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**Q&A**

# Confidentiality Versus Mandatory Reporting: What's a P&A to Do?

Produced by J. Paterson Rae
Center for Public Representation
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Q. Our P&A does a mix of investigatory work, individual client representation, and systemic advocacy. We have investigators, paralegals and attorneys on staff, all of whom sometimes engage in general investigations of facilities or incidents based upon our various access authorities and many also work on individual client cases and class actions. We are developing policies regarding how we should respond to mandatory reporting laws concerning the abuse, neglect or exploitation of children, adults with disabilities and elders. What are the factors we should consider?

A. It is important to look closely at your state's mandatory reporting laws, codes of professional responsibility, and the confidentiality requirements of the P&A statutes. If the P&A is a state agency, there may be state confidentiality laws that may impact a policy. Because mandatory reporting laws and professional responsibility codes vary from state to state, each P&A will have to individually balance the competing requirements of these laws in developing its policy.

## I. INTRODUCTION

Development of a mandatory reporting policy may be quite easy or incredibly complex. On the one hand, it may be clear under a state's mandatory reporting laws that the staff of a P&A, regardless of their professional qualification, are not mandated reporters. However, where one or more of a state's mandatory reporting laws do include some or all of the staff of a P&A within their apparent scope, the development of a policy requires an assessment of the interplay between the requirements of the reporting law or laws, the confidentiality requirements of the state code of professional responsibility, and the confidentiality provisions of the PADD, PAIMI, PAIR, PATBI and CAP programs. These various laws and rules pull in different directions, so it is not easy to develop a simple, straightforward policy that will be easy for staff to understand

and follow. Also, because all except the federal PADD, PAIMI, PAIR, PATBI and CAP rules vary from state to state, it is not possible to suggest a model policy. However, there are a number of factors that should be considered and weighed against each other. This Q&A is intended to identify the key factors and provide some guidance about how they may relate to the development of an agency policy.

### A. Mandatory Reporting Laws

The first reported criminal cases involving child abuse in the United States date back to the late 1600s, but no documented civil child protection case appeared until 1874. That case moved the petitioner to establish the New York Society for the Prevention of Cruelty to Children. That organization and others like it were responsible for placing thousands of neglected children in institutional care.[1]

Now, every state and the District of Columbia have child protection statutes that include some level of mandatory reporting of suspected abuse or neglect.[2] Using the child protection laws as models, most, but not all, states also have a mandatory reporting law governing the neglect, abuse or exploitation of adults who are elderly, disabled or otherwise vulnerable.[3] While each state's laws are different, they do share some common characteristics. They generally define the individuals who are covered or protected by the law, the conduct which triggers reporting, a list of individuals who are mandatory reporters, immunity for good faith reporting, and penalties for failure to report or filing a false report. Child abuse prevention statutes frequently require reporting by health care providers, facility staff, law enforcement officers, social workers, school personnel, staff of state child serving agencies, and clergy.[4] Adult protective services statutes frequently require reporting by health care providers, facility staff, law enforcement personnel, social workers, personal care attendants, home health

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[1] Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 Vand. L. Rev. 183, 190 (1998), The child protection agency was modeled on the Society for the Prevention of Cruelty to Animal (SPCA), established some years earlier.

[2] For a list of child abuse mandatory reporting state statutes see Trost, supra n. 1, at 194 n.63. The Child Abuse Prevention and Treatment Act (CAPTA) links federal funding of some state child abuse activities to compliance with certain federal standards. 42 U.S.C. §§ 5101 – 5106i. CAPTA was first enacted in 1974. Amendments in 1996, P.L. 104-235, are seen by some commentators as weakening the law. See, Trost, supra n. 1, at 189.

[3] For a list of adult protective services mandatory reporting laws, see Lori Stiegel and Ellen Klem, *Reporting Requirements: Provisions and Citations in Adult Protective Services Laws, by State* (ABA Comm'n on Law and Aging, 2007) (laws current as of 12/31/2006) (available online at http://bit.ly/pVqHg5). For a detailed compendium of both child abuse and adult protective services mandatory reporting laws, see Brenda V. Smith, *Fifty State Survey of Mandatory Reporting Laws* (American Univ. 2009) (available for download at http://bit.ly/pnaJWk).

