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**ARTICLE:** THE ETHICAL AND MORAL CONSIDERATIONS PRESENTED BY LAWYER/SOCIAL WORKER  
INTERDISCIPLINARY COLLABORATIONS

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**SUMMARY:**

... Between 2001 and 2002, an initiative to create a law and social work interdisciplinary project was forged involving the University of Vermont, Casey Family Services and Vermont Law School. ... How are attorneys to decide whether a client's abusive behavior will continue into the future and that disclosure of otherwise confidential client information is warranted? The Massachusetts Bar Association Committee on Professional Ethics acknowledged that decisions regarding whether to disclose confidential information are among the most difficult decisions lawyers have to make; therefore, lawyers should not be subject to disciplinary action for any reasonable judgments they make in deciding whether a particular situation falls within the exceptions to confidentiality rules. ... For example, in Utah, the state's Ethics Advisory Opinion Committee has found that because attorneys are mandatory reporters, they are required by law to report child abuse and neglect, and therefore may do so without violating the confidentiality provisions of the Utah Rules of Professional Conduct. ... Illinois case law has addressed whether there is a therapist-patient privilege that trumps reporting requirements under Illinois' child abuse reporting law. ... Vermont does not have a specific social worker privilege, but similar to the statutory scheme in Illinois, social workers are included as "mental health professionals" under Vermont's patients' privilege statute. ...

**TEXT:**

[\*191]

I. INTRODUCTION

Between 2001 and 2002, an initiative to create a law and social work interdisciplinary project was forged involving the University of Vermont, Casey Family Services and Vermont Law School. The new project placed masters-level social work students from the University of Vermont in the South Royalton Legal Clinic at Vermont Law School, and was supervised by field placement supervisors from the university and social workers from Casey Family Services, a private social services organization. n1 This Article evolved from research [\*192] regarding the relevant law and ethics advisory opinions, primarily pertaining to client confidentiality. This Article will focus on Vermont law and ethics decisions, highlighted against the backdrop of a more national perspective.

This Article is divided into three primary sections. The first section addresses the attorney's obligations within the partnership and the legal and ethical parameters of the attorney's role. The Article then explores the ethical considerations social workers face when working with attorneys in a law office setting, given their own ethical code and statutory obligations as mandatory reporters of child abuse and neglect. The final section sets forth recommendations for designing a collaborative structure that respects the professional obligations of both the project's attorneys and social workers, while at the same time, enhancing client representation through the fostering of interdisciplinary learning between the professions of law and social work.

Rules 1.6 and 1.14 of the Model Rules of Professional Conduct, both relevant rules discussed in the Article, were amended during the writing of this Article. n2 At the time this Article was sent to the publisher, no state had

yet adopted the amended versions of these rules. However, the amended rules are referred to where appropriate, and this Article discusses how they are likely to impact lawyer/social worker collaborations.

## II. THE ATTORNEY'S ETHICAL OBLIGATIONS

### A. MANDATORY REPORTING

In most states, attorneys are not mandatory reporters of abuse and neglect under state reporting statutes. n3 In a few states, prosecuting [\*193] attorneys and/or judges are listed in mandatory reporting statutes, such as in New York and Arkansas. n4 In other states, attorneys are required to report under a general category of individuals; for example, the Indiana statute requires any individual who has a "reason to believe that a child is a victim of abuse or neglect" to make a child abuse report. n5 In New Hampshire, although attorneys are not among the list of professionals considered mandatory reporters, it must be contemplated that they fall under the final catch-all "any other person" phrase in the statute given the subsequent statutory section that preserves the attorney-client privilege. n6 By contrast, in Texas, which also has a general "any person" reporting statute, the attorney-client privilege is specifically abrogated. n7

In Mississippi, Ohio, and Nevada, the general category of "attorney" is specifically included in the list of mandatory reporters, although only Mississippi acknowledges this obligation without exception for privileged communications between attorney and client. n8 In Nevada, attorneys are mandatory reporters; however, they are expressly exempted from reporting in situations where they learn of the abuse from a client who is or may be accused of abuse or neglect. n9

Ohio attorneys are listed among the professionals that must report child abuse, but they are statutorily exempted from reporting if the information is obtained in the course of the attorney-client [\*194] relationship. n10 It is not an unlimited privilege, however, as the attorney-client privilege is abrogated only when the following three conditions are met: (1) the client at the time of the communication is a child under eighteen years of age or a disabled individual under the age of twenty-one; (2) the attorney knows or suspects that the client has suffered or faces the threat of suffering any physical or mental wound, injury, disability or condition of a nature that reasonably indicates abuse or neglect of the client; and (3) the attorney-client relationship does not arise out of the client's attempt to have an abortion without the notification of her parents. n11

It is useful to consider how the attorney-client privilege might operate in interdisciplinary law/social work clinics. In Colorado, social workers may be covered by the privilege if they can be found to be "agents" of the attorneys. n12 In *Miller v. District Court*, n13 the court stated: "The agency rule recognizes that the complexities of practice prevent attorneys from effectively handling clients' affairs without the help of others. The assistance of these agents "being indispensable to [the attorney's] work ... , the privilege must include all persons who act as the attorney's agents." n14

The attorney-client privilege in Vermont extends to all individuals who are "representatives of the lawyer." n15 As defined under the Vermont Rules of Evidence section 502, a "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of legal services. n16 Comments to Rule 502 do not provide any guidance as to which individuals might qualify as "representatives" under the rule, nor does Vermont case law define the term. n17

[\*195] If the need arose, an argument could be made that under section 502, social workers involved in interdisciplinary collaborations are "representatives." Certainly, they would be assisting the attorneys in effective client representation, greatly enhancing the social work function the Clinic attorneys do in the course of their day-to-day client representation, including interviewing children in high conflict divorces and doing home visits to clients in disability cases. n18 An issue may arise as to whether the social workers are "employed" as contemplated by the rule. Should this occur, we would have to argue that the definition of "employed" does not always contemplate work for pay, n19 and as such, it is general enough to encompass both social workers who are not being monetarily compensated and social work students who are compensated in-kind with educational credits.

### B. RULES OF PROFESSIONAL CONDUCT: RULE 1.6

Child abuse reporting statutes must be viewed in conjunction with attorneys' ethical obligations under the various states' rules of professional conduct. Pursuant to the amended Model Rule 1.6, the permissive element of the rule is maintained as attorneys are permitted, but not required, to disclose otherwise confidential information relating to the representation of a client to the extent reasonably necessary to prevent reasonably certain death or substantial bodily harm. n20 Vermont's Rule 1.6 is significantly different in that disclosure is mandatory, not merely permitted if an attorney has a reasonable belief that disclosure is necessary to prevent a client from committing a criminal act that is likely to result in imminent death or substantial bodily harm. n21 The mandatory nature of Vermont Rule 1.6 reflects a [\*196] judgment that "the values underlying client confidentiality are outweighed by the need to protect human life." n22

Courts and bar associations in various states have addressed the types of circumstances under which attorneys may disclose confidential information in order to report child abuse without violating the rules of professional responsibility. Under the pre-amended Model Rule 1.6, in order for disclosure to occur, there must be a reasonable belief that a client is going to commit a crime. n23 Since the rule speaks to the prevention of future crimes by clients, ethics advisory committees in several states have authorized attorneys to disclose information regarding a client's abuse of children when attorneys believe the abuse will continue. n24

The scope of allowable disclosures varies however, from state to state. For example, Wisconsin only mandates disclosure if the lawyer has a reasonable belief that the abuse by the client, involving "likely substantial bodily or emotional harm," will continue despite the attorney's efforts in counseling the client to refrain from further abuse and seek appropriate treatment. n25

[\*197] How are attorneys to decide whether a client's abusive behavior will continue into the future and that disclosure of otherwise confidential client information is warranted? The Massachusetts Bar Association Committee on Professional Ethics acknowledged that decisions regarding whether to disclose confidential information are among the most difficult decisions lawyers have to make; therefore, lawyers should not be subject to disciplinary action for any reasonable judgments they make in deciding whether a particular situation falls within the exceptions to confidentiality rules. n26 An Indiana ethics opinion suggests that attorneys may need to consult with a social worker, psychologist or other professional trained in the area of child abuse to assist them in determining whether a client is likely to continue the abusive behavior. n27

Dilemmas posed by this assessment process can be extremely difficult to resolve given the competing interests at stake. The facts in one Massachusetts ethics opinion are descriptive. In Opinion 90-2, the attorney had to decide whether to reveal information learned during his past representation of a defendant in a child abuse case in order to prevent potential harm to other children. n28 As the past client was currently employed as a camp counselor for abused children, any abuse to these children would be doubly traumatic. n29 Further, the attorney was on the board of trustees of the camp and learned of his past client's employment through this association. n30

The Massachusetts opinion set forth a "reasonably likely" standard of certainty that the Committee found should be met prior to disclosure of confidences (i.e., does the attorney feel the past client is reasonably likely to have the intention to commit a crime?). n31 The Committee expressly sanctioned the attorney's consideration of all information in his possession, including information learned from the past representation; however, he was only admonished to disclose [\*198] information if the client would not self-disclose and to minimize any confidential information revealed. n32

