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Competing Liabilities: Responding to Evidence of Child Abuse that Surface During the Attorney-Client Relationship

Alison Beyea

University of Maine School of Law

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COMPETING LIABILITIES: RESPONDING TO EVIDENCE OF CHILD ABUSE THAT SURFACES DURING THE ATTORNEY-CLIENT RELATIONSHIP

Alison Beyea

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>CHILD ABUSE IS A CONTINUING CRIME</td>
<td>271</td>
</tr>
<tr>
<td>II</td>
<td>TORT LIABILITY FOR A FAILURE TO WARN</td>
<td>275</td>
</tr>
<tr>
<td>III</td>
<td>THE CONFIDENTIALITY RULES</td>
<td>280</td>
</tr>
<tr>
<td>A</td>
<td>Evidentiary Attorney-Client Privilege</td>
<td>280</td>
</tr>
<tr>
<td>B</td>
<td>Model Code and Model Rules</td>
<td>282</td>
</tr>
<tr>
<td>C</td>
<td>Maine's Ethical Rules</td>
<td>283</td>
</tr>
<tr>
<td>D</td>
<td>Reasonable Belief</td>
<td>287</td>
</tr>
<tr>
<td>IV</td>
<td>LEGISLATIVE ATTEMPTS TO COMBAT CHILD ABUSE</td>
<td>288</td>
</tr>
<tr>
<td>A</td>
<td>The Child Abuse Reporting Laws</td>
<td>288</td>
</tr>
<tr>
<td>B</td>
<td>Maine's Reporting Requirements</td>
<td>291</td>
</tr>
<tr>
<td>V</td>
<td>MANDATORY REPORTING IS NOT THE ANSWER</td>
<td>292</td>
</tr>
<tr>
<td>VII</td>
<td>CONCLUSION</td>
<td>295</td>
</tr>
</tbody>
</table>
COMPETING LIABILITIES: RESPONDING TO EVIDENCE OF CHILD ABUSE THAT SURFACES DURING THE ATTORNEY-CLIENT RELATIONSHIP

Alison Beyea*

Kevin Adams, a practicing attorney in Maine, represents John Brown in a dispute with Brown’s landlord. Brown is facing eviction as a result of his inability to pay the rent. Over the course of the representation, Adams has come to believe that Brown is abusing his son. Brown—who is working two jobs but still cannot pay his rent—has told Adams of the incredible pressure he is facing. Brown has admitted that the pressure is getting to him and that he feels bad that he has been “taking it out on the kid.” Brown also told Adams that he had been attending anger management meetings, but that he no longer had time to participate. Adams has met Brown’s son on two occasions. At the first meeting, Brown’s son had a black eye and at the second meeting, Adams could see that Brown’s son had bruises all over his arm. The last time Adams met with Brown, Brown mentioned that he had spent the previous evening in the emergency room of the hospital because his son had broken his arm.

What should Adams do in this situation? And, is that different from what Adams can do? Could a failure to report suspected abuse expose Adams to future civil liability for the child’s injuries under the theory of “failure to warn?” On the other hand, is Adams’s ability to report this suspected abuse constrained by professional ethical rules that protect information gained in the course of representation? Could disclosure of such information actually subject Adams to disciplinary action from the Board of Bar Overseers? To answer these questions, an attorney must consider and evaluate his or her obligations under tort law, ethical rules, and legislative enactments. This Article will consider these competing “liabilities” and will argue that an attorney in Maine has the discretion to report child abuse without violating her ethical or legal obligations.1 Although this Article calls for a policy of “permissive reporting,” it concludes that any attempt to mandate reporting would be a misguided attempt to protect children.

A discussion of an attorney’s legal and ethical relationship to the reporting of child abuse is impossible without first considering the nature of the crime of child

*Alison Beyea is serving as a law clerk to Judge Kermit Lipez of the United States Court of Appeals for the First Circuit. Upon the completion of her clerkship, Ms. Beyea will be joining Pine Tree Legal Assistance in Portland, Maine, as a Muskie Fellow for legal services. This article is an expansion of a student paper Ms. Beyea wrote while attending the University of Maine School of Law.

1. Were an attorney to make such a report, that decision would obviously call into question that attorney’s ability to represent the client. Most likely, withdrawal would be necessary. It is beyond the scope of this Article, however, to consider the resulting attorney-client relationship once a report has been made. Instead, this Article attempts to address the more fundamental question: can an attorney ever report child abuse if the information is obtained in the course of representation? This Article leaves the other equally difficult questions pertaining to the result on the attorney client relationship for future consideration.

Similarly, this Article does not consider the attorney’s obligations when representing a client charged with child abuse in a criminal proceeding. In that case, disclosure of known abuse would implicate the client’s constitutional rights to effective assistance of counsel.
abuse and its growing impact on larger and larger segments of the population; Part I analyzes this impact. Part II will consider whether tort law could effect an attorney's duty to report child abuse. Part III will analyze the effect of the ethical rules governing confidentiality on an attorney's ability to disclose child abuse when the information is obtained in the course of representation. Part IV will evaluate the application of mandatory reporting laws to attorneys. Finally, Part V will argue that, although attorneys should be encouraged to disclose child abuse in the appropriate circumstances, attorneys should not have a mandatory duty to report.

I. CHILD ABUSE IS A CONTINUING CRIME

Alexander was born in January of 1988 and Mason in March of 1992. The evidence reflected that the children had suffered inadequately explained injuries. In August 1994, the mother had taken Alexander to the hospital with a swollen right testicle and broken nose, injuries that were determined to be four days old. In November 1994, Alexander was taken to the hospital for another nose injury that the mother explained was caused by being hit by a ball. Alexander, however, did not say that he was hit by a ball. In December 1994, Alexander was hospitalized for a laceration to the forehead that the mother indicated (and Alexander reported to the treating doctor) occurred when he struck his head on a bookcase at school. According to the school guidance counselor, however, no such injury occurred at school. In February of 1995, Mason was hospitalized for a laceration to his forehead. The treating doctor found multiple bruises to his head, neck, stomach, penis, and buttocks, determined to have been "inflicted injuries."3

This quotation, taken from one of the Maine Supreme Judicial Court's more recent opinions upholding the termination of parental rights and responsibilities, describes the most distinctive attribute of child abuse—its ongoing nature.4 Child abuse is a pattern of behavior. "Child abuse is not simply a crime which occurs at a single point in time and then ceases; it is a past, present and future crime."5 This dynamic was first recognized in 19626 when a group of doctors published the

2. The types of child abuse differ. See U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1996: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM 2-7 (1998). Nonetheless, abuse can be broken down into four general categories: physical abuse, neglect, sexual abuse, and emotional abuse. See id. Neglect is the most commonly reported form and represented approximately 52% of the substantiated cases in 1996. Physical abuse accounted for 24% of substantiated cases and sexual abuse represented 12% of substantiated cases. Finally, emotional abuse made up another 6%, and 3% were victims of medical neglect. See id. Many of these children suffer more than one type of abuse. See id.


5. Stuart, supra note 4, at 246.

6. Although there were sporadic medical reports documenting suspicious combinations of injuries in the 1940s and 1950s, the 1962 article drew substantial public attention to the problem of child abuse. In 1974, the federal government became actively involved in the prevention of child abuse with the passage of The Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (codified at 42 U.S.C. §§ 5101-5107). The Act established the National Center on Child Abuse and Neglect to serve as a clearinghouse for information and research. The Act
seminal article, "The Battered Child Syndrome." The lead author, Dr. Kempe, explained that, "experiences with the repetitive nature of injuries indicate that an adult who has once injured a child is likely to repeat. . . . [T]he child must be considered to be in grave danger unless his environment can be proved to be safe." In later works edited by Dr. Kempe, doctors warned that:

[It] would appear from our investigations that the severe permanent damage associated with the "battered child syndrome" usually does not occur with the initial incident. Identification of abuse at this time thus offers an opportunity for intervention with the goal of preventing subsequent trauma and irreversible injury to the child.

The battered child syndrome has been widely accepted by the medical community; its ongoing nature is a critical component of the diagnosis. Child abuse is defined as "a multitude of nonaccidental physical and psychological traumas to children, in the vast majority of cases, over an extended period of time."

