Chapter 6

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.[1] 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, coworkers, friends, relatives, bystanders, and everyone else.

When the person considering making a report has a personal or professional relationship with the child or the child's family, that person may want to discuss the perceived problem with the family. That relationship, however, should not be considered grounds for delaying a report. Of course, the reporting law does not permit anyone—professional, friend, or relative—to make an agreement not to report in exchange for an assurance that the person who may be responsible for a child's being abused, neglected, or dependent will seek help or take other actions.

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."[2] One of the main reasons reporting laws were first enacted, after all, was to allow, encourage, or require physicians to make reports despite the physician–patient privilege and the principle of medical confidentiality.[3]

Attorneys

The Juvenile Code (the 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 that otherwise would require a report comes from a client the attorney is representing in an abuse, neglect, or dependency case.[4] In any other situation, the law requires attorneys to report the same as 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 adequately 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, no statutory exception excludes the attorney from the duty to report.

This legal duty may conflict with a lawyer's ethical obligation to maintain the confidentiality of client information.[5] The North Carolina State Bar, which adopts and interprets Rules of Professional Conduct for the legal profession, concluded that for purposes of complying with those rules, lawyers have broad discretion in deciding how to resolve the conflict. In a 1995 ethics opinion interpreting its rules in relation to the child abuse and neglect reporting law, the State Bar concluded that a lawyer ethically could report suspected abuse or neglect to social services, in compliance with the reporting law, even if the report might result in substantial harm to the client's interests.[6] The opinion also stated, however, that a lawyer ethically could decide not to make a report if the report would "substantially undermine the purpose of the representation or substantially damage" the client's interests. A lawyer deciding not to make a report in that circumstance would be in violation of the reporting law but not of the Rules of Professional Conduct.

An attorney weighing compliance with the reporting law and preservation of the confidentiality of client information 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.[7] When the two are inconsistent, a client's federal constitutional right would supersede an attorney's duty under state law to report child abuse, neglect, or dependency.[8]

Judges

Like everyone else in North Carolina, any judge who has cause to suspect that a child is abused, neglected, or dependent must make a report to the county department of social services. A report would be required, for example, if credible evidence in a child custody case gave the judge cause to suspect that one or both of the parties had disciplined their child in a cruel and harmful way. Domestic violence cases may generate occasions for reporting. They also present a challenge for judges and others who must decide whether information about a child's home situation (1) creates cause to suspect that the child is abused, neglected, or dependent or (2) indicates less than ideal circumstances but does not rise to a level of concern that warrants an assessment by the department of social services. That determination must be made with reference to the safety and well-being of the child, not just the conduct of the parents.

Occasionally a judge hearing a custody dispute between parents will conclude that neither parent is fit to have custody of the child. Although the court in that situation probably has authority to place the child directly in the custody of the department of social services,[9] a report to the department of social services pursuant to the Juvenile Code is more appropriate, given the extensive statutory scheme the Code provides for responding to children who are abused, neglected, or dependent. If the court makes a report to social services and the department determines that the child is abused, neglected, or dependent, it can file a juvenile petition and, if necessary, take immediate custody of the child before filing a petition and obtaining a custody order in the juvenile proceeding.[10] If the court places the child directly in the department's custody in the civil action, the child is not entitled to a guardian ad litem as in a juvenile case (pursuant to G.S. 7B-601); the parent is not entitled to appointed counsel if indigent; and federal funds probably will not cover the cost of the child's foster care placement. In addition, if social services is given custody in a civil action and its assessment does not substantiate abuse, neglect, or dependency, the department is left in the

awkward position of having custody of a child and being party to a civil custody action with no statutory guidance as to how it should proceed.

The court in a civil custody action does not have jurisdiction to adjudicate a child to be abused, neglected, or dependent—that jurisdiction exists exclusively in a juvenile court proceeding.[11] Neither does the court have jurisdiction to initiate a juvenile proceeding on its own motion or to order social services to assume "nonsecure custody" of a child under the Juvenile Code when the department has not filed a petition alleging that the child is abused, neglected, or dependent.[12] There is no statutory authority for a judge to order a social services department to conduct an assessment or investigation to determine whether a child is abused, neglected, or dependent. Instead, the court should make a report of suspected abuse, neglect, or dependency to the department, which would then follow its statutory obligations and procedures for responding to reports.[13]

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.[14] North Carolina's waiver (also called judicial bypass) statute requires that the court proceeding, records relating to it, and the pregnant minor's identity be kept strictly confidential.[15] 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.[16] Contacting a juvenile's parents is part of every assessment a social services department conducts in response to a report.

