things:

- i) That his "main goal" was to help Sarah and Jose become reunited;
- ii) That he would keep her confidentiality;
- iii) That his primary responsibility was to Sarah.

From Sarah's point of view, Jack's actual responses and actions showed these professions to be hypocritical. In the end, Jack became the agent for not one, but two termination of parental rights proceedings. Jack's testimony laid the groundwork for Sarah's ties to Jose to be severed forever. He further arranged for Emmie to be taken out of Sarah's home as well.

Jack also betrayed her confidentiality in increasingly painful ways. When she was desperate and felt like he was the only one she could trust, he led her on by saying that she could speak with him in confidence, and then reported her to Department of Social Services. At the two termination hearings, he told the judge and lawyers in great detail all of the secrets with which she had trusted him. After such a betrayal, she decided never to trust another professional again. She also told Jose that professionals were not to be trusted.

Finally, Jack never acted as if Sarah were his main concern. He could find her apartments when times were easy. When she cried out in desperation, however, Emmie was his only concern, and in truth, Sarah thought he was just protecting himself. He kept trying to explain that he was operating under legal obligations. Sarah heard only that he thought that his own license was more important than Sarah's family life.

Sarah felt profoundly betrayed by Jack. From the point of view of the client, what Jack professed and how he responded were wildly

disparate. She left that relationship resistant to any subsequent professional intervention.

B. Jack

The following analysis reveals that Jack was a well-meaning conscientious professional who tried to follow his ethical mandate to seek first and foremost to serve a client who valued her privacy and right to confidentiality. Jack became caught in the conflict between that mandate, and his other ethical and legal duties: the duties to report suspected maltreatment of Emmie to the DSS and the obligation to testify in the court proceeding to terminate Sarah's parental rights.

The concrete services offered by Jack to Sarah were impressive and constructive. He met with her weekly, and helped her reach the painful decision to part from Peter a second time. He found a shelter for Sarah which housed her until permanent housing was located. He facilitated biweekly visitations with Jose. He successfully located permanent housing for her. When Sarah was forced to leave that housing, he offered again to help to find housing. When Sarah made her distrust clear to him, he offered to find another counselor.

As a member of the National Association of Social Workers ("NASW"), Jack subscribed to the Code of Ethics ("NASWCE") adopted by the 1979 Delegate Assembly.²¹ He also subscribed to the model set of standards and ethics ("NFSCSW Code") for the professional practice of clinical social workers created by the National Federation of Societies for Clinical Social Work.²²

Jack conscientiously observed certain ethical and legal duties from the start of his relationship with Sarah. When Jack told Sarah that "his concern, like all social workers, was for the client first and foremost," he was simply translating into lay terms the mandate of NFSCSW section I(a): "[t]he social worker's primary responsibility is to the client."²³

21. See, *National Association of Social Workers Code of Ethics*, reprinted in *CODES OF PROFESSIONAL RESPONSIBILITY* 159 (R. Gorlin ed. 1986). This publication contains ethical codes for many disciplines and provides an excellent basis for interdisciplinary comparison of professional responsibilities.

22. *Id.* at 169.

23. NASWCE § II(F)(4) reprinted in *CODES OF PROFESSIONAL RESPONSIBILITY* 164 (R. Gorlin ed. 1986). The NASW echoes that concern. NASW section II(F)(4) stresses that "[t]he social worker should avoid relationships or commitments that conflict with the interests of clients."

Both of the social work codes, however, also include language which complicate this client-centered imperative. NASWCE section II(F)(7) notes that “[t]he social worker should apprise clients of their risks, rights, opportunities and obligations associated with social service to them.”²⁴ NFSCSW section I(a) continues the discussion of the social worker’s primary client-centered responsibility with this sentence: “[h]owever, when the interest of the individual patient or client conflicts with the welfare of his family or of the community at large the clinical social worker weighs the consequences of any action and arrives at a judgment based on all considerations.”²⁵

Several of the characters playing Jack, Sarah and Ellen in Reno criticized Jack’s failure to explain the limitations of his “client-centeredness.” This criticism illustrates the dilemma that the ethical codes raise for Jack’s day-to-day practice. Had Jack tried to represent fully and accurately to Sarah the limitations on his client-centeredness, she might justifiably have declined to trust him enough to begin a constructive relationship, and Jack’s “primary obligation to his client” would have been thwarted at the outset. On the other hand, Jack’s failure to delineate his conflicting duties fully were understandably interpreted as a betrayal by Sarah and a violation of a different ethical duty.

