

Attorney-Client Privilege versus Mandatory Reporting by Psychologists:  
Dilemma, Conflict, and Solution

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### Abstract

Buried within the laws of most states lies a potential tension between psychologists and attorneys related to mandatory reporting of certain crimes that may be divulged during psychological evaluations. In the United States, psychologists and a number of other professionals are required by law to report past criminal conduct (e.g., child or elder abuse); however, in only two states are attorneys subject to mandatory reporting of child abuse. The disparity between the ethical and legal duties of the two professions may create a serious dilemma with significant repercussions for both parties. This paper provides a brief overview of the legal and ethical responsibilities for both professions and highlights potential areas of conflict. Recommended steps to avoid such conflicts are then offered.

Key terms: mandatory reporting, child abuse, ethical conflict, forensic evaluation

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Since the 1960's, all 50 states in the US have passed statutes requiring certain professional disciplines to report crimes when the professional has good reason to believe one of the reportable crimes has occurred. In nearly all instances, these statutes are mandatory, thus there is no leeway in deciding whether or not to report a particular incident. These mandatory reporting statutes apply to a wide variety of professionals such as social workers, psychologists, physicians, nurses, police officers, and others that the legislature has charged to protect the most vulnerable of our citizens. In stark contrast, very few states have enacted similar mandatory reporting statutes for attorneys who learn of reportable events in their professional capacity (Dubose & Morris, 2005). This notable absence is principally based upon the attorney-client privilege of confidential communications and the ethical bar that prevents attorneys from disclosing a client's confidences and secrets (Mosteller, 1992).

In the vast majority of states that do not have mandatory reporting laws for attorneys, a potential conflict in professional duties and ethics may arise for psychologists providing forensic services. The dilemma may arise when, for example, an attorney contracts with a psychologist to conduct an evaluation or provide clinical services for his client. If during such an evaluation the client divulges to the psychologist a reportable event such as child abuse or elder abuse, and the psychologist has a reasonable basis to believe the disclosure, then the psychologist has no alternative but to immediately report the particulars to the authorities. This presents a dilemma, and oftentimes legal difficulties, for the attorney who must continue to represent a client whose case may have been damaged by the reporting, and who now may face additional charges.

Needless to say, the attorney's legal representation of the client can be greatly impacted in circumstances such as these.

While there are several crimes that fall under mandatory reporting statutes in the US (e.g. child abuse and elder abuse), this commentary will use child abuse as an example from which to highlight the issues surrounding the ethical dilemma that may arise when a psychologist has a duty to report and the hiring attorney does not. We use psychologists in our examples, but most of what we present applies equally well to other professionals (e.g. social workers and physicians) with mandatory reporting obligations under the law (see <http://nccanch.acf.hhs.gov> for a complete list of reporting requirements listed by state).

In this commentary, we first briefly summarize the mandatory reporting duties of the typical psychologist keeping in mind, of course, that these laws vary from state to state. We follow with the obligations of attorneys which are mandated not only by ethics, but also by law. Next, we present the tension in the law for attorneys and psychologists. Lastly, we offer a reasonable solution to the issue and present steps to prevent such conflicts and ethical dilemmas from occurring between the two professionals.

### *Mandatory Reporting by Psychologists*

Congress and the states have recognized that child abuse is a significant social problem. To address this problem, all 50 states, the District of Columbia, Puerto Rico, and The Virgin Islands have enacted mandatory reporting laws for psychologists based upon federal guidelines [*Child Abuse Prevention and Treatment Act (CAPTA)*, 42 U.S.C. 5101s]. Having mandatory reporting statutes qualifies these jurisdictions for federal monies under CAPTA and its progeny (CAPTA, P.L. 104-235, 1996). The various state statutes follow the federal guidelines and

include an absolute requirement to immediately report to proper authorities a reasonable and good faith belief that child abuse has occurred. These statutes address past acts of physical abuse, neglect, sexual abuse, and emotional abuse, but the statutes are frequently worded in such a manner as to acknowledge the ongoing nature of child abuse. The ultimate goal is to stop the abuse, punish the offender, and prevent future abuse. Such statutes effectively place psychologists and other professionals in the policing function of the state. Moreover, most state statutes impose fines or other sanctions for psychologists who know, or should have known, but failed to report child abuse. Further, the American Psychological Association's (APA) Code of Ethics requires psychologists to follow the law (APA Ethical Standards, 1.02), thus there exists an ethical requirement as well as a legal requirement to report child abuse. Contrary to the erroneous suggestions of some commentators (e.g., Golding's comment in Niland, Morgan, & Golding, 2004), reporting where required by law is absolutely mandatory and must be done immediately. There exists no avenue to circumvent the system. However, immunity from civil action is provided to those who do report in good faith and in compliance with the law.