[4] See, *e.g.*, Mass. Gen. Laws ch. 119, § 51A.

aides, clergy, and bank personnel.[5] However, the lists of mandated reporters vary greatly from state to state[6] and often, within the same state, between the child abuse prevention and adult protective services laws.[7] Virtually all mandated reporter statutes include social workers. A few states specifically include attorneys.[8] Others contain provisions that require reporting by all persons with knowledge of abuse or neglect without qualification, leaving questions regarding how they interact with the attorney-client privilege or other confidentiality rules unanswered.[9] Other state laws contain specific lists of mandatory reporters which generally do not include attorneys or investigators, but do include social workers.[10]

Not only are there variations in the way different states address the question of who must report and how issues of attorney-client privilege are treated, but within a given state the reporting rules are likely to be different for children and adults, making the development of a uniform policy even more complicated. What is, of course, clear is that the starting point in the development of any policy is a careful analysis of the specific mandatory reporting requirements for both child and adult protective services, including any exceptions to those requirements that may be applicable to staff in your agency.

### B. Professional Responsibility Rules

While almost all states, with the notable exception of California, have patterned their rules of professional conduct of attorneys after the ABA Model Rules of

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[5] See, *e.g.*, Ark. Code Ann. § 12-12-1708.

[6] Compare Ind. Code § 31-33-5-1 ("an individual who has reason to believe that a child is a victim of child abuse or neglect") with Cal. Penal Code § 11165.7 (specifically listing 38 separate categories of mandated reporters).

[7] Compare Cal. Penal Code § 11165.7 (listing 38 separate categories of mandatory reporters for child abuse) with Cal. Welf. & Inst. Code § 15630. (providing a short one sentence list of mandatory reporters for adult abuse or exploitation).

[8] See, *e.g.*, Miss. Code Ann. § 43-21-353; Nev. Rev. Stat. § 432B.220.1 & .4(i) (with exception if information obtained from a client who may be accused of abuse or neglect); Ohio Rev. Stat. §§ 2151.421 & 5101.61 (but disclosure not required if information is subject to a testimonial privilege); Or. Rev. Stat. §§ 124.060 & 419B.010 (but disclosure not required under § 419B.010 if detrimental to client); Texas Fam. Code Ann. § 261.101(abrogating attorney client privilege); 23 Pa. C.S.A. § 6311 (subject to confidentiality of information received from client).

[9] See, *e.g.*, 16 Del.Code. § 903; Idaho Code § 16-1605 (and containing specific exemption for confidential communications to clergy, but not attorneys); Ind. Code Ann. § 31-33-5-1; N.J. Stat. Ann. § 9:6-8.10; R.I. Gen Laws § 40-11-3; Wyo. Stat. Ann. § 14-3-205 (requiring report by any person, but providing at § 14-3-209 that the report may not be introduced as evidence in a judicial proceeding if otherwise protected by the attorney-client privilege).

[10] See, e.g. Mass. Gen. Laws ch. 119, § 51A; Cal. Penal Code § 11165.7; Va. Code Ann. § 63.2-1509.

Professional Conduct,[11] not all have adopted the entire code verbatim.[12] Nevertheless, all states, including California, contain provisions which prohibit an attorney from revealing client confidences without the client's consent unless authorized by a specific exception to the attorney's duty of confidentiality.[13] The duty of confidentiality extends not only to information provided by the client, but also to all information learned during the course of the representation, regardless of the source.[14] Accordingly, under ethical codes, an attorney for an incarcerated juvenile who learns from another confined youth that his client is being sexually assaulted by a guard cannot, without the client's consent, reveal that information to appropriate authorities, absent an exception to the broad confidentiality requirements of Rule 1.6(a).

The primary exception to the general confidentiality requirement of Model Rule 1.6(a) is found is subsection (b) of the Rule. That subsection permits, but does not require, an attorney to reveal otherwise confidential information to: 1) prevent reasonably certain death or serious bodily harm; 2) prevent the client from committing a crime or fraudulent act that is reasonably certain to result in substantial financial injury if the lawyer's services were or are being utilized in furtherance of the crime or fraud; or 3) prevent, mitigate or rectify substantial financial injury to another which is reasonably certain to result or has resulted from the client's commission of a crime or fraud in which the lawyer's were used.[15] While not all cases of child or adult abuse or neglect will fit within the death or substantial bodily harm exception, many will. Where this is the case, and state professional responsibility rules mandate or permit disclosure, there is no conflict between mandated reporting and the attorney's ethical responsibilities. However, in many other cases where information concerning the

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[11] The ABA Model Rules of Professional Conduct are available online at http://bit.ly/dPaBGm.

