



NAPD Formal Ethics Opinion 14-1

Social workers and other healthcare professionals may not report child or elder abuse without the express contemporaneous permission of the lawyer for whom they are doing their work.

The National Association for Public Defense (NAPD) has asked its Ethics Counselors to address the following significant question. Law firms and public defender offices often employ or contract with social workers and other healthcare professionals to assist lawyers in the delivery of Constitutionally mandated legal services to the lawyers' clients. These non-lawyer professionals provide essential services to the lawyers, particularly, but hardly exclusively, in capital cases in which mitigation evidence plays such an important role. It is not unusual for these lawyers to be defending clients whose conduct could be the subject of statutory reporting requirements imposed on social workers and other healthcare professionals.

A hypothetical will illustrate the type of situation that was considered by NAPD and its Ethics Counselors. In the course of representing a client charged with a criminal offense, the lawyer learns that the client also may have committed or somehow been involved with child or elder abuse in an unrelated matter. The lawyer decides that the proper representation of the client requires the assistance of a social worker or other healthcare professional. In that particular jurisdiction, social workers and other healthcare professionals are subject to statutory requirements, which mandate that whenever they learn of child or elder abuse they must disclose the information to public officials. From the client's perspective, the client cannot receive the services that the client is Constitutionally entitled to receive from the lawyer without sharing this

information about the alleged abuse, by whoever perpetrated it, with the lawyer's team. (This concern will be particularly acute in the mitigation phase of trials, where the client's home life may be the focus of the adjudication.) Yet if the client understands that the information will be reported to the constabulary, the client probably would not share that information.

Lawyers themselves are bound by obligations of confidentiality that prevent a lawyer from disclosing such information, on the theory that the lawyer needs the information in order to represent the client, and the client would never share the information if the client knew that doing so could result in disclosure to those who might turn out to be the client's adversaries. Indeed, there is no more fundamental fiduciary duty that lawyers owe clients than this obligation. Without it, lawyer-client trust is impossible. Thus, it is critical that this conflict be resolved to ensure that the client is afforded the legal representation required by the Constitution and the applicable rules of professional conduct.

First, it is the view of the Association and its Ethics Counselors that the lawyer's obligation of confidentiality takes precedence over any obligation of disclosure that is imposed upon social workers or other healthcare professionals when they are working for the lawyer on a matter. The Model Rules of Professional Conduct provide that, in general, a lawyer must not disclose information relating to the representation of a client without the client's consent. *See, e.g.,* Model Rules of Prof'l Conduct R. 1.6(a) (2013).¹ The attorney-client privilege and the protection of client confidentiality both derive from the United States Constitution's Sixth and Fourteenth Amendments. The Sixth Amendment, which guarantees the right to counsel, affords protection for the right to prepare and present a defense, which depends upon the confidentiality of communications between client and lawyer. *See U.S. v. Nobles*, 422 U.S. 225 (1975). The

¹ This rule is different from the standards of confidentiality binding social workers. *See, e.g.,* Code of Ethics § 1.07 (Nat'l Ass'n of Soc. Workers 1996) (revised 2008). Before hiring a social worker, the lawyer should explain the importance of confidentiality to the lawyer-client relationship.

Fourteenth Amendment has been construed to guarantee prisoners “meaningful access to the courts.” *Bounds v. Smith*, 430 U.S. 817 (1977). “The opportunity to communicate privately with an attorney is an important part of that meaningful access.” *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990). Although the Model Rules do not directly bind the non-lawyer employee, who is not subject to court discipline, the rule does bind the lawyer to prevent disclosure by all non-lawyer employees. In the hypothetical posited, the social worker or other healthcare professional is hired by the lawyer to assist the lawyer in delivering legal services. That makes the delivery of legal services the paramount purpose of the engagement. The Model Rules mandate that lawyers must take all steps necessary to ensure that all subordinate employees, both lawyers and non-lawyers, conform their conduct to the rules. *See, e.g.*, Model Rules of Prof’l Conduct R. 5.3 (2013). Thus, the lawyer may not disclose, and must ensure that no employee of the lawyer discloses, the client’s alleged or suspected conduct under these circumstances. The ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) adopt this approach with respect to non-lawyer mitigation specialists. Guideline 4.1(C).

Almost all jurisdictions have exceptions to their rules governing confidentiality that *permit* a lawyer to disclose future conduct that is reasonably certain to result in death or serious bodily injury. *See, e.g.*, Model Rules of Prof’l Conduct R. 1.6(b)(1) (2013). The rule confers discretion as to whether to report solely upon the lawyer. As a result, even in situations in which the lawyer would be free to disclose, the lawyer must require the agreement of the social worker or other healthcare professional to refrain from disclosing unless the lawyer—in an exercise of the lawyer’s exclusive discretion—grants permission to do so.