Jack’s treatment of the confidentiality issue at the outset of his professional relationship with Sarah similarly poised him on the horns of an ethical dilemma created by the inconsistent demands of the ethical codes. NASWCE section II(H) requires that the social worker “should respect the privacy of clients and hold in confidence all information obtained in the course of professional service.”²⁶ After this bold statement of principle, however, the NASWCE states that “the social worker should share with others confidences revealed by clients without their consent . . . only for compelling professional reasons.”²⁷

The NFSCSW Code mirrors the NASWCE’s ambiguous mandate to the worker. NFSCSW Code section V states:

24. *Id.* § II(f)(7) reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 164 (R. Gorlin ed. 1986).

25. National Federation of Societies for Clinical Social Work § I(a) reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 172 (R. Gorlin ed. 1986).

26. NASWCE § II(H)(1) reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 164 (R. Gorlin ed. 1986).

27. NASWCE § II(H)(1) reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 164 (R. Gorlin ed. 1986).

[T]he safeguarding of the client's right to privacy is a basic responsibility of the clinical social worker. Clinical social workers have a primary obligation to maintain the confidentiality of material that has been transmitted to them in any of their professional roles, including the identity of the client.²⁸

Nevertheless, NFSCSW Code section V(a) requires that "[c]linical social workers reveal confidential information to others only with the informed consent of the client, except in those circumstances in which not to do so would violate the law or would result in clear and imminent danger to the client or to others."²⁹ In addition, NFSCSW Code section V(c) notes, in part, "[c]linical social workers uphold their obligation to observe applicable law, including state mandates to report actual or potential abuse."³⁰

In Sarah and Jose's story, Jack was indeed required by applicable law both to report the possible neglect of Emmie and also to testify in the termination of parental rights proceeding. First, in any American jurisdiction, Jack would have been required to report Sarah's statement to the child protective authorities.³¹ Second, legal mandates also required that Jack testify in the termination proceeding against Sarah. Since *Santosky v. Kramer*,³² the state must prove by clear and convincing evidence that the parent is statutorily unfit to raise her children before parental rights can be terminated. States must sustain this high burden of proof and also demonstrate their compliance with the Adoption Assistance Act of 1980,³³ which requires the state to make reasonable efforts to reunite families and avoid prolonged foster care placement.³⁴ Only the caseworker working directly with

28. NFSCSW § V reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 172 (R. Gorlin ed. 1986).

29. *Id.* § V(a) reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 172 (R. Gorlin ed. 1986).

30. *Id.* § V(c) reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 172 (R. Gorlin ed. 1986).

31. "All fifty states now require the reporting of suspected or known child abuse by professionals who come in contact with children or their caretakers." Butz, *Reporting Child Abuse and Confidentiality in Counseling*, 66 SOC. CASEWORK 83, 84 (1985). Professor Butz offers a good overview of the problems that counselors face with confidentiality and reporting child abuse and subsequent client mistrust and withdrawal.

32. *Santosky v. Kramer*, 455 U.S. 745 (1982).

33. Adoption Assistance Act of 1980, 42 U.S.C. § 622 (1982).

34. Some state statutes incorporate both the high burden of proof and the requirement of reasonable efforts in their definitions of grounds for termination of parental rights. For example, New York's termination of parental rights statute requires any termination ground to be demonstrated by "clear and convincing proof," the constitutional standard required by *Santosky*. N.Y. Soc. SERV. LAW § 384-b(3)(g) (McKinney 1983). The definition of permanent

the parents can provide the state with the information required by these legal mandates to help the state sustain its termination case. Thus, caseworkers who have been assigned major therapeutic and service responsibilities to families regularly find themselves called upon to testify in termination proceedings against the parents with whom they had worked.

Jack's continuing duties after the termination attempt failed epitomize his predicament. Having testified in front of Sarah against her, he was again required to engage her in therapy and offer her concrete services. By this time, as Jack's responses in the roleplay indicated, Jack had been frustrated at every turn. He had provided, after tremendous effort, first-rate services which yielded no long term helpful result. He had even found housing for Sarah. When she finally showed her deep trust for him and reached out for help in crisis, he was forced to violate her confidences in order to fulfill his legal obligations. Jack was also tremendously frustrated that after all their work together, Sarah returned to Peter for a third time.

