

## Mandated Reporting of Child Abuse, Neglect, or Dependency: What's an Attorney To Do?

You are appointed to represent a juvenile in a delinquency proceeding. The petition alleges the juvenile assaulted his stepfather. When you meet with your client, he discloses that his stepfather has been beating him for years. This time, his stepfather went after his younger sister, and your client tried to protect her. In another case, you are hired to represent a father in a child custody action. Your client tells you that he just moved out of the home, where his baby and the baby's mother live. He discloses that the mother has a drinking problem and frequently attacks him physically when she is intoxicated, sometimes while she is holding the baby. He also tells you that he has come home from work to find the baby is in dirty diapers and crying in the crib while the mother is passed out on the couch.

In both these scenarios, you have cause to suspect a child is being abused or neglected. Are you required to report to the county department of social services or keep your client's communication confidential? What are the possible repercussions of your decision?

### Universal Mandated Reporting

North Carolina requires “**any person** or institution who has cause to suspect that any juvenile is abused, neglected, or dependent... or has died as a result of maltreatment” to make a report to the county department of social services where the child resides or is found. [G.S. 7B-301\(a\)](#). There is one very limited exception, which is for an attorney who learns of the suspected abuse, neglect, or dependency during the attorney's representation of a client “only in the abuse, neglect, or dependency case.” [G.S. 7B-310](#). All other recognized privileges, such as clergy, husband-wife, doctor-patient, and attorney-client (not covered by the limited exception) are explicitly excluded as a ground for the person's failure to report. [Id.](#)

North Carolina is not alone in its universal mandated reporting statute. Seventeen other states and Puerto Rico have universal mandated reporting laws for child abuse and neglect; however, not all those states preclude a recognized privilege from being an exemption to the universal reporting mandate. [Mandatory Reporters of Child Abuse and Neglect](#), Child Welfare Information Gateway.

### The Standard for Reporting

It helps to break the statute down into three sections to determine whether a report is required.

1. Does a person have “**cause to suspect**”? Although not defined in the statute, “cause to suspect” is less than actual knowledge. A person is not required to confirm that a child is actually being (or was) abused, neglected, or dependent.
2. What constitutes “**abuse, neglect, or dependency**”? These terms are defined at [G.S.](#)

[7B-101\(1\), \(15\), and \(9\)](#) respectively. A person may want to review these statutory definitions when deciding if a report is required. For each of these definitions, a juvenile is any person who is younger than 18 and is not married, emancipated, or a member of the Armed Forces. [G.S. 7B-101\(14\)](#).

3. **Who** created or caused the juvenile's abuse, neglect, or dependency? For purposes of child protective reports and services, abuse, neglect, and dependency are limited to when the juvenile's **parent, guardian, custodian, or caretaker** caused, contributed to, or allowed the conditions or actions to occur. A report should not be made if the person is not a parent, guardian, custodian, or caretaker. In those instances, a report may be made to local law enforcement.

## **Criminal Sanction**

A person who **knowingly or wantonly** (i) fails to report or (ii) prevents another person from making a report as mandated by the universal reporting statute "is guilty of a Class 1 misdemeanor." [G.S. 7B-301\(b\)](#). This criminal sanction was added to the reporting statute and became effective on October 1, 2013. Prior to October 1, 2013, the statute did not specifically address a person's noncompliance.

- "**Knowingly**" is "when the person knows what he or she is about to do and, with that knowledge, proceeds to act," and
- "**wantonly**" is when a person "acts with conscious and intentional disregard of and indifference to the rights and safety of others."

Janet Mason, [Reporting Child Abuse and Neglect in North Carolina](#), 87 (3<sup>rd</sup> ed. 2013).

No reported appellate decisions have addressed the sanctions. According to statistics from the North Carolina Administrative Office of the Courts, two charges of violations of [G.S. 7B-301](#) have been filed in district court, but the statistics do not contain information about the facts or outcomes of the cases.

## **Attorneys' Duty to Report**

Unless the attorney is representing a client in an abuse, neglect, or dependency case, the attorney is a mandated reporter under North Carolina's statute and is subject to criminal prosecution for knowingly and wantonly failing to report. This requirement for attorneys is not unique to North Carolina. Nine other states (Idaho, Indiana, Mississippi, Nebraska, New Mexico, Oklahoma, Tennessee, Utah, and New Jersey) and Puerto Rico also include attorneys as mandated reporters under their universal mandated reporting statutes although these different statutes vary on the confidentiality protections they provide. Except for Puerto Rico, all of these jurisdictions have criminal sanctions for noncompliance. [Mandatory Reporters of Child Abuse and Neglect](#), Child Welfare Information Gateway.

