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Multidisciplinary Representation of Children: Conflicts over Disclosures of Client Communications, 27 J. Marshall L. Rev. 617 (1994)

Gerard F. Glynn

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ARTICLES

MULTIDISCIPLINARY REPRESENTATION OF CHILDREN: CONFLICTS OVER DISCLOSURES OF CLIENT COMMUNICATIONS

GERARD F. GLYNN*

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I. INTRODUCTION

Children are most commonly involved in five types of legal proceedings: 1) delinquency proceedings when children are charged with crimes; 2) dependency proceedings when their parents are charged with abuse or neglect; 3) divorce proceedings when their parents are dissolving their marriage; 4) educational discipline or special education proceedings when children are in disputes with their educational system; or 5) public welfare proceedings (including social security or mental health actions), when children need services. In these proceedings it is often advantageous for a team of professionals to work together. The lawyer representing the child¹ often needs the assistance of social workers,² psychologists, educators, and doctors in her legal representation of the child.³ Other professionals can assist a lawyer in interviewing and evaluating participants in the proceedings, collecting evidence, assisting in the preparation of the case for trial, and serving as expert witnesses.⁴

1. Children have a constitutional right to representation in delinquency proceedings. See *In re Gault*, 387 U.S. 1, 36 (1967). The appointment of legal counsel in other proceedings is sporadic and often left to the discretion of the judge. Most states permit the appointment of counsel for children in dependency proceedings. See RUTH F. THURMAN, *CLIENT INCEST AND THE LAWYER'S DUTY OF CONFIDENTIALITY* 20 (1985). Courts also have the power under the rules of civil procedure to appoint counsel for children as necessary third parties in divorce proceedings. See, e.g., FLA. R. CIV. P. 1.210(a) ("Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the case."); see also John M. Specia, *Representation for Children in Custody Disputes: Its Time Has Come*, 48 UMKC L. REV. 328, 330 (1980) (listing statutes that mandate or permit appointment of lawyer or non-lawyer guardians ad litem for children).

This Article addresses those professionals who are appointed in legal proceedings to represent children. This Article assumes that legal representation of children is a positive practice which legislatures and courts should encourage. See James R. Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521 (1977-78) (discussing that a child's right to representation arises out of the notion that a child is "an independent human being" rather than merely "chattel").

2. Throughout this Article, the term "social work" refers to the profession of educated and licensed social workers. Although there are many persons working in advocacy roles and mental health positions who refer to themselves as social workers, they may not be licensed social workers.

3. The need for cooperative team efforts in law offices has been documented for many years. "In 1967, the President's Crime Commission stated: 'Defense counsel needs ready access to a number of auxiliary services resembling those available to a modern and well-equipped probation office. . . . Social investigation, diagnosis and planning call for the efforts of persons from many disciplines, of which the law is but one.'" Joseph J. Senna, *Social Workers in Public Defender Programs*, SOC. WORK, July 1975, at 271-72 (quoting NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, NATIONAL STRATEGY TO REDUCE CRIME 163 (1971)).

4. Lawyers may and often do fill these needs themselves. However, persons in other disciplines often are better trained than lawyers to handle many of the problems that may arise. See Donald T. Dickson, *Law in Social Work: Impact of Due Process*, SOC. WORK, July 1976, at 275-76 (explaining the issues

Lawyers involved in these family, criminal or social welfare proceedings often need thorough and reliable social histories about the clients and the communities in which the clients live. Professional social workers, psychologists, educators, and doctors are trained to obtain such information and to analyze the data collected.⁵ The training of these professionals often makes them better suited than the lawyers for dealing with the complicated interpersonal and psychologically volatile issues involved in these cases.⁶

Jean Koh Peters, Associate Director of the Child Advocacy Clinic at Columbia University, provides the following explanation for the need for multidisciplinary representation of children:

Most lawyers have not received professional training which would provide a basis for ascertaining their [child] clients' [sic] interests. Without expert input, there is a substantial danger that attorneys might substitute their own personal values for a more educated determination of the child's welfare. In only considered exceptions, then, should attorneys choose not to consult with trained child welfare professionals

involved when social workers participate in judicial or quasi-judicial proceedings); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications For the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) (discussing the privileged communications doctrine as it relates to attorneys who work outside traditional law practice).

5. See Arlene B. Andrews, *Social Work Expert Testimony Regarding Mitigation in Capital Sentencing Proceedings* 4 (unpublished manuscript, on file at the University of South Carolina School of Social Work) (discussing the role social workers play in capital sentencing proceedings).

6. Although there are many professionals who work with children and may work closely with lawyers, this Article focuses on four groups of professionals that are most commonly involved with lawyers in the representation of children: social workers, psychologists, doctors and psychiatrists. Other professionals who may have child/client dilemmas when working with a lawyer but who are not discussed in this Article include school counselors, drug or alcohol counselors, mental health workers and juvenile court personnel. See, e.g., William P. Robinson, III, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911 (1974); Note, *Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools*, 56 IOWA L. REV. 1323 (1971); FLA. STAT. ANN. § 39.459(9) (West 1993) (requiring confidentiality by mental health personnel); FLA. STAT. ANN. § 39.443(4) (West Supp. 1993) (requiring confidentiality by personnel in proceedings for children in need of services); FLA. STAT. ANN. § 39.411(4) (West Supp. 1993) (requiring confidentiality by child abuse and neglect personnel); FLA. STAT. ANN. § 39.045(5) (West Supp. 1993) (requiring confidentiality by delinquency personnel).

This Article does not discuss other professionals who may come in contact with lawyers because they are unlikely to be part of a legal team representing children. To review the ethical and legal dilemmas faced by other professionals, see DENZIL Y. CAUSEY & SANDRA A. CAUSEY, *DUTIES AND LIABILITIES OF PUBLIC ACCOUNTANTS* (4th ed. 1991) (accountants); Sharon K. Malheiro, Note, *The Journalist's Reportorial Privilege — What Does It Protect and What are Its Limits?*, 38 DRAKE L. REV. 79 (1988-89) (journalists); Phyllis Coleman, "Shrinking" the Clergy Exemption to Florida's Mandatory Child Abuse Reporting Statute, 12 NOVA L. REV. 115 (1987) (clergy); Terry W. Milne, Student Article, "Bless Me Father, For I Am About to Sin . . .": Should Clergy Counselors Have A Duty to Protect Third Parties?, 22 TULSA L.J. 139 (1986) (clergy); Note, *The Clergy-Penitent Privilege and the Child Abuse Reporting Statute: Is the Secret Sacred?*, 19 J. MARSHALL L. REV. 1031 (1986) (clergy).

in order to determine these interests before discharging their additional responsibilities. . . . Even experienced children's attorneys will require help in interviewing certain very young or unusually disabled clients. These children, nevertheless, may still be able to provide information, a point of view, a preference, or other perspectives which would aid the attorneys in their representation. Trained consulting social workers, working with the attorneys, could ensure that the lawyers indeed do obtain all possible aid from their incapacitated clients.⁷

A social work professor further explains the advantages of multidisciplinary legal teams:

As in most multidisciplinary teamwork, the insight of one professional will enrich the findings of another, and a cohesive impression of the person will evolve. The lawyer's role is to integrate the multidisciplinary findings into the legal defense strategy, which includes promoting communication among the disciplines as well as preparing the final presentation of arguments, orally and/or in writing.⁸

Often these multidisciplinary relationships cause ethical dilemmas due to conflicts of professional norms and personal perspectives.⁹ Conflicting ethical or legal standards of the various professionals exacerbates these problems.

This Article explores some of the ethical issues involved in a multidisciplinary team working with children in legal proceedings. The Article focuses on the relationships between professionals working together.¹⁰ In particular, the Article explores the conflicts that arise with regard to the disclosure of client communications.¹¹

7. Jean Koh Peters, *Concrete Strategies For Managing Ethical-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve The Same Client*, CHILDREN'S LEGAL RTS. J., Spring 1989, at 15, 16-17.

8. Andrews, *supra* note 5, at 13. Defense attorneys who do not hire experts when mental health plays a significant role in the case may be providing incompetent representation. See James J. Clark et al., *The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense*, CRIM. JUST., Summer 1993, at 22.

9. One commentator noted:

[a]n ethical dilemma is usually defined as a choice in which any alternative results in an undesirable action. When, for example, we have promised confidentiality to a client, who tells us something that endangers others, we have an ethical dilemma. If we uphold the confidence, we may contribute to harming others. If we violate the confidence, we violate our trust. Whatever we do, we seem to be "in the wrong."

MARGARET L. RHODES, *ETHICAL DILEMMAS IN SOCIAL WORK PRACTICE* xii (1986). A person with multiple qualifications or professional licenses may have these same dilemmas. Thus, a lawyer who is also a licensed psychologist may have conflicts if her role is not well defined or if the client has multiple expectations.

10. Other articles have confronted the ethical conflicts that arise in dealing with adult clients. See Fred S. Berlin et al., *Effects of Statutes Requiring Psychiatrists to Report Suspected Sexual Abuse of Children*, 148 AM. J. PSYCHIATRY 449, 449 (1991) (concluding that Maryland laws requiring the reporting of child abuse lead to adult patients' refusal to admit child sexual abuse).

11. Others have addressed other conflicts that can arise between professionals working as a team including: advertising and solicitation, see LAWRENCE J. RAIFMAN & JEAN A. HINLICKY, *ETHICAL ISSUES IN DUAL PROFESSIONAL PRACTICE* (1982); or the type of relationship permitted between the professionals, see

Conflicts over permissible disclosure of client communications arise in any multidisciplinary team.¹² However, when children are clients of these teams, the conflicts are heightened by mandatory child abuse reporting statutes, philosophical and professional conflicts over the role of the professionals, and parental involvement in the relationship.

Initially, this Article discusses the theories supporting protection of client information. Then, this Article reviews the conflicts between the legal, social work, medical and psychological professions including permissible disclosure of confidential information and forced disclosure of non-privileged information. This Article then explores dilemmas involving child abuse reporting, roles of the professionals and roles of parents. After reviewing the conflicts, this Article offers two solutions. The first solution guides professionals who must respond to conflicting legal and professional obligations. The second solution proposes statutes and rules that resolve some of the conflicts faced by multidisciplinary teams.

II. WHY PROFESSIONALS PROTECT CLIENT INFORMATION

There are several overlapping restrictions on disclosure of client communications. First, ethical codes and licensing statutes prevent certain professionals from disclosing client confidences.¹³ This

MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1992) [hereinafter MODEL RULES] (prohibiting lawyers from sharing fees or participating in partnerships with non-lawyers). *But see* D.C. R. PROF. CONDUCT 5.4(b) (1992) (permitting non-lawyers as partners if: providing legal services is the sole purpose of the partnership; those holding financial interest agree to abide by the rules of professional conduct; the lawyers agree to be responsible for the non-lawyers; and these conditions are set forth in writing); AMERICAN PSYCHIATRIC ASSOC., OPINIONS OF THE ETHICS COMMITTEE ON THE PRINCIPLES OF MEDICAL ETHICS 42 (1992) [hereinafter PSYCHIATRIC OPINIONS] (approving partnerships with non-psychiatrists that do "not have features that interfere with the psychiatrist's medical judgment, or delegate to the [non-psychiatrists] any matter that requires medical judgment").

12. See *infra* part III for a discussion of the conflicts arising over client communications in multidisciplinary representation relationships.

13. Each of the four professions have promulgated codes for their respective profession. The American Bar Association promulgated the MODEL RULES OF PROFESSIONAL CONDUCT. These Model Rules are not a national code controlling lawyers' professional conduct. See MODEL RULES, *supra* note 11, at pmb1. The ABA promulgated the model rules, just as it previously promulgated a Model Code of Professional Responsibility, as a guide for jurisdictions that adopt regulations governing attorney conduct. *Id.*; MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmb1. (1981). Every state and the District of Columbia have rules of conduct for attorneys promulgated by their highest courts, which rules are binding on attorneys practicing in their respective jurisdictions. See, e.g., MODEL RULES, *supra* note 11, at pmb1.; FLA. R. PROF. CONDUCT pmb1. Many of these state codes are similar to the Model Rules or Model Code, though there are some major differences. See *supra* note 11 for an illustration of a jurisdiction's departure from the model rules (comparing Rule 5.4 of the Model Rules with Rule 5.4(b) of the D.C. Rules). It is through the enforcement of these various state rules that lawyers can be sanctioned for violating client confidences.

first restriction is referred to as confidentiality. Second, statutory, common law or constitutional rights of privacy prohibit disclosure of certain client information. This second restriction is generally known as a right to privacy. Finally, evidentiary rules restrict disclosure of client communications during a trial or formal judicial proceeding. This third restriction is called a legal privilege.¹⁴ All

Sanctions include admonishments, probation, public reprimand, suspension and disbarment. *E.g.*, FLA. R. PROF. CONDUCT 3-5.1.

