

Comment,  
**ATTORNEYS' DUTY TO REPORT CHILD  
ABUSE**

## **I. Introduction**

Attorneys face ethical dilemmas from time to time in their practice. Whether it is a question of representing an alleged murderer or helping an individual with competency issues draft a will, attorneys confront difficult decisions. The American Bar Association (ABA), the *Restatement (Third) of the Law Governing Lawyers* and the American Academy of Matrimonial Lawyers have set forth guidelines to assist attorneys in making ethically correct professional decisions. One area that is particularly unclear is what duties exist for an attorney with regard to reporting suspected child abuse. A conflict exists between keeping attorney-client communications confidential and protecting a child.

While the attorney is bound by the attorney-client privilege to protect the client's confidences, public policy dictates that children must be kept safe from harm. Therein lies the conflict. To what extent should an attorney be required to keep a client's private information private? When is it acceptable for the attorney to break the client's confidences?

This article will evaluate the issues surrounding attorney-client privileges in regard to reporting child abuse. Initially, the article will address the history of the attorney-client privilege and confidentiality. Then the article will discuss the ABA's Ethics 2000, *Restatement (Third) of the Law Governing Lawyers* and the American Academy of Matrimonial Lawyers (AAML) guidelines. The article will provide reporting laws for each state to show when attorneys are required to report child abuse and when they are able to invoke the attorney-client privilege. The next section will talk about the role of attorney as a mediator in domestic relations mediation. Finally, the article will discuss the duty to disclose or warn a third party.

## II. Rules Relating to Confidentiality and the Exceptions

### A. Confidentiality and Attorney-Client Privilege

While on the surface it appears that confidentiality and attorney-client privilege are the same concept, they have distinct differences. The attorney-client privilege applies to the evidentiary side of the law. Confidentiality on the other hand involves the ethical rules of the attorney-client relationship.<sup>1</sup> This ethical duty requires the attorney to keep the client's information private.<sup>2</sup> The concept of confidentiality began in Ancient Rome for slaves who were not allowed to reveal any of their master's secrets.<sup>3</sup> Confidentiality arose from the attorney-client privilege of the sixteenth century English courts, "where 'the oath and the honor of the attorney' prevented the attorney from testifying about information accrued before, during, or after representation."<sup>4</sup>

The attorney-client privilege is based on the same principles as confidentiality. "The duty of confidentiality, whether legal or ethical, exists to encourage clients to communicate 'fully and frankly with counsel.'<sup>5</sup> The underlying principle of the privilege is also to encourage clients to fully disclose information regarding their situation to their attorneys without fear of repercussion.

To do their job, lawyers need complete and accurate facts, both about what has already occurred and about what the client contemplates doing. Receiving these facts is essential to offering legal advice, because legal obligations and remedies depend upon factual circumstances that justify the legal intervention. Lacking accurate facts, the lawyer will either apply the wrong law, give incorrect legal advice, or both, which

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<sup>1</sup> Christine Harrington, Note, *Reevaluating the Duty of Confidentiality*, 47 N.Y.L. SCH. L. REV. 423, 426 (2003) (discussing the history of confidentiality).

<sup>2</sup> *Id.*

<sup>3</sup> Emiley Zalesky, *Current Development 2001-2002: When Can I Tell a Client's Secret? Potential Challenges in the Confidentiality Rule*, 15 GEO. J. LEGAL ETHICS 957, 959 (2002) (discussing the history of confidentiality and the attorney-client privilege).

<sup>4</sup> *Id.*

<sup>5</sup> John M. Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice*, 9 MICH. J. GENDER & L. 207, 245 (2003) (discussing the ramifications of representing a domestic violence victim).

in turn will reduce public confidence in the legal system and in lawyers.<sup>6</sup>

Over time distinctions between the two concepts have become apparent. The primary difference between the two is in disclosure. Confidentially means that no information regarding the client is to be disclosed unless it meets an exception of the rules; i.e., to prevent fraud or future criminal acts. Attorney-client privilege deals with when a lawyer is obligated to testify about communications with a client.<sup>7</sup>

Another difference between attorney-client privilege and confidentiality is the scope of each.<sup>8</sup> The attorney-client privilege is directed to the court and is narrowly construed.<sup>9</sup> Confidentiality has a much wider scope. It encompasses all information that is gathered by the attorney regarding the client in the course of representing the client.<sup>10</sup> “In marked contrast to privilege, confidentiality applies to *all* information *about* a client, not simply to *communications from* a client.”<sup>11</sup>

The issue then becomes when an attorney can break the confidentiality of a client. Some feel that it is solely up to the client. “Regardless of the nature of the confidentiality obligation, the power to waive it rests with the client, not with the attorney.<sup>12</sup> The client can release the attorney from the attorney-client privilege bond in several different ways. She can either expressly or impliedly consent to the waiver. If she says something in the presence of a third party, her privilege is considered waived as well<sup>13</sup>

However, as this article will discuss next, exceptions exist to the client waiver rule. Guidelines regarding those exceptions to the rule are set forth in the American Bar Association Rules of

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<sup>6</sup> Susan R. Martyn, *Nebraska and Model Rules of Professional Conduct: In Defense of Client Lawyer Confidentiality and Its Exception*, 81 NEB L. REV. 1320, 1324 (2003) (discussing the importance of the attorney-client relationship to give good legal advice).