[12] Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in A Global Age*, 48 San Diego L. Rev. 489, 500 (2011)

[13] ABA Model Rule 1.6(a); Cal. Bus. & Prof. Code § 6068(e)(1). Because the specific wording of state codes may deviate from the ABA Model Rule and may contain additional or different exceptions to the general duty of confidentiality, it is critical in developing a policy regarding mandatory reporting to carefully review the specific code provisions in your jurisdiction. However, because most jurisdictions follow the ABA Model Rule fairly closely, this Q&A will focus on the ABA Rules.

[14] ABA Model Rule 1.6, Comment at ¶ 1.3.

[15] It is particularly important to review the crime fraud exceptions in your state's code of professional conduct. Some contain additional exceptions. See, *e.g.* Mass. Rule of Prof. Cond. 1.6(b)(1) (adding prevention of wrongful conviction as an additional exception). Others mandate, rather than simply permit, the disclosure of confidential information in certain situations, most notably where death or substantial bodily harm are likely. Alexis Anderson, Lynn Barenberg & Paul Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 Clinical L. Rev. 659, 695 & n.97 (Spring 2007) (listing nine states, Arizona, Connecticut, Florida, Illinois, Nevada, North Dakota, Texas, Virginia and Wisconsin, which mandate disclosure).

abuse, neglect or financial exploitation of a child or adult is acquired during the course of representation, the exceptions to confidentiality in Rule 1.6(b) will not apply, creating tension between the competing demands of the mandatory reporting requirements and ethical obligations of the attorney and other members of the legal team, including social workers.[16]

### C. Federal Confidentiality Laws Governing P&As[17]

The third set of factors that must be considered by a P&A in the development of a policy regarding mandated reporting is the confidentiality provisions of the PAIMI, PADD, PAIR and CAP statutes and regulations.[18] While the specific confidentiality provisions of the PADD, PAIR and CAP programs differ somewhat, they all provide in general that client identifiable information [19] obtained pursuant to the P&A access and investigatory authority is confidential. Individual identifying information regarding a client or the subject of an investigation can only be released with the consent of the individual or the individual's guardian or authorized representative.[20]

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[16] The ethical obligations of the attorney extend to and shield from disclosure information provided to agents of the attorney. J. P. Ludington, Annotation, *Persons Other Than Client or Attorney Affected by, or Included Within, Attorney-Client Privilege*, 96 A.L.R.2d 125 at § 4 (1964 and supplement); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 325 (S.D.N.Y. 2003).

[17] P&A's may also receive funding from other sources such as state IOLTA funds, foundations or private fundraising. In developing a policy on mandatory reporting, it may also important to address P&A activities undertaken exclusively with these funds.

[18] There do not appear to be statutory or regulatory provisions addressing confidentiality in the PATBI program. However, because investigation involving individuals with traumatic brain injury would also fall within the P&A's PADD or PAIR authority, *Tennessee Prot. & Advocacy, Inc. v. Wells*, 371 F.3d 342 (6th Cir. 2004), it would seem that the confidentiality provisions of those acts and regulations should govern. For a more detailed discussion of the confidentiality provisions of these programs, see Robert Fleischner & Susan Stefan, Q&A, *Confidentiality Issues in Public Reports of Investigations* (Sept. 2005) (available online at http://bit.ly/qBnNrz ). While it is certainly possible to encounter mandatory reporting issues in a P&A's PABSS, AT and PAVA work, the likelihood is fairly remote.

[19] See 45 CFR §§1386.21(1) & 1386.22(e) (PADD); 34 CFR § 381.31 (PAIR); 34 CFR § 370.48 (CAP).

[20] P&A's need to be clear when undertaking investigations pursuant to their PAIR, PAIMI or PADD authority about whether or not they are representing the individual who is the subject of the investigation. Generally, an attorney/client relationship is created when (1) a person seeks advice or assistance form an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney explicitly or impliedly agrees to give or actually gives the desired advice or assistance. If the P&A is undertaking to represent the client, it should execute a retainer agreement with the client. While it may be appropriate to undertake some investigations in this manner, by doing so the P&A loses control over the direction of the investigation. For this reason and others, frequently such investigations are undertaken pursuant to the P&A's access authority without a client.