Dr. Kempe's introduction of the battered child syndrome as a medical diagnosis for child abuse has also been widely accepted in the courts. Many jurisdictions, including Maine, permit expert testimony on the battered child syndrome, finding such testimony to be both relevant and reliable. In one of the earlier decisions to discuss the syndrome, the Supreme Court of California recognized that:

also provided that states would receive federal funds if they met certain standards aimed at protecting children. Among the necessary requirements for states to receive federal funds were the enactment of child abuse reporting laws which would assure immunity and confidentiality to a reporter of child abuse, the enactment of procedures to conduct prompt and thorough investigations into allegations of maltreatment, the maintenance of a statewide system to ensure that child abuse cases were dealt with effectively, a guarantee that every child in abuse or neglect proceedings would be provided with a guardian ad litem, and a method of disseminating information about the problem of child abuse and neglect and available treatment programs. Although some states had enacted laws that imposed mandatory or permissive reporting of child abuse, for others, the 1974 Act encouraged a more comprehensive response to child abuse. See Douglas J. Besharov, Protecting Children from Abuse and Neglect: Policy and Practice (1988). See also Elizabeth D. Hutchinson, Mandatory Reporting Laws: Child Protective Case Finding Gone Awry?, 38 Soc. Work 56 (1993).

8. Id.
13. See State v. Koon, 730 So. 2d 503 (La. Ct. App. 1999) (holding evidence of victim's prior injuries relevant to intent requirement of second degree murder and evidence of prior injuries reliable as doctor had necessary credentials and his methodology was sound); United States v. Boise, 916 F.2d 497 (9th Cir. 1990) (finding evidence of battered child syndrome relevant to intent and absence of accident); State v. Nemeth, 694 N.E.2d 1332 (Ohio 1998) (holding trial court erred in prohibiting expert testimony on "battered child syndrome" in support of claim of self defense both because evidence was relevant and expert was reliable and listing states where expert testimony is admissible); State v. Moorman, 670 A.2d 81, (N.J. Super. Ct. App. Div. 1996) (collecting cases where battered child syndrome is recognized as having a reliable scientific basis).
[it] appears from the professional literature that one of the distinguishing characteristics of the battered child syndrome is that the assault on the victim is not an isolated, atypical event but part of an environmental mosaic of repeated beatings and abuse that will not only continue but will become more severe unless there is appropriate medicolegal intervention. 14

The repetitive nature of child abuse goes beyond the experience of the victim. A recurring theme in the child abuse literature is that abused children become abusive parents. 15 Estimations of the rate of intergenerational transmission of abuse range from 7 to 70%. 16 Although recently there has been some questioning of the reliability of the studies that indicate that there is an intergenerational transmission of abuse, 17 it is still the "premiere" hypothesis in the child abuse field to explain the causes of abuse. 18

Aside from its repetitive nature, there are other distinctive characteristics of child abuse which distinguish it from other crimes. 19 The victim is often too young or too intimidated to object. According to the data compiled by Child Protective Services agencies in 1996, more than half of the victims of child abuse were seven years old or younger, and one quarter were younger than four years old. 20 Recent studies indicate that of the 1,077 child abuse fatalities nationwide in 1996, children ages three and younger accounted for 76% of these fatalities. 21 The data also show that the offender is most often a person in a parental role. Seventy-seven percent of perpetrators of child abuse were parents of victims. An additional 11% were other relatives of the victim. 22

15. There are a number of theories which attempt to explain the intergenerational transmission of abuse. The social learning theory posits that behavior is learned through modeling (we observe and imitate the behavior of those around us) and instrumental learning (we learn by being rewarded for our actions). Therefore, social learning theory postulates that abused children learn to be aggressive, or, as it is commonly referred to, the child begins a "cycle of violence." See Athena Garrett and Heather Libbey, NATIONAL INSTITUTE OF JUSTICE, Part II (1997) Background Paper #2: Child Abuse Intervention Strategic Planning Meeting <http://www.ojp.gov/nij/childabuse/bg2.html>. The attachment theory states that the type of bond that develops between a child and care-giver effects the child's later relationships. Therefore, children who are neglected and abused do not develop secure attachments to their care-givers and this pattern carries over into adulthood. The theory is that the type of care-giving received as a child is the type the child expects and recreates in adulthood. See id. Finally, the ecological theory is a biological or genetic theory which assumes that a parent's predisposition to aggression or violence is inherited by a child. See Adam M. Tomison, Intergenerational Transmission of Maltreatment, NATIONAL CHILD PROTECTIVE CLEARING HOUSE, Issue Paper No. 6 (Winter 1996).
17. See id.
19. See, e.g., Stuart, supra note 4, at 248.
22. See id. at 2-14; see also U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3), 6-3 (1996) (concluding that 77.8% of perpetrators were birth parents, 13.6% were other parents or parent-substitutes, and 8.7% fell in the other category which included other family members, other unrelated adults and others).
The consequences of child abuse are severe. The physical effects include bruises, skin markings, cuts, and burns. Some children experience extreme physical injuries including brain damage and death, and other severe health complications. The effects of abuse are not limited to bodily harm. Many children experience Post Traumatic Stress Disorder, the symptoms of which include anxiety, nightmares, generalized fear response, depression, psycho-pathology, neurosis, character disorders, and trauma-specific fears. Often the abused child has separation problems, lack of empathy, low self-esteem, and temperament problems. Developmentally, abused children often suffer from low verbal, cognitive and motor abilities, language deficiencies, and regression and low performance on cognitive tasks. They also often struggle in school academically as well as in interpersonal interactions. Abused children may have less social competence; they may act out and display self-destructive behavior, physical aggression and antisocial behavior.

Not surprisingly, the child abuse victim is linked to future juvenile delinquency and adult criminality. A recent unpublished study by Maxfield and Widom found that child abuse and neglect increases the risk for juvenile arrest by 59%, adult arrest by 27%, and arrest for violent crime by 29%. Widom also found that abused and neglected children are at an increased risk of being arrested for sex crimes. A 1983 study found that approximately 75% of juvenile delinquents and prison inmates reported family histories of child abuse.

There are also serious economic repercussions of child abuse. Great expense is placed upon the child welfare systems and the public health organizations that attempt to care for these children. A 1988 study found that over 30% of child abuse victims had chronic health problems. The report concluded that if early intervention had prevented only 20% of the abuse and neglect reported in 1983, a minimum of ninety-seven million dollars could have been saved in initial hospitalization, mediation and foster care costs.

In 1996, child protective agencies in the fifty states and the District of Columbia investigated more than two million reports alleging abuse of more than three
COMPETING LIABILITIES

According to the National Child Abuse and Neglect Data System (NCANDS) 1996 data collection, there was an 18% increase in the number of cases of child abuse between 1990 and 1996.37 The results of the congressionally mandated National Incidence Study of Child Abuse (NIS) found even more dramatic increases.38 Between the 1986 NIS study and the 1993 NIS study, the estimated number of children who were abused and neglected increased 67% (from 931,000 children to 1,553,800). The estimated number of children who were seriously injured quadrupled from 141,700 in 1986 to 565,000 in 1993.40

In 1997, there were 15,239 requests for child abuse and neglect services in Maine.41 Of the 8,016 cases which were deemed appropriate for Child Protective Services, only 4,591 were assigned for services.42 The remaining 3,425 cases were never assigned due to a lack of resources.43 The number of children the state determined to be victims of child abuse and neglect increased by 23% between 1996 and 1997.

The child abuse victim is in a particularly vulnerable position in our society. The victim cannot “walk away” from the abuse; the victim is almost always dependent on the abuser for support and care. The consequences to the victim, as well as to society as a whole, are severe and far reaching. Most significantly, child abuse is almost always a repetitive or “continuing” crime; a past instance of abuse is a likely indicator of future conduct. These unique attributes influence and effect an attorney’s legal duties and ethical obligations when confronted with confidential information of abuse.

II. TORT LIABILITY FOR A FAILURE TO WARN

In the hypothetical set forth at the beginning of this article, attorney Adams believes that his client is abusing a child and inflicting significant injuries over time. Putting aside any ethical constraints imposed by rules of ethical conduct, does Adams run the risk of civil liability for failing to warn authorities or other family members of the abuse?