<sup>7</sup> 1 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING*, 136 (1990).

<sup>8</sup> *Id.* at 168.

<sup>9</sup> *Id.* at 137.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 168.

<sup>12</sup> Burman, *supra*, note 5 at 244.

<sup>13</sup> Hazard, *supra*, note 7 at 143-46.

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Professional Conduct, the *Restatement (Third) of the Law Governing Lawyers* as well as the American Academy of Matrimonial Lawyers Standards of Conduct.

B. *The Development of Ethics 2000*

The ABA adopted the original Canons of Professional Ethics on August 27, 1908.<sup>14</sup> “These were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887.”<sup>15</sup> To monitor professional ethics in other states the Standing Committee on Professional Ethics of the American Bar Association was formed in 1913. In 1919 the name was changed to the Committee on Professional Ethics and Grievances.<sup>16</sup>

In 1958 the Committee on Professional Ethics and Grievances was separated into two committees: A Committee on Professional Grievances, with authority to review issues of professional misconduct, and a Committee on Professional Ethics with responsibility to express its opinion concerning proper professional and judicial conduct. The Committee on Professional Grievances was discontinued in 1971. The name of the Committee on Professional Ethics was changed to the Committee on Ethics and Professional Responsibility in 1971 and remains so.<sup>17</sup>

Over the years the ABA established various committees to develop an ethical blueprint for attorneys. “In 1977 the ABA created the commission on Evaluation of Professional Standards to undertake a comprehensive rethinking of the ethical premises and the problems of the legal profession.”<sup>18</sup> After a six-year study the ABA presented the Model Rules of Professional Conduct.<sup>19</sup> The Rules were adopted in 1983. Between that time and 2002 the House of Delegates of the ABA amended the Rules on fourteen different occasions.<sup>20</sup> In 1997 the Board of Governors chose to revise the Rules due to the lack of uniformity with every

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<sup>14</sup> The Model Rules of Professional Conduct Preamble is found at [www.abanet.org/cpr/mrpc/preface.html](http://www.abanet.org/cpr/mrpc/preface.html).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

state's ethics rules.<sup>21</sup> The latest revision was amended again in 2003 and is better known as Ethics 2000. Rule 1.6 of Ethics 2000, which deals with the attorney-client relationship, is the focus of this section.

There are significant exceptions to the general rules of confidentiality imposed by Rule 1.6(a) in 1.6(b). The most contested part of 1.6(b) involves exceptions of when the attorney is allowed to breach confidentiality to protect the interest of a third party.<sup>22</sup>

The most current version of Rule 1.6 states in part:

(a) A lawyer shall not reveal information to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm.<sup>23</sup>

The most significant change to this rule from the 2000 version to the 2003 version is the wording of (b)(1). It was changed from "to prevent *the client from committing a criminal act that the lawyer believes is likely to result in imminent* death or substantial bodily harm"<sup>24</sup> to **reasonably certain** death or bodily harm."<sup>25</sup>

The change to the rule in italics appears to make it easier for an attorney to report suspected child abuse. In an attempt to clarify what was meant by 1.6(b)(1), the comment section discusses what an attorney should do if that attorney becomes aware of a client who plans to dump toxic waste in a water supply that is available to the public; it does nothing to clarify when attorneys should report child abuse.<sup>26</sup> "Moreover, even with crimes involving physical injury it is not always clear what 'serious bodily harm' will consist of. For example, some child abuse

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<sup>21</sup> E. Norman Veasey, *Ethics 2000: Thoughts and Comments on Key Issues of Professional Responsibility in the Twenty-First Century*, 5 DEL. L. REV. 1, 3 (2002)(giving an overview of Ethics 2000 and the changes that had been made).

<sup>22</sup> Lewis Becker, *Ethics: Problems relating to Confidentiality*, received in the January 2004 edition of an e-mail sent by the American Bar Association Family Law section on January 28, 2004.

<sup>23</sup> American Bar Association, *Ethics 2000*, Rule 1.6(a)-(b)(1).