In any given case, there may also be an issue regarding information an attorney is ethically allowed to disclose when someone other than the client is abusing a child and the client refuses to report the abuse or give permission for the attorney to make a report. Under the pre-amended version of Model Rule 1.6, the client's inaction must constitute a crime. n33

Bar ethics committees in some states have issued advisory opinions that expressly permit disclosures if a particular client's action or inaction, in the context of another person's child abuse, would constitute a crime. For example, the Cleveland Bar Association Professional Ethics Committee found that if a lawyer reasonably believed his client would be committing the crime of child endangerment by taking her son back into the marital home, where she and her son had been abused by the father in the past, the attorney could reveal confidences and secrets of the client under DR 4-101(C)(3) of the Code of Professional Responsibility in order to prevent the crime.

n34 Under a similar factual scenario, attorneys in Virginia would be required to disclose information regarding potential child abuse by a client's spouse if the client's failure to report the abuse would constitute a crime. n35

In some situations, the client's inaction may not clearly be defined as a crime. For example, until a Wisconsin Supreme Court ruling in 1986, a parent's failure to protect a child from abuse for [\*199] failure to report abuse by another person was not criminal behavior under the state's child abuse laws. n36 After *State v. Williquette*, an advisory ethics opinion clarified that Wisconsin lawyers post-*Williquette* have a duty to report child abuse which is believed reasonably likely to continue where the abuse "derives from the probability of a passive client's exposure to criminal prosecution rather than the actual abuser's." n37

In some states, disclosures may be allowed under Rule 1.6(b)(4), as opposed to Rule 1.6(b)(1). n38 For example, in Utah, the state's Ethics Advisory Opinion Committee has found that because attorneys are mandatory reporters, they are required by law to report child abuse and neglect, and therefore may do so without violating the confidentiality provisions of the Utah Rules of Professional Conduct. n39

On the other hand, attorneys must be circumspect in all decisions regarding disclosures of confidential information because disciplinary sanctions may ensue. In *In re Pressly*, n40 a 1993 Professional Conduct Board case that went to the Vermont Supreme Court, the Court upheld a public reprimand of an attorney who disclosed confidential information regarding allegations of sexual abuse in a family court proceeding despite his client's (the mother) express instructions to keep the information confidential. n41 Surprisingly, the issue in this case was not whether the disciplined attorney was permitted to reveal [\*200] confidential information to a third party, such as the Department of Social and Rehabilitation Services (SRS), in order to protect the child. Rather, the disclosure came in response to pressured inquiries from the opposing attorney regarding the mother's request that visitation between the father and child be supervised. n42 This opinion leaves unresolved the question of whether the attorney would have been found in violation of DR 4-101 if the information had been disclosed to the state child welfare agency.

In addition to disclosures made pursuant to child abuse reporting statutes or under ethical rules, attorneys may also have a common law duty to disclose information in order to protect third parties.

In *Peck v. Counseling Services of Addison County*, the Vermont Supreme Court, relying on the California Supreme Court's decision in *Tarasoff*, held that a mental health counselor had a duty to warn the plaintiffs that their son had threatened to burn down their barn. n43 Although breaching confidentiality in this situation did not fall under any of the state's statutory exceptions to the physician-patient privilege, n44 the Court, relying on the reasoning in *Tarasoff*, created a common law "duty to warn" exception to the physician-patient privilege, finding that a "mental patient's threat of serious harm to an identified victim is an appropriate circumstance under which the physician-patient privilege may be waived." n45

The Court analogized the mental health professional's duty to warn to that of an attorney, who under the now superceded DR 4- [\*201] 101(C)(3), n46 could reveal information necessary to prevent a crime. n47 No further guidance has come from the Vermont courts since *Peck* on the issue of an attorney's duty to warn, or a therapist's or other mental health professional's similar duty. However, there is a recent reference to the attorney's duty to warn in the Reporter's Note to Vermont Rule 1.6, which states that where imminent death or substantial bodily harm is involved "there may be a common law duty to disclose in such circumstances." n48

The year following the issuance of the *Peck* decision, the Vermont Bar Association Committee on Professional Responsibility ("Committee") addressed the duty to warn issue in a 1986 opinion, finding that employees of a legal services organization may warn potential victims of the threats of a client or applicant for services. n49 Analyzing the issue under the old DR 4-101(C), the Committee found that decisions legal professionals are called upon to make regarding whether to reveal confidential information to protect a third party are moral, not ethical, in nature and require an assessment of the seriousness of a client's threats. n50 As was true in the Massachusetts ethics advisory opinion previously discussed, the Committee acknowledged that lawyers might find themselves ill-equipped to do these predictive assessments, but it offered no further guidance on how to proceed when these situations arise, except to state that lawyers must act in "good faith." n51

In Massachusetts, when harm from potential abuse may befall a third party who is also an opposing party or one adverse to a client's position, an attorney has no duty to warn the person(s) or act to prevent [\*202] the

potential danger. In *Lamare v. Basbanes*, n52 a lower Massachusetts court ruled that the father's attorney owed no duty of care to the mother or children in a post-divorce visitation matter where the attorney, who was also representing the father against charges that he molested his children, recommended a supervisor to monitor the father's visitation who failed to carry out her duties. n53 The Court held that an attorney owes no duty of care to an adversary of his or her client because to do otherwise would create an "unacceptable conflict of interest." n54

### C. WHEN YOUR CLIENTS ARE CHILDREN

When attorneys represent children, who are also potential victims, does that change the ethical landscape? The New York City Bar Committee on Professional and Judicial Ethics addressed specific questions regarding an attorney's reporting obligations in a situation where the attorney represented minors age twelve and older and was employed by a social services agency. n55

The opinion emphasizes that attorneys must treat their minor clients in the same manner as adult clients so long as the minors are found to be capable of "reasoned judgment" under the rules of professional conduct. n56 If a young client meets the considered judgment standard, and the information is a confidence or secret under DR 4-101, then either an exception must apply or the minor client must [\*203] consent to the release. n57 If a client, adult or competent minor, refuses to consent to the release of confidential information concerning child abuse or mistreatment, the Committee found that an attorney nonetheless has "latitude to report information concerning child abuse or mistreatment in the rare case in which the lawyer honestly concludes, after full consideration, that disclosure is necessary to save the client from being killed or maimed." n58

If the young client lacks decision-making capacity, New York attorneys were instructed to fully take into account the client's wishes and make "principled decisions" as to whether such disclosures relating to child abuse would be in the client's best interests. n59

The Committee also addressed the question of whether the attorney could reveal such information to others within the social services agency if she determined that the professional rules of conduct prohibited her from formally reporting child abuse or mistreatment. The decision highlights the complexity of the relationship between attorneys and social workers when they are engaged in any type of collaborative arrangement. In this particular situation, the Committee instructed attorneys to assess whether the agency employees would be covered by attorney confidentiality rules under an agency or other theory, as well as whether social workers' mandatory reporting obligations might still trump what otherwise would be protected attorney-client communications. n60 Ultimately, the Committee found that if the attorney determined that an agency employee could not "be relied on to preserve the confidentiality of the client's confidences and secrets, then (subject to any applicable exception) the lawyer [could] not make disclosure without client consent." n61

In some states, such as Vermont, both an attorney and a guardian ad litem are appointed for children in abuse and neglect cases. n62 [\*204] Although a guardian ad litem is not a mandatory reporter under Vermont's abuse reporting statute, unlike attorneys, they are not constrained by any rules of conduct that prohibit making such reports. n63 Guardians ad litem in Vermont do, however, have a Code of Ethics contained in their Policies and Procedures Manual which states that they "shall not disclose any information learned in a case to family, friends, or others not directly involved in a case ... [and] shall maintain confidentiality and respect the privacy of others in all matters relating to case assignments." n64

The potential conflicts that can arise between child, attorney, and guardian ad litem regarding confidentiality are highlighted under a recent Vermont advisory ethics opinion. n65 In this opinion, the Vermont Bar Association Advisory Ethics Committee found that when child-clients are incapable of making decisions about important matters in a case, and there is a guardian ad litem in the case who has requested the appointment of an attorney to represent the children, the guardian ad litem is the attorney's "client" for purposes of the legal representation. n66 In this opinion, the attorney for the children refused to disclose information from the children's file based on the guardian ad litem's refusal to consent to the release. n67 Of note is the fact that in this case, which was not a child welfare case, the person requesting the information was the children's mother who was the child's legal guardian at the time of the request. n68

[\*205] Under this factual scenario, it appears that, under Rule 1.6(a), a guardian ad litem, as the "client," could consent to the release of confidential information from a child-client's file, including information pertaining to abuse or neglect of the child, over the objection of the child or the child's legal guardian. This presupposes that the guardian ad litem chooses not to file a report on his or her own volition but supports and consents to the attorney making such a report.