Historically, at common law there was no affirmative obligation to act for the protection of a third party. Over time, however, courts have modified and developed several exceptions to this rule which impose civil liability for a failure to warn third parties of potential harm. Specifically, professionals who have a special relationship with either the individual who poses the risk or the party at risk may owe a duty to warn of potential harm. According to the Restatement (Second) of Torts this duty proceeds as follows: “There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless a

37. See id. at 2-6.
39. See id. at 3-3.
40. See id. at 3-13.
41. See MAINE CHILDREN'S ALLIANCE, MAINES KIDS COUNT DATA BOOK 17 (1999).
42. See id.
43. See id.
special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct."^{44} The scope of "special relationship" is not defined. Instead, the Restatement sets forth examples of those relationships that rise to the level of a special relationship: parent-child, employer-employee, possessor of land or chattels-licensee, and an individual in charge of third persons with dangerous propensities.^{45}

Does the attorney-client relationship actually give rise to a "special relationship" that would impose an affirmative duty to act? No court has been confronted with this exact issue. Nonetheless, Tarasoff v. Regents of the University of California^{46} and Hawkins v. King County Rehabilitative Services;^{47} are cited by commentators as authority for the proposition that, under certain circumstances, an attorney might owe a duty to warn a third party even where the information was obtained as a result of a confidential communication.^{48}

In Tarasoff, Prosenjit Poddar, a student at the University of Berkeley, became enamored with another student, Tatiana Tarasoff. Tarasoff rejected his advances, and Poddar sought psychiatric help at the University. While in treatment, Poddar revealed to his psychiatrist that he intended to kill Tarasoff. The psychiatrist decided to have Poddar committed for observation. When the Campus police went to obtain him, however, the police concluded that he was rational and not a threat to Tarasoff. He was never admitted to the hospital for observation. Two months later, Poddar murdered Tarasoff. At no time were either Tarasoff or her parents warned of Poddar's threats.^{49}

Tarasoff's parents sued the university on the theory "that Tarasoff's death proximately resulted from defendants' negligent failure to warn [Tarasoff] or others likely to apprise her of her danger."^{50} The Superior Court rejected the plaintiffs' claim, concluding that the facts did not give rise to a cause of action against the therapist, the policemen involved or the Regents of the University of California as their employer.^{51}

In reversing the Superior Court, the California Supreme Court first made clear that considerations of policy weigh heavily in deciding when a duty of care is owed to a third party.^{52} Quoting Professor Prosser, the court explained,

[The assertion that liability must . . . be denied because defendant bears no "duty" to plaintiff "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct . . . [Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."

^{44}. Restatement (Second) of Torts § 315 (1965).
^{45}. See id. at §§ 316-319.
^{49}. See Tarasoff v. Regents of the Univ. of Cal., 551 P.2d at 339-41.
^{50}. Id. at 342.
^{51}. Id. at 340.
^{52}. See id. at 342.
Of those policy considerations to be evaluated, the court noted that the most important to establishing the existence of a duty of care is foreseeability—a defendant will owe a duty of care to those persons who are foreseeably endangered by his conduct.\textsuperscript{54} Turning to the merits of Tarasoff's claim, the court explained that at common law "as a general rule, one person owed no duty to control the conduct of another."\textsuperscript{55} The court went on to note that "the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the defendant and the dangerous person or the potential victim."\textsuperscript{56} The court then applied this "exception" to the facts at hand and concluded that the psychiatrist-patient relationship—by definition—created a special relationship that supported an affirmative duty of care to a third party at risk.\textsuperscript{57} Accordingly, in Tarasoff, the psychiatrist had a duty to warn the victim of the threats made against her even if, in doing so, the psychiatrist would have to breach his pledge of confidentiality to his client.\textsuperscript{58}

The court acknowledged the force of the defendants' argument that "free and open [and confidential] communication is essential to psychotherapy,"\textsuperscript{59} but concluded the public interest in safety from violent assault outweighed professional concerns for confidentiality.

In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest.\textsuperscript{60}

The only reported case to apply the reasoning in Tarasoff to an attorney-client relationship is Hawkins v. King County Rehabilitative Services.\textsuperscript{61} In Hawkins, a mother sued her son's attorney for failing to disclose at a bail hearing the contents of her son's psychiatric report, which indicated that the boy posed a threat to himself and others.\textsuperscript{62} The boy was released and, eight days later, assaulted his mother and attempted suicide. The mother sued the son's attorney, alleging that the attorney had a common law duty to warn foreseeable victims of the threat the boy posed to third parties.\textsuperscript{63}

The Washington Appeals Court rejected the mother's suit on the facts, distinguishing the case from Tarasoff.\textsuperscript{54} The court concluded that the potential victim (the mother) was aware that her son might be dangerous and, because the attorney had no specific knowledge of an intended assault, the attorney did not have a duty.

\textsuperscript{54} See id.
\textsuperscript{55} Id. at 343.
\textsuperscript{56} Id. at 343-44.
\textsuperscript{57} See id. at 344-45.
\textsuperscript{58} See id. at 347.
\textsuperscript{59} Id. at 346.
\textsuperscript{60} Id. at 347-48.
\textsuperscript{61} 602 P.2d 361 (Wash. Ct. App., 1979).
\textsuperscript{62} See id. at 363.
\textsuperscript{63} See id.
\textsuperscript{64} See id. at 365.
to warn. The court, however, embraced in theory the concept of an affirmative duty to warn on the part of an attorney. The court recognized that there is “common law support for the precept that attorneys must, upon learning that a client plans an assault or other violent crime, warn foreseeable victims.” The court went further and noted that Washington precedent suggested a “willingness to limit the attorney’s duty of confidentiality when the values protected by that duty are outweighed by other interests necessary to the administration of justice.” The court discussed the difficulty in balancing the “public interest in safety from violent attack” against the public interest in securing proper resolution of legal disputes without compromising a defendant’s right to a loyal and zealous defense. The court concluded that, “the obligation to warn, when confidentiality would be compromised to the client’s detriment, must be permissive at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person.”

The Hawkins court did not analyze whether an attorney-client relationship rose to the level of a “special relationship.” Rather, it proceeded directly to a discussion of what justifies a disclosure of confidential communications. This omission suggests that the court concluded without discussion that the attorney-client relationship automatically rises to the level of a special relationship. Given the court’s reasoning, on different facts—namely, where the attorney was the only person with knowledge of the potential harm—it seems likely that the Washington court could recognize a duty to warn. Notwithstanding the court’s ultimate conclusion, the Hawkins case sets forth the rationale for concluding that the attorney-client relationship is a special relationship and that, in fact, an attorney may be held accountable for a failure to warn of such violence, even if the information is obtained in the course of the attorney-client relationship.

There are only a few cases in Maine which address the general issue of a duty of care to a third party. Two cases of particular significance, Joy v. Eastern Maine Medical Center and Flanders v. Cooper, consider whether a medical professional has a duty to third parties.

In Joy v. Eastern Maine Medical Center, the Maine Supreme Judicial Court sitting as the Law Court held that the trial court erred in ruling that, as a matter of law, a physician does not have a duty of care to a third party. In Joy, the plaintiff was driving his motorcycle when he was involved in a collision with another driver who was returning from the emergency room where he had been treated for an eye abrasion and had been given an eye patch. The plaintiff alleged, inter alia, that Eastern Maine Medical Center and an emergency room physician were negligent in failing to warn the patient not to drive with the eye patch. The trial court

65. See id. at 365-66.
66. Id. at 365.
67. Id.
68. Id.
69. Id.
70. 529 A.2d 1364 (Me. 1987).
73. See id. at 1364-65.
74. See id. at 1365.
granted the defendants' motion for summary judgment implicitly finding that, even if the hospital and physician may have had a duty to warn the patient, that duty of care did not extend to a person that was injured by the patient.\textsuperscript{75} The Law Court rejected this "rigid conception of duty"\textsuperscript{76} and found that plaintiff had stated a claim for relief on the theory that a physician has a duty to third parties (the general driving public) as well as to the patient to warn the patient of his or her limited abilities to drive.\textsuperscript{77}

In \textit{Flanders v. Cooper}, the Law Court addressed the issue of "whether a health care professional whose negligent treatment of a patient induced false memories of sexual abuse by a third party owed a duty of care to that injured party."\textsuperscript{78} In declining to recognize such a duty, the court first noted that factors other than foreseeability influence the recognition of a duty of care.\textsuperscript{79} The Law Court went on to distinguish \textit{Joy}, noting that there was no claim in \textit{Joy} that the treatment for the eye abrasion was negligent. Rather, in \textit{Joy}, the court was concerned with the doctor's negligence in failing to warn the patient of his limited vision as a result of the eye patch.\textsuperscript{80} The court also distinguished \textit{Tarasoff v. Regents of University of California} noting that there too, the duty to warn did not implicate medical judgments as to the appropriate care of the patient.\textsuperscript{81} Unlike those cases, the court concluded that "the duty that Flanders advocates is a duty of medical treatment that goes to the core of the relationship between a patient and a health care professional."\textsuperscript{82} To recognize such a duty would, in the view of the court, restrict treatment choices and intrude directly on the professional relationship.\textsuperscript{83}