The National Association of Social Workers [hereinafter NASW] has a code of ethics that delineates a social worker's ethical obligations "with those served, with colleagues, with employers, with other individuals and professions, and with the community and society as a whole." NATIONAL ASSOC. OF SOCIAL WORKERS, CODE OF ETHICS pmbl. (1990) [hereinafter NASW CODE]. The NASW Code of Ethics is a national code that binds all social workers who are members of the NASW and is enforceable only against NASW members. *See id.* If a violation is found, the NASW can order the member to pay restitution, censure the member, suspend membership, permanently exclude the member, or refer the member to a state licensing board for further sanctions by that body. NATIONAL ASSOC. OF SOCIAL WORKERS, ETHICAL REVIEW PROCEDURES Rule 2 (1990).

The American Medical Association and American Psychiatric Association have the authority to enforce the Principles of Medical Ethics only against their respective memberships. Any member found to have violated these principles can be censured, suspended or expelled. AMERICAN MEDICAL ASSOC., CODE OF MEDICAL ETHICS 57 (1992) [hereinafter AMA CODE]; AMERICAN PSYCHIATRIC ASSOC., THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY 13 (1992) [hereinafter PSYCHIATRIC PRINCIPLES]. States may have specific statutes protecting doctor-patient confidentiality, or statutes protecting psychiatric confidentiality. Typically, these statutes permit disclosure only upon permission of the client or to protect a threatened third party. For example, Florida does not have a statute that requires doctors to keep information confidential. However, all health care providers are required to respect a patient's right to privacy, which presumably includes some aspects of confidentiality. *See* FLA. STAT. ANN. § 381.026(4) (West 1993). In addition, Florida has a statute applicable specifically to psychiatrists. *See id.* § 455.2415 (West Supp. 1993). If a doctor were to violate a client's confidence, the state could revoke the doctor's license. *See, e.g., id.* § 458.331(2) (West 1991), § 455.227(1) (West Supp. 1993).

The American Psychological Association has a Code of Conduct which is enforceable only against members of the American Psychological Association. Sanctions for violation of the Code include "reprimand, censure, termination of [American Psychological Association] membership, and referral of the matter to other bodies" such as state licensing boards. AMERICAN PSYCHOLOGICAL ASSOC., ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT INTRODUCTION (1992) [hereinafter PSYCHOLOGICAL CODE]. In licensing professional psychologists, states delineate the scope of confidentiality. *See, e.g.,* FLA. STAT. ANN. § 490.005 (West Supp. 1993), § 490.0147 (West 1991). Penalties for a breach of this statutorily-mandated confidentiality may include revocation of the license, suspension from practice, or a fine. *E.g.,* FLA. STAT. ANN. § 490.009(1) (West 1991).

14. All four professionals have some form of privilege in most jurisdictions. The attorney-client privilege was the first privilege recognized under the common law. Although still recognized as the most protected of privileges, the attorney-client privilege, like all the professional privileges, has been weakened in recent years. *See* Richard L. Marcus, *The Perils of Privilege: Waiver and The Litigator*, 84 MICH. L. REV. 1605, 1605 (1986) (discussing court decisions "narrowly" construing the attorney-client privilege). It is believed that without the privilege, an attorney-client relationship would be difficult if not impossible.

See Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 605-11 (1980) (giving examples of attorney-client relationships without the privilege); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 118 cmt. c (Tentative Draft No. 2, 1989) (listing three main reasons for the privilege: enhancing the efficacy of legal services, requiring accomplishment of legal work, and the unwillingness of clients to disclose without the privilege).

All fifty states have some form of the attorney-client privilege while the rules covering attorney-client privilege differ from state to state. See, e.g., FLA. STAT. ANN. § 90.502 (West 1979); N.D. R. EVID. 502; OR. REV. STAT. § 40.225 (1988). To be protected under the attorney-client privilege, the communications must be for the purpose of obtaining legal advice. See, e.g., NEV. REV. STAT. § 49.095(3) (1991); N.M. R. EVID. 503(A)(4); OR. REV. STAT. § 40.225(1)(b) (1988); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122. Communications for other purposes, such as psychological counseling, would not be protected. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 cmt. c; 1 MCCORMICK ON EVIDENCE § 88, at 322 (John W. Strong et al. eds., 4th ed. 1992) [hereinafter MCCORMICK]; CHARLES W. EHRHARDT, FLORIDA EVIDENCE 246 (1992). This privilege is broader than many privileges because it covers communications to subordinates and professionals working with the attorney as well as communications to the attorney herself.

Although social work is a relatively new profession, state legislatures have recognized the need to protect the communications between these professionals and their clients. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 9-121 (1989); NEV. REV. STAT. §§ 49.251-253 (1991); OR. REV. STAT. § 40.250 (1988). If they are not recognized as a profession, social workers may be accorded a privilege based on the particular jobs they take, such as sexual assault counselors, school counselors, psychotherapists, marriage counselors or probation officers. See, e.g., CONN. GEN. STAT. ANN. § 52-146K (West Supp. 1993) (battered woman or sexual assault counselor privilege); FLA. STAT. ANN. § 90.5035 (West 1979) (sexual assault counselor privilege); LA. REV. STAT. ANN. § 13:3734 (West 1994) (health care provider privilege including a licensed professional counselor-patient privilege); ME. REV. STAT. ANN. tit. 16, § 53-A (West Supp. 1993) (sexual assault counselor privilege); NEV. REV. STAT. § 49.290 (1991) (school counselor privilege); N.M. R. EVID. 509 (children's probation officer and social services worker privilege); *Id.* § 40.245 (1988) (school counselor privilege); *Id.* § 40.262 (1988) (professional counselor or marriage and family therapist privilege); WYO. STAT. § 1-12-116 (1988) (sexual assault advocate privilege).

Under the common law there was no doctor-patient privilege. See *Allred v. State*, 554 P.2d 411, 414 n.5 (Alaska 1976) and accompanying text. The privilege was first recognized by statute in 1828 in New York. MCCORMICK, *supra*, § 98, at 369. A majority of the states now recognize a physician-patient privilege. Robert A. Wade, Note, *The Ohio Physician-Patient Privilege: Modified, Revised, and Defined*, 49 OHIO ST. L.J. 1147, 1148 (1989); MCCORMICK, *supra*, § 98 n.5 (commenting that only 10 states do not have a physician-patient privilege). To be protected under the doctor-patient privilege, the communication must be for the purpose of diagnosis or treatment. See, e.g., N.D. R. EVID. 503(b); LA. REV. STAT. ANN. § 13:3734 (West 1990) (health care provider privilege including physician-patient privilege).

Although states normally do not provide psychologists with an independent privilege, the legislatures or courts have generally included them under a psychotherapist-patient privilege. Franklin Cleckley, *A Modest Proposal: A Psychotherapist-Patient Privilege For West Virginia*, 93 W. VA. L. REV. 1, 6 (1990). All states except West Virginia have some form of the psychotherapist-patient privilege. *Id.*; see, e.g., *Allred*, 554 P.2d at 418; LA. REV. STAT. ANN. § 13:3734 (West 1990) (health care provider privilege including physician-patient, psychologist-patient, and licensed counselor-patient privileges); NEV. REV. STAT. § 49.215 (1991) (doctor-patient privilege including those persons licensed to practice medicine or psychology); N.D. R. EVID. 503; OR. REV. STAT. § 40.230 (1988); R.I. GEN. LAWS § 5-37.3-3 (1987) (health care provider including physi-

three types of restrictions on disclosures are counterbalanced by statutes mandating disclosure in some circumstances.¹⁵

Even when professions enforce standards of confidentiality on their own membership, society has developed, through the courts and legislature, additional remedies for a breach of professional confidence. The legal methods of enforcement include monetary sanctions and may, like enforcement by the profession, conclude in revocation of a professional license.¹⁶

While the professional is often granted the discretion to assert a privilege or confidentiality regarding client communications,¹⁷ the protection belongs to the client,¹⁸ and the client has the power to waive any protection she may have to keep her communications

cian-patient, psychologist-patient and psychiatric social worker-patient privilege).

The psychotherapist privilege covers not only psychologists but others working in the mental health profession including doctors. McCORMICK, *supra*, § 98, at 371; *see, e.g.*, FLA. STAT. ANN. § 90.503 (West 1991). There are additional protections of some counselors that may be more comprehensive. In Florida, for example, there is a sexual assault-counselor-victim privilege which protects the communications even when made in the presence of a third party and does not have the exceptions of the psychotherapist-patient privilege. *See* FLA. STAT. ANN. § 90.5035 (West 1991). The rationale for the psychotherapist privilege has been recognized as more compelling than that for the doctor-patient privilege because patients are more reluctant to disclose mental health problems than physical problems. Saltzburg, *supra*, at 616-25; *see also Allred*, 554 P.2d at 416-18.

Under all these professional privileges, courts limit the privilege and permit disclosure when the contents of the communications are necessary for the professional to protect herself against a complaint by the client, or to protect a third party from harm by the client. *See, e.g.*, NEV. REV. STAT. ANN. § 49.095 (1991) (attorney-client privilege); OR. REV. STAT. § 40.250 (1988) (social worker-patient privilege).

15. *See infra* part IV.A. for a discussion of mandatory child abuse reporting laws; *see also* Berlin et al., *supra* note 10, at 449-53 (discussing the effect of laws mandating psychiatrists report suspected sexual abuse of children); Phyllis Coleman, *Creating Therapist-Incest Offender Exception To Mandatory Child Abuse Reporting Statutes- When Psychiatrist Knows Best*, 54 U. CIN. L. REV. 1113 (1986) (arguing the best interests of the child dictate relaxed abuse reporting requirements when the patient is an "incest offender").

16. *See, e.g.*, FLA. STAT. ANN. § 490.009(h) (West Supp. 1991) (Restriction of Practice).

17. *See, e.g.*, N.D. R. EVID. 502(c) (A lawyer may claim "the privilege but only on behalf of the client."); N.D. R. EVID. 503(c) (A physician or psychotherapist may claim the privilege "but only on behalf of the patient."); OR. REV. STAT. § 40.225(3) (1988) (A lawyer may claim "the privilege but only on behalf of the client."); *Id.* § 40.230(3)(d) (1988) (Psychotherapist may claim the privilege "but only on behalf of the patient."); *Id.* § 40.235(3)(d) (1988) (Physician may claim the privilege "but only on behalf of the patient.").

18. *See, e.g.*, AMA CODE, *supra* note 13, at xi ("The patient has the right to confidentiality."); N.D. R. EVID. 502(b) (lawyer-client privilege); N.D. R. EVID. 503(b) (physician and psychotherapist privilege); FLA. STAT. ANN. § 40.225(2) (West 1988) (attorney-client privilege); *Id.* § 40.230(2) (1988) (psychotherapist-patient privilege); *Id.* § 40.235(2) (1988) (physician-patient privilege).

private.¹⁹ Furthermore, whether a nondisclosure rule is labelled a privilege, a right to privacy or protection of a client confidence, courts tend to rely on the reasonable expectations of the parties in deciding whether a communication should be kept private. If the parties to the communication expected privacy, then courts are inclined to protect the communications. However, if the parties were communicating, for example, in an open area with many others listening, then courts would likely refuse to grant any protection.²⁰

The primary distinction among confidentiality (either professional or statutory), protection of privacy, and privilege is the type of punishment for unauthorized disclosures of information. Violating a client confidence or privacy right can lead to civil, criminal, or professional sanctions. Violating a rule of privilege could lead to a mistrial or at least to exclusion of the privileged evidence.²¹ A violation of any of these protections could also be a basis for a malpractice claim by a patient or client.²²

19. See AMA CODE, *supra* note 13, at xi ("The physician should not reveal confidential communications or information without the consent of the patient."); MODEL RULES, *supra* note 11, Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ."); PSYCHOLOGICAL CODE, *supra* note 13, at 10 (A psychologist may "disclose confidential information with the appropriate consent of the patient.").

When representing children, the issue of whether a child is competent to grant waiver may arise. Often a waiver of a child's communication may be given by a parent. However, if the parent has a potentially adverse interest to the child, a professional should probably not accept a parental waiver. See *infra* part IV.C. for a complete discussion of problems in the parent-child relationship.

20. See McCORMICK, *supra* note 14, § 74 n.5 and accompanying text; see, e.g., N.D. R. EVID. 503(a)(4) (physician privilege).

21. Privilege can be more difficult to enforce for someone who is not a party to the judicial proceeding. Many people challenge and litigate privileges before grand juries, and judges regularly recognize a witness' right to raise a privilege during trial testimony. However, once the asserted privilege is denied by a lower tribunal, the person asserting privilege may not have standing to raise the issue on appeal. See McCORMICK, *supra* note 14, § 73.1.