North Carolina courts have not examined the degree to which a report of incest might interfere with the minor's right to confidentiality or whether the much broader reporting requirement in the Juvenile Code ever applies with respect to information a judge obtains in a judicial bypass proceeding.[17] The Fourth Circuit Court of Appeals, however, 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.[18]

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. The Fourth Circuit quoted with approval from a concurring opinion by Justice Kennedy in a U.S. Supreme Court case:

> '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.'[19]

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 specifically exempted from the duty to report, at least to the extent that the information they have derives from "pastoral communications."[20] North Carolina's statute does not address 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 must make a report to the department of social services.[21] A religious official, like everyone else, has a duty to report 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 religious 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.[22] Unlike most other statutory privileges, the clergy–communicant privilege statute includes neither an exception for child abuse and neglect cases nor authority

for the court to compel disclosure upon finding that disclosure is necessary to a proper administration of justice.[23] Before July 1, 1999, the Juvenile Code explicitly overrode certain specified privileges, including husband–wife and doctor–patient but not the clergy–communicant privilege. Since that time, however, the Code has provided unequivocally that no privilege, except a 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.[24]

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 protected religious freedom. One can imagine a constitutional challenge to the application of the reporting requirement to clergy on that basis. On the other hand, a state's exempting the clergy privilege while abrogating the privileges involved when a person seeks similar counsel from a non-religious professional could form the basis for a different kind of challenge.[25]

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. 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.[26] On the other hand, without the disclosure, 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 a 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 the following federal law authorizing the federal Secretary of Health and Human Services to issue Certificates of Confidentiality:

> The Secretary may authorize persons engaged in biomedical, behavioral, clinical, or other research (including research on mental health, including research on the use and effect of alcohol and other psychoactive drugs) to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the

> conduct of such research the names or other identifying characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings to identify such individuals.[27]

The certificates are designed to protect researchers from being compelled to disclose information that would identify research participants, in order to promote participation in studies by assuring confidentiality. The Secretary of Health and Human Services has delegated authority to issue certificates to the National Institutes of Health (NIH), and applications for certificates go through NIH regardless of whether the research involves NIH funding.[28] A researcher may voluntarily disclose information that is protected by a certificate, including information relating to child abuse, if the informed consent form provides for such disclosures.[29]

Summary

Except for a very limited statutory exception for attorneys, possible constitutional exceptions, and Certificates of Confidentiality for researchers, the reporting 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 questions and issues for these professionals:

- When and how should school guidance counselors, physicians, psychologists, and others inform people who come to them for assistance that the law requires confidentiality to be broken if necessary to report suspected child abuse, neglect, or dependency?
- 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?

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.

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 a report may do more harm than good.

Notes

1. North Carolina General Statutes (hereinafter G.S.) § 7B-301. The North Carolina General Statutes can be viewed online at www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl.

2. *Id.* 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).

3. The terms "privilege" and "confidentiality," although sometimes used interchangeably, do not have exactly the same meaning. Privilege generally refers to a statutory rule allowing a person to prevent the disclosure in court of communications between that person and a specified professional. Confidentiality, on the other hand, refers to a broader prohibition or restriction on the disclosure of information. Most privileges are statutory, and in North Carolina law they are set out in Article 7 of G.S. Chapter 8. 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 Exam'rs of Practicing Psychologists, 121 N.C. App. 739, 746, 468 S.E.2d 443, 447 (1996) (distinguishing the psychologist–patient privilege and a psychologist's "general professional obligation to maintain the confidentiality of client information").

4. G.S. 7B-310.

5. Rule 1.6 of the Revised Rules of Professional Conduct of the North Carolina State Bar (RPC) imposes strict limits on a lawyer's ability to reveal information acquired from a client in a professional relationship. The rule can be accessed at www.ncbar.gov/rules/rpcsearch.asp.

6. North Carolina State Bar, RPC 175 (Jan. 13, 1995), *2012 Lawyer's Handbook* (Abridged), 10-61 to 10-62. *See also* RPC 120 (July 17, 1992), *2012 Lawyer's Handbook* at 10-41 to 10-42. The *Handbook* is available at www.ncbar.gov/handbook/2012%20Handbook.pdf.