However, the PAIMI regulations regarding confidentiality, rather than broadly proscribing the release of individually identifiable information without consent, also provide that the P&A must maintain the confidentiality of records and information "pertaining to … [c]lients[21] to the same extent as is required under Federal or State laws for a provider of mental health services." 42 CFR § 51.45(a)(1)(i). Because mental health providers are mandatory reporters under virtually every state child or adult abuse and neglect protection act, this provision may provide an exception to confidentiality where abuse, neglect or financial exploitation as defined in state law is known or reasonably suspected.

## II. RECONCILING THESE COMPETING OBLIGATIONS.

There is an obvious tension between mandatory reporting laws which require disclosure of sensitive personal information about individuals and the confidentiality provisions of attorney codes of professional responsibility and federal laws governing the programs administered by P&A's. In addition to these conflicting legal constraints, individual P&A's may have their own philosophical position regarding the disclosure of information concerning abuse and neglect to state authorities. Some P&As may welcome the opportunity to report such information, viewing this as complementing their fundamental mission to eliminate abuse and neglect of individuals with disabilities. Other P&A's, viewing this issue more narrowly from the perspective of an attorney, may be reluctant to disclose any information which would be subject to the broad attorney-client confidentiality rules absent client consent or a clear and unambiguous obligation to do so.

The first thing any P&A should do is carefully review the mandatory reporting laws in their state. For many P&A's, this will be the beginning and end of their mandatory reporting policy development because no members of their staff will be included as a mandatory reporter. However, for those P&A's in states which include some or all members of the P&A staff as mandated reporters, a policy should be developed, and the task of doing so can be quite complex, depending upon which members of the staff may be mandated reporters, whether there are any qualifications on their duty to report,[22] the federal program pursuant to which

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[21] The PAIMI regulations, as well as the PADD and PAIR regulations regarding confidentiality utilize the term "client" in the context of P&A investigations. However, in this context "client" does not appear only to apply where the P&A has engaged in an attorney-client relationship with the individual or is representing the individual being investigated pursuant to some form of formal agreement with that person. Rather, the regulations appear to use the term client to describe the person who is the alleged victim of abuse or neglect whether or not the agency has established an attorney-client relationship.

[22] For instance, some states which include attorneys as mandated reporters do not require them to report if their client is the alleged perpetrator or if the information was received from their client. See n. 7, *supra*.

the information was obtained, whether the information was obtained in a case, or during intake, or when providing information and referral, or in the course of an investigation in which an attorney-client relationship was established and, if so, the scope of confidentiality protections under professional responsibility rules.

If the information was obtained in an investigation conducted under PADD or PAIR authority, there would appear to be no obligation to report. As detailed above, the federal regulations governing both programs provide broad protection against disclosure of client identifiable information obtained during such an investigation. Under the Supremacy Clause, these federal confidentiality rules should preempt any contrary state law, including state mandatory reporting rules.[23] However, it is a different story if the information was obtained under the P&A's PAIMI authority, for the PAIMI statute and regulations regarding confidentiality provide that the information is protected to the extent that it would be protected under federal or state law for a provider of mental health services. Because mental health providers are virtually certain to be included within the list of mandated reporters under state law, the PAIMI regulations may not provide any meaningful protection against disclosure.

If the mandatory reporting law covers P&A staff and the information indicating abuse, neglect or exploitation was discovered pursuant to the P&A's PAIMI authority, the next question to answer is whether the P&A had undertaken the case on behalf of a client (*i.e.* had established an attorney-client relationship) or on its own independent authority to investigate allegations of abuse or neglect. If there was no attorney-client relationship, the professional responsibility rules regarding confidentiality do not apply and the information regarding actual or suspected abuse, neglect or exploitation should be reported.[24]

Finally, if the mandatory reporting laws apply to P&A staff and the information was discovered in a PAIMI case in which an attorney-client relationship was established, it is then necessary to determine the extent to which the rules of professional conduct may require confidentiality. It is important to bear in mind that staff who are assisting an attorney with a case are also covered by the rules of professional responsibility.[25] Therefore, to the extent that a mandatory

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[23] See *Iowa Prot. & Advocacy Services, Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D. Iowa 2001) (holding that P&A access authority under the PAIMI and PADD statutes and regulations preempted any state law limitations on access); *Prot. & Advocacy For Persons With Disabilities v. Armstrong*, 266 F. Supp. 2d 303, 319 (D. Conn. 2003) (same).