#### D. DISCLOSING THE LIMITS TO ATTORNEY/CLIENT CONFIDENTIALITY

A secondary issue, tangential to confidentiality obligations, is what responsibility attorneys have to inform their clients, at the outset of representation, of the limits of confidentiality. This is particularly relevant in states like Vermont, where as discussed previously, attorneys are obligated to disclose confidential information in order to prevent a client from committing a criminal act that they believe will likely result in imminent death or substantial bodily harm.<sup>n69</sup> This will also be a more urgent issue under the broadened, amended Model Rule 1.6.

How much detail must an attorney put forward? Under Model Rule 1.4, attorneys are required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>n70</sup> Neither the rule nor the Comment to the rule specifically addresses the issue of "warning" clients regarding the limits of client confidentiality.<sup>n71</sup>

However, the Comment to Model Rule 1.4 does state that where a minor client of diminished capacity is involved, informing the young client of the adult standard of "appropriate for a client who is a [\*206] comprehending and responsible adult" may be "impracticable."<sup>n72</sup> Under New York City Bar Opinion 1997-2, the Committee on Professional and Judicial Ethics addressed several specific questions pertaining to what, if any, discussion of the limits to confidentiality attorneys should have with their minor clients.<sup>n73</sup> The Committee found that it was appropriate to discuss, prior to undertaking the representation, those instances in which otherwise confidential information might be shared, such as where an attorney believes the client will kill or maim himself or another.<sup>n74</sup>

The Committee further found that under some circumstances it was ethical to obtain advance consent from a potential minor client that would allow the attorney to later release confidential information which the attorney was permitted to disclose under the ethical code, e.g., information that the client was going to maim or kill himself.<sup>n75</sup> The Committee, however, warned that advance consent should only be sought if it is thought to be in the client's best interests and the consent is informed and voluntary.<sup>n76</sup>

#### E. RULES OF PROFESSIONAL CONDUCT: RULE 5.3

Model Rule 5.3, entitled "Responsibilities Regarding Nonlawyer Assistants," is another rule relevant to interdisciplinary clinics.<sup>n77</sup> This [\*207] rule requires that a partner and/or other attorneys in a firm who have "comparable managerial authority" make reasonable efforts to ensure that the firm has measures in place that give reasonable assurance that nonlawyers' conduct is compatible with the professional obligations of the lawyer.<sup>n78</sup> The Comment to the rule lists several categories of individuals that might fall under the heading "nonlawyer assistant" including secretaries, investigators, law student interns, and paraprofessionals who are in the employ of the attorney.<sup>n79</sup> Rule 5.3 further requires that a lawyer give such assistants "appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client ... ." <sup>n80</sup> Vermont Rule 5.3 is based in large part on Model Rule 5.3.<sup>n81</sup>

When developing an interdisciplinary law/social work clinic, the interplay between Rule 1.6 and Rule 5.3 needs to be thoroughly explored. There is at least one ethics opinion from the District of Columbia that addresses this intersection in the context of the issue most central to law/social work legal clinics: the conflict between a social worker's duty to report abuse under a mandatory reporting statute and the attorney's confidentiality rules when both professionals work together in the same office.<sup>n82</sup>

As in the Vermont Rule, under D.C. Rule 5.3, attorneys are required to implement measures in a law practice to ensure that nonlawyer assistants comply with the attorneys' professional rules of conduct, including the mandates of Rule 1.6 which instruct attorneys to exercise "reasonable care" in protecting a client's confidences

and secrets. n83 While the Committee acknowledged the "quandary" posed by the seemingly conflicting attorney rules of professional conduct on [\*208] the one hand, and the D.C. social workers' mandatory reporting obligations on the other, it did not discourage social worker/lawyer collaborations. n84

The primary issue addressed in the opinion is whether the "required by law" exception to Rule 1.6 allows social workers to make reports of abuse and neglect under the abuse reporting statute. n85 The Committee found that Rule 1.6(e), which allows persons employed by attorneys to disclose confidences or secrets, is "strictly derivative" of the exceptions for disclosures by attorneys. n86 Therefore, since attorneys in the District of Columbia are not mandatory reporters, and not required by law to make reports of child abuse, the Committee found that the 1.6(d) exception did not allow social workers to make reports under D.C.'s mandatory reporting statute. n87

Even so, the Committee found that attorneys could undertake specific steps to fulfill their obligations under Rule 5.3 when social workers working in a law office are confronted with a reporting situation. n88 According to the Committee, there are two things an attorney must do to comply with the rules of professional conduct. First, attorneys must fully explain to their clients the reporting obligations of the social workers and obtain client consent for any social worker involvement. n89 Secondly, attorneys must inform social workers of the attorneys' duty regarding confidentiality under Rule 1.6. n90 Attorneys were also cautioned not to advise social workers regarding their reporting obligations or request that the social workers ignore their statutory reporting responsibilities. n91

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### III. SOCIAL WORKER OBLIGATIONS

#### A. CONFIDENTIALITY AND MANDATORY REPORTING

The next section of the Article will focus on the legal and ethical responsibilities of social workers who are involved in interdisciplinary projects. Social workers have their own code of ethics promulgated by the National Association of Social Workers. n92 Several provisions of the Code are relevant to this commentary.

The first Ethical Standard is entitled "Social Workers' Ethical Responsibilities to Clients". n93 Under Ethical Standard 1.07 of this section, social workers are first admonished to respect their clients' privacy, and standards of confidentiality apply once private information is shared. n94 Social workers are allowed to disclose confidential information without client consent only for "compelling professional reasons" such as when necessary to prevent "serious, foreseeable and imminent harm to a client or other identifiable person" n95 or when required by law. n96 The Code limits the amount of information disclosed to the "least amount of confidential information necessary to achieve the desired purpose." n97

Under the Standards, social workers are obligated to inform clients of the exceptions to the rules of privacy and confidentiality that generally guide the social worker/client relationship. As soon as possible in the relationship, and as needed thereafter, social workers are specifically instructed to "discuss with clients and other interested parties the nature of confidentiality and limitations of clients' right to confidentiality," and they are to "review with clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required." n98

The vast majority of states, including Vermont, expressly list "social workers" among those professionals mandated to report [\*210] suspected child abuse and neglect. n99 In Vermont, mandated reporters have some discretion as the reporter must only report in those cases where he or she has "reasonable cause to believe" a child has been abused or neglected. n100 The penalties for failure to report are minimal; there is a maximum \$ 500 fine unless the reporter failed to report with the intent to conceal abuse or neglect of a child, in which case the penalty is a maximum fine of \$ 1,000 or six months in jail. n101

Social workers often find themselves balancing the societal need for reporting with the potential benefits of maintaining trusting, therapeutic relationships with their clients through strict adherence to rules of confidentiality. Also, social workers sometimes question the benefits of reporting given their experiences with

social services systems that are often overwhelmed with high numbers of cases and a resultant lack of responsiveness. n102

Researchers are currently investigating the abuse reporting rates of social workers and other professionals. In one western New York study, it was found that seventy percent of social workers surveyed had made one or more mandated reports over the course of their careers, which ranged from zero to ten years. n103 They did so despite reservations that ranged from not wanting to be "second guessed," to thinking an already fragile family situation might be harmed more than helped by reporting suspected abuse. n104 In another study that compared the disclosure rates of social workers to that of psychologists and psychiatrists, social workers were found to be significantly more likely to state a willingness to reveal confidential information. n105 However, age was found to be a significant factor as older social workers were much less likely to state a willingness to betray confidences. n106

[\*211] As social workers exercise discretion in their reporting, they need to be aware of the potential lawsuits that might arise either from making a report that allegedly should not have been made or from failing to make a report. Issues of immunity and privilege dominate the courts' discussions in these cases.

In *LaShay v. Department of Social and Rehabilitation Services*, the Vermont Supreme Court held that an SRS caseworker was not entitled to qualified immunity for failing to report potential abuse of a foster child who was placed by the agency in the home of a man whom allegedly had previously requested sex with a minor. n107 Although the individual was a casework supervisor, the Court held that he was obligated to report that information (supposedly to an investigator in the office) under the mandatory reporting statute once the information was reported to him. n108 The Court stated that "the statute does not differentiate between those who are employed by the state and those in the private sector." n109

In a 2001 Ohio case, the Ohio Supreme Court reversed the lower courts and held that a school district and a teacher were not entitled to immunity from tort claims for the teacher's failure to report allegations of sexual abuse a girl reported in a peer mediation group. n110 The Court specifically held that neither the peer mediation coordinator, the city board of education, nor the city school superintendent had sovereign immunity from an action for damages where there was an alleged failure to report abuse under the state's mandatory reporting statute. n111

In another failure-to-report case, a Texas appeals court upheld the misdemeanor criminal conviction of a pre-kindergarten teacher for her [\*212] failure to report child abuse. n112 In Texas, "a person having cause to believe a child's physical or mental health has or may be adversely affected by abuse or neglect" must immediately report the abuse and/or neglect. n113 In this case, the sanctioned teacher witnessed two teacher's aides put a severely mentally impaired child's hand under burning water in an attempt to teach him not to eat his feces. n114 The teacher was sentenced to 120 days confinement "probated for one year" and ordered to pay a \$ 1,000 fine. n115

Cases are sometimes brought not for failure to report, but for wrongful reports made by mandatory reporters. In a 1987 Montana case, a client sued her counselor for negligence, invasion of privacy, violation of statutory duty of confidentiality, and intentional infliction of emotional distress for reporting abuse her husband had committed sixteen years earlier. n116 In her defense, the counselor argued that she made the report because, in her opinion, sexual abuse is a "chronic behavior which, without therapeutic intervention, is subject to repetition, even after long lapses of time." n117 The Montana Supreme Court agreed and held that even though the abuse had occurred years in the past, it was proper for a counselor to make a report, even over her client's objection, if the alleged perpetrator was in a position to abuse again, which he was in this case as he had grandchildren. n118 The Court also found the counselor was entitled to the immunity provided by the reporting statute as the counselor had not acted in bad faith or with malicious intent. n119

[\*213]

## B. SOCIAL WORKERS AND PRIVILEGE

Social workers, therapists and other professionals, even if they otherwise are granted a statutory privilege, will not enjoy such privilege when it conflicts with their mandatory reporting requirements. Many mandatory reporting

statutes explicitly state that such privileges are abrogated when professionals are obligated to carry out their reporting duties. n120 Case law is also instructive on this issue.