Although the court was concerned that the imposition of a duty of care to the third party would be a severe intrusion on the professional-patient relationship, it was also concerned that the "recognition of the duty urged by Flanders would undermine laws enacted by the Legislature to enhance efforts to uncover and to investigate possible instances of child abuse."\textsuperscript{84} The court did not want the imposition of a duty of care to the alleged abuser to serve as a disincentive to the detection and treatment of abuse.\textsuperscript{85}

\textit{Flanders} could be read broadly to suggest that the court would hesitate to impose a duty of care on a third party when that duty would interfere with a professional-client relationship. As with the medical profession, there are parallel concerns in the legal profession that imposing a duty of care would impermissibly interfere with the attorney-client relationship. However, the court's rejection of a duty of care was driven in part by its overriding concern with protecting children. If the court were confronted with a situation where an attorney's failure to act allowed a child to suffer great harm, it might conclude that a duty of care should be

\textsuperscript{75} See \textit{id}.
\textsuperscript{76} Id.
\textsuperscript{77} See \textit{id} at 1366.
\textsuperscript{78} \textit{Flanders v. Cooper}, 1998 ME 28, ¶ 3, 706 A.2d 589, 590.
\textsuperscript{79} See \textit{id} ¶ 4, 706 A.2d at 590.
\textsuperscript{80} See \textit{id} ¶ 5-6, 706 A.2d at 590.
\textsuperscript{81} See \textit{id} ¶ 7, 706 A.2d at 590-91.
\textsuperscript{82} Id. ¶ 8, 706 A.2d at 591.
\textsuperscript{83} See \textit{id}.
\textsuperscript{84} Id. ¶ 9, 706 A.2d at 591.
\textsuperscript{85} See \textit{id} at ¶ 10, 706 A.2d at 591-92.
imposed in light of the overwhelming number of abused children, as well as the extent of the damages inflicted on these children. In addition, on other occasions the court has been clear that whether a duty of care exists "necessarily involves considerations beyond the factual determination that a particular injury was a foreseeable consequence of some particular conduct . . . [and] is in turn dependent on recognizing and weighing relevant policy implications." Given the court's willingness to evaluate the existence of a duty of care with an eye towards policy, as well as its limited recognition that there can be a duty of care to a third party, the court could conclude that a duty of care exists between an attorney and third parties at risk as a result of the client's potential violent conduct.

With regard to the specific issue of potential civil liability for an attorney who fails to warn of her client's child abuse, there is no clear guidance. It does appear, however, that the imposition of civil liability remains a possibility for an attorney who does not warn authorities about the abuse of a child.

III. THE CONFIDENTIALITY RULES

Under the scenario facing attorney Adams, even if he were not concerned that a failure to warn of abuse could expose him to tort liability, Adams might feel a moral obligation to disclose the abuse. When the information of the abuse is gained in the course of Adams's legal representation of Brown, Adams would need to carefully consider his ethical obligations under the professional rules of conduct in deciding whether disclosure would be permissible. This section is devoted to an analysis of the impact of ethical rules on an attorney's ability to make a report of child abuse.

Historically, an overriding concern of the legal profession has been that communications between an attorney and client be held confidential. Without such confidentiality, it is argued, the attorney-client relationship would be irreparably undermined. This concern with confidentiality is reflected in both substantive areas of the law (evidentiary rules), as well as the ethical rules attorneys must comport with in order to remain licensed members of the profession. The evidentiary rules are narrow—they can serve to protect the client from having information pertaining to the client's representation disclosed in the courtroom. The ethical rules, by contrast, are much more expansive and require that the attorney keep information obtained during the course of representation confidential, subject to a few limited exceptions.

A. Evidentiary Attorney-Client Privilege

Maine Rule of Evidence 502 provides: "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . ." The privilege is an evidentiary rule—in other words,

86. See id., ¶ 4, 706 A.2d at 590 (quoting Cameron v. Pepin, 610 A.2d 279, 282 (Me. 1992)).
88. ME. R. EVID. 502(b). The privilege historically belonged to both the attorney and the client. Today, however, the privilege lies exclusively with the client. If the client waives the privilege, the attorney may not assert it and the attorney must testify to the communications. See Stuart, supra note 4, at 251.
communications protected by the privilege cannot be compelled in court. Specifically, the rule protects against the in-court disclosure of communications made in confidence by a client to the lawyer, so long as the communications pertain to the subject of legal representation. Therefore, for example, if an attorney who was representing a wife in a custody dispute learned from the wife that she had abused her children, the client could invoke the privilege and keep the attorney from being compelled to present in-court testimony about that information. The only exception to this rule would be if the wife actually sought advice or assistance from the attorney on how to commit the crime itself. This is termed the crime-fraud exception and it is recognized in every state. The exception applies to both communications concerning future crimes and fraud as well as wrongful acts already in progress.

Because the evidentiary rules of privilege only address the in-court compulsion of testimony, the evidentiary rules have no bearing on disclosure of abuse to civil authorities. Therefore, whether an attorney in Maine can disclose information pertaining to a client's abuse of a child to civil authorities is not affected by evidentiary rules even when the knowledge of abuse was gained in the course of

89. Two justifications for the attorney-client privilege are asserted: utilitarian and humanistic. The utilitarian justification assumes that clients need fully informed legal advice in order to be fully protected. By protecting communications from disclosure, clients are encouraged to reveal all relevant information and, therefore attorneys, once they know all critical information, are in the best position to offer legal advice and legal representation. It is also an underlying assumption that, given the comfort and trust between lawyer and client as a result of the privilege, clients will seek legal advice about questionable conduct. The lawyer will then be able to counsel the client to seek resolution within the confines of permissible, legal conduct, thus discouraging the client from illegal conduct.

The humanistic or rights-based approach concerns the client's privacy, autonomy, and dignity, giving recognition to both the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to effective assistance of counsel in criminal cases. The reasoning is that "an accused should not be convicted on the basis of a forced disclosure of the client's privileged communications to his lawyer. Forcing the accused's lawyer to testify concerning those communications would be an indirect way of requiring the accused to testify against himself, and would deny him effective assistance of counsel." Leslie C. Levin, Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others, 47 RUTGERS L. REV. 81, 86; see also To Disclose or Not to Disclose: The Dilemma of the School Counselor, 13 MISS. C. L. REV. 323, 324 (1993); Roger C. Cramton & Lori P. Knowles, Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited, 83 MINN. L. REV. 63, 102-04 (1998).


91. See Cramton & Knowles, supra note 89, at 103. See, e.g., Purcell v. District Attorney for Suffolk County, 676 N.E. 2d 436 (Mass. 1997). In Purcell, the client informed the attorney that he intended to burn down a building where he had recently been fired as a maintenance man. See id. at 437-38. The attorney called the authorities, who found arson materials and charged the client with attempted arson. See id. at 438. The attorney was then subpoenaed to testify at trial about what his client had told him about the arson. See id. The attorney refused to testify on the basis of the attorney-client privilege. See id. Because the court concluded that the client's statements were made in the course of obtaining legal advice, rather than obtaining assistance in committing a crime, the communications were protected by the privilege. See id. at 440-41.

92. See Levin, supra 89, at 86-87.
legal representation and pertained to the subject of representation. Rules of professional conduct, on the other hand, speak directly to this issue and govern an attorney's ability to make a report of a client's abuse of a child based on otherwise confidential information.

B. Model Code and Model Rules

The rules of professional conduct provide that information gained by an attorney in the course of representation must be kept confidential and may not be revealed in any forum, subject to limited exceptions. Although justifications for the rule of confidentiality abound, the principle rationale is that "[T]he observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance." 93

The ethical rules relating to the confidentiality of client communications have been promulgated in three model codes issued by the American Bar Association: the Canons of Professional Ethics in 1908, the Model Code in 1969, and the Model Rules in 1983. The codes serve as recommendations to guide each state in its adoption of a code of professional conduct. 94

The Model Code of 1969 contained a general prohibition on disclosure of client's confidences or secrets. 95 Under the Code, a confidence referred to information protected by the attorney-client privilege under applicable law. 96 Secrets referred to other information gained in course of the professional relationship. 97 Secrets were considered to be either information that the client requested be kept confidential or information that would be embarrassing or detrimental to the client if it were revealed. 98 In an exception to the general mandate of confidentiality, the Code provided that "[a] lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime." 99 The Model Code further permitted an attorney to reveal otherwise confidential information if required by a court or by law. 100

93. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt 2 (1997).
94. Each state has its own code of professional conduct; some states are modeled after the Model Code while others find guidance in the Rules. These are binding rules that govern the practice of law—an attorney who fails to comply with the rules risks punishment ranging from reprimand to the revocation of her professional license.