Jack's legal duties forced him to detail his "confidential" relationship with Sarah in open court. Having fulfilled this legal duty, he found that his legal duties again required him to help Sarah plan. By this time he lacked any basis for a constructive relationship with Sarah, and watched helplessly as her relationship with her son and her prospects for reuniting with him shrivelled away.

Certainly, Jack was required initially to explain to Sarah the parameters of their professional confidentiality. His failure to do so was dishonest and disrespectful to Sarah. Understandably, Jack wanted to put the client-oriented service imperative, an ethical mandate embodying the essence of his profession, before what one Jack called the "hopelessly ambiguous" task of explanation. Jack wanted to actualize his ethical duty to respect Sarah's clear value on confidentiality. Jack's conflicting ethical duties posed a hard choice, perhaps

neglect, one New York termination ground, includes the "reasonable efforts" requirement:

For the purposes of this section, "permanently neglected child" shall mean a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, *notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.*

N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinneys 1983) (emphasis added).

a choice that a system seeking to empower clients through confidential therapy should not find itself posing.

While many competent conscientious social workers in practice today are no doubt successfully navigating the choppy ethical waters into which Jack capsized, one must be concerned about the expenditure of professional energy devoted to that difficult task. One must also be concerned about the wary clients who, like Sarah, would rather forego a therapeutic relationship than accept current restrictions on confidentiality.

Jack's interactions with Ellen compounded his frustration. Both appeared to have the same goals: The reunion of Sarah and Jose. Yet Ellen misrepresented his hard work and portrayed him to the court as an irresponsible worker. She presented an essentially false view of the whole family to the court, depicting a household without Peter. She also distorted Jack's own record to the court, stressing Jack's recent inability to offer services to Sarah. She did not explain to the court that Jack's conflicting ethical and legal obligations made it impossible for him to keep Sarah's trust; she focussed only on the fact that services were not provided after Emmie was removed from the home. Jack left the courtroom labelled as an ineffective, incompetent social worker in a case where he had worked hard and, for some time, effectively. Jack thereafter was constantly pestered by Ellen to plan with Sarah. From Jack's vantage point Ellen appeared not to realize that she had participated in the erosion of Jack and Sarah's relationship.

The frustration that Jack showed in the roleplay accurately reflected the sense of futility felt by a conscientious caseworker who finds his ethical and legal requirements defeating the central service imperative of his profession. While Jack was not faultless in his professional behavior, his plight demands attention by a family services/family court system which depends upon professionals like him to serve clients like Sarah constructively.

C. Ellen

As observed in the roleplay, Ellen had second thoughts about her actions in the case, both with respect to Jack, and with respect to Jose.

Despite their common goals, Ellen's legal strategy and her theory of the case forced her to discredit Jack's work. Ellen honored the ethical imperative that "the authority to make decisions [affecting

the merits of the cause] is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."³⁵ Ellen sought to provide a legal basis for defeating the termination of parental rights petition, as Jose wanted. Because she could not claim that Sarah had indeed fulfilled her parental obligations, Ellen's only hope for defeating the petition laid in pointing to Jack's failings. A more sympathetic presentation of Jack's dilemmas would only have highlighted Sarah's failures to cooperate with Jack since Emmie's removal from the home, and contributed to the effort to terminate Sarah's parental rights.

Nevertheless, Ellen's decision to perform a hostile cross-examination of Jack was far from a satisfying professional decision for her. She faced a classical legal ethical dilemma: The attorney's duty to cross-examine and discredit the truthful witness.³⁶ In addition, she knew that defeating the termination petition would put Jack back in the position of planning with Sarah. Her long-term goal of reuniting Sarah and Jose led her to wanting Jack and Sarah to have as positive a relationship as possible. Yet her cross-examination of Jack may well have contributed to Sarah's failing to respect Jack in his future work with her.

Moreover, Ellen undermined her working relationship with a professional with whom she would have future dealings on Jose's behalf. Unlike the social work codes, the legal ethical codes are silent on the issue of establishing and maintaining cooperative working relationships, as far as possible, with professionals of other disciplines.³⁷ I have argued elsewhere that lawyers for children nevertheless have a duty to cooperate with consulting social workers serving the same clients.³⁸ Here, too, Ellen clearly should have attempted to the greatest

35. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1988) [Hereinafter "CPR"].