The Washington Supreme Court had an opportunity to address the issue directly in a case where a client of a mental health center sued a psychologist and therapist who provided counseling services to him, and then subsequently reported his statements regarding his physical abuse of a young child under the Washington reporting statute. n121 In analyzing the relevant privilege statutes in conjunction with the mandatory reporting statute, the Court held that the statutes could be reconciled by finding that the legislature intended the societal interest in encouraging child abusers to seek treatment to be secondary to that of protecting children from future abuse. n122 The Court cited the civil immunity section of the reporting statute as evidence that the legislature contemplated that physicians and psychiatrists might be required to report otherwise confidential, privileged information. n123

Illinois case law has addressed whether there is a therapist-patient privilege that trumps reporting requirements under Illinois' child abuse reporting law. n124 In Illinois, "social workers" are "therapists" under the Mental Health and Developmental Disabilities Confidentiality Act. n125 Pursuant to this statute, social workers enjoy a privilege that extends to records, communications, personal notes, and certain psychological test material. n126 Because the Illinois abuse reporting statute expressly abrogates any privilege that may apply, with the [\*214] exception of the privilege for clergy, these cases have all upheld therapists' disclosures of otherwise confidential information when made pursuant to their mandatory reporting obligations. n127

Vermont does not have a specific social worker privilege, but similar to the statutory scheme in Illinois, social workers are included as "mental health professionals" under Vermont's patients' privilege statute. n128 This statute protects communications between patients and mental health professionals so long as the communications are made for the purpose of diagnosis or treatment. n129

Vermont Rule of Evidence 503, in accordance with the statute, is entitled "Patient's Privilege," and it covers doctors, dentists, nurses, and mental health professionals. n130 There are several exceptions to Vermont Rule 503 which include a "risk of harm to a child" exception that abrogates the privilege in family court proceedings where custody or visitation is at issue, as well as in child welfare proceedings, where, subsequent to a hearing, the court finds the following: (1) risk of harm to a child warrants disclosure; (2) the probative value outweighs the potential harm to the patient; and (3) the evidence is not reasonably available through other means. n131

In addition to the exceptions to the privilege, professionals may also be confronted with issues regarding the scope of the privilege. For example, the Vermont Supreme Court in *State v. Curtis* n132 found that communications made to social workers in the course of investigations were not protected from discovery by the privilege because these types of statements are not made for the purpose of diagnosis or treatment. n133 In *Curtis*, the Court also found that social workers were not "mental health professionals" when carrying out their investigative function, and, for that reason as well, the patient's privilege did not protect information in the social worker's file. n134

[\*215] In 1995, the United States Supreme Court recognized, for the first time, an evidentiary privilege for licensed social workers in federal court proceedings. n135 The Court was persuaded to acknowledge what was termed a "psychotherapist-patient privilege" under the Federal Rules of Evidence given the movement in the states to both recognize such a privilege and find that the dictate of *Rule 501 of the Federal Rules of Evidence* had been met, for instance, that new privileges be defined by interpreting "common law principles ... in light of reason and experience." n136 By the time of the Court's decision in 1996, all 50 states recognized some form of psychotherapist-patient privilege, and the "vast majority of states" additionally extended a testimonial privilege to licensed social workers. n137

### C. THE LIMITS TO CONFIDENTIALITY

Given the limits to confidentiality imposed by mandatory reporting statutes, to what extent are social workers obligated to inform clients of such limitations "up front?"

The Social Worker's Code of Ethics states that social workers [\*216] should "discuss with clients and other interested parties the nature of confidentiality and limitations of clients' rights to confidentiality," and they should

"review with clients circumstances where confidential information may be requested and where disclosure of confidential information may be legally required." n138 Under the Code, this conversation is to happen as early in the social worker-client relationship as possible and as often as necessary throughout the course of the relationship. n139

In the western New York study discussed supra, it was found that social workers varied greatly in the timing of their discussions with clients regarding the limits of confidentiality and the amount of information they gave to clients on the subject. n140 Most social workers in the study did warn their clients of the limits of confidentiality and of mandated reporting requirements, although not always in much depth. n141 In an effort to form a trusting therapeutic relationship with their clients, some social workers did not have a discussion regarding the limits to their confidential relationships until the client was actively engaged in treatment. n142 It was also found that the social workers who had more in-depth discussions with their clients on the limits of confidentiality still did not clearly describe what might constitute reportable information or the potential consequences of a social worker making such a report. n143

Turning to the law, many of the reported cases on the issue of what constitutes a adequate notice by social workers to clients, regarding the limitations of confidentiality, involve criminal defendants who raise the lack of proper "warnings" as a defense. However, none of these cases fault social workers for failing to provide warnings to clients of their mandatory reporting obligations.

For example, in a 1986 Pennsylvania case, the defendant in a child abuse prosecution argued that a caseworker should have given him Miranda warnings, as well as told him of her obligation to report suspected abuse prior to his making incriminating statements to her [\*217] regarding his abuse. n144 The Court held that the caseworker had no duty to give the defendant warnings of any type because the law itself serves to warn individuals that certain information is not confidential under the abuse reporting statute. n145

Similarly, in *People v. Younghanz*, n146 a California appellate court ruled that the child abuse reporting statute did not turn mandatory reporters into police agents; therefore, no Miranda warnings were required to be given prior to conversations with individuals who might later be charged under the child abuse statute. n147 The court did state, however, that "in order to protect a patient's expectation of privacy regarding the seemingly therapeutic and confidential therapy session ... the therapist should warn the patient of his or her statutory duty to testify against the patient concerning instances of child abuse." n148

### III. ATTORNEYS AND SOCIAL WORKERS IN COLLABORATION

#### A. INTRODUCTION

There are four models of representation that interdisciplinary law/social work clinics might utilize: the consultant model, the employee model, the consent model, and the confidentiality wall model. n149 There are pros and cons to using each of these models. Interdisciplinary clinics that treat social workers and social work students as "employees," with the expectation that they will abide by attorney rules of confidentiality even when reportable abuse and/or neglect issues are likely to be present, place a heavy burden on attorneys to show that they have taken the steps necessary under Model Rule 5.3 to ensure that the conduct of the nonlawyers "is compatible [\*218] with the professional obligations of the lawyer." n150 If a clinic opts to use the "consent model," an issue may arise in some jurisdictions as to whether an attorney may, without violating any ethical rules, solicit client consent when the consent may lead to adverse repercussions for the client. n151

After researching and evaluating all of these options, our collaboration chose the confidentiality wall model which was being used at the time by the University of Denver's domestic violence clinic. n152 This model requires erecting an invisible wall or screen between the social workers and lawyers which, in theory, prevents social workers from learning of reportable information in the first instance; thereby minimizing or even eliminating situations where social workers might feel obligated to reveal information otherwise protected under Rule 1.6. While client consent would need to be obtained, the consent would be to social worker participation with a [\*219] wall in place and an expectation that confidential information would remain confidential, as opposed to the broader consent that may be prohibited under Rule 1.7.

#### B. BUILDING AN EFFECTIVE CONFIDENTIALITY WALL

Given the possible models of collaboration in light of current law and ethics opinions, our partnership opted to utilize the confidentiality wall model. "Confidentiality walls" or "screens" are expressly allowed by the Vermont Rules of Professional Conduct in certain situations. Rule 1.11 specifically allows a lawyer who is moving from government practice to private practice to be screened from participation in cases where the new firm might otherwise be disqualified due to the new attorney's conflict arising from his or her prior representation. n153 The comments to Vermont Rule 1.11 do not provide any guidance as to what might constitute an appropriate screen, although various courts and bar associations have issued opinions that render guidance. Since social workers would be most analogous to nonlawyer "employees," much of the following discussion focuses on screening when nonlawyers move from one firm to another.