## Communicating with the Client

[Rule 1.4](#) addresses attorney-client communication. An attorney may want to disclose to the client at the outset of his or her representation that communications are confidential except that the attorney must make a report to social services if the attorney has cause to suspect a child is abused, neglected, or dependent. If an attorney makes the report as required by [G.S. 7B-301\(a\)](#), comment 13 to [Rule 1.6](#) requires the attorney to communicate with his or client.

## Ethics Opinions from the North Carolina State Bar

Two decades ago, the North Carolina State Bar addressed the impact of the reporting law on confidential information obtained by an attorney. When [RPC 175](#) was published, G.S. 7A-551 (which was replaced with [G.S. 7B-310](#)) did not contain an explicit sanction for noncompliance with the reporting statute. The addition of an explicit criminal sanction for noncompliance may or may not change the State Bar's view. The Rule of Professional Conduct referred to in the opinion was Rule 4, which is now [Rule 1.6](#). [RPC 175](#) answers two questions:

1. Does the Rule of Professional Conduct require the lawyer to make a report to social services when the information is considered confidential? No.
2. Is it ethical for a lawyer to reveal confidential information of suspected child abuse or neglect to social services as required by the reporting statute? Yes.

## When Does Rule 1.6 Not Apply?

An attorney cannot rely on [Rule 1.6](#) when his or her cause to suspect a child is abused, neglected, or dependent arises in a setting where confidentiality does not apply. [Rule 1.6](#) confidentiality does not apply when:

1. a client waives the attorney-client privilege or confidentiality, or
2. the cause to suspect child abuse, neglect, or dependency arises in a setting that is not confidential, such as a court hearing.

## Is There a Constitutional Challenge to a Criminal Charge?

Perhaps. The reporting statute recognizes the need for an exemption for attorneys who are representing a client in an abuse, neglect, or dependency proceeding. Yet, the statute does not recognize the same need to protect a client confidence when an attorney is representing a client in a criminal action. The Sixth Amendment of the U.S. Constitution provides that the accused in a criminal prosecution has the right to "assistance of counsel for his defense." And, the North Carolina Supreme Court has held that attorney-client privilege is "critical to effective assistance of counsel." *State v. Ballard*, 333 N.C. 515 (1993). An attorney who is representing a client in a criminal proceeding and who makes a report to social services as a result of information the

attorney obtains from the client's confidential communication may be a violation of the client's Sixth Amendment rights. The Sixth Amendment applies to juvenile delinquency proceedings as well as criminal proceedings. *In re Gault*, 387 U.S. 1 (1967).

A constitutional challenge is likely to be limited to an attorney who is representing a client in a criminal or delinquency proceeding. Other than the Sixth Amendment right to effective assistance of counsel in a criminal proceeding, "attorney-client privilege is without constitutional protection." Robert P. Mosteller, *Child Abuse Reporting Law and Attorney-Client Confidences: the Reality and the Specter of Lawyer as Informant*, 42 Duke L.J. 203, 269 (1992). As such, "a legislature could constitutionally eliminate the protections of the attorney-client privilege except when criminal litigation has been formally initiated." *Id.* at 271.

### **Criminal Prosecution under G.S. 7B-301 is Not a Violation of the Rules of Professional Conduct**

[RPC 175](#) discusses a lawyer's ability to exercise discretion under what is now [Rule 1.6](#) in determining that a report "would substantially undermine the purposes of the representation or substantially damage the interests of his or her client." The example provided in the opinion is when a lawyer believes a report based on a client confidence would deprive a client in a criminal proceeding with effective assistance of counsel. A good faith decision to not report will not be deemed a violation of the Rules of Professional Conduct.

### **Immunity**

An attorney, and any other person, who makes a report in good faith is immune from any civil or criminal liability. [G.S. 7B-309](#). Good faith is presumed. *Id.* However, an attorney who makes a report may be open to claims of ineffective assistance of counsel.

### **A Report Does Not Mean Access to the Attorney's Files**

Although attorney-client privilege is not recognized as an exemption from the mandated reporting statute (except for when an attorney is representing a client in an abuse, neglect, or dependency case), a report is not an invitation for social services to obtain the attorney's files. The Juvenile Code allows both the department of social services and a child's guardian ad litem to obtain confidential information but specifically exempts information protected by attorney-client privilege. [G.S. 7B-302\(e\)](#), [-601\(c\)](#).

### **What Do You Think?**

I understand this post may raise more questions than answers. But given the 2013 change in the statute, which makes it a crime to knowingly and wantonly fail to report, it seems appropriate to raise this issue and provide a summary of the laws, ethics opinion, and issues.