The Maine Bar Rules provide in relevant part:
Rule 1. Scope of Rules.
(a) Jurisdiction. These rules govern the practice of law by attorneys within this State and the conduct of attorneys with respect to their professional activities and as officers of the Court.
Rule 3.1 Scope and Effect
(a) This Code shall be binding upon attorneys as provided in Rule 1(a). Violation of these rules shall be deemed to constitute conduct 'unworthy of an attorney' for purposes of 4 M.R.S.A. § 851 and Rule 7(e)(6)(A).

ME. BAR. R. 1(a), 3.1 (a).
95. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(B) (1969).
96. See id. at DR 4-101(A).
97. See id.
98. See id.
99. Id. at DR 4-101(C)(3).
100. See id. at DR 4-101(C)(2).
When the Model Code was replaced by the Model Rules, the section relating to client confidences was notably altered. In its final form, a strict approach to disclosure was adopted—Rule 1.6 permitted disclosure of confidential information only when necessary to prevent a crime that would result in imminent death or substantial bodily harm.101 "A lawyer may reveal [confidential] information to the extent that the lawyer reasonably believes necessary: To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."102

The adoption of Rule 1.6 was a striking departure from the Model Code. Under the Model Code, there was no restriction on the type of crime that permitted disclosure. The Model Rules narrowed the categories; only confidential information pertaining to a crime that could cause imminent death or substantial bodily harm could be revealed. Moreover, the Rules introduced the element of "reasonable belief" to the analysis.103

C. Maine's Ethical Rules

The Maine Code of Professional Responsibility is based on the Model Code, although there are important variations. With regard to the confidentiality provisions, the Maine Code is unique. Rule 3.6(h) states, "except as permitted by these rules or as required by law or by order of court, a lawyer shall not, without the informed written consent of the client, knowingly reveal a confidence or secret of the client; [or] use such confidence or secret to the disadvantage of the client...."104

Confidences and secrets, as in the Model Code, include privileged information and information specifically requested to be held in confidence: "As used herein ‘confidence’ refers to information protected by the attorney-client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client."105 Unless there is an independent legal requirement or the attorney is ordered by the court, the attorney must not disclose confidential information.106

101. See HAZARD AND HODES, supra note 87, § 1.6:302.

102. MODEL RULE OF PROFESSIONAL CONDUCT, 1.6(b)(1) (1998).

103. Model Rule 1.6 has generated significant debate. See R.W. Nahstoll, The Lawyer’s Allegiance: Priorities Regarding Confidentiality, 41 WASH & LEE L. REV. 421 (1984); Albert Alschiler, The Preservation of a Client’s Confidences: One Value Among Many or a Categorical Imperative?, 52 U. COLO. L. REV. 349 (1980); Marvin E. Frankel, The Search for Truth Continued: More Disclosure, Less Privilege, 54 U. COLO. L. REV. 51 (1982). Much of the commentary has been negative. Such sentiment is reflected by the authors of the Law of Lawyerly: “although Rule 1.6 as finally adopted reflects the laudable desire to minimize exceptions to confidentiality, it goes too far. Many lawyers will chafe under a rule that threatens to punish them if they do what is morally right. The public, when it understands these implications, will not praise the profession for granting maximum protection to clients, but will condemn the profession for imperiously decreeing that its ‘ethics’ supersede prevailing notions of morality.” HAZARD AND HODES, supra note 87, at § 1.6:302.

104. ME. BAR. R. 3.6(b)(1).

105. Id. R. 3.6(b)(3).

106. The section "as required by law" immediately removes a lawyer from the obligations of Rule 3.6. For example, if there were a legislative duty to report child abuse, Rule 3.6 would not apply because there would be an independent legal requirement.
Rule 3.6(h)(4) provides the exception to the general duty of confidentiality. Rule 3.6(h)(4) states "this provision is not violated by the disclosure of a client’s intention to commit a crime or the information necessary to prevent the crime or to avoid subjecting others to risk of harm."\(^{107}\) The intention of this exception is consistent with the Model Code and the Model Rules; lawyers must not be prohibited from preventing future crimes. The exception, however, is considerably broader than the exception in both the Model Code and the Model Rules, and has significant implications on whether an attorney can report her client’s abuse of a child.

According to the language of the rule, if an attorney knows that his or her client intends to abuse a child in the future (i.e., the client tells the attorney that he or she is going to abuse his or her child that evening), the attorney may reveal the otherwise confidential information.\(^{108}\) Child abuse is a crime, and a lawyer does not violate ethical obligations by the disclosure of a client’s intent to commit a crime or the information necessary to prevent the crime.\(^{109}\)

Moreover, the rule allows for disclosure of information that would avoid subjecting others to a risk of harm. Thus, the intended abuse need not rise to the level of a crime for the attorney to have the discretion to disclose information. Therefore, as to future conduct, no ethical problem is presented under Maine Bar Rule 3.6; the facts fall squarely within the future crime exception and an attorney may disclose otherwise confidential information.

The next and more difficult, albeit likely, question is whether an attorney, who knows his or her client has abused a child in the past and believes that the client will continue to commit such abuse, may report the abuse when it is based on otherwise confidential information. Under the ethical rules, if a client reveals that he or she robbed a bank three years ago, this information could not be revealed since it does not reveal an intention to commit a future crime or future harm. However, in the case of child abuse, do past instances of abuse constitute an appropriate basis for disclosure? Because child abuse is best understood as a continuing crime, under Maine’s Rule 3.6, an attorney should be able to report abuse without violating his or her ethical obligations even when the information pertains to past instances of abuse.

Generally, as discussed previously, the rules of confidentiality are read to preclude attorneys from revealing past misconduct without client permission. However, the nature of the crime is such that past conduct is an indicator of future behavior. If a lawyer knows of past instances of abuse, this information implicates the present and the future as well; the crime is inherently ongoing. "[O]ne of the distinguishing characteristics of the battered child syndrome is that the assault on the victim is not an isolated, atypical event but part of an environmental mosaic of repeated beatings and abuse that will not only continue but will become more severe unless there is appropriate medicolegal intervention."\(^{110}\) Therefore, in the case of child abuse, it is appropriate to view past instances of abuse as indicating a continuing course of conduct. Under this reasoning, disclosure of information

\(^{107}\) ME. BAR. R. 3.6(h)(4).
\(^{108}\) Unlike other states, like Wisconsin where the ethical rules impose a mandatory duty to disclose (shall), Maine Rule 3.6 appears to be permissive.
\(^{109}\) ME. BAR. R. 3.6(h)(4).
regarding past abuse would not be precluded by confidentiality rules because child abuse is a continuing crime that implicates the future—specifically, the client’s future intentions to commit a crime.

The text of Maine’s Rule supports this conclusion. As noted, the rule first allows for disclosure as to “intent” to commit a crime—clearly a forward looking rule. This language would not encompass past perpetrations of a crime. The rule goes on to state, however, that information necessary to prevent a crime or to avoid subjecting others to risk of harm may also be disclosed.111 Where evidence of a past crime demonstrates a future risk of harm, the rule would appear to permit disclosure. Therefore, in the case of child abuse, where the past informs the future, the disclosure of past instances of abuse could protect the child from future risk of harm and should be permissible under the rules.

This conclusion is consistent with the ethics committees of other states that have considered the question of whether an attorney may disclose otherwise confidential information to make a report of child abuse.112 Six ethics panels consider such reporting to be consistent with the attorney’s ethical obligations.113

In a 1992 North Carolina opinion, the State Bar stated that an attorney may disclose confidential information to report suspected past and potentially continuous child abuse. The panel stated that “[i]f the lawyer believes that the clients intend to continue the abuse, disclosure would be authorized, in the lawyer’s discretion, under the exception to the confidentiality rule regarding a client’s intention to commit a crime.”114 The ethics panel did not discuss what level of knowledge or certainty would be required for an attorney to report child abuse. Rather, the panel seemed to leave such decisions to the discretion or conscience of the attorney.115

Not surprisingly, North Carolina’s ethical rules are based on the more permissive Model Code. The confidentiality exceptions to the North Carolina Ethics Rules permit disclosure of confidential information when the client is likely to commit a crime. The more generous exceptions of the Model Code give ethics committees and the licensed Bar greater flexibility in deciding whether to make a report free from-potential ethical violations.

111. See id.

112. The state ethical rules, which govern confidentiality and disclosure, vary between the disclosure necessary to prevent a crime to the more substantial requirement of disclosure only when necessary to prevent death or serious bodily harm. Child abuse falls under either rule, however. It would be irresponsible to argue that child abuse does not have the ability to threaten serious bodily harm or even death:

The limitation to serious future crimes probably has little necessary impact in the child abuse area with respect to substantial instances of abuse. Courts or ethics panels can, without distorting the words beyond their reasonable meaning, define the impact of abuse, whether involving physical trauma or sexual exploitation with its accompanying psychological damage, as constituting serious injury to these particularly vulnerable victims.