36. This debate is well followed in Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966), and responding articles.

This dilemma was not intentionally incorporated into the hypothetical, but was identified by Professor Martin Guggenheim of New York University Law School, a participant in the roleplay at Reno.

37. The social work codes require that social workers "extend to . . . other profession[als] the same respect and cooperation that is extended [to themselves]" and "to cooperate with [other professionals] fully for the best interests of the client" NASWCE § III(J)(8) reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 166 (R. Gorlin, ed. 1986). There are no corresponding rules for attorneys in either the Model Rules of Professional Conduct ("Model Rules") or the Model Code of Professional Responsibility ("CPR").

38. The lawyers' duty to cooperate with consulting social workers stems from state laws that assign the lawyer the duty to look out for the child's best interests, ethical duties assigned to lawyers with clients under a disability, and the frequent need for social work assistance in

possible degree to develop and maintain a cooperative relationship with Jack in order to help Jose realize his long-term goal of reunion with Sarah. Yet Ellen's conscientious fulfillment of her duties of zealous advocacy in the termination proceeding led her to undermine that relationship.

In a similar way, Ellen's duty of confidentiality to Jose frustrated her full participation in furthering Jose and Sarah's reunion. Because of Jose's clear invocation of confidentiality, Ellen was unable to advocate for services which recognized Jose, Sarah and Peter as a family unit. She was forced to portray the case, in court and in her informal advocacy, without Peter, an essential player in the case. Ellen thus used her professional power to further a false image of family, in a move counterproductive to the services needed to support Jose's actual family.

On the other hand, Ellen's ethical responsibilities made plain that she had no choice but to honor Jose's confidentiality. Unlike Jack, Ellen was not presented here with circumstances in which her legal responsibilities or ethical mandates would allow her to consider betraying Jose's confidences. The Disciplinary Rules ("DR") clearly state that a lawyer "shall not knowingly reveal a confidence or secret of his client" unless either the client 1) consents after full disclosure; or 2) has stated his intention to commit a crime; or the attorney must reveal those confidences 1) by law or court order, or 2) to establish or collect his fee or to defend himself against charges of wrongful conduct.³⁹ Jose's request that Ellen tell no one of Sarah and Peter's reunion fit none of those exceptions.

Unfortunately, Ellen could take little comfort in her success and conscientiousness in maintaining Jose's confidentiality. By representing his express wishes and carefully maintaining Jose's confidentiality, Ellen participated in a system in which Jose was not only denied what he wanted, namely a reunion with his mother and "Daddy," but also in which Jose's unhappiness and frustration led to behaviors that forfeited his "best interests," i.e., a life as an adopted child in his foster family.

The statute under which Ellen was appointed for Jose and the Code provisions regarding representation of a client "under a disa-

performance of duties. Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, 10 CHILDREN'S RTS. J. 15 (1989).

39. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c) (1988).

bility," however, did not allow Ellen to consider the "best interests"-oriented role. The statute instructed Ellen to "represent" her client, which suggested a traditional attorney's role for her. The lawyer's Code of Professional Responsibility alters the lawyer-client relationship for clients under a disability only when there exists "any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf."⁴⁰ Jose certainly exhibited no illness or disease which suggested that his judgment was fundamentally impaired; in fact, his insistence on confidentiality suggested that he understood in a sophisticated way the nature of the attorney-client relationship. Jose's wishes, while unwise from a social work point of view, are analogous to "low-percentage" goals any client, adult or child, might legitimately wish represented by counsel.⁴¹ His wishes are also totally consistent with the public policy expressed in the Adoption Assistance Act of 1980⁴² and many state laws, as well as that endorsed in *Santosky v. Kramer*:⁴³ the reunification of the natural family.

In the roleplay, Ellen expressed discomfort with her professional role with Jose. Had she sought merely to address his best interests from the start, perhaps Jose would have ended up better off than he now was: homeless and family-less. Perhaps he would have come to prefer his adoptive family and come to accept his mother's inability to plan for him. Yet her duty under the Model Code to abide by his decisions regarding the goals of his representation precluded that approach to Jose's representation.

Some participants, commenting on the roleplay in defense of Ellen, argued that Jack and Sarah's relationship was seriously damaged long before Ellen's hostile cross-examination of Jack. Another argued that Ellen did less harm to Jose and Sarah by cross-examining Jack about his failings than she would have done in a cross-examination

40. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1990).