7. *See* RPC 175, cited in full in note 6, above. An attorney would have no guarantee that a court or the State Bar would agree with the attorney's conclusion that making a report would jeopardize the client's constitutional rights.

8. Neither the attorney–client privilege nor a lawyer's duty to maintain the confidentiality of client information is statutory. One legal scholar has concluded that for the most part the attorney–client privilege is not constitutionally required and that it could be legislatively eliminated in contexts other than criminal prosecutions. Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney–Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 Duke L.J. 203, 271–72 (1992). *See also* Katharyn I. Christian, *Putting Legal Doctrines to the Test: The Inclusion of Attorneys as Mandatory Reporters of Child Abuse*, 32 J. Legal Prof. 215 (2008).

9. *See* Isaac v. Wells, 189 N.C. App. 210, 657 S.E.2d 445 (2008) (unpublished), in which the court of appeals affirmed the trial court's order placing children in the custody of social services in a civil custody action but remanded for additional findings of fact and for the trial court to enter an order making the social services department a party to the civil action. Although the trial court's order had indicated that it was "reactivating" a juvenile case involving the same children, the appellate court held that jurisdiction in the juvenile case had been terminated. *See also* Wilson v. Wilson, 269 N.C. 676, 153 S.E.2d 349 (1967) (affirming an order entered in a civil custody action temporarily placing children in the custody of the county department of public welfare).

10. G.S. 7B-500(a).

11. G.S. 7B-200(a).

12. *See In re* Ivey, 156 N.C. App. 398, 576 S.E.2d 386 (2003).

13. *See* Ky. Cabinet for Health & Family Servs. v. Garber, 340 S.W.3d 588 (Ky. App. May 6, 2011) (affirming writs of prohibition directed to two trial court judges who, in domestic violence actions, ordered state Child Protective Services to investigate possible neglect or abuse and holding that issuing the orders instead of reporting suspected abuse or neglect violated the separation of powers provision of the state constitution).

14. Belloti v. Baird, 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979).

15. G.S. 90-21.8.

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

17. Although all states have child abuse reporting laws, few courts seem to have addressed this issue. State legislatures address it in a variety of ways in judicial waiver statutes. *See, e.g.*, Tex. Fam. Code § 33.009 (requiring the court or the minor's guardian ad litem or attorney ad litem to report specified sexual offenses to law enforcement, child protective services, or another appropriate agency based on information obtained during a confidential judicial waiver proceeding).

18. Manning v. Hunt, 119 F.3d 254, 273 (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 enjoin the enforcement of the state statute. Thus, the court's holding was not that the statute is constitutional but, rather, that the plaintiffs challenging the statute were not likely to prevail on the merits at a trial on that issue.

19. *Manning*, 119 F.3d at 273, *quoting* Hodgson v. Minnesota, 497 U.S. 417, 493–94, 110 S. Ct. 2926, 2967–68 (1990) (Kennedy, J., was joined by Rehnquist, C.J., White, J., and Scalia, J., in his concurrence).

20. For a chart showing each state's treatment of clergy as mandated reporters, see U.S. Department of Health & Human Services (hereinafter DHHS), Administration for Children & Families, Child Welfare Information Gateway, "Clergy as Mandatory Reporters of Child Abuse and Neglect," 2012, www.childwelfare.gov/systemwide/laws_policies/statutes/clergymandated.cfm.

21. North Carolina is in a minority of states that both mandate reporting by "any person" and deny or do not address the clergy–penitent privilege in child abuse cases. See the chart in the publication cited in full in note 20.

22. 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."

23. 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).

24. G.S. 7B-310.

25. *See* Julie M. Arnold, Note, "*Divine*" *Justice and the Lack of Secular Intervention: Abrogating the Clergy–Communicant Privilege in Mandatory Reporting Statutes to Combat Child Sexual Abuse*, 42 Val. U. L. Rev. 849 (2008); J. Michael Keel, Comment, *Law and Religion Collide Again: The Priest–Penitent Privilege in Child Abuse Reporting Cases*, 28 Cumb. L. Rev. 681 (1997).

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

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

28. *See* DHHS, Office of Extramural Research, National Institutes of Health (NIH), *Certificates of Confidentiality Kiosk*, http://grants.nih.gov/grants/policy/coc/.

29. See the link under *Certificates of Confidential Information* entitled "Frequently Asked Questions: Certificates of Confidentiality," on the NIH web page cited in full in note 28, or go directly to http://grants.nih.gov/grants/policy/coc/faqs.htm.