<sup>24</sup> Model Rules of Conduct revision form found at <http://www.abanet.org>.

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> American Bar Association, *Ethics 2000*, Rule 1.6 found at the website <http://www.abanet.org>.

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cases which involve only mental but not physical harm might not fall into this category, leaving helpless children with no protection.”<sup>27</sup> Although the ABA does appear to be trying to protect children, the rules that attorneys are using to guide their decisions need to be a comprehensible roadmap that they can easily follow.

*C. Restatement (Third) of the Law Governing Lawyers*

The American Law Institute (ALI), which is comprised of practicing lawyers, judges and academics, began to draft the *Restatement of the Law Governing Lawyers* in 1986.<sup>28</sup> “Unlike the ABA Model Rules, the ALI has not proposed a code of regulations that it expects state courts to adopt as rules of the court. Instead it has drafted a series of principles, also called ‘black letter rules,’ followed by commentary and examples.”<sup>29</sup>

The *Restatement (Third) of the Law Governing Lawyers*, completed after twelve years of drafting and debate, reexamined both the fiduciary duty of confidentiality, found in both lawyer professional codes and in the law of agency, and the evidentiary client-attorney privilege, which blocks disclosure of client confidences in litigation.<sup>30</sup> Chapter Five of the Restatement deals with confidential client information. “While the professional obligation to keep client information secret is the hallmark of professional practice, confidentiality can also be exploited to violate the law.”<sup>31</sup> The Restatement (Third) of the Law Governing Lawyers states in Section 66:

- (1) A lawyer may use or disclose confidential information when the lawyer reasonably believes that its use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person.
- (2) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client

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<sup>27</sup> Limor Zer-Gutman, *Revisiting the Ethical Rules of Attorney-Client Confidentiality: Towards a New Discretionary Rule*, 45 LOY. L. REV. 669, 684 (1999) (discussing ethical issues with disclosing confidential client information).

<sup>28</sup> THOMAS MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY INCLUDING CALIFORNIA AND NEW YORK RULES 376 (2003).

<sup>29</sup> *Id.*

<sup>30</sup> Hazard, *supra* note 7, at 134.2.

<sup>31</sup> Restatement (Third) of the Law Governing Lawyers, Introduction of Chapter Five.

not to act. If the client has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent the harm and advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.

(3) A lawyer who takes action or decides not to take action permitted under this section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person.<sup>32</sup>

The comment section of the Restatement gives more detail than the Model Code in regard to what actions by an attorney are covered by this section. Comment *b* states "No lawyer code explicitly permits disclosure, as broadly permitted by Subsection (1), solely on the justification that death or serious bodily harm is threatened, such as where a lawyer becomes aware that a person's life is at risk because of a noncriminal act of the client."<sup>33</sup> The comment goes on to say that it would be unlikely that an attorney would be held liable if he acted in good faith when disclosing potentially life-threatening information of a client.<sup>34</sup>

Unlike the comment section in the ABA which discussed toxic waste in a stream, the Restatement covers issues such as sexual abuse as well as suicide. Comment *h* states "serious bodily harm within the meaning of the Section includes life-threatening illness and injuries and the consequences of events such as imprisonment for a substantial period and child sexual abuse. It also includes a client's threat of suicide."<sup>35</sup> Comment *d* discusses the lawyer's reasonable belief that action is necessary. "A lawyer's discretion to take appropriate action to prevent death or serious bodily harm under this Section is predicated on the lawyer's reasonable belief that the action is necessary to prevent reasonably certain death or serious bodily harm to a person."<sup>36</sup> The Restatement gives more precise guidance for an attorney to follow when it comes to dealing with attorney-client privileged information. It seems to indicate that there would not be any liability for an attorney to report suspected child abuse. There is

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<sup>32</sup> *Id.* at § 66.

<sup>33</sup> *Id.* at Comment *b*.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at Comment *h*.

<sup>36</sup> *Id.* at Comment *d*.

little, if any, case law that has held an attorney liable for reporting suspected child abuse.

#### D. *American Academy of Matrimonial Lawyers*

The American Academy of Matrimonial Lawyers (AAML) developed the *Bounds of Advocacy*. It “represents the collective wisdom of the 1,200 members of the American Academy of Matrimonial Lawyers.”<sup>37</sup> These standards of conduct “emerge as the first attempt by such a voluntary lawyer’s association to draft ethical standards for its specific area of practice that go beyond those required by the American Bar Association state ethics codes.”<sup>38</sup> The primary reason that the Standards of Conduct were developed was “to provide guidance to matrimonial lawyers confronting moral and ethical problems. . . Existing codes often do not provide adequate guidance to the matrimonial lawyer.”<sup>39</sup> The Standards of Conduct encompass such areas as attorney competency, the relationship between opposing counsel and the attorney-client relationship.