A Vermont Advisory Ethics Opinion provides relevant guidance on the subject of confidentiality walls. In Opinion 78-02, the Vermont Bar Association's Ethics Advisory Committee was asked whether a paralegal, who worked on a case for one party, disqualified the firm she later worked at from representing the opposing party. n154 The Committee decided that such a rule was not necessary so long as certain "controls" were put in place in these situations; namely that such individuals are screened from any direct or indirect participation in the matter at issue, and they are prohibited from communicating with his or her new colleagues about the matter. n155 Likewise, when confronted with a paralegal moving from one law firm to another, the American Bar Association opined that so long as effective screening mechanisms were in place, and so long as no information relating to the representation at issue was revealed by the paralegal to any person in the employing firm, the employing firm did not need to be disqualified from the case. n156

[\*220] What does an effective screen consist of? In a 2000 Florida case, the court did not attempt to provide a general procedure for erecting a confidentiality wall within a firm, but the court found instead that "the specific methods to be used and their effectiveness will vary with the size and structure of the hiring firm, its internal operating procedures, and the nature and scope of the litigation involved." n157 However, the court also found that, at a minimum, the hiring firm needed to admonish the new nonlawyer employee not to discuss the case with anyone in the hiring firm, restrict the new employee from access to the computer and paper files related to the case, and prohibit all attorney and non-attorney employees of the hiring firm from discussing the case with the new employee. n158

It is not enough for a firm to have a screening procedure; screening procedures should actually be in place prior to a potentially disqualifying event. In a very instructive decision, the Seventh Circuit, joining other circuits, sanctioned the general practice of using confidentiality walls to allow attorneys to move from government jobs to private firms without causing the new firm's disqualification in cases where the new attorney has a conflict of interest. In holding that the wall or screen must be in place prior to the time the conflict arises, the court found the timing issue to be so compelling that it stated in a footnote that "timely screening arrangements are essential to the avoidance of firm disqualification." n159 In a later Seventh Circuit case, [\*221] the Court followed the *Lasalle Natl. Bank v. County of Lake* reasoning and upheld the disqualification of a firm where the new attorney had knowledge of the case at issue from his prior firm, and there were no "institutional mechanisms" in place at the new firm to "protect the sacrosanct privacy of the defendants' attorney-client relationship." n160

Even where attorneys work in the same government office and have conflicting roles, the use of a wall or screen within the office has been found to negate charges of impropriety. n161 State-wide public defender systems are often confronted with these types of conflicts issues, and, in at least one case, the court found that a conflict did exist, and allowed an appellate attorney in a public defender system to withdraw from an appeal involving ineffective assistance of counsel where a local public defender had handled the initial court proceedings. n162

### C. WALL CONSTRUCTION

Given the framework set out through caselaw and ethics opinions, the following guidelines were incorporated into the project's internal policies for the construction and operation of the confidentiality wall:

1. The wall must be fully operational before social work students work collaboratively on Clinic cases according to agreed-upon policies and procedures which have been reduced to writing.

2. The social workers must be excluded from information that might warrant a report of abuse and/or neglect, including access to files and access to information on the Clinic's computer systems. Hard copy files with this information are to be kept separately in a locked file cabinet that social workers do not have access to. [\*222] Moreover, they shall not have access to shared Clinic computer drives.

3. All Clinic staff, including work study students, must be trained in the policies pertaining to the wall and how it operates so that they do not inadvertently leave files, phone messages, or other materials containing protected information in an area where they might be seen by the social workers. All staff will be given a copy of the policy to read and will be required to attend a training session on policy implementation. The partners to the collaboration will regularly review the policy and revise as necessary.

4. It is imperative that attorneys fully inform clients of the pros and cons of consenting to social worker collaboration, including the fact that social workers are mandatory reporters and what this means. Clients must give written informed consent to working with the social workers and social work students prior to social worker involvement on a case.

#### IV. CONCLUSION

After the first year of the collaboration, it became clear to the participants that lawyers/law students and social workers/social work students working together greatly benefited the Clinic clients and enhanced what each group of professionals might accomplish alone. The social workers were particularly helpful in assisting in child welfare cases where the Clinic represented parents and children who were already in the abuse/neglect system (post disposition), reunification efforts were in progress, or the child clients were to be in long term foster care. The social workers were instrumental in such endeavors as formulating appropriate visitation plans, discussing the pros and cons of various residential treatment options, and enhancing our understanding, from a social worker's perspective, as to why an agency might be advocating a specific plan to the exclusion of other potential plans. Working with social workers made the work more focused and more holistic, and undoubtedly, the collaboration made the attorneys better client advocates.

The social workers and social work students developed a deeper appreciation for the role of the attorney in child welfare cases, and they learned how to more effectively use the law to their clients' advantage. [\*223] In terms of the educational value for the two groups of students, the project sensitized the students to the particular roles of each profession, and it showed them, through working together, how partnering can lead to better client outcomes.

Since the project did not face any problems with the confidentiality wall model in its trial year, it is likely that this model will continue to be used if and when the partnership re-emerges. At this time, there does not appear to be any general ethical prohibitions on a law school clinic-based law and social work collaboration provided that the partners are aware of the issues raised in this article and do the necessary research regarding the law in their particular jurisdiction before starting out.

#### **Legal Topics:**

For related research and practice materials, see the following legal topics:

## FOOTNOTES:

n1. The South Royalton Legal Clinic is a civil law clinic for low income Vermonters hosted by Vermont Law School. Approximately fifteen - twenty law students participate in the clinical program each semester. The first year (and thus far only year) the law/social work project was in operation was during the 2002-2003 academic year. Vermont Law School is not affiliated with the University of Vermont and is located more than one hour away from Burlington, home to the University. This presented several logistical problems that need to be ironed out. The University of Vermont's professors provided general supervision to the social work student but could not, due to distance, provide the type of day-to-day supervision we felt the project required. A social worker from Casey Family Services provided the on-site supervision during 2002-2003 as part of her sabbatical, but this was not a long-term remedy. We are in the process of seeking funding for an on-site social worker in order to continue the collaboration.

n2. See Ctr. Prof. Resp., Summary of House of Delegates Action on Ethics 2000 Commission Report, [http://www.abanet.org/cpr/e2k-summary\\_2002.html](http://www.abanet.org/cpr/e2k-summary_2002.html) (accessed Nov. 11, 2005).

n3. See Laura W. Morgan, *Between a Rock and a Hard Place: An Attorney's Duty to Report Child Abuse* PP 3-6 (Nat'l. Leg. Research Group & Lawtek Media Group, LLC 1998) (copy on file with Whittier J. of Child & Fam. Advoc.).

n4. *Ark. Code Ann. 12-12-507(b)* (2005); *N.Y. Soc. Serv. Law 413* (McKinney 2005) (in New York, the specific listings include district attorneys, assistant district attorneys and investigators working in district attorneys' offices).

n5. *Ind. Code Ann. 31-33-5-1* (West 2005); see *Utah Code Ann. 62A-4a-403(1)* (2005). A Utah Bar Ethics Committee opinion provides that Utah attorneys may disclose confidential information under Rule 1.6(b)(4), which allows for disclosures to the extent necessary to comply with the Rules of Professional Conduct or other law, in order to comply with the mandatory reporting statute (emphasis added); Utah St. B. Ethics Advisory Op. Comm., Op. 95-6 (1995). Interestingly, the only statutorily recognized privilege in Utah is preserved for priests/clergy and penitents. See *Utah Code Ann. 62A-4a-403(2)* (2005).

n6. See *N.H. Rev. Stat. Ann. 169-C:29* (West 2005) (entitled "Persons Required to Report"); see also *id.* at 169-C:32 (according to the "Abrogation of Privileged Communication" statute, only the attorney-client privilege is preserved, while other privileges such as the spousal privilege and other professional-patient/client privileges are explicitly abrogated).

n7. See *Tex. Fam. Code Ann. 261.10(c)* (2005).

n8. *Miss. Code Ann. 43-21-353* (2005); *Ohio Rev. Stat. Ann. 2151.421(A)(1)* (Anderson 2005); *Nev. Rev. Stat. Ann. 432B.220* (LEXIS 2004).

n9. *Nev. Rev. Stat. Ann. 432B.220.3(i)*.

n10. *Ohio Rev. Code Ann. 2151.421(A)(1)(b)-(A)(2)*.

n11. *Id.* at 2151.421(A)(2) (stating the physician-patient privilege is similarly waived when the three criteria are met).

n12. See Jacqueline St. Joan, Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality, 7 *Clinical L. Rev.* 403, 462-462 (2001) (citing and construing *Miller v. District Court*, 737 P.2d 834 (Colo. 1987)).

n13. 737 P.2d 834 (Colo. 1987).

n14. 737 P.2d at 834, 838 (citing John Wigmore, Wigmore on Evidence vol. 8, 2301, 583 (rev. ed., Little, Brown & Co. 1961)); see also St. Joan, *supra* n. 12, at 462-464. As of the time Ms. St. Joan wrote the article, this issue had not yet been tested in a Colorado court or before a state bar ethics advisory committee.

n15. *Vt. Stat. Ann. tit. 12 502(b)* (2005).

n16. *Id.* at 502(a)(4).

n17. Vermont cases do not attempt to define the term "representatives of the lawyer." *Id.*

n18. The South Royalton Legal Clinic represents low-income clients in a wide variety of civil cases, including divorces and other family court cases as well as child welfare cases.