41. For helpful discussions of the eternal debate on the proper role of the lawyer for children, see J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 111-132 (1979); J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 65-71 (1973); Wizner & Berkman, *Being a Lawyer for A Child Too Young to Be a Client: A Clinical Study*, 68 NEB. L. REV. 201 (1989); Lyon, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CALIF. L. REV. 681 (1987); Guggenheim, *The Right to be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984). William Simon provides a controversial proposal for changing the role of lawyers generally away from strict advocacy for their client's wishes towards "doing justice." Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1082 (1988).

42. Adoption Assistance Act of 1980, 42 U.S.C. § 622 (1980).

43. *Santosky v. Kramer*, 455 U.S. 795 (1982).

focussing on Sarah's shortcomings. A third comment noted that, whether Ellen represented Jose's wishes or ignored his wishes and represented his best interests, her relationship with him was bound to be destroyed. While these arguments might well console an agonized Ellen under these circumstances, the framing of the arguments illustrates the paucity of good choices that the system offers Ellen in this case. Are the best results that Ellen can strive to achieve for Jose an assault on an already troubled relationship or a minimization of harm?

As one Ellen argued in the roleplay, "at least I did what my client wanted me to do and I postponed, at least for a while, the destruction of his family." If this is the most constructive role Ellen can play on Jose's behalf, the system would do well to reexamine its rationale for assigning lawyers for children in cases like Jose's.

Ellen ended her representation of Jose with profound misgivings on whether she had helped the case at all. Had she indeed contributed to making Jose's life worse? While unlike Jack she did not face the pervasive frustration and the painful breakdown of her professional relationship, Ellen, like many lawyers for children, was left wondering whether legal representation ultimately provides children with a consistently positive service.

D. Jose

How did Jose evaluate Ellen's professional work on his behalf? Again, this ethical assessment must ask "what did Ellen profess? And how did she respond?"

To Jose, Ellen professed primarily that she would work to get Jose what he wanted. Yet her response to his expressed desire did not get Jose home. Ellen did not succeed in this promise. In the end, Jose had no home.

Ellen had also professed that she would keep his confidentiality. In the roleplay, I asked Jose if he was glad that Ellen at least kept his confidence. How did Jose feel about her faithful response? Jose answered that he in fact did not know that she had kept his confidences. Jose felt out of touch with Ellen, who was simply a sporadic presence in his life; he did not trust that she had not given his secrets away.

Jose expressed two reactions in response to my questions about his feelings. First, Jose was convinced that the sad outcome of his case was all his fault. He must be an unlovable child for one adult

after another—his mother, his foster parents, his lawyer—to leave him. Second, Jose was clear about his mistrust of adults. None of them had ever kept their promises. All of them had let him down. His mom had said that Jose would go home, only to learn in court that the judge does not consider Sarah his mother anymore. His foster parents said that they would adopt him, and now have changed their minds. His lawyer said that Jose would go home. Now, Jose has no home.

The long silences in the roleplay paralleled the angry, pained silence that many children like Jose must feel. Jose cannot understand how a system designed and described as a “helping system” could leave him in such a lonely, unnurturing life. Children like Jose often direct their anger and frustration either inwardly towards themselves, or outwardly, indiscriminately, acting out their confusion and pain.

E. Observations

What is achieved by designing a hypothetical case study and roleplay to illustrate the frustration of four well-meaning players in the family services and family court system? Jack’s and Ellen’s dilemmas suggest that systemic reforms in the past have incrementally complicated professional roles to the point of eroding their essential usefulness. In some instances, the gradual addition of professional requirements, and in others, the transplanting of traditional roles to new settings, may be counterproductive for the clientele the system hopes to serve.

Jack’s predicament illustrates the way in which the gradual erosion of social worker-client confidentiality, through expanded mandatory reporting requirements and expanded duties to testify, have made the quintessential therapeutic social worker-client relationship both increasingly difficult to develop and increasingly difficult to maintain. A social worker who successfully explains to his client the many exceptions to the confidentiality rule at the outset will most likely end up with a client reluctant to confide anything. On the other hand, a social worker who, like Jack, maintains confidentiality with no clear delineation of the limitations of that privacy, ultimately dishonors his client through a failure of candor. He ignores an ethical mandate to present the risks of his services fully, and precipitates a major disruption of the relationship if he is forced to betray confidences. He also risks the potential poisoning of other confidential relationships in the client’s future.