Mosteller, supra note 90, at 278.


115. See id.
In an early decision, New Jersey issued an ethics opinion ruling that the attorney's duty of confidentiality does not apply to the continuing crime of child abuse when the facts demonstrate a propensity to continue the crime.\(^\text{116}\) Interestingly, New Jersey's ethical rule governing confidentiality is based on the more restrictive Model Rules and only permits disclosure of information when the attorney reasonably believes it "necessary to prevent the client from committing a criminal act... that is likely to result in death or substantial bodily harm."\(^\text{117}\) The New Jersey ethics committee's decision demonstrates that even the narrow exceptions to the general rule of confidentiality still permit the disclosure of past instances of abuse without violation of ethical rules.

Similarly, in Wisconsin, the ethics committee held that the lawyer must report information regarding child abuse with or without client consent, so as to prevent a crime when the lawyer reasonably believes that the abuse will continue.\(^\text{118}\) As in New Jersey, Wisconsin has a modified version of the Model Rule 1.6 which provides that a lawyer "shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act... likely to result in death or substantial bodily harm..."\(^\text{119}\) However, unlike the New Jersey rule, the Wisconsin rule is mandatory; the attorney must reveal the information.

When presented with the question of whether an attorney may reveal past instances of child abuse, the ethics committees seem to take a permissive approach. Regardless of the confidentiality rules in place, whether they are based on the Model Code or the Model Rules, the committees recognize child abuse is a unique crime; the crime is not limited to specific instances of conduct. The committees apparently permit disclosure of otherwise confidential information when past and future conduct are fundamentally intertwined.\(^\text{120}\)

Academic treatment of this issue also seems to recognize that the ethical rules for attorneys must allow the discretion to report. In *The Law of Lawyering* child abuse serves as an example of a "future or continuing" crime.\(^\text{121}\) The authors borrowed a hypothetical case presented to the Massachusetts Bar Association Ethics Committee to consider where disclosure was permissible.\(^\text{122}\) In the case presented, the lawyer formerly represented a client who pled guilty to charges of child molestation and served a sentence of probation. The lawyer learned that the former client was working at a camp for troubled and abused children. The lawyer que-


\(^{117}.\) N.J. RULES OF PROFESSIONAL CONDUCT 1.6(b)(1) (1992).


\(^{119}.\) Wis. Sup. Ct. R. 20:1.6(b).

\(^{120}.\) Continuing crimes have been included in the "future crime exception" to the confidentiality rules. See HAZARD AND HODES, supra note 87, at § 1.6: 303-1. In one such example, the New York City Bar Association Ethics Committee was asked to consider whether an attorney, who discovered his client had become a fugitive and had learned where the client was hiding, must reveal his client's whereabouts. The committee avoided the decision of whether flight was a crime but did state that, "if it is a crime, then the client has disclosed to the attorney the commission of a crime and has implicitly expressed an intention to continue committing the crime." Committee on Professional & Judicial Ethics of Association of Bar of New York, Op. No. 81-13 (1981). In such case, a lawyer may reveal a future or continuing crime.

\(^{121}.\) See HAZARD AND HODES, supra note 87, at § 1.6:303-1.

ried the ethics committee whether he could reveal that information to the camp. The authors indicated that where a lawyer knows of past instances of abuse and thought it "reasonably likely" that further offenses of abuse would be committed, the lawyer should have the discretion to disclose the information.

Agreeing with the Massachusetts Ethics Panel's conclusion, the authors indicated that where a lawyer knows of past instances of abuse and thought it "reasonably likely" that further offenses of abuse would be committed, the lawyer should have the discretion to disclose the information.

In reviewing the scope of the future harm exception to confidentiality rules, the Restatement on the Law of lawyering suggests that "these Sections do not apply to a past act of a client, no matter how clearly illegal and serious, if the consequences of the act have already occurred." This statement, however, does not deny the attorney the right to disclose known past incidents of abuse. In the case of child abuse, past acts of abuse have grave present and future consequences for the child and society. As the Restatement makes clear, "[A] lawyer may take preventative measures under this Section even though some act has already occurred if the consequences of the act have not yet been inflicted on the victim." In the case of child abuse, the consequences extend far from a single incident of violence. Disclosure is therefore consistent with the Restatement.

D. Reasonable Belief

Assuming that disclosure is ethical and that the attorney is the only person who knows of the abuse, how is an attorney to decide what constitutes a sufficient indication that past abuse is a predicate for future abuse; what standard of proof is required to disclose? In other words, how sure does an attorney need to be that a child has been abused by her client? Maine Bar Rule 3.6(h)(4) does not define the level of cognition necessary to trigger the rule's application and permit disclosure. It simply states, "this provision is not violated by the disclosure of the client's intention to commit a crime...." As noted previously, the language of Model Rules suggests that confidences may be revealed according to a standard of "reasonable belief." The Model Rules define "belief or believes" to be "that the person involved actually supposed the facts in question to be true. A person's belief may be inferred from the circumstances." "Reasonable belief"... when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Taking a

123. See id.
124. See Hazard and Hodes, supra note 87, at §1.6:303-1 ("[I]t is imperative that a lawyer... have discretion to disclose, so that he can quietly use the threat of disclosure to arrange for the former client to remove himself from the camp.").
126. Id. (emphasis added).
127. ME. BAR. R. 3.6(h)(4),
128. See id.
129. "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act...." MODEL RULES OF PROFESSIONAL CONDUCT 1.6(b) (1998). Even though the reasonable belief modifies the necessity of disclosure, it indicates discretion on the part of the attorney and therefore can be read to apply to the less restrictive 'reasonable belief' standard to level of knowledge.
130. MODEL RULES OF PROFESSIONAL CONDUCT 9 (1997).
131. Id.
conservative approach, if a standard of reasonable belief were read into Maine Rule 3.6(h)(4), an attorney may report the information where she infers from the circumstances that her client is abusing a child, even though the attorney does not have firm factual evidence. This standard seems an appropriate balance between the requiring undisputable evidence prior to disclosure and a recognition that an attorney will rarely be given definitive evidence on this issue.

There is no doubt that many lawyers find these subjective and inferential standards discomforting. 132 Attorneys are trained to disbelieve, to question the truth. This is no excuse, however, for suspended belief in the case of preventing future harm. As the authors of The Law of Lawyering stated:

[A]lthough his professional role may require a lawyer to take a detached attitude of unbelief, the law of lawyering does not permit a lawyer to escape all accountability by suspending as well his intelligence and common sense . . . all authorities agree—even those who take the most unqualified positions on the duty of a lawyer zealously to serve his clients—that there comes a point where only brute rationalization, moral irresponsibility, and pure sophistry can support the contention that the lawyer does not "know" what the situation is. 133

IV. LEGISLATIVE ATTEMPTS TO COMBAT CHILD ABUSE

Thus far, this Article has argued that attorney Adams has the discretion to make a report of child abuse to civil authorities without running afoul of his ethical obligations. Given the nature of child abuse, disclosure of otherwise confidential information is permissible under the rules of professional conduct, and although such disclosure would interfere with the attorney-client relationship, the interference is justifiable on the theory that attorneys must have the ability to reveal information which subjects others to risk of harm. Some state legislatures, however, have begun to include attorneys in lists of professionals who are subject to a mandatory duty to report child abuse. The trend to adopt a legislatively mandated duty to report, which would deny an attorney any discretion not to report abuse, would significantly and detrimentally alter the attorney-client relationship. It might also have the effect of thwarting the very goal of such legislation; namely, the protection of children.

A. The Child Abuse Reporting Laws

In recognition of the pernicious effects of child abuse, and with the goal of increasing protection for children subject to abuse, every state in the nation has some form of statutory reporting requirements. 134 The statutes mandate that cer-

132. HAZARD AND HODES, supra note 87, at § 403 (Professional Unbelief versus Personal Knowledge).
133. Id.
tarn professionals, typically professionals who have some contact with children, are required to report suspected or known cases of child abuse to either civil or criminal authorities. Originally the statutes were limited to the medical profession and only required the reporting of serious physical injuries or non-accidental injuries. Over time, the statutes have come to include a greater variety of persons who have contact with children. Similarly, the types of conditions that must be reported have grown to include physical neglect, sexual abuse, and emotional maltreatment. Currently, there seems to be a trend to impose a duty on "all persons" or "anyone" who suspects child abuse. To encourage reporting, all states grant immunity from civil or criminal liability for those who make a report as long as the report was made in good faith.


