

Part III

Responsibilities and Rights of Reporters

Who Must Report

General Rule

North Carolina's reporting law applies to every person and every institution in the state. It requires "[a]ny person or institution who has cause to suspect that any juvenile is abused, neglected, or dependent, as defined by G.S. 7B-101, or has died as the result of maltreatment" to make a report to the county department of social services. The reporting requirement applies to doctors, social workers, therapists, teachers, law enforcement officers, and others whose professions sometimes involve them directly with problems of abuse, neglect, or dependency. It applies equally, though, to housing inspectors, store clerks, co-workers, friends, relatives, bystanders, and all others.

Confidential and Privileged Communications

With one very small exception for attorneys, which is discussed below, North Carolina law provides that "[n]o privilege shall be grounds for any person or institution failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity."¹ One of the main

reasons reporting laws were first enacted, after all, was to allow, encourage, or require physicians to report despite the physician–patient privilege and the principle of medical confidentiality.²

Attorneys

The Juvenile Code contains only one exception to the otherwise universal duty to report. An attorney is not required to make a report if "the knowledge or suspicion is gained by [the] attorney from that attorney's client during representation only in the abuse, neglect, or dependency case."³ In any other situation, the law requires attorneys to report like everyone else. If an attorney learns from a parent about that parent's abuse or neglect of a child, or about the parent's inability to care appropriately for the child, while representing the parent in a child support action, a divorce, or any other matter that does not involve the abuse, neglect, or dependency itself, that attorney must make a report to social services.

This legal duty may conflict with a lawyer's ethical duty to maintain a client's confidences.⁴ The North Carolina State

Bar, which adopts and interprets Rules of Professional Conduct for the legal profession, gives lawyers broad discretion in deciding how to resolve the conflict. In a 1995 ethics opinion, the State Bar interpreted its rules in relation to the child abuse and neglect reporting law.⁵ The opinion concluded that a “lawyer may ethically report information gained during his or her professional relationship with a client to DSS [department of social services] in compliance with the statutory requirement even if to do so may result in substantial harm to the interests of the client.” The opinion also states, however, that a lawyer, without violating the Rules of Professional Conduct, “may in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine the purpose of the representation or substantially damage the interests of his or her client,” even where the failure to disclose the information constitutes a violation of the reporting law. The opinion acknowledges that its rules may not protect a lawyer from criminal prosecution for failing to comply with the reporting law.

An attorney weighing compliance with the reporting law and preservation of a client’s confidence should consider, among other things, whether making a report would deprive his or her client of a constitutional right—such as the right to effective assistance of counsel in a criminal case. When the two are inconsistent, a client’s federal constitutional right may supersede the attorney’s duty under state law to report child abuse, neglect, or dependency.⁶

Judges

Like everyone else, judges who have cause to suspect that a child is abused, neglected, or dependent must make reports to departments of social services. A report would be required, for example, if a judge presiding in a child custody or domestic violence case heard evidence that gave the judge cause to suspect that one or both of the parties had disciplined their child in a cruel and harmful way.⁷

A judge may learn of (or develop cause to suspect) abuse, neglect, or dependency during a court proceeding that is required to be strictly confidential. The United States Supreme Court has held that a state may not constitutionally require parental consent for a minor to obtain an abortion unless the state also provides a confidential judicial procedure through which the minor can seek a waiver of the parental consent requirement.⁸ North Carolina’s so-called judicial bypass statute requires that the court proceeding, records relating to it, and the pregnant minor’s identity be kept strictly confidential.⁹ The statute also provides, however, that a judge who finds that the minor has been a victim of incest must notify the director of the department of social services “for further action pursuant to [the Juvenile Code provisions relating to abuse and neglect].”¹⁰

Does the state reporting requirement violate the pregnant minor’s constitutional right to a confidential proceeding? The Fourth Circuit Court of Appeals concluded that a party making that argument was not likely to prevail. The court characterized as “unconscionable” the proposition that judges cannot be required to report abuse they learn about in judicial bypass proceedings. The court said:

Appellants would have a judge, who is sworn to uphold the law, withhold vital information regarding rape or incest which would allow state authorities to end the abuse, protect the victim, and punish the abuser. Not only would Appellants' position prevent the judge from helping the victim seeking the abortion, but it would prevent the judge from helping other juveniles in the same household under the same threat of incest. This Court does not believe that the Constitution requires judges to be placed in such an untenable position.¹¹

The opinion suggests that the court would apply the same reasoning not only to the specific duty to report incest under the abortion consent waiver statute but also to the duty under the Juvenile Code to report abuse, neglect, and dependency. Quoting with approval from a concurring opinion in a Supreme Court case, the court said: "No one can contend that a minor who is pregnant is somehow less deserving of the State's protection. It is reasonable to provide that any minor who contends that she cannot notify her parent or parents because she is the victim of neglect or abuse must allow the State to use its power to investigate her declaration and protect her from harm."¹²

Religious Officials

Some states' reporting laws explicitly include clergy among the people who are mandated to report child abuse or neglect. In other states clergy are explicitly exempted from the duty to report, at least to the extent that the information they have derives from "pastoral communications."¹³ North Carolina's statute has no provision relating

specifically to religious officials and the duty to report; therefore, they apparently are included in the mandate that "any person" with cause to suspect child abuse, neglect, or dependency make a report to the department of social services.¹⁴ A religious official, like everyone else, has a duty to report child abuse, neglect, or dependency regardless of that official's relationship to the child. Whether mistreatment of a child *by* a religious official is abuse or neglect that must be reported to the social services department depends on whether that official is the child's parent, guardian, custodian, or caretaker. (The definition of "caretaker" is discussed in Chapter 4.)