When psychologists perform contracted services for attorneys, the attorney's legal and ethical duty to honor the attorney-client privilege attaches via the law of contracts to the psychologist (Mosteller, 1992). Therefore, all ethical rules governing confidentiality of client information that are applicable to the attorney also apply to the psychologist. However, in the case of suspected child abuse, the vast majority of states have created statutory language that specifically abrogates the psychologist-patient privilege of confidentiality for the narrowly defined suspected unlawful conduct (Thompson, 2002). This abrogation relieves the psychologist of an ethical or legal dilemma vis-a-vis her or his own ethical and legal duties to honor confidentiality, but abrogation does not negate her or his contractual obligation to the

attorney (District of Columbia Bar Association Opinion, 1998; Kansas Attorney General Opinion, 2001; Thompson, 2002). The psychologist, although narrowly relieved of the duty to protect the confidence of the client, still remains under the umbrella of the attorney's ethical and legal duty to protect confidentiality. The mandatory reporting statutes permit reporting to the authorities only that information pertaining to the suspected child abuse. Under the contractual promise to the attorney and ethics of the psychologist, confidentiality of all other disclosures made by the client must be maintained. What to report or not report can, of course, become difficult to clarify because issues are often inextricably interwoven. If too much is revealed, the psychologist may be later judged to have overstepped the duty to report in violation of the law, ethics, and contractual obligations to the attorney. If this occurs, the attorney is arguably liable to his client for damages and could also face charges of ethics violations. When a client discloses child abuse to a psychologist under contact to an attorney, it is imperative that the psychologist proceed with utmost caution and regard for the narrow path that must be followed for she or he is indeed on the horns of an ethical and legal dilemma, despite being granted immunity for reporting to the authorities in good faith (Kansas Attorney General Opinion, 2001). Such immunity is granted vis-a-vis the client only.

### *Ethical and Legal Responsibilities of Attorneys*

As mentioned above, mandatory reporting statutes vary by state, and they exist in all 50 states. The professionals listed in the statutes vary, and many states use language such as "any person may report" or "any person must report." In the majority of states, attorneys are rarely included. In fact, in only two states are attorneys specifically mentioned and required to report child abuse when the abuse is learned within the scope of the attorney's representation of the

client (i.e., Texas and Mississippi). In these two states, the attorney-client privilege is narrowly abrogated in matters of child abuse, and thus there should be no conflict or dilemma between the duties of the psychologist and those of the attorney. In 13 states (DE, FL, ID, IN, KS, NE, NJ, NM, NC, OK, RI, UT, and WY), attorneys are included in the “any person must report” language of the statutes, but are required to report only when they learn of the reportable event *outside* the scope of their representation of a client. Attorneys are not mentioned in any other statutes regarding mandatory reporting. Thus, arguably the potential for a legal and ethical dilemma and conflict exists in every jurisdiction of the US except Texas and Mississippi.

### *Tension in the Law*

As noted above, there should be neither dilemma nor conflict in those jurisdictions where the psychologist and the attorney both have a legal duty to report. However, the conflict does arise in the vast majority of jurisdictions because the psychologist has an affirmative legal duty to report child abuse, and the attorney has an opposite and opposing legal and ethical duty to maintain the confidences and secrets of the client. As an employee or hired consultant to the attorney, the psychologist is deemed under the law to be a *nonlawyer assistant* under the American Bar Association’s (ABA) *Model Rules of Professional Conduct* (MRPC, Rule 5.3; see [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html) or Dzienkowski, 2005). Under the MRPC, attorneys must make reasonable efforts to ensure that the nonlawyer’s “conduct is compatible with the professional obligations of the lawyer” (Rule 5.3[b]). Failure to do so subjects the attorney to ethical sanctions, which in extreme circumstances can lead to disbarment. In fact, each attorney in a law firm is responsible for the conduct of all other members as well as any nonlawyers in the firm or under hire. Thus, when clients disclose information of a damaging

nature to their own interests to nonlawyers who have a duty to report the disclosure, the job of the attorney becomes exceedingly more difficult.