This ethical conflict for social workers appears to have developed as systemic reformers have proposed the expansion of mandated reporting duties or the suspension of privileges and confidentiality in a growing number of circumstances. These reformers no doubt perceived a need to make more information available to courts, as well as a need to share information among service providers. While expanding available information seems to be a laudable goal in theory, Jack's frustration demonstrates that the traditionally protected confidential relationships upon which the system's success depends cannot tolerate casual tinkering.

The roleplay reveals that the structure of confidentiality in the current family court/social services system hampers the development and maintenance of constructive therapeutic relationships between social workers and clients. Had the roleplay or other ethical analysis been undertaken as those systemic reforms were proposed, the devastating effect of the erosion of confidentiality could well have been predicted.⁴⁴

Ellen's dilemma raises a different question about the family services/family court system: What is the appropriate lawyer's role in representation of children? Are state jurisdictions correct to inject lawyers for children into civil proceedings involving families? Examining the experience of Ellen and lawyers like her should enable systemic reformers to understand how the role of the lawyer for children is being fulfilled by actual professionals.

44. I do not suggest here that confidentiality between social workers and clients must be absolutely safeguarded under all circumstances. Indeed, I believe that achieving the proper balance between necessary confidentiality of professional relationships and the need for greater disclosure of information to ensure appropriate social services and appropriate adjudications is one of a handful of key issues to be resolved in the evolution of the family court. Jack's predicament suggests that adjustments in the structure of confidentiality must be made with a view to the concrete effects of erosion of confidentiality as well as with an eye to the effects of those adjustments systemwide.

Scholars from several disciplines have addressed many different aspects of this important debate. For differing views of discretionary reporting of child abuse by therapists, compare, e.g., Note, *Vanishing Exception to the Psychotherapist-Patient Privilege: The Child Abuse Reporting Act*, 16 PAC. L.J. 335 (1984) (favoring discretionary reporting) with Butz, *Reporting Child Abuse and Confidentiality in Counseling*, 66 SOC. CASEWORK 83 (1985) (against discretionary reporting).

On suggested reforms for the child abuse reporting laws see, e.g., Smith & Meyer, *Child Abuse Reporting Laws and Psychotherapy: A Time for Reconsideration*, 7 INT'L J. L. & PSYCHIATRY 351 (1984). For specific reforms when the abuser is a patient, see, e.g., Miller & Weinstock, *Conflict of Interest Between Therapist-Patient Confidentiality and the Duty To Report Sexual Abuse of Children*, 5 BEHAV. SCI. & L. 161 (1987) (advocating that the patient/abuser's therapist not be required to report); accord Coleman, *Creating Therapist-Incest Offender Exception to Mandatory Child Abuse Reporting Statutes—When Psychiatrist Knows Best*, 54 CINN. L. REV. 1113 (1986).

Ellen's angst illustrates the way in which attorneys for children playing traditional roles in adversarial legal proceedings sometimes find themselves hampering the long-term welfare of their clients. Clearly, however, had the Model Code allowed Ellen to choose to represent what she and the experts considered Jose's "best interests," her relationship with her client would have been perhaps even more troublesome than it was in this hypothetical situation.⁴⁵ In that choice, her practice might have foundered as Jack's did. Had she pursued goals that Jose did not articulate, Jose might have still felt betrayal and frustration as his "advocate" argued against his express wishes.

Children's lawyers thus often struggle with the conflict between a commitment to offer service to children on the one hand, and a dedication to the lawyer's role on the other. As seen through Ellen's eyes, the hard choices are agonizing. As a lawyer, is she bound to treat Jose as much like an adult client as she can, even if that treatment appears to contribute to a lessening in her client's quality of life? Yet, if she is allowed to moderate and alter her obligations as a lawyer per se, is she really performing a lawyer's role at all?

Once systemic reformers understand the range of dilemmas that these professionals face, based on analysis of case studies and research into the roles that lawyers for children play, the reformers can then consider whether the role of the lawyer for children should be re-examined or reshaped in the continuing evolution of the family court. As changes in the lawyering role with children clients are recommended, or as lawyers for children are mandated in a growing number of case types, reformers would do well to seek an understanding, from the client's view, of how these changes will affect the client's perception of the lawyer-client relationship.⁴⁶

45. For instance, a pure "best interests" position might suggest that Ellen treat Jose's statements less confidentially. It is hard to see how a lawyer can justify a violation of a client's confidentiality, however, given the plain mandates of both the CPR and the ABA Model Rules of Professional Conduct. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1988); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1988).