22. If a client's secret is improperly disclosed, the client may sue for defamation, invasion of privacy, breach of fiduciary duty or professional malpractice. See, e.g., MacDonald v. Clinger, 446 N.Y.S.2d 801, 805 (N.Y. App. Div. 1982) (permitting a suit against a psychiatrist for a breach of the fiduciary duty of confidentiality where the psychiatrist allegedly disclosed confidential information to the patient's wife); Horne v. Patton, 287 So. 2d 824, 829 (Ala. 1973) (recognizing causes of action for breach of doctor's duty of confidentiality, violation of privacy, and implied contractual duty of confidentiality from alleged facts that a doctor disclosed confidential information to a patient's employer). *But see* Hague v. Williams, 181 A.2d 345, 349 (N.J. 1962) (recognizing duty of confidentiality, but concluding that an exception applies in regards to a life insurance policy and therefore rejecting a suit for a breach of that duty against a doctor who disclosed a terminal illness to a life insurance company). A professional may also become liable for failing to disclose information that is not protected by confidentiality. See, e.g., Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976) (permitting suit for wrongful death against a psychotherapist and his employer for failure to warn an intended victim of a patient's

Furthermore, the professional obligation to keep client communications confidential is much broader than the legally-recognized privilege. Professional ethical obligations govern conduct not only in the courtroom, but also in the professional's everyday affairs.²³ Therefore, confidentiality restricts the professional's ability to disclose while a privilege restricts the states right to compel disclosures.

There are also overlapping legal implications among these protections. Violation of statutory privilege may be used as evidence of a tortious breach of privacy.²⁴ Also, confidentiality statutes may create an evidentiary privilege.²⁵

A. Theories Supporting Confidentiality

Lawyers, doctors, social workers, and psychologists are all trained to assist people. In developing a relationship with a client, these professionals rely on information provided by the client.²⁶ One of the main theories supporting confidentiality is the belief that clients will be less than forthcoming with the truth if not given protection from disclosure of professional-client communications.²⁷ Thus, without confidential protections, the professionals will not be able to rely on their clients' information to do their jobs.

There are many other reasons for professional rules of confidentiality. Philosopher Sissela Bok finds the following justifications:

threat). In developing these theories of civil liability, the courts often rely on the protections provided to clients in the confidentiality codes and the rules of privilege. Therefore, professions with the greatest protections of client information may face the greatest potential liability for negligent disclosure of client information. Likewise, the professions with the greatest discretion to disclose client information may have the most protection against civil suits.

23. MODEL RULES, *supra* note 11, Rule 1.6 cmt.; *see also* AMA CODE, *supra* note 13, at 1 ("Ethical standards of professional conduct and responsibility may exceed but are never less than, nor contrary to, those required by law.")

24. *See, e.g.*, *Berry v. Moench*, 331 P.2d 814, 818 (Utah 1958) (holding that privilege rules implied a cause of action for unauthorized disclosure).

25. *See* ARK. CODE ANN. § 17-39-107 (Michie 1992) (providing that social worker confidentiality statutes are also an evidentiary privilege); *Allred v. State*, 554 P.2d 411, 422-24 (Alaska 1976) (Boochever, C.J., concurring) (arguing that a confidentiality statute creates a privilege because it forbids disclosure of the communication to another person which would include the court).

26. As the American Medical Association explained:

The confidentiality of physician-patient communications is desirable to assure free and open disclosure by the patient to the physician of all information needed to establish a proper diagnosis and attain the most desirable clinical outcome possible. Protecting the confidentiality of the personal and medical information in such medical records is also necessary to prevent humiliation, embarrassment, or discomfort of patients.

AMA CODE, *supra* note 13, at Opinion 5.07.

27. Some criticize this theory. *See, e.g.*, *Marcus, supra* note 14, at 1619-20 (arguing that this "utilitarian analysis" has not been supported with empirical evidence).

- (1) human autonomy regarding personal information;
- (2) respect for relationships;
- (3) respect for promises; and
- (4) benefit of confidentiality to society and to those in need of advice and aid.²⁸

In a purely therapeutic environment, the rationale behind confidentiality may be even stronger. The client-patient in these circumstances often is dealing with issues hidden from his own consciousness and clearly undisclosed to others even if conscious to himself. Therefore, the first goal of therapy is the development of a trusting relationship in which the patient can disclose secrets. Once this therapist-patient relationship is in place, any violation of this trust is devastating to the therapeutic intervention. A breach of trust can impair the ability of the patient to develop a similar relationship with this or any other therapist.²⁹

To promote a profession's ability to attract clients and maintain professional standards upon which the community of clients can rely, each profession regulates its members and enforces rules of confidentiality. The enforcement mechanisms vary from profession to profession, but generally include sanctions as severe as denial of membership in the profession or revocation of a professional license. Those protections of client confidences and enforcement mechanisms are also codified in many state statutes.

B. Theories Supporting Privileges

Unlike confidentiality, privilege is a purely legal, rather than ethical or professional concept. A privilege is a legal protection from compulsory disclosure of information.³⁰ Privileges generally are established state-by-state.³¹ There are some universally ac-

28. *Rhodes, supra* note 9, at 65-66.

29. See *Coleman, supra* note 15, at 125-26 (discussing the destruction of trust in a psychiatrist-patient relationship when confidentiality is breached).

30. Privileges that are unlikely to be involved in an attorney's representation of a child are not discussed in this Article. See *supra* note 6 for publications addressing these professions.

31. The federal rule of privilege states:

[e]xcept as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501. This rule defers the decision on privilege in federal courts to the common law or to the decisions of the states in federal diversity actions. Thus, most law on privilege is developed through the states' legislatures and courts.

cepted privileges, but each state may have its own variation on the general rule.

Although widely accepted, a privilege limits a court's fact-finding abilities. By recognizing a privilege, the law excludes evidence from being heard. The general belief is that this loss of evidence is necessary to limit damage to professional relationships. Since this exclusion of evidence harms the courts' ability to seek the truth, courts are generally reluctant to recognize privileges unless absolutely necessary.

John Wigmore's utilitarian legal analysis of privilege is the most prevalent and widely respected explanation of this concept. Wigmore concludes that communications should only be protected by an evidentiary privilege if the communications meet the following criteria:

- (1) The communications must originate in a *confidence* that they will not be disclosed;
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties;
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; [and]
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.³²

Stephen Saltzburg offers an alternative analysis of the recognition of privilege:

To strike a balance between extrajudicial and litigation goals, a court should analyze the way in which a particular privilege promotes or supports a private relationship and determine whether rejection of the privilege would damage that relationship. If actual damage is expected (as it appears to be when private consultations with lawyers, doctors, and psychiatrists are made public), a court then should determine the extent of the damage. After a court determines the damage that public exposure of confidences would cause, it should determine whether recognition of the privilege would result in a loss of evidence that otherwise would be available to it. If little or no evidence will be lost, as in the traditional attorney-client privilege, then the case for recognizing the privilege is strong. When a privilege deprives a party of important evidence, the case for rejecting the privilege is stronger. The litigation needs and out-of-court values then must be accommodated.³³

32. 8 WIGMORE, EVIDENCE § 2285 (McNaughton ed. 1961) (emphasis in the original). But see Note, *supra* note 4, at 1229 n.23 and accompanying text criticizing these standards as ambiguous. See also Marcus, *supra* note 14, at 1605; Allred v. State, 554 P.2d 411, 428-30 (Alaska 1976) (Dimond, J., concurring) (criticizing Wigmore's third criterion and concluding that Wigmore's criteria are descriptive of privileges and not necessarily prescriptive).

33. Saltzburg, *supra* note 14, at 648. For additional theories on when privileges should be granted, see ROY D. WEINBERG, *Introduction to CONFIDENTIAL AND OTHER PRIVILEGED COMMUNICATION* v (1967); Fisher v. United States, 425 U.S. 391, 403 (1976) (describing the justification for an attorney-client privilege).

No matter which analysis courts employ, privileges are the method the law uses to protect certain communications.

III. CONFLICTS OVER CLIENT COMMUNICATIONS IN MULTIDISCIPLINARY RELATIONSHIPS

A. *Problems in Multidisciplinary Representation and Conflicts Among the Professional Codes*

There are some ethical standards regarding client communications upon which the legal, social work, medical, and psychological professions agree. All the professions discussed in this Article protect, to some degree, a client's privacy and permit the disclosure of client confidences without a client's consent under some circumstances.³⁴ However, these professions disagree on what communications constitute client confidences, when confidentiality may be overridden, and how to obtain a client's consent.

34. See MODEL RULES, *supra* note 11, Rule 1.6. It states:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
 - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.

Regarding client communications, the National Association of Social Work code states:

Confidentiality and Privacy. The social worker should respect the privacy of clients and hold in confidence all information obtained in the course of professional service.

1. The social worker should share with others confidences revealed by clients, without their consent, only for compelling professional reasons.
2. The social worker should inform clients fully about the limits of confidentiality in a given situation, the purposes for which information is obtained, and how it may be used.

NASW CODE, *supra* note 13, at 5-6.

In states where social workers are licensed, the state licensing statutes often define confidentiality differently from the NASW CODE, delineating detailed exceptions to the confidentiality. See, e.g., FLA. STAT. ANN. § 490.0147 (West 1991), which states:

Any communication between any person licensed under this chapter and his patient or client shall be confidential. This privilege may be waived under the following conditions:

- (1) When the person licensed under this chapter is a party defendant to a civil, criminal, or disciplinary action arising from a complaint filed by the patient or client, in which case the waiver shall be limited to that action.

(2) When the patient or client agrees to the waiver, in writing, or when more than one person in a family is receiving therapy, when each family member agrees to the waiver, in writing.

(3) When there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society and the person licensed or certified under this chapter communicates the information only to the potential victim, appropriate family member, or law enforcement or other appropriate authorities.

The Hippocratic oath states in part: "[w]hatever, in connection with my professional practice, or not in connection with it, I may see or hear in the lives of men which ought not be spoken abroad I will not divulge, as reckoning that all should be kept secret." Almeta E. Cooper, *The Physician's Dilemma: Protection of the Patient's Right to Privacy*, 22 ST. LOUIS U. L.J. 397, 398 n.5 (1978); see also Berlin et al., *supra* note 10, at 449 (describing the physician-patient privilege as an "old and time-honored" tradition).

This mandate of secrecy has been significantly weakened in modern times. The American Medical Association's Principles of Medical Ethics states: "A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law." AMA CODE, *supra* note 13, at x. This principle was explained by the American Medical Association through its Council on Ethical and Judicial Affairs: "The patient has the right to confidentiality. The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest." *Id.* at xi.

Psychiatrists, often participate in some capacity in legal matters involving children and are bound by the Principles of Medical Ethics. However, the American Psychiatric Association encourages its members, before complying with a client's waiver of confidentiality, to fully apprise the client of the ramifications of the waiver, permits the member to challenge a legal order requiring disclosure and grants the psychiatrist discretion to disclose confidences "to protect the patient or the community from imminent danger." "The continuing duty of the psychiatrist to protect the patient includes fully apprising him/her of the connotations of waiving the privilege of privacy." PSYCHIATRIC PRINCIPLES, *supra* note 13, § 4(2).

When a psychiatrist is ordered by the court to reveal the confidences entrusted to him/her by patients, he/she may comply or he/she may ethically hold the right to dissent within the framework of the law. When the psychiatrist is in doubt, the right of the patient to confidentiality and, by extension, to unimpaired treatment, should be given priority. The psychiatrist should reserve the right to raise the question of adequate need for disclosure. In the event that the necessity for legal disclosure is demonstrated by the court, the psychiatrist may request the right to disclosure of only that information which is relevant to the legal question at hand. *Id.*

The American Psychological Association has promulgated the *Ethical Principles of Psychologists and a Code of Conduct*, mandating the following confidentiality in its Ethical Standards:

Psychologists have a primary obligation and take reasonable precautions to respect the confidentiality rights of those with whom they work or consult, recognizing that confidentiality may be established by law, institutional rules, or professional or scientific relationships.