The MRPC contains strict instructions prohibiting attorneys from revealing information related to the representation of a client (Dzienkowski, 2005). Rule 1.6 of the MRPC is the primary basis for the much discussed attorney-client privilege governing confidentiality of client information from which other doctrines, such as the work-product rule, spring. The rule states that an attorney “shall not” disclose confidences or secrets of a client unless the client consents. This privilege of confidentiality promulgated by the MRPC has been clearly established in legal jurisprudence for hundreds of years and in fact dates back to the old common law (Mosteller, 2003). Such privilege belongs solely to the client. The reasons for client confidentiality are many and include facilitating the full development of all facts necessary to allow proper legal representation of the client, even those facts that may be embarrassing or legally damaging. The assurance of confidentiality also encourages clients to seek legal assistance to ensure their rights are asserted. If clients cannot in total confidence reveal their past acts completely, then the attorney, and thus the client, is operating at a distinct legal disadvantage. Therefore, the guarantee of confidentiality is in the best interests of an ordered and lawful society. The US Supreme Court has clearly upheld this principle of law in ruling that the attorney-client privilege survives even the death of the client (*Swidler & Berlin v. United States*, 1998).

Despite the numerous viable reasons for an attorney to maintain absolute confidentiality, there are nonetheless several exceptions to this doctrine which should be disclosed to the client at the outset of the attorney-client relationship. For example, an attorney is impliedly authorized to make disclosures in carrying out the representation of the client in the normal course of business. Attorneys may also disclose confidential information in order to prevent a future criminal act, if



for example, during the course of representation, they come to believe the client intends to commit substantial bodily harm or kill another person. Lastly, an attorney may reveal confidences to establish a defense in the event a controversy arises between the attorney and the client, to establish a defense to a criminal charge or civil action, or to respond to allegations of unethical conduct. There are, however, no exceptions listed in the MRPC for breaching a client's confidence to report child abuse, elder abuse, or any other past crimes.

Failure to report child abuse by an attorney who acts to protect the client privilege is in full accord with the MRPC yet is not completely free of an ethical dilemma, because under the MRPC, an attorney may not knowingly counsel or assist a client in conduct that is criminal or fraudulent (Rule 1.2). Thus, arguably if the attorney believes the child abuse will indeed recur, the attorney may be seen by some as at least passively and knowingly allowing the crime to continue. At this juncture, attorneys may choose one of several options. They may, where practical, attempt to persuade the client to cease the criminal conduct. Alternatively, in extreme cases, the attorney may withdraw from representation (Rule 1.16), although the criteria for withdrawal has been interpreted to require material furthering of a course of criminal conduct which the attorney seeks to avoid.

Some legal commentators argue that child abuse is an on-going crime that is likely to recur, therefore attorneys who learn a client is abusing a child can and should advise the client that he is mandated to report the abuse in order to prevent a future crime from taking place (Thompson, 2002). Opponents of this approach argue that because child abuse may not be "substantial bodily harm" or an act likely to result in "imminent death," to report would be an ethical violation and would destroy the attorney-client relationship (Green, 2004). Of course, the attorney could, based upon moral grounds, advise the client to self-report the abuse, but this is

also fraught with ethical questions because an attorney should not advise their client to act in a way that is detrimental to their liberty or property interests. One might assume that attorneys can circumvent the bar against breaching confidential information by referring their client to a psychologist for evaluation because they know that the psychologist must report in accord with existing mandatory reporting laws. However, if the attorney made a referral for this surreptitious purpose, he may be judged to be in violation of the MRPC and subject to sanctions and disbarment. Thus, while these aforementioned alternative approaches seem to hold promise, the truth of the matter is that the vast majority of attorneys when confronted with such situations do not report nor do they advise the client to self-report (Green).