[24] It is also important to carefully review the definitions of abuse, neglect or exploitation in the mandatory reporting laws. In some cases, the definition may only apply to abuse, neglect or exploitation by certain designated individuals in a caretaker, fiduciary or other relationship with the impacted individual. In other cases, the definition may be quite expansive. Unless the P&A policy carefully delineates the conduct which is subject to reporting, it is likely that some staff will be inclined to over-report, while others will under-report.

[25] See fn. 15, *supra.*

reporting law provides an exception to an attorney for reporting information that might implicate his or her client, that same exception should carry over to other staff working with the attorney on the case. The more difficult question arises where the mandatory reporting statute by its terms covers attorneys without qualification either explicitly or by necessary implication (*e.g.* states which require "any person" to report). Where the level of abuse, neglect or exploitation rises to the level of serious bodily harm or substantial injury to financial interests which would allow permissive disclosure under professional responsibility rules, it would seem that there would be no conflict between the professional responsibility rules and the mandatory reporting rules. While not without some doubt, under such circumstances, disclosure pursuant to the mandatory reporting rules appears to be required.[26]

Where the level of abuse, neglect or exploitation does not rise to a sufficient level to permit disclosure under the state code of professional responsibility, the clash between attorney-client confidentiality and mandatory disclosure rules becomes direct and difficult to reconcile. Ethics opinions on the subject have been largely unhelpful, frequently opining that it would be a breach of ethics for the lawyer to disclose, but declining to offer an opinion on the lawyer's possible criminal or civil liability for failing to report.[27] Where the mandatory reporting law explicitly includes attorneys in the list of mandated reporters, it seems likely that courts would conclude that the statute takes precedence over the ethical rule. However, where the statute simply includes attorneys as part of a general "all persons" reporting requirement, it is unclear and undecided whether the client confidentiality rule or the mandatory reporting requirement controls. This may be the area in which the P&A may determine the direction of its policy based upon whether it places a higher value on maintaining client confidentiality or on the protection of individuals from abuse or neglect.[28]

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[26] Compare, Katharyn I. Christian, *Putting Legal Doctrines to the Test: The Inclusion of Attorneys As Mandatory Reporters of Child Abuse*, 32 J. Legal Prof. 215, 229-30 (2008) (arguing that mandatory reporting requirements would not interfere with attorneys' duties of confidentiality because child abuse is considered a continuing crime) with Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. Rev. 125 (2006) (arguing that attorney-client confidentiality should trump mandatory reporting, even where disclosure would be permitted); Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 Geo. J. Legal Ethics 243 at nn. 45-58 and accompanying text (1987) (discussing ethics opinions from New Jersey, Indiana and Virginia which require reporting where professional responsibility rules permit disclosure); see also *State v. Snell*, 314 N.J. Super. 331, 337-38, 714 A.2d 977, 980 (App. Div. 1998) (analogizing attorney-client privilege to psychotherapist-patient privilege and holding that mandatory reporting law permitted psychiatrists breach of patient confidentiality regarding child abuse).

[27] See, Lockie, *Salt in the Wounds*, 36 N.M. L. Rev. at 137 n.73 (listing ethics opinions from numerous jurisdictions).

[28] Where the ability to reconcile the competing obligations of the state's mandatory reporting laws with its professional responsibility rules and the PAIMI confidentiality

## III. CONCLUSION

The development of a policy regarding how the P&A will address its competing obligations under mandatory reporting laws, P&A confidentiality requirements and professional responsibility rules can be challenging. Precisely because of the complexity of the interrelation of these different obligations, it is important for P&A's to develop policies which will provide clear guidance on how to respond. No one size will fit all. Each program must carefully analyze its state's laws and rules and develop a policy that reconciles the sometimes competing rules governing P&A activities.

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provisions is unclear, it may be useful for the P&A to obtain a legal opinion from an outside law firm or the state ethics commission to guide its policy development. However, before doing so, be sure that you will be comfortable with the end result. Obtaining such an opinion and then developing a policy at odds with it will subject the agency and staff to a higher risk of liability than would be the case if the policy were developed without such outside advice.