PSYCHOLOGICAL CODE, *supra* note 13, at Ethical Standard 5.02. The Code permits the following exceptions:

- (a) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose, such as (1) to provide needed professional services to the patient or the individual or organizational client, (2) to obtain appropriate professional consultations, (3) to protect the patient or client or others from harm, or (4) to obtain payment for services, in which

Lawyers and social workers must keep all information obtained in their client relations confidential.³⁵ By contrast, physicians and psychologists are mandated to respect confidentiality, but are not given guidelines regarding what information the professional should consider confidential.³⁶

The professions also delineate different exceptions to confidentiality. The most explicit and significant difference involves the protection of the client or others threatened by the client. A lawyer may reveal confidential communications only if she believes it is necessary to prevent imminent death or substantial harm to herself or another.³⁷ Social workers may disclose such confidences "only for compelling professional reasons."³⁸ Psychologists may disclose only when mandated by law.³⁹ Psychiatrists appear to disagree, even with other doctors, on the interpretation of the same Principles of Medical Ethics when it comes to the protection of third parties threatened by the client. Doctors are warned to take reasonable steps to protect victims threatened with serious bodily harm by a client.⁴⁰ However, psychiatrists are advised to err on the side of confidentiality, especially if disclosure would impair treatment.⁴¹

Lawyers are explicitly permitted to disclose client communications to fully accomplish the professional task requested by the client.⁴² Presumably, social workers, doctors, and psychologists are

instance disclosure is limited to the minimum that is necessary to achieve the purpose.

- (b) Psychologists also may disclose confidential information with the appropriate consent of the patient or the individual or organizational client (or of another legally authorized person on behalf of the patient or client), unless prohibited by law.

Id. at Ethical Standard 5.05.

35. See MODEL RULES, *supra* note 11, Rule 1.6(a) ("A lawyer shall not reveal information relating to representation . . ."); NASW CODE, *supra* note 13, at 5 (A social worker must "hold in confidence all information obtained in the course of professional service.").

36. See AMA CODE, *supra* note 13, at x, xi; PSYCHOLOGICAL CODE, *supra* note 13, at Ethical Standards 5.01(a), 5.05.

37. See MODEL RULES, *supra* note 11, Rule 1.6(b)(1). But see the Florida rule regarding disclosure of client confidences which allows less discretion than the ABA rule: "A lawyer shall reveal such information to the extent the lawyer believes necessary: (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial harm to another." FLA. R. PROF. CONDUCT 4-1.6(b). This Florida rule requires a lawyer to reveal this information, whereas the Model Rules permit, but do not require, a lawyer to reveal this information. The second section of the Florida rule unlike the ABA rule, could also require disclosure of prior crimes if it would prevent future death or future substantial harm to another.

38. NASW CODE, *supra* note 13, at 5.

39. PSYCHOLOGICAL CODE, *supra* note 13, at Ethical Standard 5.05.

40. AMA CODE, *supra* note 13, at Opinion 5.05.

41. PSYCHIATRIC PRINCIPLES, *supra* note 13, § 4(9).

42. See MODEL RULES, *supra* note 11, Rule 1.6(a) (stating that a lawyer may make disclosures impliedly authorized).

permitted to disclose for these professional needs; however, their ethical standards do not explicitly permit such disclosures without the permission of the client.

Social workers and psychiatrists are required to fully disclose the limits of confidentiality.⁴³ The other professions do not mandate such disclosures.

Where the client's consent to disclosure is required, the professions disagree on the procedure for obtaining such consent. Social workers, doctors, and psychologists may disclose confidential information after a client consents.⁴⁴ However, a lawyer or psychiatrist may not accept consent until the professional has consulted with the client about the consent.⁴⁵

The ABA Code of Professional Responsibility specifically defines the lawyers' responsibility as it relates to subordinates.⁴⁶

43. NASW CODE, *supra* note 13, at 6; PSYCHIATRIC PRINCIPLES, *supra* note 13, § 4(2). If there will be a loss of privilege, the American Psychiatric Association concludes that a psychiatrist must fully explain any potential loss of privilege to a client prior to an evaluation:

Psychiatrists are often asked to examine individuals for security purposes, to determine suitability for various jobs, and to determine legal competence. The psychiatrist must fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination. . . . Ethical considerations in medical practice preclude the psychiatric evaluation of any person charged with criminal acts prior to access to, or availability of, legal counsel. The only exception is the rendering of care to the person for the sole purpose of medical treatment.

Id. at 6-7.

44. NASW CODE, *supra* note 13, at 6; AMA CODE, *supra* note 13, at xi; PSYCHOLOGICAL CODE, *supra* note 13, at Ethical Standard 5.05(b).

45. MODEL RULES, *supra* note 11, Rule 1.6(a) states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ." PSYCHIATRIC PRINCIPLES, *supra* note 13, § 4(2) states: "The continuing duty of the psychiatrist to protect the patient includes fully apprising him/her of the connotations of waiving the privilege of privacy."

46. The ABA Model Rules of Professional Conduct state:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

MODEL RULES, *supra* note 11, Rule 5.3; *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 113 cmt. d, at 32 (Tentative Draft No. 3, 1990); *Id.* § 120 cmt. h, at 117-18 (Draft No. 2, 1989).

Under this rule, secretaries and investigators are subject to attorney-client confidentiality. However, there is little case law involving other professionals

However, the social work, medical, and psychological professions do not specifically define professional responsibility for subordinates.⁴⁷

Where standards differ, the professionals may have tremendous conflict. The professionals' ability to work as a team in a joint strategy to assist a client may be jeopardized if they are worried about their colleagues' conflicting obligations to their respective professions. If a client reports child abuse to a psychiatrist, the psychiatrist may be required to report this information to a state agency, where the lawyer's code may not permit such reporting. If professionals are responsible to their respective professional organizations and licensing boards for the acts of their colleagues, then a lawyer could be punished by a state court for the psychiatrist colleague's report of an admission of child abuse by the client.⁴⁸ The next part of the Article explores these multidisciplinary relationships in the context of professional privileges.

B. Problems in Multidisciplinary Representation and Conflicts Between Professional Privileges

The only universally recognized privilege is the attorney-client privilege. The other professions are protected in most jurisdictions. The specific protection provided to any of these professions differs from jurisdiction to jurisdiction.

Psychotherapists and attorneys have the most widely recognized privileges. Likewise, their privileges are the broadest, tending to cover not only communications, but also records. This coverage clearly includes speculation and conclusions about the

working with an attorney. *See, e.g.*, *State v. Schneider*, 402 N.W.2d 779, 787 (Minn. 1987) (holding that it was proper for defense lawyer to disclose information to a psychologist hired to assist in an insanity defense); FLA. R. CRIM. P. 3.216(a) (holding that a defense expert on competency or insanity is protected under lawyer-client privilege).

47. However, state laws and regulations may hold a physician responsible for disclosures by subordinates, including physician assistants, emergency medical technicians, nurses or nurse practitioners. *See, e.g.*, FLA. STAT. ANN. § 458.331(1)(dd) (West Supp. 1992).

The code for psychologists mandates "[p]sychologists [to] provide proper training and supervision to their employees or supervisees and take reasonable steps to see that such persons perform services responsibly, competently and ethically." PSYCHOLOGICAL CODE, *supra* note 13, at Ethical Standard 1.22(b). However, there is no language holding psychologists responsible for subordinates.

48. *See, e.g.*, MODEL RULES, *supra* note 11, Rule 5.3 (holding a lawyer responsible for non-lawyer associates if the lawyer had knowledge of the non-lawyer's conduct); D.C. R. OF PROF. CONDUCT 5.4(b) (1992) (permitting non-lawyers as partners as long as providing legal services is the sole purpose of the partnership, all holding financial interest agree to abide by the rules of professional conduct, the lawyers agree to be responsible for the non-lawyers, and these conditions are set forth in writing).

case or client.⁴⁹ These privileges also protect subordinates working for the professional as long as the assistance is provided in the role in which the privilege was granted to the professional.⁵⁰ If the subordinate goes beyond the task of lawyering, for example, and begins counseling, then the attorney-client privilege may not be applicable.

The rules covering attorney-client privilege are generally more extensive than those regarding the psychotherapist privilege.⁵¹ However, if the mental health professional is an employee of the attorney or hired for the purpose of litigation by the attorney, or by the client under the advice of the attorney, the attorney-client privilege could override the statutory limits on the psychotherapist privilege. Similarly, when a party in pending litigation consults a physician, the protection may not come from the physician-patient privilege, but from an attorney-client privilege if the attorney hired the physician.⁵² The lawyer may use the doctor in interpreting the testimony of witnesses, including the client, or in evaluating the client's competence.⁵³

Where two professionals are involved, it may be important to determine which professional had first contact with the client. This may provide an indication of the client's expectations regarding the relationship. If the client contacted the attorney first, the attorney-client privilege should apply. However, if the client contacted a psychologist first, a psychologist-patient privilege may apply.⁵⁴ If one of the professionals is not necessary for the professional relationship, but nevertheless participates in confidential client communication, the privilege may be destroyed.⁵⁵

When working with experts, an attorney may waive the attorney-client privilege if the expert becomes a witness⁵⁶ or if, after becoming a witness, the expert relies on protected material to assist

49. This is clearly delineated for attorneys under the work product doctrine. Presumably, the protection covering a psychotherapist's records was intended to protect the opinions disclosed in those records. Otherwise, the protection would only go to the communication between the psychotherapist and client.

50. Compare NEV. REV. STAT. § 49.095 (1986) (protecting communications made for the purpose of professional legal services) with *id.* § 49.225 (protecting communications made for the purposes of diagnosis and treatment by a doctor).

51. The attorney-client privilege has few if any delineated exceptions.

52. See McCORMICK, *supra* note 14, § 89; *Noggle v. Marshall*, 706 F.2d 1408, 1417-24 (6th Cir.) (Edwards, J., dissenting), *cert. denied*, 464 U.S. 1010 (1983).

53. See Saltzburg, *supra* note 14, at 642-45 (recognizing that this distinction between the roles as a witness and advisor could apply equally to all experts).

54. *Id.* at 644 n.154.

55. *Id.*

56. See, e.g., FED. R. CIV. P. 26(b)(4)(A)(i).

in her testimony.⁵⁷ In criminal cases involving the insanity defense, some courts conclude that an attorney may consult a psychiatrist to get advice, but that once the psychiatrist interviews the client and reaches an expert opinion regarding insanity, the psychiatrist may be open to subpoena by the opposing side.⁵⁸

Privileges may also differ on protection of subordinates. While the attorney-client privilege protects communications to subordinates, the statutes or rules often do not specify what types of subordinates are covered.⁵⁹ Social Workers' privilege may include

57. See generally Marcus, *supra* note 14, at 1642-48. To overcome these problems of waiver, Marcus has suggested that courts should change their paradigm when reviewing privilege issues ranging from waiver to fairness. *Id.* He argues that the prime concern should be to prevent a privilege-holder from affirmatively using privileged material to garble the truth, while invoking the privilege to deny his opponent access to related privileged material that would put the proffered evidence in perspective. *Id.* at 1654. He continues:

Applying this fairness analysis to recurrent civil litigation situations suggests clear resolutions for some enduring problems. Thus, the "putting in issue" waiver should be limited to situations in which the privilege-holder makes affirmative use of privileged material as evidence; it should not be imposed as a tax on the decision to raise certain issues. Similarly, inadvertent revelation of damaging material to an opponent should not work a waiver. Beyond these situation, the fairness analysis requires a sometimes difficult assessment of circumstances of the case in order to decide whether to find a waiver. Where privileged information has been shared, for example, a key question is whether the sharing has given it such currency that denying it to the opponent would threaten to make a mockery of justice. Similarly, where material has been used in witness preparation, the question is whether the opponent will be unfairly hampered in cross-examining the witness without the material.

Id. at 1655.

58. *People v. Edney*, 350 N.E.2d 400 (N.Y. 1976). *But see* FLA. R. CRIM. P. 3.216(a) (permitting the appointment of expert to assist in competency or insanity proceeding and specifically stating that the expert is protected by lawyer-client privilege).