46. For instance, William Simon proposes that lawyers be allowed ethical discretion in their client representation in deciding what clients to represent and how to represent them. "[T]he basic consideration [of this discretion] should be whether assisting the client would further justice." Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1082, 1083 (1988). Reformers considering an implementation of Simon's point of view should look closely at the effect of Simon's proposal on the lawyer-client relationship. How much, for instance, will a client confide in an attorney if the client knows that the attorney may seek a goal contrary to the client's interests in the name of "doing justice?" In the roleplay's scenario, how much would Jose confide in Ellen if he knew she was seeking his "best interests," which conflicted with his stated wishes?

Reformers would likely conclude that traditional lawyering approaches are counterproductive to the goals of the family court or that the role currently played by lawyers for children can be more effectively played by other professionals. Or reformers may determine that minor adjustments in the ethical codes will eliminate the kinds of dilemmas that Ellen and her colleagues, and Jack and his colleagues, face. What is essential to the analysis that precedes these conclusions is a deep look into the experience of these professionals and their clients. The deep sense of alienation shared by Sarah and Jose suggests that the system sorely needs this analysis in order to serve families and children in a constructive, healthy manner.

V. DOES THE ROLEPLAY ACHIEVE THE GOALS AND SERVE THE ASSUMPTIONS OF ETHICAL ANALYSIS?

In many ways, the Reno roleplay achieved its goals of sensitizing its system-oriented participants to ethical dilemmas in the family court/social services system. In comments reported to me by participants and symposium organizers, many of the participants commented that they were struck by the power of assuming a role, and felt refreshed by the opportunity to "experience" the system from an individual client or professional's point of view. While several participants suggested that they wished they had played the part of a professional like themselves, many enjoyed the perspective offered by a different role.⁴⁷

In their brief encounter with a different viewpoint on the system, the symposium participants asked themselves, "how do parents and children perceive the system, given their daily contacts with the

47. The choice of lawyer and social work roles in a conference dominated by judges and administrators was deliberate. To further the distance between these professionals' abstract pondering of the system and this experience, I assigned professional roles that did not match those of the participants.

By including a dilemma from the profession of the majority of the participants, the "vacation" aspect of the role play might have been lost. Naturally, those professionals would become more engaged in that dilemma to the exclusion of other perspectives. For instance, the responses of the Jacks and Ellens in the roleplay showed a deep acceptance of the lawyer's role and a tendency to point more blame on the social worker. Perhaps this owed to the legal background of most participants. On the other hand, acting out one's own professional role in simulations can be a very effective way of allowing professionals to evaluate or experience in a new light their day-to-day roles in a reflective environment. Several participants suggested adding a judicial ethical perspective to the case study. If one is added, in order to capitalize on the "freshness" of the perspective, it might be best to assign non-judges to the judge roles. In making the decision, facilitators should assess from group to group the relative merit of the "vacation" versus the need to engage the professional's own experience.

professionals assigned to serve them?" Many participants reported that they found the roleplaying an effective focussing lens on their systemic evaluation. Many participants reported that the roleplay was engaging and even fun.

This examination of the Reno roleplay raises two important criticisms: One of the way in which the roleplay was actually run in Reno; and one of roleplay generally. First, the roleplay at Reno was clearly too brief. The assumptions behind the roleplay and its goals were not clearly articulated. The exploration of the feelings and evaluations of the four characters was rushed and truncated. Ironically, Jose's comments were saved for last because of their importance and then were cut off due to lack of time. Many interesting observations could not be pursued for lack of time, nor could interesting dialogue between the characters take place. In fact, I even cut Jose off when he tried to tell me how he felt, too early for *my* timing.

In addition, the reflection on the roleplay was undertaken entirely by the facilitator without valuable input from the de-roled characters. Many participants commented to me afterwards that they felt as if they were still "in role," because they had had no way to debrief the experience. One participant commented: "Help me! I'm still Jose and I feel so miserable!"

Based on that experience, I recommend that a minimum running of the roleplay take seventy-five minutes, with half an hour devoted to the observations of the characters, half an hour devoted to discussion of the roleplay by the de-roled characters, and fifteen minutes by the facilitator to discuss the conclusions and further directions of the ethical analysis. If possible, the debriefing or the entire roleplay should be undertaken in smaller groups to allow each participant maximum participation.