North Carolina law relating to the competence of witnesses to testify in court has long recognized a clergy–communicant privilege.¹⁵ Unlike most other statutory privileges, the clergy–communicant privilege does not include either an exception for child abuse and neglect cases or authority for the court to compel disclosure upon finding that disclosure is necessary to a proper administration of justice.¹⁶ Before July 1, 1999, the Juvenile Code explicitly overrode certain specified privileges—for example, husband–wife and doctor–patient—but not the clergy–communicant privilege. Since July 1, 1999, however, the Juvenile Code has provided unequivocally that no privilege, except the narrow attorney–client privilege, is grounds for failing to report suspected abuse, neglect, or dependency or for excluding evidence in a case involving the abuse, neglect, or dependency of a child.¹⁷

Confidential communications between a person and his or her rabbi, minister,

priest, or other religious confidant might be viewed as part of that individual's exercise of his or her religious freedom. A legal challenge to the application of the reporting law to clergy made on that basis would require a court to balance the individual's interest in exercising that right against the state's objectives in requiring clergy to report.¹⁸

Researchers

Like many clinicians and practitioners, researchers may find their professional objectives and ethics in conflict with a duty to report suspected child abuse, neglect, or dependency.¹⁹ Especially when the research itself concerns child abuse and neglect, obtaining informed consent from research participants may be hindered by disclosure of the researcher's legal duty to report suspected abuse or neglect. Without the disclosure, on the other hand, the participant's consent is not fully informed if he or she has been told that the information provided will be kept confidential. Even when the research is totally unrelated to abuse or neglect, information the researcher obtains may give that person cause to suspect that a child is abused or neglected.

State law provides no exception or exemption for researchers. Some researchers, however, may obtain a limited exemption under a federal law²⁰ that allows the federal Secretary of Health and Human Services to issue Certificates of Confidentiality. These certificates are designed to protect "researchers and institutions from being compelled to disclose information that would identify research participants, . . . [to] help achieve

the research objectives and promote participation in studies by assuring privacy to subjects."²¹ The Secretary has delegated authority to issue the certificates to the National Institutes of Health (NIH), and applications for certificates go through NIH regardless of whether the research involves NIH funding.²²

Except for a very limited statutory exception for attorneys, possible constitutional exceptions, and Certificates of Confidentiality for researchers, the law makes no accommodation for professionals who—because of tradition, ethics, or legal obligation—consider confidentiality an essential element of their relationships with clients or patients.

The reporting requirement can raise troublesome issues for these professionals. For example:

- When and how should school guidance counselors, physicians, psychologists, and others inform people who come to them that the law requires confidentiality to be broken if necessary to report child abuse, neglect, or dependency?
- If a school counselor or similar professional assures a young girl that their conversation is confidential, how should that person react when the girl begins to describe the sexual abuse she is suffering at home?
- If students, patients, or clients are informed or reminded that suspected abuse, neglect, or dependency must be reported, will those who need help be discouraged from seeking it?

Questions like these do not have easy answers. The tension between the reporting law and the need to encourage trust and disclosure in order to provide effective services is long-standing and ongoing. Affected professionals—both individually and collectively—struggle

to resolve that tension and, no doubt, will continue to do so.²³ Periodically proposals are made to change the law to carve out more exceptions. Unless the law is changed, though, it requires reporting even by those who fear that the report will do more harm than good.

Notes to Chapter 6

1. G.S. 7B-310. State mental health law provides specifically that mental health, developmental disability, and substance abuse facilities must disclose confidential information for purposes of complying with the child abuse, neglect, and dependency reporting law. G.S. 122C-54(h).

2. The terms “privilege” and “confidentiality,” although sometimes used interchangeably, do not have exactly the same meaning. “Privilege” generally refers to a statutory rule that allows a person to prevent a court from requiring the disclosure of certain communications in court. “Confidentiality,” on the other hand, refers to a broader obligation not to disclose information. Most privileges are statutory. While confidentiality may be based on statute, often it is an ethical duty deriving from professional standards rather than from law. *See, e.g.,* Sultan v. State Bd. of Examiners of Practicing Psychologists, 121 N.C. App. 739, 468 S.E.2d 443 (1996).

State statutes recognize and define the scope of the following types of privileged communications: physician–patient (G.S. 8-53); clergyman–communicant (G.S. 8-53.2); psychologist–client or psychologist–patient (G.S. 8-53.3); school counselor–student (G.S. 8-53.4); marital and family therapist–client (G.S. 8-53.5); husband–wife (G.S. 8-56 and G.S.8-57); certified social worker delivering private social work services–client (G.S. 8-53.7); licensed professional counselor–client (G.S. 8-53.8); optometrist–patient (G.S. 8-53.9); peer counselor–client law enforcement employee (G.S. 8-53.10); journalist–source (G.S. 8-53.11); and employee or agent of a domestic violence or rape crisis center–victim (G.S. 8-53.12).