59. See, e.g., NEV. REV. STAT. § 49.085 (1986) (protecting communications to "a person employed by the lawyer to assist in the rendition of professional legal services"); N.D. R. EVID. 501-505; see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 120 (Tentative Draft No. 2, 1989). Others covered clearly include secretaries, law clerks, and paralegals, as well as professionals working for the attorney when they are aiding in the legal representation. See, e.g., *State v. Schneider*, 402 N.W.2d 779, 787 (Minn. 1987) (holding that it was proper for defense lawyer to disclose information to a psychologist hired to assist in an insanity defense); FLA. R. CRIM. P. 3.216(a) (stating that defense expert on competency or insanity is protected under lawyer-client privilege); FED. R. CIV. P. 26(b)(4)(B) (limiting access to experts who are not to be called as witnesses but are specially employed to assist in preparation of trial); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (analogizing an accountant to an interpreter to provide attorney-client privilege); *San Francisco v. Superior Court*, 231 P.2d 26 (Cal. 1951) (holding that physician hired by an attorney is subject to the attorney-client privilege); *State v. Pratt*, 398 A.2d 421 (Md. 1979) (holding that psychiatrist employed by an attorney is protected by the attorney-client privilege); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 120 cmt. g-h (Tentative Draft No. 2, 1989); Saltzburg, *supra* note 14, at 625-29. *But see* OR. REV. STAT. ANN. § 40.225(1)(e) (1988) (specifically permitting access to a physical or mental examination made by a physician); McCORMICK, *supra* note 14, § 91.

coverage of subordinates to a licensed social worker.⁶⁰ Although some states protect communications made to doctors' subordinates, in many jurisdictions such protection does not extend to subordinates such as social workers or nurses working with the doctor.⁶¹ It may be difficult to distinguish which professionals the psychotherapist privilege covers due to its broad definition of psychotherapist.⁶²

One expanding area of professional cooperation in criminal law involves the use of sentencing specialists to assist the defense in presenting mitigating factors at sentencing. In one California case, the prosecutor attempted to force a sentencing specialist, hired by the defense, to testify about the contents of a confession made to the specialist.⁶³ The trial court quashed the subpoena but reserved the possibility of having the sentencing specialist testify to impeach the defendant if the defendant testified in his own behalf.⁶⁴

Thus, the breadth of professional privileges may cause conflicts within a team of multidisciplinary professionals. Also, the relationship between professional team members may affect the privilege which attaches. In addition, confidentiality may impact on the client's privileges.

60. See, e.g., NEV. REV. STAT. ANN. § 49.252 (1986) (protecting subordinates who are "participating in the diagnosis or treatment under the direction of the social worker"). This statute protects social workers and their subordinates involved in therapy, but does not appear to apply to social workers involved in advocacy. *Id.*

61. See *Lipsey v. State*, 318 S.E.2d 184 (Fla. 1984) (refusing to extend the psychiatrist privilege to a chaplain and behavioral specialist who worked with a psychiatrist in a community clinic). *But see* LA. REV. STAT. ANN. § 13:3734 (West 1990) (establishing health care provider privilege including employees "acting in the course and scope of [their] employment"); *Allred v. State*, 554 P.2d 411 (Alaska 1976) (extending the psychotherapist-patient privilege to a social worker who worked with a psychiatrist in a drug treatment clinic). See also McCORMICK, *supra* note 14, § 99.

62. See, e.g., *Allred*, 554 P.2d at 422-24; Note, *A Uniform Testimonial Privilege for Mental Health Professionals*, 51 OHIO ST. L.J. 741 (1990) (calling for the broadest possible definitions). It is also not clear what subordinates, if any, are covered. See, e.g., *Allred*, 554 P.2d at 422-24. *But see* LA. REV. STAT. ANN. § 13:3734 (West 1990) (health care provider privilege including employees "acting in the course and scope of [their] employment"); N.D. R. EVID. 503(a)(4) (including "persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family"); *State v. Miller*, 709 P.2d 225 (Or. 1985) (finding a confession of murder to a psychiatrist's receptionist protected under psychotherapist privilege), *cert. denied*, 475 U.S. 1141 (1986); see also Note, *A Uniform Testimonial Privilege for Mental Health Professionals*, *supra* (calling for the broadest possible definitions). *But see* *Cunningham v. Southlake Ctr. for Mental Health, Inc.*, 125 F.R.D. 474 (N.D. Ind. 1989) (holding that psychotherapist-patient privilege does not extend to social work supervisor who is not a medical doctor or licensed psychologist).

63. *People v. Azevedo*, No. A964130 (Super. Ct. of Los Angeles, Cal.—Apr. 10, 1990).

64. *Id.*

C. Conflicts Between Privilege and Confidentiality

Professionals are often confronted with conflicts between their professional obligations of confidentiality and statutory or court denials of privilege. When these conflicts arise, professionals must choose between complying with their professional standards or complying with a court order. Most professionals are obligated to initially assert the confidentiality obligation and force the tribunal to resolve the conflict.⁶⁵ If the professional chooses to comply with the professional obligation over the court order, the court will likely incarcerate the professional for contempt of court.

This conflict may arise for individual professionals when clients disclose an intention to harm someone. While many of the codes of confidentiality permit reporting of threats to cause bodily harm,⁶⁶ these exceptions to confidentiality are very limited, permitting only necessary disclosures,⁶⁷ and do not necessarily permit in-court testimony. However, because such information may not be privileged,⁶⁸ a professional who makes the initial disclosure may be subjecting herself to a subsequent subpoena to testify.

For example, if a psychologist reports a patient's threat to batter a spouse and the spouse petitions for a restraining order against the patient, the judge may demand that the psychologist testify and may not recognize the patient's communications regarding the battery as legally privileged. The psychologist must then choose between the code of confidentiality and a contempt of court citation.

The American Psychological Association recommends the following when a conflict between client confidences and privileges arises:

If the [Ethical Principles of Psychologists and Code of Conduct] establishes a higher standard of conduct than is required by law, psychologists must meet the higher ethical standard. If the Ethics Code standard appears to conflict with the requirements of law, then psychologists make known their commitment to the Ethics Code and take steps to resolve the conflict in a responsible manner. If neither law nor the Ethics Code resolves an issue, psychologists should consider other professional materials and the dictates of their own consciences, as well as seek consultation with others within the field when this is

65. See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 115 (Tentative Draft No. 3, 1990) (requiring lawyers to take reasonable steps to assert protection).

66. See, e.g., MODEL RULES, *supra* note 11, Rule 1.6(b)(1); AMA CODE, *supra* note 13, at Opinion 5.05; PSYCHOLOGICAL CODE, *supra* note 13, at Ethical Standard 5.05(a)(3).

67. See, e.g., FLA. STAT. ANN. § 490.0147(3) (West 1991) (permitting psychologists to report the information "to the potential victim, appropriate family member, or law enforcement or other appropriate authorities").

68. See, e.g., OR. REV. STAT. ANN. § 40.250(3) (Supp. 1992) (limiting the social work privilege when the communication reveals the intent to do a harmful act).

practical.⁶⁹

These types of conflicts are common in all the professions. The dilemma becomes more complicated with multidisciplinary representation. There may not only be conflicts between each professional's ethical code and the applicable law, but layers of conflict among the various professional codes and among the statutes which apply to the different professions.

D. Constitutional Protection for Criminal Defendants

A privilege against disclosure is a statutory protection that normally protects against disclosure of client information in criminal and civil cases. However, in criminal cases, a state's attempt to discover information disclosed by the client to the defense attorney may lead to a Fifth or Sixth Amendment constitutional violation. This constitutional protection may broaden the scope of the privilege when professionals work with defense counsel.⁷⁰ On the other hand, the Constitution may also weaken privileges if the privileges prevent or limit the right of the defense to subpoena and question government witnesses.

The Sixth Amendment to the United States Constitution grants criminal defendants the right to legal counsel.⁷¹ Although the Sixth Amendment does not specifically protect against disclosure of client communications, such disclosures would interfere with the attorney-client relationship and prevent effective assistance of counsel.⁷² Therefore, courts have heightened the protection given to criminal defense attorneys and their clients. Courts have also protected the ability of defense lawyers to hire experts to assist in trial preparation. These experts are often protected under this constitutionally mandated attorney-client privilege.⁷³ Accordingly, a multidisciplinary team working for a child accused of a crime may have not only professional and statutory obligations of confidential-

69. PSYCHOLOGICAL CODE, *supra* note 13, at 2. This would appear to encourage psychologists to accept incarceration for contempt of court. However, one's conscience could dictate complying with a court order to avoid incarceration.

70. See *Noggle v. Marshall*, 706 F.2d 1408, 1414 (6th Cir.), *cert. denied*, 464 U.S. 1010 (1983).

71. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend VI. There may be a Fifth Amendment privilege against disclosure of client communications to the client's counsel or expert hired by counsel. See *McCORMICK*, *supra* note 14, §§ 135-36, 153; *Estelle v. Smith*, 451 U.S. 454 (1981) (finding a psychiatric examination violated the Fifth Amendment rights of a defendant in a capital murder case.)

72. Saltzburg, *supra* note 14, at 603 n.14 (giving examples of attorney-client relationships without the privilege).

73. *But see Noggle*, 706 F.2d 1408 (finding constitutionally permissible Ohio's limited privilege of foreclosing the use of defense experts in cases in chief).

ity, but also constitutional mandates protecting confidentiality.⁷⁴

Similarly, all these privileges, when applied to prosecution witnesses, may be limited by the constitutional rights to due process and confrontation.⁷⁵ Thus, a father accused of sexual molestation of a child may be permitted to pierce the client communications protections created by confidentiality or privilege if these protections prevent adequate due process or confrontation. The United States Supreme Court held that state evidentiary rules protecting child victims may be secondary to an accused's right to confront and cross-examine witnesses.⁷⁶

IV. DILEMMAS ARISING IN MULTIDISCIPLINARY LEGAL REPRESENTATION OF CHILDREN

A. Mandatory Child Abuse Reporting Laws

Professional organizations, legislatures, and courts limit confidences and privileges in circumstances where they conclude that the cost of nondisclosure is greater than that of disclosure.⁷⁷ When representing, counseling or treating children, this judgment is most commonly encountered in statutes that mandate reporting of suspected child abuse or neglect.⁷⁸

74. These constitutional protections can be waived if the legal team is not careful. Some waivers may occur if certain defenses or issues are raised by the defense. See McCORMICK, *supra* note 14, § 136.

75. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. . ."). Using this constitutional protection, the United States Supreme Court has stricken testimonial protections. See *Washington v. Texas*, 388 U.S. 14 (1967) (invalidating a prohibition against having a codefendant testify); *Davis v. Alaska*, 415 U.S. 308 (1974) (permitting a defendant to cross examine a witness about his juvenile record even though this record is protected by statutory confidentiality) McCORMICK, *supra* note 14, § 74.2.

76. See *Davis*, 415 U.S. 308.

77. See, e.g., MODEL RULES, *supra* note 11, Rule 1.6(b)(1); AMA CODE, *supra* note 13, at Opinion 5.05; PSYCHOLOGICAL CODE, *supra* note 34, at Ethical Standard 5.05(a)(3); OR. REV. STAT. ANN. § 40.250(3) (Supp. 1992).

78. All states now require reporting of suspected child abuse. Thomasine Heitkamp & Tara Lea Muhlhauser, *Children In the Court: Rethinking and Challenging Our Traditions*, 66 N.D. L. REV. 649, 652 n.14 (1990); see also W. WADLINGTON ET AL., CHILDREN IN THE LEGAL SYSTEM 789 (1983). For an analysis of these laws, see Brian G. Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103 (1974); THURMAN, *supra* note 1, at 18; Coleman, *supra* note 6, at 117-18. There are also a number of reporting statutes that abrogate privileges and confidentiality. E.g., FLA. STAT. ANN. § 415.109 (West 1991) (requiring disclosure of suspected abuse of the elderly or disabled). See also Cooper, *supra* note 34, at 401-04 (noting that physician's may be required to report gun shot wounds, births, deaths, and communicable diseases); PAUL R. KFOURY, CHILDREN BEFORE THE COURT: REFLECTIONS ON LEGAL ISSUES AFFECTING MINORS 117-27 (1991) (discussing mandatory reporting of a request for an abortion from a female adolescent).

Critics of these statutes mandating reporting of a victim's or perpetrator's confidential communications claim that victims of abuse generally do not volun-

These statutes require persons who suspect child abuse to report such abuse to a central state authority.⁷⁹ Professionals and others are required to report abuse whether they discover the abuse from the victim or the perpetrator. There is often a criminal sanction for failure to report, and immunity from both civil and criminal actions for those who report in good faith. These statutes may require reporting of both actual signs of abuse and oral reports of abuse. They do not necessarily require professionals to provide specific information regarding treatment or other information that may compromise the professional-client relationship, even if this information would be helpful in a court proceeding regarding the abuse.⁸⁰ The purpose of this type of statute is to protect the child who has been subjected to abuse or neglect.⁸¹

Once an abuse report is filed, states may respond in two ways. First, there may be criminal sanctions that focus on punishment and deterrence. Second, where the abuse occurs within the family, civil child welfare statutes emphasize state intervention to provide services to the family in the hopes of rehabilitating the dysfunctional environment and keeping the family together.⁸² In either case the effect of the disclosure of confidences is traumatic to those

tarily seek help due to the lack of trust of strangers, fear of retribution, moral confusion and the desire not to hurt the perpetrator, who is often a parental figure. If the lack of trust claim is true, a disclosure of the information by a professional would destroy any possible future disclosure of information and might prevent victims from obtaining the professional help they need. Although victimization is used to justify mandatory reporting statutes, the similar status of rape victims justifies arguments for complete privilege. *See generally* Note, *Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege*, 17 U.C. DAVIS L. REV. 1213 (1984). *See also* Coleman, *supra* note 15, at 1113 (arguing that the reporting of child abuse disclosed by the perpetrator in therapy is harmful to the best interests of the child); THURMAN, *supra* note 1, at 3-9 (quoting Delaney, *The Battered Child and the Law in HELPING THE BATTERED CHILD AND HIS FAMILY* 187 (C. Kempe & R. Helfer eds. 1972)) (criticizing the criminal process as unsuccessful in addressing the child abuse case and questioning the effectiveness of the entire judicial response to abuse and neglect cases).