Second, roleplay generally is unquestionably flawed in that participants temporarily assuming the roles of others can never replicate the full true experience of the other. Indeed, any facilitator of this roleplay must stress that the point of the exercise is not an achievement of complete empathy with any given character in the system. Such an aspiration would be dangerous and ultimately disrespectful to the clients of the system.

The roleplay, thus, simply allows participants a taste or a glimpse of the experience of clients and professionals in the system. It is useful for would-be reformers to step into the shoes of the system's clients and professionals, not because they can thereby "know" how these individuals actually feel, but rather because reformers can

experience how they themselves might feel in those circumstances. It is important that the experience of a roleplay is not immediately generalized to make instant broad changes in the system. Instead, roleplays, if correctly used, may help reformers identify needed areas of reform and evaluate proposed reforms in the first instance.

Roleplay should not be seen as a substitute for systematic evaluation of the family court/social services system by families and children themselves. This Article suggests roleplay as a complement to a multi-techniqued evaluation of systemic performance and systemic changes. This evaluation must include among other data empirical research into the reactions of families and children to individual parts of any system; e.g., evaluations of specific service programs, legal services, family court experiences.⁴⁸

VI. SUGGESTIONS FOR FURTHER APPLICATIONS AND STUDY

Roleplays like Sarah and Jose's story can effectively be designed to explore other important professional dilemmas in the family court/social services system, including: Child protective caseworker's conflicting roles as investigator and service provider; the probation officer's role as arm of the court and service provider; the judge's duty to safeguard proper adversarial procedures and her duty to serve the best interests of the child; the state attorney's duty to serve the best interests of the child; the state attorney's duty to serve justice and to represent the state bureaucracy. These are just a few of the many professional dilemmas that recur in the existing family services/family court system.

Readers interested in the use of roleplay generally can benefit from literature describing the use of roleplay in various educational contexts.⁴⁹ Others interested in ethical analysis generally are urged to investigate other methods for facilitating group investigation of professional roles and professional effectiveness. Existing academic literature can introduce interested students to a range of studies and

48. For a study of outpatients and their reactions to loss of confidentiality, see, e.g., Applebaum, Kapen & Walters, *Confidentiality: An Empirical Test of the Utilitarian Perspective*, 12 BULL. AM. ACAD. PSYCHIATRY L. 109 (1984).

49. See, M. SHAW, R. CORSINI, R. BLAKE & J. MOUTON, *ROLEPLAYING: A PRACTICAL MANUAL FOR GROUP FACILITATORS* (1980) (offering interdisciplinary bibliography of sources on the topic of roleplaying).

scholarly writings on a variety of topics related to confidentiality.⁵⁰

This roleplay technique represents both a starting point for investigation of systemic change and a starting point for experiential exploration of individual professional roles. As discussed, the technique also represents the intersection and interaction of those two concerns. It is hoped that the technique can contribute in a small way to increasingly helpful professional involvement in an increasingly constructive family services system.

50. On the special problems of reporting when the child abuser is also a substance abuser receiving treatment, see Saltzman, *Reporting Child Abusers and Protecting Substance Abusers*, 31 *SOC. WORK* 474 (1986); Rinella & Goldstein, *Family Therapy with Substance Abusers: Legal Considerations Regarding Confidentiality*, 6 *J. MARITAL & FAM. THERAPY* 319 (1980).

For a general overview of the relationship between attorneys and the mental health field, see, S. Shah, *Legal and Mental Health System Interactions—Major Developments and Research Needs*, 4 *INT'L J. L. & PSYCHIATRY* 219 (1981). For specific problems and conflicts in regards to confidentiality see, Note, *Functional Overlap Between Lawyer and Other Professionals: Its Implication for the Privileged Communications Doctrine*, 71 *YALE L.J.* 1227 (1962).

For a review of the therapist-patient privilege in federal courts, see, K. Cerveny & M. Kent, *The Psychotherapist-Patient Privilege in Federal Courts*, 59 *NOTRE DAME L. REV.* 791 (1984).

On psychiatrists' duty to breach the confidentiality of the "dangerous" patient, see *Tarasoff v. Regents of University of California*, 17 *Cal. 3d* 425, 551 *P.2d* 334, 131 *Cal. Rptr.* 14 (1976); Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 *EMORY L.J.* 263 (1982).