135. See Rosencrantz, supra note 23, at 339.

136. See id. at 340.

137. For example, in Kentucky the statute reads: "Duty to Report Dependency, Neglect or Abuse (1) Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made . . ." Ky. REV. STAT. ANN. § 620.030 (Baldwin 1996) (emphasis added). Oklahoma's statute begins by specifically including certain medical professionals and teachers of children under 18 and then in subsection (d) states "every other person having reason to believe that a child under the age of 18 years has had physical injuries . . . shall report the matter promptly." OKLA. STAT. ANN. tit. 10, § 7103 (West 1996) (emphasis added). See also DEL CODE ANN. tit. 16, § 903 (1998); FLA. STAT. ANN. § 39.201 (West Supp. 1998); IOWA CODE § 16-1619 (1998); IND. CODE ANN. § 31-33-5-1 (West 1998); MD. CODE ANN., FAM. LAW § 5-705 (1998); NEB. REV. ST. § 28-711 (1998); N.H. REV. STAT. ANN. § 169-C:29 (1998); N.J. STAT. ANN. § 9:6-8.10 (West 1993); N.M. STAT. ANN. § 32a-4-3 (Michie 1998); N.C. GEN. STAT. § 7B-301 (1999); OR. REV. STAT. § 419B.010 (1998); R.I. GEN. LAWS §§ 40-11-3(1998); TENN. CODE ANN. §§ 37-1-403 (1998); TEX. FAM. CODE ANN. §§ 261.101 (West 1996 & Supp. 1998); UTAH CODE ANN. §§ 62A-4a-403 (1998); WASH. REV. CODE §§ 26.44.030 (1997 & Supp. 1999); W. VA. CODE § 49-6A-2 (1998); WIS. STAT. § 48.981 (1997 & Supp. 1998); WYO STAT. ANN. § 14-3-205 (1998).

The same professionals for whom reporting is mandatory are often also the beneficiaries of a statutory privilege to keep their client's confidences and secrets confidential. To address this apparent conflict, all states, except New Jersey, have statutorily waived certain privileged communications for cases of reporting child abuse. These abrogation provisions typically include physician-patient, psychotherapist-client, clergyman-penitent, and husband-wife privileges and allow for the reporting of child abuse.

Statutes in twenty-one states subject attorneys to a statutory duty to report known or suspected child abuse. Three of these states—Mississippi, Nevada, and Ohio—have statutes which explicitly include attorneys among the groups subject to reporting requirements. However, the Ohio statute goes on to exempt attorneys from the reporting requirement if the information is received in the attorney-client relationship. Similarly, in Nevada, attorneys are mandatory reporters unless the attorney "has acquired the knowledge of abuse or neglect from a client who is or may be accused of the abuse and neglect." Given these caveats, attorneys are not mandatory reporters when it comes to their clients. Mississippi, on the other hand, seems to require reporting no matter what the circumstance. The exact intent of the Legislature, however, is unclear. All the statute provides is that "the reporting of an abused or neglected child shall not constitute a breach of confidentiality." Although this language seems to indicate an intent to require attorneys to report regardless of where the information came from, the language is ambiguous.

The other eighteen states that include attorneys as mandatory reporters do so through language that imposes a duty on "any person" or "any person, including but not limited to" or "any other person." Of these states, treatment of confi-
dentiality varies, ranging from explicit statements that exempt attorneys from reporting when the information is gained in a professional relationship\(^{148}\) to statement which indicate that confidentiality provisions will not exempt attorneys from reporting.\(^{149}\)

**B. Maine's Reporting Requirements**

In Maine, child abuse reporting requirements are governed by 22 M.R.S.A. § 4011. Maine does not impose a generalized duty on "all persons" or "anyone" to report known or suspected child abuse. Any person, however, may make a report if "that person knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected."\(^{150}\) There is a broad range of professionals, however, who, when acting in their professional capacity, must report known or suspected abuse or neglect.\(^{151}\) The information is to be reported to the Department of Human Services or the administrator of the institution, agency, or facility immediately.\(^{152}\) If any person, required by law to report, knows or has reasonable cause to suspect child abuse by a person other than the child's caretaker, a report must be made to the District Attorney.\(^{153}\) As the mandatory reporting law conflicts with some preexisting privileged communications, section 4015 abrogates the husband-wife, physician and psychotherapist-patient privileges that are set forth in the Maine Rules of Evidence and by statute.\(^{154}\) Accordingly, the privilege to


\(^{151}\) See id. § 4011:

1. Persons mandated to report suspected abuse or neglect. 1. Reasonable cause to suspect. When, while acting in a professional capacity, an adult who is a medical or osteopathic physician, resident, intern, emergency medical services person, medical examiner, physician's assistant, dentist, dental hygienist, dental assistant, chiropractor, podiatrist, registered or licensed practical nurse, teacher, guidance counselor, school official, social worker, court appointed special advocate or guardian ad litem for the child, homemaker, home health aide, medical or social service worker, psychologist, child care personnel, mental health professional, law enforcement official, state fire inspector or chair of a professional licensing board that has jurisdiction over mandated reporter knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected, that person shall immediately report or cause a report to be made to the [Department of Human Services].

\(^{152}\) Id. A report of known or suspected child abuse must be made immediately by telephone to the department. If requested by the department, a written report should be submitted within forty-eight hours. See id. § 4012(1). Section 4014 guarantees immunity from liability to any person who reports or participates in an investigation or proceeding and does so in good faith. See id. § 4014(1). Furthermore, Subsection 3 grants a rebuttable presumption of good faith. See id. § 4014(3). Alternatively, any person who knowingly violates any of these provisions is subject to civil charges which may not amount to more than a five hundred dollar fine. See id. § 4009.

\(^{153}\) See id. § 4011(1).

\(^{154}\) See id. § 4015.
keep communications confidential is set aside in relation to the required reporting and/or cooperation with investigations of known or suspected child abuse.\textsuperscript{155} Although the list of professionals subject to the mandatory reporting law is exhaustive, attorneys are not included in the list.\textsuperscript{156} Whether a mere oversight or a conscious decision, the legislative history of the law is silent. Nor do subsequent amendments to the statute offer any guidance. Nonetheless, as there is no general duty to report and attorneys are absent from the list of persons required to report, in Maine, there is no statutory requirement that attorneys disclose information of known or suspected child abuse obtained while acting in their professional capacity. Alternatively, as the Maine statute permits any person to report known or suspected child abuse, there would be no statutory conflict with an attorney choosing to make such a report. In short, under the current statutory scheme, an attorney in Maine is neither required to report nor prohibited from reporting known or suspected child abuse.

V. MANDATORY REPORTING IS NOT THE ANSWER

Although this article argues that an attorney may disclose information pertaining to child abuse obtained in the attorney-client relationship without violating ethical rules or legislative enactments, attorneys should not be mandated to disclose such information.

It is undisputed that mandatory reporting laws have increased the number of children who are reported to child protective agencies.\textsuperscript{157} The increase in reports has been consistent and dramatic in the thirty years since mandatory reporting became the norm. In 1987, 2.2 million children were reportedly abused—more than fourteen times the number reported between 1963 and 1987.\textsuperscript{158} By 1996, the number increased to 3 million reports of child abuse.\textsuperscript{159} No doubt, many thousands of children have been saved from death and serious injury because of the reporting laws.\textsuperscript{160} Additional resources have been allocated to address the issue

\textsuperscript{155} If the Maine Legislature enacted a provision which either included attorneys specifically or, more generally, imposed a duty on all persons to report suspected child abuse, a lawyer, depending on the precise language of the statute could have a duty under the law to report. If so, the obligation "as required by law" would relieve the lawyer of any ethical constraints or obligations pursuant to the Maine Rules of Conduct. See ME. BAR. R. 3.6(h)(1).

\textsuperscript{156} Attorneys serving as guardians ad litem for "the child" are included as mandated reporters. Guardians, however, are appointed by the court to represent the best interest of the children. Guardians do not represent parents in child protective services. See ME. REV. STAT. ANN. tit. 22, § 4005 (West 1992 & Supp. 1998). Thus, the attorney-client relationship is not implicated in the same way it would be when the attorney is acting as counsel for her client.

\textsuperscript{157} Compare Douglas Besharov, Gaining Control over Child Abuse Reports, PUB. WELFARE, Spring 1990, at 36 (arguing that one consequence of mandatory reporting is "over reporting" which undermines efforts to prevent child abuse) with David Finkelhor, Is Child Abuse Overheated? The Data Rebut Arguments for Less Intervention, PUB. WELFARE, Winter 1990, at 23 (arguing that data do not reveal significant trouble with over-reporting as a result of mandatory reporting).