### *The Attorney vs. the Psychologist*

In all jurisdictions, an attorney cannot ethically or lawfully advise a psychologist to fail to report child abuse. Once the psychologist believes with reasonable and good faith that child abuse has occurred, the mandatory reporting provisions of the law are triggered, and a report must be filed immediately. As a courtesy, the attorney should be informed, but there is no need to seek approval or permission. Further, the client should also be informed if it is judged safe and prudent to do so. The attorney in this situation may feel quite uncomfortable, but the attorney must not give any advice to the psychologist, partly because the psychologist is not a client, and principally because an attorney may not counsel or advise anyone in a course of action that is unlawful (Rule 1.2).

As noted above, in those two jurisdictions where mandatory reporting laws apply to attorneys within the scope of client representation, these rules barring disclosure of confidential information are abrogated. That is, attorneys must inform their clients at the outset of the

representation that certain behaviors disclosed to them by the client must be reported to the authorities and that no attorney-client privilege will attach to such criminal conduct. Thereafter, if covered criminal conduct is disclosed, then the client has done this of his own free will, has been duly informed, and understands the consequences. This a priori warning to the client, plus the mandatory reporting law, relieves the attorney of future liability.

### *Avoiding Dilemmas, Conflict, and Damages*

There are several steps that can be taken to avoid a conflict of duties under the law in order to eliminate or reduce damages to all parties. It is axiomatic that when attorneys represent clients for certain matters (e.g., child custody, divorce, criminal defense), there is an inherent probability that psychological services may be required. In those cases, when the attorney first realizes a need for psychological services, this issue should be discussed with the client. The attorney should in a neutral manner inform the client of the legal mandate for the psychologist to report to the authorities certain past criminal conduct, without exception. The reportable crimes can be listed for the client. The attorney should ascertain that the client has a full and complete understanding of the ramifications of disclosure. The client may exercise due diligence in disclosing to the psychologist, or alternatively, the client may simply choose not to utilize psychological services. This latter decision can be weighed as to the potential impact on the present case in consultation with the attorney.

If after appropriate explanation by the attorney a client agrees to meet with the psychologist, the attorney should next inform the psychologist that while he has no mandatory reporting duty under the laws of their state, he is nonetheless fully aware that the psychologist does have such legal and ethical obligations. He should further inform the psychologist that he

has apprised his client of the mandatory reporting laws for psychologists in their state. The attorney incurs no legal duty to advise or educate the psychologist as to the ethical or legal duties of the psychologist per se, because the psychologist is not a client. In fact, to do so would arguably be unethical conduct by the attorney. However, the attorney may and should inform the psychologist of the duty to maintain confidentiality, and that this mandate for confidentiality extends to the psychologist for all matters concerning the client in the instant case not specifically abrogated under the mandatory reporting statute for their state.

There are a number of steps the psychologist can take to minimize this potential for conflict. When the client initially meets with the psychologist, the psychologist should advise the client of the mandatory reporting obligations under the law. The scope of the law should be explained together with steps the psychologist will follow if the mandatory reporting duty is triggered. Of course, the psychologist also has other caveats and information to convey to the client such as disclosures that may trigger a Tarasoff or other type of warning, depending upon the laws in the particular jurisdiction.

Employing the above recommended steps assures that, prior to initiation of the psychological evaluation, the client will have been fully informed by both the psychologist and the attorney as to what past and future conduct the client might reveal which will not be protected under either attorney-client privilege or psychologist-client privilege. The client then is fully informed and can make decisions in their own best interests.

### *Conclusion*

The tension in the law described above which affects attorneys and psychologists working within the legal confines of their respective roles, remains in all but two jurisdictions.

To date only two states, Texas and Mississippi, have legislatively addressed the issue of attorneys reporting child abuse, or elder abuse for that matter, and clarified the responsibility for attorneys. In our society, only elected legislators can address and correct this lack of moral direction through enacted laws. There is a great and pressing social need to address this social policy issue. Unfortunately, there is no widespread trend underway for more states to change their mandatory reporting laws to include attorneys, thus this dilemma and potential for conflict between psychologists and attorneys will be with us for the foreseeable future. Therefore, all professionals need to be fully educated and informed of the issues. The steps outlined in this paper may prove helpful for both psychologists and attorneys and if implemented, may minimize the risk for professional conflicts and dilemmas.

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## Brief Biographies

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