n19. Definitions of "employ" include: "to engage the services of," "to provide with a job," and "to devote to or direct toward a particular activity or person;" furthermore, other definitions provide a broader definition than merely work for pay (e.g. "employment" can mean "an activity in which one engages ..."). See Merriam-Webster's Collegiate Dictionary 379 (10th ed., Merriam-Webster, Inc. 1996).

n20. Model R. Prof. Conduct 1.6(b)(1) (ABA 2002).

n21. *Vt. R. of Prof. Conduct 1.6(b)(1)* (2005). Vermont's rule follows the old version of Model Rule 1.6; therefore, it only mandates disclosures in these circumstances when it is a client's potential action that is at issue. This mandatory provision brings Vermont attorneys closer to being mandatory reporters than attorneys in those states where they are not included in mandatory abuse reporting statutes and their professional rules of conduct allow for discretionary reporting under their respective versions of Rule 1.6. Wisconsin attorneys are also mandated to "reveal such information to the extent the lawyer reasonably believes necessary" to prevent the client from committing a criminal or fraudulent act that an attorney reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the property or financial interest of another. See *Wis. R. of Prof. Conduct SCR 20:1.6(b)* (2005).

n22. See *Vt. R. of Prof. Conduct 1.6, Reporter's Notes* (citing to J. Taylor, Work in Progress: The Vermont Rules of Professional Conduct, 20 *Vt. L. Rev.* 901, 905-910 (1996)).

n23. Compare Model R. Prof. Conduct 1.6 (ABA 2000) with Model R. Prof. Conduct 1.6 (ABA 2002) (amended version).

n24. See Md. St. B. Assn. Comm. on Ethics Op. 83-60 (1983); see also Mass. B. Assn. Comm. on Prof. Ethics, Op. 90-2 (1990); N.J. Advisory Comm. on Prof. Ethics, Op. 280 (1974); Wis. St. B. Ethics Comm. Op. E-88-11 (1988); Howard Davidson, Reporting Suspicions of Child Abuse, What Must a Family Lawyer Do?, 17 *Fam. Advoc.* 50, 50 (1995); Morgan, *supra* n. 3.

n25. Wis. St. B. Ethics Comm. Op. E-88-11 (1988). The Vermont Committee on Professional Responsibility found that where an attorney represented multiple clients and one client told the attorney of the possible criminal activity of another one of his clients, the attorney could not reveal the confidence of the client/father as to the (criminal) secret of the client/mother because the criminal conduct was in the past and "completed." If the mother's conduct had been a "continuing crime", the attorney would have been permitted to disclose the information under the Model Code of Professional Responsibility. DR 4-101(C)(3). The attorney at issue was instructed to withdraw from all further representation in the case. Vt. B. Assn. Advisory Ethics Op. 95-19 (1995).

n26. Mass. B. Assn. Comm. on Prof. Ethics, Op. 90-2 (1990).

n27. See Davidson, *supra* n. 24, at 50 (citing to Ind. St. Ethics Comm. Advisory Op. 1-1986).

n28. Mass. B. Assn. Comm. on Prof. Ethics, Op. 90-2 (1990).

n29. *Id.*

n30. *Id.*

n31. *Id.*

n32. *Id.* In this case, much of the relevant information was a matter of public record so disclosure perhaps could have been limited to the public record information. Although the Massachusetts Committee found that attorneys were within ethical boundaries so long as they acted reasonably in deciding whether to reveal confidential information under one of the exceptions to the confidentiality rules, the Committee does warn attorneys of the potential tort liability under a Tarasoff analysis if lawyers fail to warn potential victims, as well as the potential malpractice issues on the other hand for revealing confidential information. *Id.*; see generally *Tarasoff v. Regents of University of California*, 17 *Cal. 3d* 425 (*Cal.* 1976).

n33. Compare Model R. Prof. Conduct 1.6 (ABA 2000) with Model R. Prof. Conduct 1.6 (ABA 2002) (as amended).

n34. Cleveland B. Assn. Prof. Ethics Comm., Op. 92-2 (1992). This opinion is also interesting because it cites to, and discusses, the Ohio mandatory reporting statute which mandates attorneys to report in situations where the client is under eighteen years of age and other factors are met. See Ohio Rev. Stat. Ann. 2151.421(A)(1).

n35. See Morgan, *supra* n. 3 (discussing Va. St. B. Ethics Comm., Op. 705 (1985)).

n36. *State v. Williquette*, 385 *N.W.2d* 145, 147 (*Wis.* 1986). The Wisconsin Supreme Court specifically held that "a parent who knowingly permits another person to abuse the parent's own child subjects the child to abuse within the meaning of sec. 940.201." *Id.* at 147. The specific criminal behavior in this case

was "foreseeable risk of cruel maltreatment." See *id.* at 150. This child abuse statute has since been replaced by a more comprehensive statute that addresses crimes against children. A section of the new statute codifies the Williquette holding and specifically criminalizes the failure of a person who is responsible for the child's welfare to act to prevent bodily harm to the child. Under this statute, such failure to act is a felony, a more serious felony if the potential harm is "great bodily harm." See *Wis. Stat. Ann. 948.03(4)(a)-(b)* (West 2005); see also *State v. Rundle*, 500 N.W.2d 916, 921 (Wis. 1993).

n37. See Wis. St. B. Ethics Comm. Op. E-88-11 (1988).

n38. Utah R. Prof. Conduct 1.6(b)(4) (permitting disclosures that are required by the Utah Rules of Professional Conduct or other law).

n39. See Utah St. B. Ethics Advisory Op. Comm., Op. 95-6 (1995). The Ethics Committee does not go so far as to say this is a mandatory duty, even in light of the mandatory language in the abuse reporting statute, since this would have required an interpretation of law which it held "lies beyond the purview of this Committee." *Id.*

n40. *In re Pressly*, 628 A.2d 927 (Vt. 1993).

n41. *Id.* at 929.

n42. There is no indication in the opinion that the disciplined attorney was concerned that by keeping the allegations of abuse confidential the child might be harmed or that he counseled his client to report the allegations. The Supreme Court takes note of this and states: "The Respondent does not contend, nor does the record reflect, that his disclosure was intended or necessary to protect the child" and ultimately found that the attorney had revealed a client confidence in violation of the Model Code of Professional Responsibility DR 4-101. *Id.* at 931. DR 4-101 was part of Vermont's Code of Professional Conduct which was superseded in 1999 by the Vermont Rules of Professional Conduct. Commentator Laura Morgan states that Pressly provides "the most dramatic example of the duty of an attorney not to make a report because of the client's instructions." See Morgan, *supra* n. 3.

n43. See 499 A.2d 422, 427 (Vt. 1985) (citing *Tarasoff*, 17 Cal. 3d at 435).

n44. *Vt. Stat. Ann. tit. 12, 1612(a)* (2003). Under Vermont law, the therapist in Peck is a "mental health professional" and is covered by this statute. *Id.* at 1612(c)(13). The Peck Court cited to various statutory exceptions to this privilege. *Peck*, 499 A.2d at 425; see also *Vt. Stat. Ann. tit. 33, 4913(a)* (2003).

n45. See *Peck*, 499 A.2d at 426.

n46. See Model Code of Professional Responsibility DR 4-101(C)(3) (superseded in 1999 by Vt. R. Prof. Conduct 1.6, stating in relevant part that a lawyer may reveal "the intention of his client to commit a crime and the information necessary to prevent the crime").

n47. See *Peck*, 499 A.2d at 426.

n48. See Vt. R. Prof. Conduct 1.6 (2005) (citing to *Peck*, 499 A.2d 422).

n49. See Vt. B. Assn. Advisory Ethics Op. 86-03 (1986). In this opinion, the person was not an actual client but only a person seeking services, hence, the duty owed to this person was arguably more tenuous. *Id.*

n50. *Id.*

n51. *Id.* Although the Peck case had been recently decided by the Vermont Supreme Court, the Committee declined to comment on the case, finding it beyond the purview of the Committee to render legal opinions. See generally *Peck*, 499 A.2d 422; see also Mass. B. Assn. Comm. on Prof. Ethics, Op. 90-2.

n52. 636 N.E.2d 218, 218-219 (Mass. 1994).

n53. *Id. at 218-219.* In *Lamare*, the Department of Social Services supervisor and the two children met the father in a parking lot and got into his car. The father then drove to a remote section of the highway, forced the supervisor out of the car, and subsequently took the children with him to Greece. There are no facts in the reported decision that indicate how the father's attorney could have or should have known enough about this scheme to prevent it, if in fact he felt some obligation to do so. In fact, the supervisor had been approved by the Department of Social Services. *Id.*

n54. *Id. at 219.* The court further stated that if a party is unrepresented and relies on services rendered by an attorney, the attorney owes that person a duty of reasonable care; however, this was not the case in *Lamare* as the mother was represented by an attorney and the children were represented by either an attorney and/or guardian ad litem throughout the proceedings. *Id. at 219-220.*

n55. N.Y.C. Assn. B. Comm. Prof. & Jud. Ethics, Op. 1997-2 (1997) [hereinafter N.Y. Ethics].