Standards of Conduct 2.26 states, “An attorney should disclose evidence of a substantial risk of physical or sexual abuse of a child by the attorney’s client.”<sup>40</sup> The comment section that follows the rule offers various ways to deal with the issue. One is to refuse to assist the client.<sup>41</sup> Another suggestion is for the attorney to withdraw from the case if allowed and if it would not negatively impact the client.<sup>42</sup> A third suggestion is to have a guardian ad litem (GAL) appointed.<sup>43</sup> In some jurisdictions a GAL appointment would be considered adverse to the client due to the fact that determining the need for one would be based on confidential information.<sup>44</sup>

Notwithstanding the importance of the attorney-client privilege, the obligation of the matrimonial lawyer to consider the welfare of the children, coupled with the client’s lack of any legitimate interest in preventing his attorney from revealing information to protect the chil-

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<sup>37</sup> *The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIM. LAW. 1, 1(1992).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* at 29.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



dren from likely physical abuse, requires disclosure of a substantial risk of abuse and the information necessary to prevent it.<sup>45</sup>

In a footnote, the AAML stated that 2.26 should only be followed if the laws of the jurisdiction in which the attorney practices allows it. If the laws do not allow disclosure than 2.26 does not apply.<sup>46</sup> Obviously the Standards of Conduct need to be used in conjunction with the laws in each state that pertain to reporting suspicions of child abuse.<sup>47</sup>

The same can be said about the rules from the ABA and the Restatements. While all of them provide a guide for ethical decision making in the practice of law, they are not a substitute for established law in their jurisdictions. It is important for attorneys to consult laws in their own state regarding reporting suspected child abuse.

### III. Mandatory Reporting and Liability for Failure to Disclose

#### A. Mandatory Reporters

Any citizen may report suspected child abuse provided that person has a good faith belief that abuse is occurring. Certain professionals have been designated by statute as mandated reporters so that they *must* report suspected abuse. Examples of mandated reporters are social workers, teachers and physicians.<sup>48</sup> Members of the clergy are also mandated reporters in certain circumstances.<sup>49</sup> Information gathered through communications such as confession is barred from this requirement. In some states photo processors are required to report any suspected abuse.<sup>50</sup>

Attorneys are in a unique position. While the general public may assume that attorneys are mandated reporters, the information that would be gathered regarding the abuse takes place dur-

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<sup>45</sup> *Id.* at 30.

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g. Ellen Morris, Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality and Juvenile Delinquency, 11 GEO. J. LEGAL ETHICS 509 (1998).

<sup>48</sup> See Mo.R.S. § 210.115.

<sup>49</sup> See Mo.R.S. § 352.400.

<sup>50</sup> This information is found at <http://www.nccanch.acf.hhs.gov>

ing the course of representing the client. As discussed earlier that information would be protected by the attorney-client privilege. "Traditionally, a privilege was considered a 'judicially recognized point of honor among lawyers in England.' Originally the only privileges judicially recognized at common law were between an attorney-client and husband-wife."<sup>51</sup> Currently, approximately 34 states specifically state when a communication is privileged in their reporting laws. This type of communication is usually exempt from mandatory reporting laws.<sup>52</sup>

Each state takes a different approach in regards to mandatory reporting statutes. Some statutes specifically include attorneys as mandated reporters. Other statutes may include attorneys, but exempt them from reporting under certain circumstances. Finally, a statute may not say anything in regards to mandatory reporting.<sup>53</sup> Each state's statutes are provided below.

Mandatory reporting statutes that require an attorney to report suspected child abuse are in direct conflict with the attorney-client relationship.<sup>54</sup> On the one hand, the crucial reason for the attorney-client privilege is to provide the client with a sense that the client is able to disclose anything to the attorney without fear of repercussion. On the other hand, if that attorney discovers that a child is being abused at the hands of his client the attorney may feel that he has an ethical duty to stop that from occurring. This puts the attorney in a difficult position with regard to the client. By reporting suspected child abuse by a client, the attorney may be subjecting the client to potential criminal prosecution or losing custody of a child. However, if attorneys do not report their suspicions, that leaves the child at risk for further abuse.

The following table is based on information from the National Clearinghouse on Child Abuse and Neglect information website.

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<sup>51</sup> David B. Canning, Comment, *Privileged Communications in Ohio and What's New on the Horizon: Ohio House Bill 52 Accountant Client Privilege*, 31 AKRON L. REV. 505, 507 (1998).

<sup>52</sup> This information is found on the National Clearinghouse of Child Abuse and Neglect Information website at <http://www.nccanch.acf.hhs.gov>.