Critics also claim that disclosure of perpetrator communications may also cause more harm than good. One author concludes:

If a report is filed by a psychiatrist, but the father denies it when questioned by the investigating agency, the child is likely at even greater risk. The father will probably discontinue treatment and so close the door on this avenue of help. The response of law enforcement officials is often "ineffective and unpredictable."

Coleman, *supra* note 15, at 1149; *see also* Coleman, *supra* note 6, at 116, 122-23.

79. *See, e.g.*, MD. CODE ANN. FAM. LAW §§ 5-704-05 (1991); FLA. STAT. ANN. § 415.504 (West 1991).

80. Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 FAM. L.Q. 143, 144-45 (1984).

81. These statutes often do not state an intent to prevent further harm but rather to protect those who have been previously subjected to abuse or neglect. *See, e.g.*, MD. CODE ANN. FAM. LAW § 5-702.

82. *See* Coleman, *supra* note 6, at 118 n.23.

involved.⁸³

Although these statutes override many professional confidences and privileges, attorneys are often treated differently. Some states specifically exempt attorneys from the obligation to report,⁸⁴ while others require attorneys to disclose child abuse.⁸⁵ Some states specifically permit attorney discretion in this area.⁸⁶

If the applicable statutes exempt only one professional from the obligation to report, the conflict in a multidisciplinary team becomes obvious. A social worker may be required to report suspected abuse or neglect under the statute, but if he is employed by an attorney and privy to attorney-client communications, the attorney may not be permitted to allow disclosure of the information. Case law has not resolved the clear conflict presented by these multidisciplinary teams.

This conflict is highlighted in a State of Maryland Attorney General opinion. Although Maryland exempts attorneys from mandatory reporting of abuse and neglect, the Attorney General's office concluded that a psychiatrist working with a lawyer is not exempt from mandatory reporting unless the lawyer referral "occurs after the initiation of a criminal proceeding against [the client], as part of the attorney's trial preparation."⁸⁷ This interpretation clearly restricts a lawyer's ability to develop ongoing relationships with other professionals who can assist the attorney from the initial client interview onward.

In addition to the potential statutory conflicts, professionals may have conflicts between their professional duties to protect confidentiality and the statutory duty to report. Although there are exceptions to blanket confidentiality obligations, these mandatory child abuse reporting obligations often exceed the discretion or obligation professionals have to protect third parties. Third party protection provisions often give professionals discretion to disclose a client's intention to commit a potential future harm.⁸⁸ Under these

83. Regardless of the state response regarding the perpetrators, it is clear that the victims of child abuse need assistance through therapy. Disclosures by persons whom a child trusts may make subsequent therapy difficult. *Id.* at 120-24. "Ultimately, society may need to decide in some instances whether it is more important to emphasize a criminal justice approach, giving priority to prosecuting offenders, or to emphasize a public health approach, giving priority to the identification and treatment of abused children." Berlin et al., *supra* note 10, at 453; see also Brian G. Fraser, *supra* note 78, at 103 (arguing against criminal prosecution in child abuse cases and recommending therapeutic approaches to the problem of abuse).

84. See, e.g., MD. CODE ANN. FAM. LAW § 5-705(a)(2) (1991); FLA. STAT. ANN. § 415.512 (1991).

85. See, e.g., OHIO REV. CODE ANN. § 2151.421 (Anderson Supp. 1992).

86. See, e.g., WIS. STAT. ANN. § 48.981(2) (West 1987).

87. 90 Op. Att'y Gen. 7 (1990).

88. See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 117A (Tentative Draft No. 3, 1990).

mandatory reporting statutes, a professional must report past harm or potential future harm done by the client, if the client is the perpetrator, or done to the client, if the client is the victim. There is no discretion given to the professionals since it applies to past as well as planned future conduct. Thus it is broader than the third party protection exception to confidentiality.

No professional association requires its members to report past harms.⁸⁹ Such reporting of past harms could prevent a client from disclosing past conduct, which would severely hamper many professionals' counseling, therapeutic or investigatory tasks. Under professional codes, professionals generally have the discretion, but not the obligation, to report potential harm.⁹⁰ This discretion often requires balancing the likelihood of harm to the client relationship, the seriousness of the threat and the capabilities of the client.⁹¹ No

89. Regarding a child reporting abuse to a lawyer, one author argues convincingly that a lawyer could be required both to report and could be prohibited from reporting under the ABA rules, state rules of professional conduct for attorneys and state statutes. To develop her arguments, the author gives a hypothetical case involving the sexual abuse by a father of a nine year old that is disclosed to an attorney for the child. First, she concludes:

[c]ounsel for the children should not reveal the incest over the objection of his client if counsel has determined that the child is competent to make that decision. If the child is not competent, counsel should either act as de facto guardian and make the decision in the child's best interest or see that a guardian ad litem is appointed for the child.

THURMAN, *supra* note 1, at 25-26. Next, she argues:

... given the seriousness of the abuse, the distinct possibility that it will continue, and the questionable competency of [a nine year old] child, counsel should reveal the information. A nine-year old child's competency to direct counsel in her own best interest is problematic, both because of the child's tender years and the possibility that she has been subjected to manipulative pressures and intimidation capable of clouding the judgment of an even more mature victim of parental incest.

Id. Finally, she suggests that discretionary decision making on behalf of this child would be most appropriate, whether acting as a guardian or through the assistance of a separate guardian ad litem. *Id.*

90. The ABA justifies this discretion in the following comment:

[T]o the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

MODEL RULES, *supra* note 11, Rule 1.6 cmt.

91. The ABA describes the balancing in the following manner:

The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A

such balancing is permitted by mandatory reporting statutes.

Additional problems arise regarding the extent of the disclosure. Professional codes mandate limited disclosures. However, if a report of child abuse has been made by a therapist treating the child victim, the law may provide an attorney representing the perpetrator with unlimited access to the victim's counseling records. This issue arose in one Florida case⁹² where the majority found that the reporting statute superseded the privileges dealing with abuse and neglect and, therefore, allowed the defense to depose the treating psychologist.

Under these circumstances, a lawyer told of abuse by a client accused of a crime in a state mandating lawyers to report, may have to choose among the lawyer's professional obligation of confidentiality,⁹³ the client's constitutional rights,⁹⁴ and the statutory mandate. A social worker working for a lawyer representing a criminal defendant may violate the client's constitutional rights by reporting.⁹⁵

The disclosures forced by the reporting statutes cause conflicts within professions as well as between professions. The American Medical Association has issued an opinion clearly stating that a doctor must comply with the law.⁹⁶ At the same time, the American Psychiatric Association, which follows the same Code of Medical Ethics, has recognized the difficult professional dilemma caused by these laws.⁹⁷

lawyer's decision not to take preventive action . . . does not violate this Rule.

Id.

92. *Jett v. State*, 605 So. 2d 926 (Fla. Dist. Ct. App. 1991), *approved*, 626 So. 2d 691 (Fla. 1993).

93. The lawyers' provisions generally only permit a lawyer to disclose future crimes that will "likely result in imminent death or substantial bodily harm." MODEL RULES, *supra* note 11, Rule 1.6(b)(1); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 117A (Tentative Draft No. 3, 1990).

94. *See supra* part III.D. for a discussion of criminal defendants' constitutional rights.

95. *See supra* note 72 and accompanying text discussing scope of attorney-client privilege.

96. AMA CODE, *supra* note 13, at Opinion 2.02. In support of this opinion, the American Medical Association cites one of its principles. Principle III states: "A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient." *Id.* at x.

97. In response to a question by a psychiatrist, the American Psychiatric Association stated:

Question: Have I behaved ethically in not disclosing to state authorities that my patient had sexually abused his children? . . . In my defense the abuse as reported by my patient had not been as extreme as reported by the wife. Furthermore, the patient and I had been therapeutically working on the problem and I anticipated an early resolution.

*B. Role Definition: Advocating or Representing the
Best Interest of the Child*

All these professionals, when working together, may agree on what action is in the best interest of a child client. However, a dilemma may arise if some conclude that pursuing the child's best interest will undermine the team's role as advocate. It is clear under the American Bar Association rules that attorneys should treat children like any other client.⁹⁸ With this normalized attorney-client relationship, an attorney must respect the confidentiality of her child clients even if keeping the confidence is not in the clients' best interest, for it is clear that the lawyer's role as an advocate is to work for the clients' stated goals within legal and ethical bounds.

Under their professional standards, social workers stand be-

Answer: This is a situation in which your ethical position may come into conflict with state law. It would appear that you behaved ethically because in your clinical opinion you felt that the child abuse had been exaggerated, you and the patient were therapeutically working on the problem and anticipated an early resolution. Section 4, Annotations 1,2 and 9 (APA) would lend support to your position. Nevertheless, where state law requires disclosure, you are ethically required to do so.

PSYCHIATRIC PRINCIPLES, *supra* note 13, at 33-34.

98. Rule 1.14 states:

- (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

MODEL RULES, *supra* note 11, Rule 1.14. The comment following this rule further states in part:

The fact that a client suffers a disability does not diminish the lawyer's obligations to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

Id. Rule 1.14 cmt; *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 35 (Tentative Draft No. 5, 1992).

There is evidence that many attorneys representing children do not follow this mandate. *See* David R. Katner, *The Enhanced Ethical Obligations of Representing Juveniles* 179-88 (unpublished manuscript, on file at Tulane Law School Juvenile Law Clinic). Courts tend to encourage juvenile attorneys to pursue the best interest of clients even if that would mean disclosure of client confidences. *See* Thomas Grisso et al., *Competency to Stand Trial in Juvenile Court*, 10 INT'L J.L. & PSYCHIATRY 1, 6-7 (1987) (citing studies throughout the 1970s that indicated attorney would disclose juvenile client confidences including admissions of guilt).

tween the law and the hurt.⁹⁹ Although there is no doubt that social workers have an ethical obligation to be advocates,¹⁰⁰ the social work profession still debates the proper role of advocacy in their practice.¹⁰¹ There is a conflict between those who argue that social workers should fill a pure advocate role and those who argue that they should work in the best interest of the client and community.¹⁰² Due to the vagueness of the professional regulations for social workers, they, and many of their professional colleagues, are left with the discretion to define their role when representing clients, deciding for themselves whether or not to respect confidentiality if it goes against the clients' best interests.

While the professional role of doctors and psychologists is not clear regarding a child client, these professions tend to permit disclosures of client confidences if maintaining the confidence would be detrimental to the client's best interests. Therefore, it would seem that these professions would be more inclined to protect a child's interest, even if to do so would violate the child's right to confidentiality.

Joseph Senna, reporting on these dilemmas as they arise in a public defender's office, explains the issues:

The attorney sees his basic task as winning the case and getting a verdict of not guilty for his client when possible, whereas the social worker is primarily concerned about evaluating the offender's behavior. . . . For example, the social worker might report that the client needed extended treatment, but the attorney wanted the shortest possible sentence. Such problems resulted, in the main, because the public defender was basically concerned with the sentencing process, while the social worker focused on the broader issue of rehabilitation. . . . [W]hen the client need[s] extended treatment, a light sentence obtained by the public defender might not be in the client's best interest.¹⁰³

For example, a child may tell her multidisciplinary team of professionals that she does not want her parents to know she is pregnant, while the team may conclude that the disclosure to her parents would be in her best interest. If the team members view their obligations to serve the client's wishes as paramount, they will respect the request of confidentiality. If they view protection of the client's best interests as their primary obligation, then disregarding the client's request and disclosing the pregnancy to the par-

99. Jose B. Ashford et al., *Advocacy by Social Workers in the Public Defender's Office*, Soc. WORK, May-June 1987, at 199-204.

100. National Assoc. of Social Workers Ad Hoc Comm. on Advocacy, *The Social Worker as Advocate: Champion of Social Victims*, Soc. WORK, Apr. 1969, at 16; Sharon Caulum & Michael Sosin, *Advocacy: A Conceptualization for Social Practice*, Soc. WORK, Jan.-Feb. 1983, at 12-17.

101. Ashford et al., *supra* note 99.

102. Caulum & Sosin, *supra* note 100, at 12-17.

103. Senna, *supra* note 3, at 271, 274-75.

ents will be the outcome. However, if the professionals are divided as to their role, a dilemma arises.