n56. *Id.* (citing generally to Report of the Working Group on Determining the Child's Capacity to Make Decisions, 64 *Fordham L. Rev.* 1339 (1996); Peter Margulies, The Lawyer as Caregiver: Child Clients' Competence in Context, 64 *Fordham L. Rev.* 1473 (1996)).

n57. *Id.* The Committee found that given that the clients would be "verbal minors age twelve or older who affirmatively seek a lawyer's assistance" they would generally be found capable of considered judgment. *Id.*

n58. *Id.* (citing N.Y. St. B. Assn. Comm. Prof. Ethics, Op. 486 (1978); N.Y. Code Prof. Resp. prelim. state.; Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* 1.6.304 (2d ed., Aspen L. & Bus. 1998)).

n59. N.Y. Ethics, *supra* n. 55.

n60. *Id.*

n61. *Id.* (referencing N.Y. St. B. Assn. Comm. Prof. Ethics, Op. 490 (1978)).

n62. Although the statute only requires appointment of a guardian ad litem (GAL) or counsel for the child in child welfare proceedings on motion, Vermont Family Court Rule 6 requires that both be appointed. Compare *Vt. Stat. Ann. tit. 33, 5525* (2005) with Vt. R. for Fam. Proc. 6(a)-(c). This is not the case in other

family court proceedings, such as divorces, where a GAL and/or attorney may be appointed but are not required, with the exception of the appointment of an attorney where a child subject to the proceedings is to testify. See *Vt. Stat. Ann. tit. 15 669*, 594 (2004). Attorneys in Vermont follow a client-directed model of representation while the lay GALs represent their child clients' best interests. See *Vt. R. for Fam. Proc. 6(a)-(c)* (for a description of GAL duties).

n63. See 22 Me. Rev. Stat. Ann. 4011-A(1)(A)(16) (2005); *Mont. Code Ann. 41-3-201(2)(i)* (2005). In some states, e.g., Maine and Montana, even though attorneys are not mandatory reporters, a GAL is expressly required to make reports of a abuse and neglect under child abuse reporting statutes. *Id.*

n64. See Vermont Guardian Ad Litem Policies and Procedures: A Guide for the Volunteer Guardian Ad Litem at 11-12.

n65. *Vt. B. Assn., Advisory Ethics Op. 2000-02.*

n66. *Id.* (stating, "at the time in question, the children here were seven and four years old and incapable of making decisions about important matters ...").

n67. *Id.*

n68. *Id.*

n69. *Vt. R. Prof. Conduct 1.6(b)(1).*

n70. *Model R. Prof. Conduct 1.4 (ABA 2002).*

n71. *Id.* One commentator is of the opinion that attorneys need only provide their clients with a general explanation of the confidentiality rules and the major exceptions to the rules at the outset of representation with the goal of providing enough information to allow the client to ask intelligent questions regarding confidentiality as the case progresses. See Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 *Cath. U. L. Rev.* 441, 485 (1990). He also admonishes attorneys to keep in mind that failure to inform clients as to the limits of confidentiality could result in disciplinary sanctions or a civil lawsuit and/or might be perceived by clients as an act of deception that could undermine or destroy the attorney-client relationship. *Id.*

n72. *Model R. Prof. Conduct 1.4 cmt.*

n73. *N.Y.C. Assn. B. Comm. Prof. & Jud. Ethics, Op. 1997-2.*

n74. *Id.*

n75. *Id.* The Committee found that under the dictates of EC 4-2 which states that client consent can only be given after full disclosure, and is effective "only if given on the basis of information and consultation reasonably appropriate in the circumstances" there could not be only one "script" and the consultation task could not be fully delegated to nonlawyer personnel. *Id.* (quoting *Restatement (Third) of the Law Governing Lawyers 114 cmt. c* (1996)).

n76. *Id.* The Committee also addresses the issue of what course of action an attorney should take if the client later revokes his consent. The Committee found that unless there is an exception that allows disclosure, the attorney becomes bound by the rules of confidentiality. The attorney could sever the attorney-client relationship in these situations only as the Rules allow, e.g., where there would be no "material adverse effect on the interests of the client" pursuant to DR 2-110. Further, the Committee found that in situations where the representation is contingent upon the client giving advance consent, a critical question is whether the client fully comprehends that he or she might not be able to find representation elsewhere, and still feels free to refuse to consent. *Id.*

n77. Model R. Prof. Conduct 5.3 (ABA 2002).

n78. *Id.*

n79. *Id.*

n80. See *id.* at cmt. (emphasis added).

n81. See Vt. R. Prof. Conduct 5.3 (2005).

n82. D.C. B. Leg. Ethics Comm., Ethics Op. 282 (1998). In this opinion, requested by social worker employees in a law firm in the District of Columbia, the Committee assumed the social workers were employees of the firm or acting as consultants, although the request for the opinion didn't state what the social workers' actual status was in the firm. *Id.* The inquiry also did not state whether the information pertaining to abuse/neglect came from the client or elsewhere but the Committee stated this made no difference in terms of its analysis. *Id.*

n83. See *id.* (citing and discussing D.C. R. Prof. Conduct 1.6(e), 5.6 (1998)).

n84. *Id.*

n85. See *id.* (citing and discussing D.C. R. Prof. Conduct R. 1.6(d)). Social service workers are required to report abuse and neglect. *D.C. Code Ann. 4-1321.02* (LEXIS 2005).

n86. D.C. B. Leg. Ethics Comm., Ethics Op. 282.

n87. *Id.*; see also Vt. B. Assn. Advisory Ethics Op. 86-03 (indicating that nonlawyers who worked for a legal services organization had the "same obligation as a lawyer to protect the confidences or secrets of a client").

n88. D.C. B. Leg. Ethics Comm., Ethics Op. 282 (requiring the lawyer to take steps to assure the client understands the inconsistency, and citing D.C. R. Prof. Conduct 1.4(b) that provides a lawyer must explain a matter to "the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

n89. *Id.*

n90. Id.

n91. Id.

n92. See Natl. Assn. of Soc. Workers, Code of Ethics of the Natl. Assn. of Soc. Workers, <http://www.socialworkers.org/pubs/code/code.asp> (accessed Nov. 13, 2005).

n93. Id. at ethical stand. 1.

n94. Id. at ethical stand. 1.07(a).

n95. Id. at ethical stand. 1.07(c)

n96. Id. at ethical stand. 1.07(j).

n97. Id. at ethical stand. 1.07(c).

n98. Id. at ethical stand. 1.07(e).

n99. See e.g. *Ala. Code 26-14-3* (2004); *Colo. Rev. Stat. 19-3-304(1)-(2)* (2005); *Fla. Stat. Ann. 39.201(1)* (West 2005); *Vt. Stat. Ann. tit. 33, 4913(a)* (2005).

n100. *Vt. Stat. Ann. tit. 33, 4913(a)*.

n101. Id. at 4913(e)(1)-(2).

n102. See *St. Joan*, supra n. 12, at 455-456.

n103. Howard Doucek & Murray Levine, Reporting Clients for Child Mal treatment: A Study of the Effect of Mandated Reporting on Social Work Practice, 8 *J.L. & Soc. Work* 171, 173-174 (1998).

n104. Id.

n105. Jacob Jay Lindenthal, Christiaan J. Lako & Anwar Ghali, Studies into the Management of Confidentiality, 8 *J.L. & Soc. Work* 189, 197 (1998).

n106. Id.

n107. *Lashay v. Dept. of Soc. & Rehab. Services*, 625 A.2d 224, 228 (Vt. 1993).

n108. Id.

n109. *Id. at 229*. The caseworker claimed that the only information he had been told was that the alleged perpetrator was bisexual and had made advances toward a male co-worker. The co-worker turned out to be a minor; however, this fact was in dispute at the trial court level and resolved in favor of the appellant-child at the Supreme Court given the posture of the case as one for summary judgment. The Court acknowledges that an allegation that someone was bisexual is not enough to trigger reporting under *Vt. Stat. Ann. tit. 33, 4913(a)*. *Id. at 228 n. 4*.

n110. *Campbell v. Burton*, 750 N.E.2d 539, 541-542, 545 (Ohio 2001).

n111. *Id. at 545*. In Ohio, the reporting statute imposes a criminal penalty for failure to report and grants both civil and criminal immunity to persons who have a duty to report thus "encouraging those with special relationships with children, such as doctors and teachers, to report known or suspected child abuse." See *id.* (discussing Ohio. Rev. Code Ann. 2151.421(G)(1)(a), 2151.99 (Anderson 2005)).

n112. *Morris v. State of Texas*, 833 S.W.2d 624, 626 (Tex. App. 14th Dist. 1992).

n113. *Tex. Fam. Code Ann. 261.101(a)* (2002).

n114. *Morris*, 833 S.W.2d at 626.

n115. *Id.*

n116. *Gross v. Myers*, 748 P.2d 459, 459-460 (Mont. 1987).

n117. *Id. at 461*.

n118. *Id. at 462*.