<sup>53</sup> Brook Albrandt, Note, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX. L. REV. 655, 657 (2002)

<sup>54</sup> *Id.* at 658.

**State Specific Information on Reporting Laws<sup>55</sup>**

STATE	STATUTE	MANDATORY REPORTING	PRIVILEGED COMMUNICATIONS GRANTED
<b>ALABAMA</b>	ALA. CODE § 26-14-3(a); § 26-14-10	No	Yes
<b>ALASKA</b>	ALASKA STAT. § 47.17.020(a) § 47.17.023 § 47.17.060	No	Not granted in statutes reviewed
<b>ARIZONA</b>	ARIZ. REV. STAT § 13-3620(A); § 8-805(B)-(C)	No	Yes
<b>ARKANSAS</b>	ARK. CODE ANN. § 12-12-507(b)-(c); § 12-12-518(b)(1)	Prosecutors; Judges*	Yes
<b>CALIFORNIA</b>	CAL. PENAL Penal Code § 11166(a), (c); § 11165.79(a)	No	No
<b>COLORADO</b>	COLO. REV. STAT. § 19-3-304(1), (2), (2.5); § 19-3-311	No	No
<b>CONNECTICUT</b>	CONN. GEN. STAT. § 17a-101(b); § 17a-101a	No	Not addressed in statutes reviewed
<b>DELAWARE</b>	DEL. CODE ANN. Tit. 16 § 903; § 909	No**	Yes
<b>FLORIDA</b>	FLA. STAT. ch. § 39.201(1); § 39.204	Judges*	Yes
<b>GEORGIA</b>	GA. CODE ANN. § 19-7-5(c)(1), (g); § 16-12-100(c)	No	Not granted in statutes reviewed
<b>HAWAII</b>	HAW. REV. STAT. § 350-1.1(a); § 350-5	No	Not granted in statutes reviewed
<b>IDAHO</b>	IDAHO CODE § 16-1619(a), (c); § 16-1620	No**	Yes
<b>ILLINOIS</b>	ILL. COMP. STAT. 325 ILCS § 5/4	No	No
<b>INDIANA</b>	IND. CODE § 31-33-5-1; § 31-33-5-2; § 31-32-11-1	No**	Not granted in statutes reviewed
<b>IOWA</b>	IOWA CODE § 232.69(1)(a)-(b); § 728.14(1); § 232.74	No	Not granted in statutes reviewed

<sup>55</sup> 2003 Child Abuse and Neglect State Statute Series Statutes at a Glance: Mandatory Reporters of Child Abuse and Neglect (This table was compiled from information found on the National Clearinghouse of Child Abuse and Neglect Information website at <http://www.nccanch.acf.hhs.gov>).

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<b>STATE</b>	<b>STATUTE</b>	<b>MANDATORY REPORTING</b>	<b>PRIVILEGED COMMUNICATIONS GRANTED</b>
<b>KANSAS</b>	KAN. STAT. ANN. § 38-1522(a), (b)	No	Not addressed in statutes reviewed
<b>KENTUCKY</b>	KY. REV. STAT. ANN. § 620.030(1), (2); § 620.050(3)	No**	Yes
<b>LOUISIANA</b>	LA. REV. STAT. ANN. Ch. Code art. § 603(13); § 609(A)(1); § 610(F)	Mediators	No
<b>MAINE</b>	ME. REV. STAT. ANN. Tit. 22, § 4011-A(1); § 4015	Guardian Ad Litem	No
<b>MARYLAND</b>	MD. CODE ANN. FAM. LAW § 5-704(a); § 5-705(a)(1)	No**	Yes
<b>MASSACHUSETTS</b>	MASS. GEN. LAWS ch. 119, § 51A; § 51B	No	No
<b>MICHIGAN</b>	MICH. COMP. LAWS ANN. § 722.623 (1), (8); § 722.631	No	Yes
<b>MINNESOTA</b>	MINN. STAT. § 626.556 Subd. 3(a), 8	No	No
<b>MISSISSIPPI</b>	MISS. CODE ANN. § 43-21-353(1)	Yes**	Not addressed in statutes reviewed
<b>MISSOURI</b>	MO. REV. STAT. § 210.115(1); § 210.140; § 568.110	No	Yes
<b>MONTANA</b>	MONT. CODE ANN. § 41-3-201(1)-(2), (4)	Guardian Ad Litem	No
<b>NEBRASKA</b>	NEB. REV. STAT. § 28-711(1); § 28-714	No**	Not granted in statutes reviewed
<b>NEVADA</b>	NEV. REV. STAT. § 432B.220(3), (5); § 432B.250	Yes*	Yes
<b>NEW HAMPSHIRE</b>	N.H. REV. STAT. ANN. § 169-C:29; § 169-C:32	No**	Yes
<b>NEW JERSEY</b>	N.J. STAT. ANN. § 9:6-8.10	No**	Not addressed in statutes reviewed
<b>NEW MEXICO</b>	N.M. STAT. ANN. § 32A-4-3(A); § 32A-4-5(A)	Judges**	No
<b>NEW YORK</b>	N.Y. SOC. SERV. LAW § 413(1)	District Attorneys	Not addressed in statutes reviewed
<b>NORTH CAROLINA</b>	N.C. GEN. STAT. § 7B-3-1; § 7B-310	No**	Yes
<b>NORTH DAKOTA</b>	N.D. CENT. CODE § 50-25.1-03; § 50-25.1-10	No	Yes