3. G.S. 7B-310.

4. Rule 1.6 of the Revised Rules of Pro-

fessional Conduct of the North Carolina State Bar addresses the lawyer’s obligation to preserve the confidences of a client. N.C. Admin. Code tit. 27, ch. 2, Rule 1.6 (July 1997). The rule permits a lawyer to disclose confidential information, however, when required to do so “by law or court order.”

5. The North Carolina State Bar, “RPC 175 (January 13, 1995),” *The North Carolina State Bar Lawyer’s Handbook 2003 (Abridged)* (hereinafter *Handbook*), 205–6. *See also* “RPC 120 (July 17, 1992),” *id.* at 185–86.

6. *See Handbook*, 206. One legal scholar has concluded that “most of the breadth and sweep of the attorney–client privilege is without constitutional protection” and that “a legislature could constitutionally eliminate the protections of the attorney–client privilege except when criminal litigation has been formally initiated.” Robert P. Mosteller, “Child Abuse Reporting Laws and Attorney–Client Confidences: The Reality and the Specter of Lawyer as Informant,” 42 *Duke Law Journal* 2 (1992): 203, 271–72.

7. Sometimes a judge hearing a custody dispute between parents will conclude that neither parent is fit to have custody of the child. Although occasionally judges in that situation order that the child be placed in the custody of the department of social services, it is more appropriate for the judge to make a report to the county department of social services. The department can file a juvenile petition and, if necessary, take immediate custody of the child before obtaining a custody order in the juvenile proceeding. G.S. 7B-500.

8. *Bellotti v. Baird*, 443 U.S. 622 (1979).

9. G.S. 90-21.8.

10. G.S. 90-21.8(f).

11. *Manning v. Hunt*, 119 F.3d 254 (4th Cir. 1997). The court, affirming a judgment of the federal district court, held that the district court had not abused its discretion when it denied a motion for a preliminary injunction and refused to join the enforcement of the state statute. Thus, the court’s holding was not that the statute is constitutional, but that the plaintiffs challenging the statute were not likely to prevail on the merits at that issue.

12. *Id.*, quoting with approval from Justice Kennedy’s concurring opinion in *Hodgson v. Minnesota*, 497 U.S. 417, 493–94, 110 S. Ct.

2926, 2967–68 (Kennedy, J., joined by Rehnquist, C.J., White, J., and Scalia, J., concurring).

13. National Clearinghouse on Child Abuse and Neglect Information, “Reporting Laws: Clergy as Mandated Reporters,” *Child Abuse and Neglect State Statutes Series* (Washington, D.C.: U.S. Department of Health and Human Services, 2002), 3–4. See also, Donald T. Kramer, *Legal Rights of Children*, 2d ed. (Colorado Springs, Colo.: Shepard’s/McGraw-Hill, Inc., 1994), 2:63.

14. North Carolina has been described as one of only three states that both mandate reporting by “any person” and deny the clergy–penitent privilege in child abuse cases. National Clearinghouse on Child Abuse and Neglect Information, “Reporting Laws: Clergy as Mandated Reporters,” *Child Abuse and Neglect State Statutes Series* (Washington, D.C.: U.S. Department of Health and Human Services, 2002), 3.

15. G.S. 8-53.2 reads as follows: “No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however,

that this section shall not apply where [the] communicant in open court waives the privilege conferred.”

16. When first enacted in 1959, the statute did give the court that authority. In 1967, however, the General Assembly amended the statute to delete that provision. 1967 N.C. Sess. Laws ch. 794. Thereafter the state supreme court held that the amendment indicated “the General Assembly’s intent to remove from the trial courts any discretion to compel disclosure when the clergy–communicant’s privilege exists.” *State v. Barber*, 317 N.C. 502, 510, 346 S.E.2d 441, 446 (1986).

17. G.S. 7B-310.

18. See J. Michael Keel, “Comment: Law and Religion Collide Again: The Priest–Penitent Privilege in Child Abuse Reporting Cases,” 28 *Cumberland Law Review* 681 (1997).

19. See Rebecca R. Socolar, Desmond K. Runyan, and Lisa Amaya-Jackson, “Methodological and Ethical Issues Related to Studying Child Maltreatment,” *Journal of Family Issues* 16, no. 5 (September 1995): 565–86.

20. Section 301(d) of the Public Health Service Act (42 U.S.C. 241(d)).

21. Office of Extramural Research, National Institutes of Health, “Certificates of Confidentiality Information: Background Information.” Retrieved 8 April 2003 from <http://grants1.nih.gov/grants/policy/coc/>.

22. *Id.*

23. See, e.g., Seth C. Kalichman, *Mandated Reporting of Suspected Child Abuse: Ethics, Law, & Policy*, 2d ed. (Washington, D.C.: American Psychological Association, 1999).