There are a few jurisdictions that actually *mandate* disclosure by lawyers of confidential client information when necessary to prevent reasonable likelihood of death or serious bodily harm to others. Under those circumstances, the result remains the same. The lawyer must

ensure that the social worker or other healthcare professional only discloses the client's confidential information relating to child or elder abuse if the lawyer concludes that the legal test for the exception has been met, i.e., that there is a substantial likelihood that death or serious bodily injury will result.

In the foregoing hypothetical, the conduct subject to reporting requirements is committed by the client. However, a further question may arise in situations in which the lawyer—and, by extension, any social worker or other healthcare professional hired to assist in the matter—learns of such conduct committed by someone other than the client, for instance a significant other or family member of the client. Although such situations may implicate complex and compelling concerns, it is the view of the Association and its Ethics Counselors that, so long as the information relates to the representation of the client and is learned by the lawyer or member of the legal team in the course of the representation, the lawyer's judgment about disclosure of confidential information must prevail, such that the social workers or other healthcare professionals must be barred from disclosure unless the lawyer determines that they may disclose.

Another question may arise in situations in which the social worker's engagement extends beyond the termination of the legal matter. The Model Rules impose upon lawyers the same obligations of confidentiality with respect to former clients as to ongoing clients. *See, e.g.,* Model Rules of Prof'l Conduct R. 1.9(c)(2) (2013). Therefore, if the lawyer's representation of the client has terminated, the lawyer still may not disclose any information relating to the representation, pursuant to Rule 1.6, and the lawyer is still required under Rule 5.3 to take all steps necessary to ensure that all subordinate employees, both lawyers and non-lawyers, conform their conduct to the applicable rules. Since these obligations extend to former representations, it is the view of the Association and its Ethics Counselors that lawyers must ensure that former

employees—that is, those who were hired to assist with a legal matter that has since terminated—conform their conduct to the Model Rules, insofar as the conduct relates to the former representation in question. Thus, if the social work case continues beyond the conclusion of the legal matter, the lawyer’s judgment about confidential information relating to the former representation must still prevail, such that social workers or other healthcare professionals formerly employed by the lawyer to assist with the matter may only disclose that which they learned during the representation if the lawyer determines that they may do so.

The Association and its Ethics Counselors have found a reasonably bright line rule that, without the permission of the lawyer, social workers and other healthcare professionals may not report information about child or elder abuse learned during the course of the representation of a client. And from the point of view of the lawyer and the client, that is exactly right. However, social workers and other healthcare professionals may be concerned about their own exposure to liability if they follow the lawyer’s advice not to report. Some states’ attorneys general have endorsed the view that, when social workers and other healthcare professionals work under the direction of lawyers as part of a legal defense team, they are exempt from mandatory reporting requirements. *See, e.g.,* Ariz. Att’y Gen. Op. I07-006 (2007). Some states have made this clear in their statutory law. *See, e.g.,* Ky. Rev. Stat. Ann. § 31.100(6) (2013). In those states, social workers and other healthcare professionals should feel confident following the direction of the lawyer.

But what if the social worker or other healthcare professional insists on proceeding with the disclosure? Under those circumstances, the Association and its Ethics Counselors think the answer is clear. The lawyer ought to take all reasonable remedial steps to prevent such disclosure, including seeking adjudication from a court of law that the lawyer’s duty of confidentiality to the client takes precedence over any statutory obligation of the social workers

or other healthcare professionals to report. In that way, the social workers or other healthcare professionals will be protected because a court of law—not simply the hiring lawyer—has provided the final word on this clash between the duty of confidentiality on the one hand and the duty to report on the other.

Importantly, to the extent that the law in any given state is unsettled on this issue, clients face a risk that reportable behavior will be reported. Lawyers should therefore screen clients for potentially reportable behavior before hiring a social worker. If the lawyer uncovers evidence of reportable behavior, the lawyer may decide not to hire a social worker. An alternative may be to hire a social worker to provide advice based on information provided by the lawyer, without allowing the social worker to speak directly to the client or to visit the client’s home. Even if the lawyer does not uncover risk factors suggesting reportable behavior, the lawyer should warn the client about mandated reporting prior to engaging a social worker on the case. Model Rules of Prof’l Conduct R. 1.4(b) (2013) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

Respectfully submitted,

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