STATE	STATUTE	MANDATORY REPORTING	PRIVILEGED COMMUNICATIONS GRANTED
<b>OHIO</b>	OHIO REV. CODE ANN. § 2151.421(A)(1), (A)(2), (G)(1)(b)	Yes*	Yes
<b>OKLAHOMA</b>	OKLA. STAT. tit. 10 § 7103(A)(1); § 7104; § 7113	No**	Not granted in statutes reviewed
<b>OREGON</b>	OR. REV. STAT. § 419B.005(3); § 419B.010(1)	Yes*	Yes
<b>PENNSYLVANIA</b>	PA. CONS. STAT. 23 Pa. § 6311(a), (b)	No	No
<b>RHODE ISLAND</b>	R.I. GEN LAWS § 40-11-3(a); § 40-11-6(a); § 40-11-11	No**	Yes
<b>SOUTH CAROLINA</b>	S.C. CODE ANN. § 20-7-510(A); § 20-7-550	Judges*	Yes
<b>SOUTH DAKOTA</b>	S.D. CODIFIED LAWS § 26-8A-3; § 26-8A-15	No	Not granted in statutes reviewed
<b>TENNESSEE</b>	TENN. CODE ANN. § 37-1-403(a); § 37-1-605(a); § 37-1-411	Judges**	Not granted in statutes reviewed
<b>TEXAS</b>	TEX. FAM. CODE ANN. § 261.101(a)-(c); § 261.102	No**	No
<b>UTAH</b>	UTAH CODE ANN. § 62A-4a-403(1)-(3); § 62A-4a-412(5)	No**	No
<b>VERMONT</b>	Vt. STAT. ANN. tit. 33, § 4913(a), (f)-(h)	No	No
<b>VIRGINIA</b>	VA. CODE ANN. § 63.2-1509(A); § 63.2-1519	Mediators	Not granted in statutes reviewed
<b>WASHINGTON</b>	WASH. REV. CODE § 26.44.030 (1), (2); § 26.44.060(3)	No	Not granted in statutes reviewed
<b>WEST VIRGINIA</b>	W. VA. CODE § 49-6A-2; § 49-6A-7	Judges, Family Law Masters or Magistrates*	Yes
<b>WISCONSIN</b>	Wis. STAT. § 48.981(2), (2m)(c)-(e)	Mediators	Not addressed in statutes reviewed
<b>WYOMING</b>	WYO. STAT. ANN. § 14-3-205(a); § 14-3-210	No**	Yes

LEGEND

\*Discrepancy

\*\*All persons

The state statutes contain varying requirements. For example, Oregon has reporting statutes that specifically state that at-

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torneys are mandated reporters.<sup>56</sup> However, in another section of the statute attorneys are allowed to invoke the attorney-client privilege so that they do not have to report suspected child abuse.<sup>57</sup> When an attorney is allowed to use the privilege it is puzzling why the legislature designates them as mandated reporters in the first place.

Seventeen states currently list “any person” as a mandated reporter.<sup>58</sup> Clearly it could be argued that attorneys fall under this broad category of “any person” and therefore would not be in violation of the attorney-client privilege if they reported suspected child abuse. Out of those seventeen states that have the “any person” category, only eight of them allow attorneys to invoke the privilege.<sup>59</sup> In two states (Mississippi and New Jersey) attorneys as mandated reporters are not addressed in any of the reporting statutes.<sup>60</sup> In the remaining seven states, an attorney as a mandated reporter is explicitly denied in any of the statutes.<sup>61</sup> One idea that may explain conflicting rules is that states are trying to grant attorneys immunity whether they report suspected child abuse or not. If attorneys report and it hurts the client, they can show that they were required to report because attorneys are deemed to be mandated reporters under the statute. However, if attorneys choose to do nothing with the information they can claim immunity under the attorney-client privilege as long as they can demonstrate that they received the information in the course of representation. Attorneys would therefore have a superior duty to their clients then they do to a third party, whom they do not represent, that is being abused.<sup>62</sup>

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<sup>56</sup> OR. REV. STAT. 419B.005(3).