C. Problems of Parental Relationships

Children, especially adolescents, may have many conflicts with their parents. These conflicts may be heightened in judicial proceedings, and are most strained when the parents are charged with abuse or neglect of the child. Other conflicts arise in delinquency or education proceedings when the parents' desired outcomes may differ from those sought by the child client.¹⁰⁴ However, a child can rarely be helped legally or psycho-socially without the support of the parents, the most important people in a child's life.¹⁰⁵

Professionals working with children may have divided loyalties and obligations between the parents and the child client.¹⁰⁶ While parents may be paying for the professional services,¹⁰⁷ the child may be disclosing information he or she specifically instructs the professional not to repeat to the parents. Professionals working with children confront this conflict daily when parents request information regarding a child's treatment or case.

When there is not a conflict between the parent and child, the parent may be very helpful to the professionals in reaching their goals for the child. A parent can provide vital information about the child including medical, psychological, and educational information.¹⁰⁸

Even if the parent can assist the professional, it is often professionally and legally advantageous to have some private communications with the child client. Professionals will want to have communications with the child-client without the parents present to evaluate the child's behavior outside the presence of the parent and to challenge the perceptions provided by the parent. Legally, the parents' presence could destroy any confidentiality or privilege. Courts treat parents like any other third party present during a

104. See Katner, *supra* note 98.

105. Sandra B. McPherson, *Custody, Confidentiality and Treatment*, FAM. ADVOC., Spring 1993, at 10, 11.

106. These conflicts become more complicated when a child is involved in parental divorce proceedings or is in the custody of one parent after a divorce. See, e.g., *id.* at 10.

107. Unless the professional is court appointed, it is the parents who normally initiate the professional relationship with the child. Even if the child initiates the relationship, a parent's consent may be required to establish a binding contract. See RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (stating that contracts made by minors are voidable by the minor). Thus, professionals wanting to assure payment must get an adult to ratify the employment contract.

108. In many jurisdictions, records can only be disclosed to the parent, and a child or her attorney cannot obtain access to records without the parent's authorization.

conversation.¹⁰⁹ Because courts only protect communications that are intended to be kept secret, the presence of a third party is evidence that the client did not intend the conversation be kept secret. If the parent is necessary to assist in the client communications, the communication could be protected under professional-client confidences or privileges.¹¹⁰ However, if the parent is not necessary, anything said in the presence of the parent may not be protected.¹¹¹

It is clear that an attorney's obligations are to the client and not to the client's parents, even if the attorney is paid by the parents.¹¹² Thus, attorneys clearly are not permitted to disclose client confidences to the parents unless one of the exceptions is

109. See, e.g., FLA. STAT. ANN. § 90.502 (West 1991) (defining an attorney-client confidential communication as one which "is not intended to be disclosed to third persons other than . . . those reasonably necessary for the transmission of the communication"). But see *Bowers v. State*, 29 Ohio St. 542, 546 (1876) (holding that a mother's presence does not eliminate attorney-client privilege).

110. See McCORMICK, *supra* note 14, § 99; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 120 cmt. g (Tentative Draft No. 2, 1989).

111. See *In re Guardianship of Walling*, 727 P.2d 586 (Okla. 1986) (holding that attorney-client privilege does not extend to grandmother whose presence was not necessary). If a jurisdiction recognizes a parent-child privilege, then a parent's presence would not cause a loss of the confidential or privilege protection. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 121 cmt. b (Tentative Draft No. 2, 1989). However, few states have recognized such a privilege. See, e.g., IDAHO CODE § 9-203(7) (Supp. 1986); MINN. STAT. ANN. § 595.02(i) (West 1986); MASS. ANN. LAWS ch. 233, § 20 (Law. Co-op. Supp. 1987). Most courts considering the parent-child privilege rejected such protection. See, e.g., *Port v. Heard*, 764 F.2d 423 (5th Cir. 1985); *United States v. Ismail*, 756 F.2d 1253 (6th Cir. 1985); *United States v. Davies*, 768 F.2d 893 (7th Cir.), *cert. denied*, 474 U.S. 1008 (1985); *In re Grand Jury Subpoena of John Doe*, 842 F.2d 244 (10th Cir.), *cert. denied*, 488 U.S. 894 (1988); *In re Grand Jury Subpoena of Santerelli*, 740 F.2d 816 (11th Cir. 1984); *State v. Willoughby*, 532 A.2d 1020 (Me. 1987); *Hope v. State*, 449 So. 2d 1319 (Fla. Dist. Ct. App. 1984). But see *People v. Fitzgerald*, 422 N.Y.S.2d 309 (N.Y. Co. Ct. 1979) (recognizing parent-child privilege). Without this additional protection, attorneys are advised to restrict conversations to those persons known to be protected by the privilege. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 120, reporter's notes at 121 (Tentative Draft No. 2, 1989).

112. MODEL RULES, *supra* note 11, Rule 1.8(f). The Rule states:

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by rule 1.6.

Id.; see also *Katner*, *supra* note 98, at 184-88; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 215 (Tentative Draft No. 3, 1990).

The issue of informed consent for child-clients can become difficult when one is concerned about a child's competency. However, an attorney is obligated to treat the child as a normal client. See MODEL RULES, *supra* note 11, Rule 1.14(a). Therefore, an attorney must assure that the client has adequate information to assess the risks and advantages of the relationship prior to acceptance of payment by the parent. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 202 (Tentative Draft No. 3, 1990).

applicable.¹¹³

Psychiatrists have also been advised to respect the client's right to confidentiality. In response to an inquiry regarding the release of information to an insurance company, the American Psychiatric Association recommended:

If the child is of sufficient maturity to judge the issue of complete confidentiality versus claim payment, the child should also be asked to give permission. Traditionally, this consent is a blanket consent and not truly informed. To be fully informed, the patient would have to approve the report before it was sent. This creates an ethical dilemma since the parent's consent is not informed unless he sees the report also. The child may not want the parent to see the record. Judging the maturity of the child, the psychiatrist will honor the child's request for confidentiality.¹¹⁴

V. TWO PROPOSED SOLUTIONS

It is clear that many problems arise from any multidisciplinary relationship. To protect children, legislatures and courts need to resolve these problems in a systematic way. In the meantime, practitioners can take immediate steps to protect their clients. The following suggestions are addressed to two distinct audiences. The first solution gives guidance to practitioners in multidisciplinary teams. The second solution gives guidance to lawmakers on eliminating some of the conflicts which arise in increasingly prevalent multidisciplinary professional relationships.

A. Practical Resolution

To protect their clients and themselves from unnecessary intrusions into their professional-client relationships, multidisciplinary teams of professionals must delineate the goals of their professional cooperation. The teams must resolve conflicts in writing at the beginning of their relationship and avoid confusion.

113. MODEL RULES, *supra* note 11, Rules 1.8(f), 1.6. One may argue that under Rule 1.6(a) an attorney has discretion to disclose a child client's confidence to a parent as necessary to "carry out the representation." However, the potential for conflicts between a parent and child is often so great in legal proceedings that any disclosure to a parent should be approved by the client to avoid any impression of disloyalty to the child client. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 215 commentary at 187-88 (Tent. Draft No. 4, 1991).

114. PSYCHIATRIC PRINCIPLES, *supra* note 13, at 32. This answer does not solve the dilemma. It leaves it to the individual psychiatrist to decide when a child is mature enough to consent. The American Psychiatric Association further states:

[c]areful judgment must be exercised by the psychiatrist in order to include, when appropriate, the parents or guardian in the treatment of a minor. At the same time, the psychiatrist must assure the minor proper confidentiality.

Id. at 6.

In resolving ethical disputes, such teams must resolve what roles the different professionals working together will take.¹¹⁵ If non-attorney professionals are viewed as merely expert witnesses working for a lawyer, some discovery rules may apply.¹¹⁶ If the professionals are consultants to the attorney, an attorney-client privilege may protect against unwanted invasion into the disclosure of client information.¹¹⁷ If the professional goal is therapy, a privilege, if any, will come from a psychotherapist statute. Therefore, the role definitions of the professionals on the team impact the entire professional ethics discussion.

As an initial matter, the professionals must agree on their relationships. If one professional is a subordinate, many of the potential conflicts over client communications may be avoided. However, most professionals cannot use a superior's order to protect them from professional or legal liability.¹¹⁸

Once an agreement has been reached regarding the multi-professional relationship, the different professionals need to verify with their respective professions that their arrangement does not run afoul of their professional standards. If the professionals conclude that the primary objective is legal representation, then all communication to the mental health professional must relate to the litigation in order to be a protected privilege. Just as a lawyer or her staff that gives advice outside the scope of the legal representation is not protected by the attorney-client privilege, a mental health professional or social worker employed by the attorney must consider the scope of his communications to ensure that they do not overstep the parameters of the attorney-client relationship. Furthermore, the attorney standards of confidentiality apply where the primary goal of the relationship is legal representation.

115. See Mary C. Hutton, *Child Sexual Abuse Cases: Reestablishing The Balance Within The Adversary System*, J. L. REFORM, Winter 1987, at 491 (discussing the impact on the legal system of asking child sexual abuse professionals to take on the sometimes conflicting roles of investigator, chronicler, expert, advocate and therapist).

116. The United States Court of Appeals for the Sixth Circuit has concluded that the Sixth Amendment to the United States Constitution does not protect disclosure from a psychiatrist hired by the defense in preparing for a case when that psychiatrist was hired as a potential witness. *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir.), cert. denied, 464 U.S. 1010 (1983).

117. There are many strategic reasons to have mental health professionals as consultants on a legal team while not using the same individuals as expert witnesses. Some reasons include: developing a mental health theory of the case that communicates the client's subjective experience; finding expert witnesses to develop the mental health evidence and present it effectively; brainstorming to develop a streamlined argument; and avoiding harming the case by overemphasizing the mental health issues. Clark et al., *supra* note 8, at 23.

118. See, e.g., MODEL RULES, *supra* note 11, Rule 5.2(a) (stating that "[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person").

The Sentencing Project, a non-profit organization that helps public defender offices develop multidisciplinary sentencing teams, advises attorneys to formalize the relationship in writing.¹¹⁹ They recommend that the attorney be treated as the controlling professional in the team.¹²⁰ To create a clear intention to establish an attorney-client privilege, the Sentencing Project recommends that a team of professionals execute the following agreement:

All interviews conducted of the defendant or of other persons by the sentencing specialist, and all writings and notes prepared by the sentencing specialist, are to be considered confidential and privileged information which may be discussed, or released to, no other persons without [the attorney's] consent and the consent of the defendant in this case.¹²¹

In addition to formalizing the purpose of the multidisciplinary team among the professionals, the team must explain the purpose to the client at the initiation of the client relationship. If disclosure becomes necessary under certain circumstances, these limits on confidentiality should be disclosed in a formal client contract.¹²² This agreement among the professionals and full disclosure to the client will clarify the purpose and limits of the client-professional relationship. This clarification of purpose will help a court in resolving any future disputes over confidentiality and privilege.¹²³

Once the professionals have established their relationships and disclosed their roles to the client, they must establish protocols by which all the professionals can abide. For example, when working with children, there will still be many conflicts between the need to

119. THE SENTENCING PROJECT, THE MATTHEW YEAGER SUBPOENA CASE 7 n.5 (1990).

120. *Id.*

121. *Id.*; see also Saltzburg, *supra* note 14, at 644, 649-50 (recommending clarification of expert roles to prevent confusion and forced disclosure).

122. See MARGARET L. RHODES, ETHICAL DILEMMAS IN SOCIAL WORK PRACTICE 71-72 (1986); Coleman, *supra* note 6, at 136 n.115. This is the practice of the Johns Hopkins sexual abuse clinic. The clinic recognizes that disclosure of the reporting laws probably contributes to the patients' reluctance to disclose sexual abuse: "Each [patient] is told beforehand that certain types of disclosure will result in reporting. It would probably be possible to identify some children at risk by eliminating the practice of informed consent. However, this would represent a significant departure from societal expectations and a redefinition of the physician-patient relationship." Berlin et al., *supra* note 10, at 449, 453.

There is tremendous difficulty in drafting such a document. It is often difficult for attorneys to understand the complications of confidentiality, privilege and waiver. To create a document that an average client could understand would be almost impossible. See Marcus, *supra* note 14, at 1605. One author concludes that such a disclosure by a therapist would only prevent successful treatment. Coleman, *supra*, note 15, at 1126-31.