\textsuperscript{158} See Douglas Besharov, Gaining Control over Child Abuse Reports, PUBLIC WELFARE, Spring 1990, at 34-40 (hereinafter Besharov, Gaining Control).


of child maltreatment since the inception of reporting.161 Yet, of great concern is a study conducted by the United States Department of Health and Human Services which estimates that 68% of the children who met the criteria for abuse and neglect were not reported, yet, among reported cases, 56% were ruled to be unsubstantiated (reports which are dismissed after an investigation because of insufficient evidence upon which to proceed).162 This suggests that mandatory reporting may in fact be an unreliable tool in combating child mistreatment, leading to both under-reporting and over-reporting.163

Explanations for this phenomena differ. Under-reporting seems tied to a lack of understanding of signs of child abuse and neglect, particularly with mandated reporters who do not have a mental health background, as well as a lack of guidance on what constitutes child abuse or a reasonable suspicion of abuse. This suggests that abused children are being missed not because enough people are mandated reporters, but rather because there is a significant education gap. The solution, therefore, would be to enhance public and professional education. Specifically, child protective agencies, working in concert with other professionals, need to “provide realistic guidance about deciding to report” such as educational materials which clarify legal definitions of abuse and neglect, examples of reporting situations, how to recognize abuse and neglect and what to expect when a report is made.164 Again, problems of under-reporting are not necessarily going to be solved by expanding the pool of mandated reporters.

Under-reporting by mental health professionals who are mandated reporters seems to relate to concerns that the child welfare services are unable to respond to reports. There is the additional concern that making a report will destroy the therapeutic relationship. These two concerns, however, seem related. To the extent that a mental health professional doubts the child protective agency will respond to a report, the professional will be less likely to sacrifice the therapeutic relationship.165 “Over time, as mandated reporters have more experience with [child protective agencies], they often learn . . . that ‘nothing would have been done’ in response to a report of only moderate abuse or neglect. [The] data suggest that mandated reporters often begin to prescreen cases as they learn about [child protective agencies’] operations and the enormous burdens under which these agencies labor.”166 This form of under-reporting is a direct reflection on the inadequate resources devoted to child welfare—not a lack in the scope of the mandatory reporting laws.167

161. See id. at 9.
164. Id.
166. Id.
167. See Holly Watson & Murray Levine, Psychotherapy and Mandated Reporting of Child Abuse, 59 Am. J. Orthopsychiatry, 246, 249 (1989) ("Some professionals prefer not to comply with the mandatory reporting because the epidemic of reporting has not been matched by a rise in appropriate services to help the child and family.").
Professionals have also expressed concerns that "the intervention of social agencies with the family will have harmful consequences; that removing the child from the home may be more detrimental than allowing the child to stay . . . ."168

The over-reporting of abuse is a significant problem as well. Some researchers have concluded that the rate of unfounded reports is as high as 65%.169 "Potential reporters are frequently told to 'take no chances' and to report any child for whom they have the slightest concern. There is a recent tendency to tell people to report children whose behavior suggests that they may have been abused—even in the absence of any other evidence of maltreatment."170 Furthermore, for a mental health professional who is clearly subject to the Tarasoff duty to warn, reporting of relatively minor incidents is necessary to insulate him- or herself from potential civil liability. Finally, the lack of family-oriented social service agencies has led to an increase in reports to the child protection agencies for issues that, although related to child welfare, are totally unrelated to abuse and neglect.171 The child protection agencies, designed to address reports of children in danger, are now expected to provide "all encompassing child welfare."172

The consequences of over-reporting pose significant dangers to child welfare. "[T]he nation’s child protective agencies are being inundated with 'unfounded' reports."173 Over-reporting significantly strains the already scarce resources of child protective agencies, and they are then "less able to respond promptly and effectively when children are in serious danger."174

Most discussion of the successes and failures of mandatory reporting is taken from the mental health profession's experience with the laws. Given that those who work in the child protective field are forced to make the decision on whether to report on a daily basis, it is appropriate that this discussion take place in their field. Nonetheless, the failures of mandated reporting, as evidenced by the under- and over-reporting of abuse, suggests that we should hesitate to engage attorneys in this system.

It seems that the greatest danger in including attorneys as mandated reporters is the fear of over-reporting. Given that mental health professionals find it difficult to evaluate the nature of abuse, it seems likely that attorneys would have even greater difficulty making the same sorts of evaluations. To protect themselves from potential liability, attorneys might feel compelled to "take no chances," making reports that do not rise to the level of abuse or neglect. This seems very likely where an attorney-reporter has no mental health background to rely upon to make an evaluation of possible abuse. Any over-reporting by attorneys would place additional pressures on the already overburdened child protective services in the State of Maine.

There are other reasons for not making attorneys mandated reporters. Of the many professionals who are mandated reporters under the Maine statute, all have

168. See id.
169. See Besharov, Gaining Control, supra note 158, at 36-37. But see Finkelhor, supra note 158, at 23 (challenging Besharov's data that abuse is over-reported).
170. See Besharov, Gaining Control, supra note 158, at 38.
172. See id.
173. Besharov, Gaining Control, supra note 158, at 36.
174. See id. at 38.
some, albeit in some cases tangential, relationship to children. They are doctors or teachers or members of law enforcement—members of the community who may in fact regularly interact with children. Although the family law practitioner would be the most likely candidate for contact with children, even there it is unclear that attorneys are in the same category as other reporters. Attorneys are hired to represent the legal rights and responsibilities of their clients; in most cases they are not employed in an effort to treat, teach, or protect children.

Nor can we ignore the importance of the attorney-client relationship. This article has argued that there are cases where disclosure of otherwise confidential information is appropriate and necessary to protect children. The potential for damage to the attorney-client relationship is justified in those limited scenarios given the competing interest in protecting children. However, if attorneys were mandated reporters, and felt compelled to make a report on the slightest piece of information in an effort to protect themselves from future liability, the consequences to the attorney-client relationship would be significant. Once a report was made, it seems likely that the trust between an attorney and the client would be strained, particularly if the report concerned information that would not rise to the level of abuse and neglect in the eyes of child protective services. Representation of the client would be difficult at the very least. Moreover, in cases where the conduct in question did seem to be significant, an attorney who was a mandated reporter would have no discretion to attempt to work with the client in an effort to address problems, nor could the attorney use the threat of disclosure to motivate a client to seek help. The attorney would be required to make a report immediately.175

Ultimately, we must engage in a balancing act. No one in the mental health profession seems to dispute that child abuse reporting laws have helped save children's lives. However, an assumption of reporting laws is that they will lead to early discovery of maltreatment symptoms and the prevention of further, more serious injury or death.176 Implicit in this assumption is that sufficient resources will be allocated to adequately provide for prevention and treatment. Yet, funding has been far from adequate. As noted above, the growing number of cases that need to be investigated, and the lack of qualified staff, leave very few resources to aid families that have been identified as those in trouble. If there comes a time where we decide to fully fund child protective services such that any and all reports can be adequately and quickly investigated, it may be that we can rethink the issue of mandatory reporting. Until then, however, imposing this statutory mandate on attorneys will increase the burden on state agencies, which has the potential of actually diverting resources from those who truly need help, and will significantly alter the attorney-client relationship. Unless we can find a way to make the benefits to children outweigh the potential harms to both children and the attorney-client relationship, the scale tips in favor of flexibility. Attorneys must not be mandatory reporters, instead they must have the discretion to report child abuse.

VII. CONCLUSION

As the community is confronted on a daily basis with the escalation of violence against children, we must reconsider traditional legal responses in light of

176. See Hutchinson, supra note 6, at 56-63.
modern problems. Legal statutes and ethical rules traditionally are written by adults for adults. The laws presuppose that individuals affected by the law will at least have the capacity to help themselves. But in the case of child abuse, where the victims are young, vulnerable, and without physical and legal protection, special protections must be afforded by the law.

As a general practice, an attorney should maintain a client's confidences. Yet, in some cases, where an attorney learns that a client is abusing a child, the only satisfactory option may be disclosure. Some commentators argue that the cost of disclosure is so grave that confidentiality should transcend all other interests. This view, however, "gives inordinate weight to the sanctity of the attorney-client relationship in light of important competing interests and ignores the countervailing societal interest of discovering intended wrongdoing before it is perpetrated."\textsuperscript{177} In the case of child abuse, attorneys must not turn a blind eye to this national crisis. Attorneys must play a limited, but important, role in its prevention.

\textsuperscript{177} Stuart, \textit{supra} note 4, at 259.