<sup>57</sup> OR. REV. STAT. 419.010(1).

<sup>58</sup> See *supra*, note 53. Those states are: Delaware, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah and Wyoming.

<sup>59</sup> *Id.* Those states are: Delaware, Idaho, Kentucky, Maryland, New Hampshire, North Carolina, Rhode Island and Wyoming.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Nine states list judges, prosecutors and/or guardians ad litem as mandated reporters.<sup>63</sup> Out of those nine, four grant attorney-client privilege. In the other five the privilege either is not granted by the statute or it is not addressed.<sup>64</sup>

It appears that even though laws are in place to help abused children, those laws protect attorneys as well if not better. While the states are attempting to clear up the ambiguity in regard to mandated reporting, no bright line rule exists at this point to assist attorneys in deciding whether they have a duty to report suspected abuse or not.<sup>65</sup>

### B. Mediation

Many forms of alternative dispute resolution are in use today. Arbitration, negotiation and mediation are just a few that are available. Mediation is a popular tool that family courts use to assist families to resolve disputes that arise during dissolutions regarding child custody issues.<sup>66</sup> Some debate exists whether mediators are mandated reporters or not due to the confidential nature of the mediation itself. In particular, the question arises whether attorneys who are in a role of mediator become mandated reporters in that context.

At the beginning of every mediation, the mediator will have the parents sign a mediation agreement. The agreement discusses among other topics the confidentiality of the mediation. The mediator will then deliver a monologue. In this speech the mediator lays down the ground rules of the mediation process. The mediator will go over such things such as: respecting the other party's point of view, only one person speaks at a time and other ground rules. It is at this time that a mediator will explain the rules of confidentiality. Mediators are not to be subpoenaed to court to discuss what occurs in mediation.<sup>67</sup> Mediators explain that what is said in mediation stays in mediation. Mediators who are also mandated reporters, as in the case of a social worker

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<sup>63</sup> *Id.* Those states are: Arkansas, Florida, Maine, Montana, New Mexico, New York, South Carolina, Tennessee and West Virginia.

<sup>64</sup> *Id.*

<sup>65</sup> Albrant, *supra* note 51.

<sup>66</sup> LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 2D EDITION 313 (1997)

<sup>67</sup> See Mo. S.Ct Rule 88.08.

conducting a mediation, will discuss exceptions to the rule of confidentiality such as reporting suspected child abuse. By telling the parents at the beginning of the mediation session, they are forewarned that if there is any suspicion of child abuse it will be reported. It could be argued that this would hamper a parent's ability to speak freely during the mediation. Fortunately, the parents are usually focused on working out an agreement in regard to parenting time so that the warning of possible reporting does not keep them from fully discussing issues.

Each state has different rules regarding mediators and mandated reporting. In Missouri the mediator is required to have either a J.D. or a master's degree in a social health field, such as a social worker, in order to do domestic relations mediations.<sup>68</sup> The difference in education makes a difference as to whether the mediator is a mandated reporter. If a social worker facilitates the mediation and one party makes allegations of abuse, the mediator is also a mandated reporter and must call in a hotline report. However, if an attorney mediator is in the same mediation and hears the exact same information, the attorney is under no obligation to report the allegation. If the same set of circumstances occurs across the state line in Kansas, the rules change. When a mediation is performed in that state a mediator is a mandated reporter regardless of what type of education or background the mediator possesses.<sup>69</sup>

Whether a mediator is a mandated reporter or not is a highly contested issue. Some mediators feel very strongly that the entire process of mediation is confidential regardless of what is disclosed. Others believe that they have an ethical duty to protect children who are possibly being abused.

The American Bar Association (ABA) Family Law section compiled their first standards for mediators in 1984.<sup>70</sup> They were entitled *Standards of Practice for Lawyer Mediators in Family Law Disputes*. Family law was a rapidly expanding area of the law and the ABA realized that these standards were no longer adequate.<sup>71</sup> They were lacking a discussion of critical areas such

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<sup>68</sup> Mo. S.Ct Rule 88.05.

<sup>69</sup> Kan. Stat. Ann. § 38-1522 (2001)

<sup>70</sup> This information is found at <http://www.abanet.org> in the Section of Dispute Resolution.

<sup>71</sup> *Id.*



as child abuse, domestic violence, etc.<sup>72</sup> In 1996 the ABA combined efforts with AFCC, the Academy of Family Mediators and the Society of Professionals in Dispute Resolution in order to come up with standards that were better equipped to deal with the problems that family mediators are faced with such as reporting child abuse.