123. One Florida judge has warned professionals to advise clients about limits on confidentiality: "It is inconceivable that a health care professional could ethically accept communications from his or her patient without first disclosing that any such communications would be available as evidence against them [sic] in any civil or criminal case." *Jett v. State*, 605 So. 2d 926, 932 (Fla. Dist. Ct. App. 1991) (Griffin, J., dissenting), *approved*, 626 So. 2d. 691 (Fla. 1993).

respect the child client's privacy and the need to fulfill societal, parental or professional demands for disclosure. The first response in these dilemmas may be to empower the client. The professionals could agree to approach and explain the dilemma to the child in language the child can comprehend and request permission to disclose the confidence if that is the best approach to solving the problem. Another approach may be to encourage the child herself to disclose if disclosure is desirable.¹²⁴ For example, if the teenage client has been regularly beaten by her teenage boyfriend but does not want the team of professionals to tell anyone, one of the professionals could approach the client and encourage her to disclose the information to a battered woman's shelter or the police.

B. Statutory Reform

The professions, legislatures, and courts need to resolve inconsistencies in the treatment of different professions. The professions discussed throughout this Article will continue to regulate their respective memberships, but these professions can also recognize and encourage a multidisciplinary approach to client treatment and representation by addressing the conflicts for multidisciplinary teams. The states, through their law making bodies, should treat regulated professions consistently unless there is an overriding justification for certain distinctions.¹²⁵

1. Professional Codes of Ethics

Each profession must address, in its respective code, how to handle other professionals working together. If a modification of the rules is not necessary, the professions should clarify the effect of such relationships with an ethical opinion by the respective profession's ethics committee. The professions can choose one of two routes. The professional either can be made responsible for all the work of her co-workers regardless of their status as independent

124. Obviously, this empowerment assumes some maturity on the part of the client. While it would be ridiculous to attempt to empower a two year old child, it is difficult to draw bright lines demarcating when a child is old enough to make these decisions. Such a determination should be made on a case by case basis, creating shifting presumptions based on the age of the child. Presumably, teenagers would be empowered in this manner. In contrast, children under twelve presumably would need the assistance of their parents in making these decisions.

125. The logic of applying different standards to different professionals working together for the same client is difficult to understand. The lawyer's job includes counseling, yet, as a lawyer, one is not required to disclose information that a social worker or psychologist must report. See Note, *supra* note 4, at 1226; Coleman, *supra* note 6, at 115 (arguing that the Florida statute protecting clergyman who counsel sexual abusers from mandatory reporting statutes is inconsistent with the requirement that psychotherapists report client confidences).

professionals,¹²⁶ or the professionals can be exempt from responsibility for another co-worker who is an independently-licensed professional regulated by another professional organization.

This latter approach codifies the status quo, allowing each multidisciplinary team to clarify the relationships between its professionals. It protects each individual on a team from consequences for the conduct of a co-worker. However, such an arrangement may confuse the client and leave her without recourse against any team member who discloses a confidence because a different code protects each professional.

Adopting the former route would force professionals working together to resolve the conflicts in their approaches because all members would be responsible for each other's conduct. Thus each person would have an interest in clarifying the role of each member of the team. A form of this approach adopted by the D.C. Court of Appeals requires all the professionals to agree in writing regarding the sole purpose of the partnership and to agree that the lawyer's ethical rules will apply to all the professionals in the partnership.¹²⁷

Each profession should require each professional team to specify the primary purpose of the partnership. Once the purpose of the partnership is defined, then the most applicable code should be applied to the team. For example, if the team's primary goal is to provide psychological counseling and all the professionals agree to this in writing, then the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct should be the guide for appropriate conduct for all the professionals in the team.¹²⁸

126. This is the approach of the District of Columbia Court of Appeals when regulating attorneys, and of the American Psychiatric Association. See D.C. R. PROF. CONDUCT 5.4(b) (1992) (permitting non-lawyers as partners if: providing legal services is the sole purpose of the partnership; all holding a financial interest agree to abide by the rules of professional conduct; the lawyers agree to be responsible for the non-lawyers; and these conditions are set forth in writing); PSYCHIATRIC PRINCIPLES, *supra* note 13, at 42 (approving partnerships with non-psychiatrists that do "not have features that interfere with the psychiatrists' medical judgment, [or] delegate to the [non-psychiatrists] any matter that requires medical judgment").

127. D.C. R. PROF. CONDUCT 5.4(b) (1992). This rule only applies to multidisciplinary teams in the District of Columbia in which there is shared ownership in a legal partnership. Presumably, in other non-partnership relationships, a lawyer would be responsible for the other professionals as if the professional were a secretary. Furthermore, under Rule 5.4 only the attorney partners can be sanctioned. See *id.* It is not clear under the applicable regulation applying to the other professions how social workers, doctors or psychologists would be disciplined for a failure to clarify such a relationship.

128. See, e.g., *id.* This rule clearly requires a recognition that all parties agree that the sole purpose of the relationship is providing legal services. A lawyer could still have a partnership with a psychologist to create a counseling

This delineation of purpose should minimize the conflict over the proper professional role for these teams when working with children. If a team were to conclude that the primary goal is the acquisition of social services for a child, then, under the National Association of Social Workers' rules, disclosure of some client confidences would be acceptable in furtherance of this goal.¹²⁹

2. *Statutes, Rules, and Regulations*

For these multidisciplinary relationships to be secure, the states, which regulate these professions and protect their confidences and privileges, must also provide recognition of these relationships and treat them consistently in their regulations. The regulation of client communications needs to be consistent in definition as well as exceptions.¹³⁰

First, a state must decide if it wishes to protect professional-client relationships. Then, it must decide what aspects of the relationship will be protected and who may be privy to the relationship without destroying the protection. Next, a state must determine what limited circumstances will permit exceptions to this protection. Finally, a state must decide when this general protection will be treated as an evidentiary privilege.

The following is a proposed confidentiality statute that could be applied consistently to lawyers, social workers, doctors and psychologists:

- (a) A licensed professional shall not reveal information relating to a client relationship unless the client consents in writing after consultation, except as stated in paragraph (b).
- (b) A professional may reveal information relating to a client relationship to the extent the professional reasonably believes necessary:
 - (1) to provide needed professional services to the client, such as a disclosure to a co-worker or subordinate of the professional;
 - (2) to protect the client or others from imminent death or substantial bodily harm, provided such disclosures are limited to that necessary to accomplish the protection;
 - (3) to report to the state's child abuse registry that the client has abused or neglected a child, or if the client is a minor, that the

or public relations organization and not be liable for her conduct regarding these "non-lawyer" activities.

129. Here, as in all situations, the professionals should discuss their intended disclosure with the client and permit the client to veto the disclosure, even though such a veto may prevent the professionals from meaningfully assisting the client. In such a situation, it may be necessary to terminate the professional relationship.

130. To assure greater consistency in rule promulgation and enforcement among these professionals, all professions should be regulated by one body, such as a state legislature, and supervised by one body, such as a state department of regulation. This would revamp how all states regulate lawyers. However, the justification for lawyers' self-regulation is questionable. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* §§ 2.1-.2 (1986).

client has been abused or neglected, provided such a disclosure is limited to the initial report and investigation; or

- (4) to establish a claim or defense on behalf of the professional in a controversy between the professional and the client, to establish a defense to a criminal charge or civil claim against the professional based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the professional's relationship with the client, provided such disclosures are limited to that necessary to achieve the stated purpose.

The importance of such a statute would be the consistency applied to all the professions. This statute would require all professions to get clients' written consent to releases of information, permit disclosures to co-workers or subordinates, and allow for limited disclosures to report child abuse or neglect or to protect the client or others from imminent death or serious bodily harm and to protect the professionals from allegations of misconduct. Most of the professions already have this basic framework.

This statute would be a departure from the traditional child abuse reporting statute.¹³¹ The professionals regulated under this statute would be granted discretion to decide when to report child abuse and neglect. It would be a clear shift from mandatory reporting to discretionary reporting.¹³² This discretion could be limited to certain professions which the state recognizes have a certain level of competence necessary to make these difficult case-by-case analyses.¹³³ The professionals would have to balance whether the potential harm to the child would be lesser or greater with disclosure. In some cases, it would be better for the child to continue successful therapy, rather than cause a potentially fatal blow to the professional relationship through reporting of prior abuse that may have ceased.

This new professional discretion would also only permit limited disclosure. Once there has been a report of child abuse, no additional information would be expected from the professional. While this approach could undermine the success of criminal prosecutions, it would permit the state to interfere in the perpetrator-child relationship while having limited impact on the professional-client relationship. This would allow states to bring civil proceedings to

131. To be consistent, the concomitant mandatory reporting statute would have to be modified.

132. Now almost all professions except for lawyers and clergy are required to report suspected child abuse or neglect. See *supra* part IV.A. for a discussion of mandatory reporting statutes.

133. Traditional child abuse statutes exempt lawyers and clergy from mandatory reporting. It is difficult to understand why these professionals, who are not trained in the diagnosis of potential mental or physical harm to children, are given more discretion than other professionals who are better trained for this analysis. See Coleman, *supra* note 6, at 115.

protect the child and succeed with lower standards of proof.¹³⁴

As a Florida court of appeals judge recognized, the purpose of these mandatory reporting statutes is the discovery of the perpetrator, not the disclosure of ongoing communication:

[T]his statute was not intended to expose anyone, whether victim or abuser, to ongoing discovery of communications with their treating psychiatrist after disclosure of the abuse. Such result not only would be manifestly unfair to victims, as in this case, but it is also not fair to the abuser who seeks treatment for his or her mental disorder. Post-discovery treatment would seem impossible when any communication to a treating psychiatrist would be admissible in evidence against the patient in any civil, criminal or other proceeding.¹³⁵

This statement represents an appropriate bias in favor of a service-oriented response to child abuse.

These statutory reforms resolve many of the conflicts confronting multidisciplinary teams in regard to client communications. An additional statutory reform is necessary to assist teams working with children to avoid conflicts with the client's parents. The following is an example of a statute that may resolve these potential conflicts:

A professional working with a child-client may only accept a waiver of confidentiality if the child grants the waiver; however, a professional may accept a waiver from the legal guardian of a child under the age of twelve if the professional concludes that the child does not have sufficient understanding or maturity to grant a waiver. This statute does not prevent a professional from releasing information based upon a release signed by a legal guardian of any client who has been found by court order to be legally incompetent to handle his/her own affairs.

This statute grants children equal status with an adult client. Except for legal incompetents, the professional cannot release information without the client's permission. This statute does recognize that some children cannot make decisions regarding waiver of their rights. Clearly a two year old cannot waive access to his client information. The professional is granted discretion on a case-by-case basis to decide when a parent can waive for a child. In cases involving disputes between the child and parent, a professional can use her discretion and refuse to disclose any information based on a parental release.

Once a state has consistency in its definition of and exceptions to confidentiality, it should establish a consistent standard of privilege to protect certain professions, especially those likely to work together as a team. The following statute could apply to lawyers, social workers, doctors, and psychologists:

134. Most states require only a preponderance of the evidence for a court-ordered removal of a child from a caretaker.

135. See *Jett v. State*, 605 So. 2d 926, 932 (Fla. Dist. Ct. App. 1991) (Griffin, J., dissenting), *approved*, 626 So. 2d 691 (Fla. 1993).

A licensed professional shall not be examined in a civil, criminal or administrative proceeding as to confidential communications given the professional by the client, except:

- a) When the client gives consent to disclose;
- b) When the client initiates legal action or a professional conduct complaint against the professional; or
- c) When the client reveals a clear intent to commit serious bodily harm to himself or others, and the professional is a witness in a mental health commitment proceeding or a hearing for a restraining order from violence or threats of violence.

A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is necessary to further the rendition of professional services to the client or reasonably necessary for the transmission of the communication.

This privilege is consistent with the strict confidentiality statute. It allows limited exceptions, including disclosures to protect the client or third parties from serious bodily harm. Also, it would not permit testimony in child abuse or neglect proceedings except as it relates to a mental health commitment or restraining order. In recommending this statute, there has been a conscious decision to give greater protection to the professional relationships at the cost of the fact finding abilities of courts. It is hoped that the professionals given the discretion by these reforms may be able to resolve the complicated problems that arise when children are the subjects of legal proceedings.

If these statutes were applied consistently to all professions, multidisciplinary approaches to the treatment and representation of children would be easier. The professionals would have a clear understanding of their obligations to the state, and the professionals could provide their clients a clear definition of confidentiality and its exceptions.

VI. CONCLUSION

There is a growing number of multidisciplinary teams representing children. These teams working for children involved in the court system have conflicts which team members must resolve and explain to the client at the beginning of the client relationship. To facilitate these arrangements, the law needs to be clear regarding the legal and professional protections for client communications. Under existing law, neither clients nor professionals working in multidisciplinary teams have a clear understanding of the legal obligations regarding client communications.

The courts and legislatures should resolve these conflicts. The laws that cause turmoil for clients and professionals must be reconciled. Until this reconciliation, multidisciplinary teams must take care to protect their communications through well-defined roles that have been explained to the clients.