n119. *Id.* (citing to *Mont. Code Ann. 41-3-203* (2005)). The current version of this statute, adds "grossly negligent" and knowingly providing false information in the report to the list of behaviors that will exempt a mandatory reporter from the protection of the immunity statute. *Id.* The dissent provides an argument for less discretion based on a statutory construction theory. The dissenting justice argued that there was no child, i.e., a person under the age of eighteen, who was being abused or at "imminent risk of harm" when the information became known. Therefore, there was no "child", as defined by statute, that needed protection. The dissent was vehemently opposed to extending reporting requirements to protect speculative victims based on an alleged perpetrator's past behavior. The lone dissenting justice went so far as to call the counselor a "professional busybody." *Gross*, 748 P.2d at 463 (Sheehy, J., dissenting).

n120. See e.g. *Ark. Code Ann. 12-12-507(c)* (2005); *N.H. Rev. Stat. Ann. 169-C:32* (2005).

n121. See *Washington v. Fagalde*, 539 P.2d 86, 87 (Wash. 1975).

n122. *Id. at 90*.

n123. *Id.* (citing *Wash. Rev. Code Ann. 26.44.040(7)* (West 2005)).

n124. See generally *People v. Morton*, 543 N.E.2d 1366 (Ill. App. 4th Dist. 1989); *People v. McKean*, 418 N.E.2d 1130 (Ill. App. 2d Dist. 1981); see also 325 Ill. Comp. Stat. Ann. 5/4 (West 2005) (for the Illinois child abuse reporting statute).

n125. 740 Ill. Comp. Stat. Ann. 110/2 (West 2002).

n126. *Id.*

n127. *Id.*

n128. *Vt. Stat. Ann. tit. 12, 1612(a)* (2004). The statute extends a privilege to "mental health professionals" which is a term that includes social workers. See *Vt. Stat. Ann. tit. 18, 7101(13)* (2004).

n129. *Vt. Stat. Ann. tit. 12, 1612(a)*.

n130. See *Vt. R. Evid. 503*.

n131. See *Vt. R. Evid. 503(d)(7)*.

n132. 597 A.2d 770 (*Vt. 1991*).

n133. *Id. at 772-773*.

n134. The Court reiterated that Vermont does not have a specific social worker privilege, and the court stated that social workers must meet "a higher degree of qualification" for the privilege to attach. *Id. at 772*. For the privilege to exist a "mental health professional" can also be "a person reasonably believed by the patient to be a mental health provider"; however, the Court did not find that the Curtis patient held this belief. See *id.* (citing and discussing *Vermont R. Evid. 503(a)(5)*).

n135. *Jaffe v. Redmond*, 518 U.S. 1, 15-17 (1996). In this case, a social worker who was counseling a police officer accused of killing a man, refused to turn over her notes from therapy sessions and also refused to answer questions pertaining to the sessions when testifying. *Id.*

n136. *Id. at 8-9, 12* (citing to and discussing *Fed. R. Evid. 501*). The Court found that the federal privilege, which clearly extends to psychiatrists and psychologists, should also extend to confidential communications made to licensed social workers in the course of psychotherapy because the same reasons for recognizing the privilege for treatment by psychiatrists and psychologists applies with equal force to the services clinical social workers provide. The Court also empathized with the many people that can't afford the services of a psychiatrist or psychologist and turn to social workers for psychotherapy and acknowledged that social workers today "provide a significant amount of mental health treatment." *Id. at 15-16*.

n137. *Id. at 12-13, 16-17* (noting that the scope of the various states' respective therapist-patient privileges varied). This is still the case in Arizona, where licensed social workers, counselors, marriage and family therapists and substance abuse counselors are considered "behavioral health professionals" and are granted a statutory privilege as such, which is specifically abrogated for child abuse reporting and a duty to

warn where there is a "clear and imminent danger" to the client or others. See Az. Rev. Stat. Ann. 32-3261(A), 32-3283 (2005).

n138. Natl. Assn. of Soc. Workers, *supra* n. 92, at ethical stand. 1.07(e).

n139. *Id.*

n140. See Doucek & Levine, *supra* n. 103, at 176-179.

n141. *Id.* at 182.

n142. *Id.* at 177.

n143. *Id.* at 183. The researchers found this was particularly true when the clients were children. *Id.*

n144. *Commonwealth v. Arnold*, 514 A.2d 890, 892 (Pa. Super. Ct. 1986).

n145. *Id.* at 895.

n146. 156 Cal. App. 3d 811 (4th Dist. 1984).

n147. *Id.* at 817.

n148. *Id.* at 818 (pointing out that Younghanz disclosed acts of abuse first to a student counselor at a community mental health clinic who then immediately relayed the information to the director of the clinic. The director then discussed the problem with Younghanz and advised him that he was required to report the incident. He also gave Younghanz a copy of the mandatory reporting statute; however, even after the warning regarding reporting requirements, Younghanz continued to provide information of his abusive actions to the director).

n149. See St. Joan, *supra* n. 12, at 430-431.

n150. See Model R. Prof. Conduct 5.3(a). In employee model clinics, social workers must feel comfortable elevating confidentiality over their mandatory reporting obligations. According to the reasoning of the District of Columbia Bar Legal Ethics Committee, in law/social work collaborative clinics in D.C., social workers can work with attorneys under what appears to be an employee model and report abuse without fear of causing a violation of attorney rules of professional conduct so long as attorneys take certain steps to inform clients of the potential for reporting and obtain client consent. See D.C. B. Leg. Ethics Comm., Ethics Op. 282.

n151. See generally St. Joan, *supra* n. 12, at 434-436. Colorado requires the use of a "disinterested attorney" standard when evaluating whether it is in the client's interest to consent to representation. See Colo. R. Prof. Conduct 1.7(c) (2005). Neither the Model Rules nor Vermont's Rule 1.7 contains this provision; however, the Comment to Vermont's Rule 1.7 provides: "Loyalty is an essential element in the lawyer's relationship to a client ... . As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent." See Vt. Rules Prof. Conduct 1.7 cmt. Query

whether even absent the disinterested lawyer standard, an attorney can in good faith obtain client consent to sharing information with a mandatory reporter who is a member of the representation "team." *Id.*

n152. Attorneys and social work faculty at the University of Denver's interdisciplinary domestic violence clinic opted for a "confidentiality wall" model when they began their collaborative clinical work in 2000-2001. At the Denver clinic they found the following were integral to effective wall construction: early implementation of the protective practices, including obtaining certain client consent; formal notification to all staff of policies pertaining to implementation of the wall; creation of "shadow files" where protected information is kept away from other information; and effective training and monitoring through ongoing discussions in the interdisciplinary seminar and formal follow-up research as to the effectiveness of the wall and the program generally. See *St. Joan*, supra n. 12, at 440-442.

n153. *Vt. R. Prof. Conduct 1.11* (2005).

n154. *Vt. B. Assn. Advisory Ethics Op. 78-02* (1978).

n155. *Id.* (citing to *ABA Formal Ethics Op. 342* (1975)).

n156. *ABA Informal Ethics Op. 88-1526* (1988); see also *Kapco Mfg. Co., Inc. v. C. & O. Enter., Inc.*, 637 *F. Supp.* 1231, 1240 (*N.D. Ill.* 1985) (discussing an office manager/secretary who moved from one firm to another; the hiring firm was not disqualified because the hiring firm had taken appropriate steps to ensure that the office manager did not work on the case where she had a conflict and no one discussed the case with her).

n157. See *Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 *So. 2d* 196, 209 (*Fla. 1st Dist. App.* 2000).

n158. *Id.*

n159. See *Lasalle Natl. Bank v. County of Lake*, 703 *F.2d* 252, 259 (*7th Cir.* 1983). The Court noted that the screening arrangements courts and commentators have approved share some common characteristics. These include: having screening in place in a timely manner; ensuring that no documents are shown to the infected attorney nor any discussions are had among the new attorney and the members of the firm (in one case cited to files were kept in a locked file cabinet with the keys controlled by two partners and issued to others only on a "need to know" basis); and ensuring that no fees derived from the representation at issue are shared with the "infected" attorney. *Id.*; see also *Ethics Committee of the Colorado Bar Association*, *Formal Op. 88* (1991) (where Committee also describes features of effective wall including that the files of the matter in question be moved from any central filing area to a separate room which the newly-hired attorney would be instructed not to enter and any data pertaining to the case on the firm's network be protected from the attorney's inadvertent access as well as telephone messages, intra office memoranda should be kept from the attorney).

n160. *Schiessle v. Stephens*, 717 *F.2d* 417, 421 (*7th Cir.* 1983).

n161. See *Ranum v. Colo. Real Estate Commn.*, 713 *P.2d* 418, 420 (*Colo. App.* 1985). In this case, regulatory attorneys and conflicts counsel were separated within the Colorado Attorney General's Office. See *id.*

n162. *McCall v. Dist. Ct. for Twenty-First Jud. Dist.*, 783 P.2d 1223, 1227 (Colo. 1989). In a footnote however, the Court found that it might be possible for the public defender system to minimize conflicts by "adopting internal procedures to prevent access to information." *Id.* at 1228 n. 6.