By 2000 the consortium came up with new Model Standards.<sup>73</sup> Standard IX gives mediators guidance when confronted with issues of child abuse and neglect.<sup>74</sup> Standard IX states that mediators should not continue the mediation if child abuse is suspected.<sup>75</sup> The Standard also states “If the mediator has reasonable grounds to believe that a child of the participants is abused or neglected within the meaning of the jurisdiction’s child abuse and neglect laws, the mediator shall comply with applicable child protection laws.”<sup>76</sup>

### C. Liability of Disclosure

Very little case law exists involving the liability of attorneys in regard to either abuse of the attorney-client privilege or failure to disclose a potentially dangerous situation. Courts seem reluctant to hold attorneys accountable for failing to warn third parties of potentially dangerous situations.

*In the Matter of Goebel*<sup>77</sup> involved an attorney, William Goebel, who disclosed information to one of his clients (Criminal Client) regarding another client (Guardianship Client) who was represented by an attorney in the same firm. Criminal Client wanted to know where Guardianship Client lived. He had made threats against the Guardianship Client stating that he wanted to kill the Guardianship Client. Goebel attempted to tell him that he did not have any idea where the other client lived but Criminal Client would not believe him. Goebel showed Criminal Client an envelope that had been returned from the Guardianship Client stamped No Such Street (NSS) to prove to Criminal Client that he did not know where Guardianship Client was located.

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 703 N.E. 2d 1045 (Ind. 1998).

Goebel was fearful of Criminal Client due to the threats on Guardianship Client as well as threats toward Goebel's own family. A couple of days after being shown the envelope, Criminal Client located the Guardianship Client's home and killed her husband.

Goebel did not contact either the police or the potential victim of this interaction to warn her prior to the murder. The court stated,

Both the content of the respondent's interview with the police and his lack of action after showing the envelope to the criminal client to prevent him from locating the guardianship client demonstrate that the respondent did not display the envelope to prevent commission of a criminal act, but rather he did so based on the criminal client's forceful demand.<sup>78</sup>

As a result of that finding, the court issued a public reprimand for his lack of warning to the Guardianship Client.

"Having duties to disclose can open the door to many liability claims. If the lawyer discloses confidential material, the client can sue for malpractice, claiming that the disclosure was negligent. On the other hand, if the lawyer decides not to disclose, she is also vulnerable to suits by third parties affected by the concealment."<sup>79</sup> Research for this article did not reveal any recent cases that imposed liability on an attorney for disclosure or non-disclosure. One article found stated that there were no known reported cases that dealt with liability for an attorney.<sup>80</sup> The closest a case came to holding an attorney responsible is in *Goebel* with the public reprimand.

#### D. *Duty to Warn*

While it is unclear whether an attorney has a duty to report suspected child abuse, it is even murkier as to whether an attorney has a duty to warn a third party.

Historically, at common law there was no affirmative obligation to act for the protection of a third party. There is no duty to control the conduct of a third person as to prevent him from causing physical

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<sup>78</sup> *Id.* at 1098.

<sup>79</sup> Zer-Gutman, *supra* note 23, at 672.

<sup>80</sup> Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*. 36 IDAHO L. REV. 479, 481 (2000).

harm to another unless relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.<sup>81</sup>

It appears that the main factor to consider when trying to decide if an attorney has a duty to warn is whether or not the attorney had a good faith belief that his client was going to kill or seriously injure someone. However, even that factor is narrowly construed by the courts.<sup>82</sup>

While limited case law exists in regard to holding an attorney liable for failure to warn, that could start to change. The changes in the *ABA Ethics 2000* could hold attorneys to a higher standard. Along with the higher standards may come a need to report child abuse to protect not only the abused but also the attorney as well.

#### IV. Conclusion

It is obvious that no easy, clear-cut answers respond to the question of whether attorneys should be considered mandated reporters. Due to the lack of case law in this area and the ambiguity of the statutes that do address mandated reporters, it is doubtful that these questions will be answered any time soon.

Strong arguments exist on both sides of the reporting issue. On the one hand, it could be said that any person, whether an attorney or not, has a moral duty to help protect those who are abused, especially children who are unable to protect themselves. On the other hand, the longstanding traditions of confidentiality, the attorney-client privilege, and the duty to protect your client's confidences argue for silence. Attorneys will need to look at each ethical dilemma they encounter individually and decide what the best solution is for that situation.

Lisa Hansen

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<sup>81</sup> Beyea, *supra* note 5, at 275-76.

<sup>82</sup> Burman, *supra* note 5, at 232.

