

Child abuse is a problem of national concern.¹

Statistics indicate that past instances of child abuse and neglect, absent intervention, are predictors that future abuse likely will occur.² In Texas, 30,980 confirmed allegations of child abuse and neglect were reported from Sept. 1, 2001, through Aug. 31, 2002,³ with allegations ranging from child abandonment,⁴ emotional abuse,⁵ medical neglect,⁶ and neglectful supervision,⁷ to physical abuse,⁸ physical neglect,⁹ refusal to accept parental responsibility,¹⁰ and sexual abuse.¹¹

As an attorney, what are your obligations to report suspected child abuse and neglect? How is attorney-client privilege affected by the Texas reporting law? Consider the following hypothetical situations:

- You meet with John and Jane Doe to advise them on estate planning matters. During their meeting, you learn that the couple recently completed marital counseling. Jane Doe discloses that approximately nine months earlier, during an argument with her husband, their 11-year-old son intervened and was inadvertently injured by her husband. This injury resulted in a trip to the hospital and stitches. The hospital did not question the injury. Mr. Doe indicates that this incident prompted him to seek counseling and that the family has been in counseling since then.
- You meet with Jane Smith regarding her wish to divorce John Smith. Mr. and Mrs. Smith have three young daughters. Mrs. Smith indicates that Mr. Smith is physically abusive to her and her daughters. She also indicates that her oldest daughter, age 11, told Mrs. Smith that Mr. Smith was touching her in her “private places.”

This article examines an attorney’s duty to report suspected child abuse and neglect in Texas by reviewing the history of reporting laws and current laws in other states and in Texas. It also addresses attorney-client privilege and how it is affected by the Texas reporting law.

THE ATTORNEY AS MANDATORY REPORTER

BY CAMILE GLASSCOCK DUBOSE AND CATHY O. MORRIS

Overview of Reporting Laws

The Children's Bureau of the U.S. Department of Health, Education and Welfare developed the first model child abuse and neglect laws in 1963.¹² By 1967, all 50 states had some type of reporting requirement.¹³ To encourage individuals to report, every state has statutes which grant some type of civil and criminal immunity to those who report suspected child abuse and neglect in good faith.¹⁴

The child abuse reporting statutes adopted by states vary.¹⁵ Many states impose mandatory reporting requirements on various professionals without listing attorneys among those professionals and allow for permissive reporting by any other person or individual.¹⁶ One provides that "any person" *may* report suspected abuse and neglect,¹⁷ while several *require* "any person" to report suspected abuse and neglect (emphasis added).¹⁸ Eleven states require various professionals (without specific mention of attorneys) and any other person to report suspected child abuse.¹⁹ One lists various

professionals as mandatory reporters and then goes on to specifically include attorneys as persons who "may" report.²⁰ Attorneys fall into the category of persons required to report in the 14 states that impose mandatory reporting requirements on "any person";²¹ however, many of these states limit the reporting requirement to information obtained outside of the attorney-client relationship.²² Six states have reporting statutes that specifically list attorneys as mandatory reporters.²³ Three of those states limit the attorney's duty to report to information obtained outside of the attorney-client relationship.²⁴ One requires attorneys to report suspected child abuse and neglect unless the information is obtained in the course of the attorney-client relationship, the client is under the age of 18, and the client is likely to suffer further harm as a result of the report.²⁵ Texas and Mississippi are the only states that specifically mandate attorneys to report suspected child abuse and neglect even if the information

is obtained during the course of attorney-client communications.²⁶

Texas Statutory Requirements

Texas' first child abuse and reporting statute was enacted in 1965 and stated that any physician "may" report suspected abuse and neglect of a child.²⁷ Who may report was broadened in 1969²⁸ and mandatory language was added in 1971.²⁹ The 1971 amendment required mandatory reporting by any person who suspected that a child had been the victim of abuse or neglect, and provided immunity for those persons who reported suspected abuse in good faith.³⁰

At present, Texas' general reporting statute provides:

- a) A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report as provided by this subchapter.
- b) If a professional has cause to believe that a child has been abused or neglected or may be abused or neglected or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first suspects that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. A professional may not delegate to or rely on another person to make the report. In this subsection, "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health

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care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

- c) The requirement to report under this section applies without exception to an individual whose personal communications may otherwise be privileged, *including an attorney*, a member of the clergy, a medical practitioner, a social worker, a mental health professional, and an employee of a clinic or health care facility that provides reproductive services³¹ (emphasis added).

As indicated, Texas' mandatory reporting requirements apply even to an attorney whose communications may be privileged. Importantly, however, the law also acknowledges that the attorney-client privilege may still continue to exclude this information as evidence in a proceeding regarding the abuse or neglect of a child.³²

Mandatory Reporting Laws

As it appears, the legislature's express extension of Texas' mandatory reporting law on attorneys at least partially abrogates the attorney-client privilege.³³ That is, Texas' reporting statute creates a clear disclosure requirement where an attorney obtains information that otherwise would be protected by the ethical confidentiality principle.³⁴ Put another way, the command that a lawyer keep information confidential as part of the rules of professional responsibility may not supersede the mandatory legal duty to report.³⁵ This conflict lies at the heart of the dilemma posed by the hypothetical situations presented above: "Although the drafters of the mandatory child abuse statutes may not have intended to reshape the attorney-client privilege, the mere existence of these statutes, which raise questions regarding the continued protection of the privilege, has an important impact upon how the ethics rules that might otherwise preclude disclosure are applied."³⁶

Attorney-Client Privilege

Evidentiary privileges, such as the attorney-client privilege, were initially justified as a means of preserving the

honor of those entrusted with confidential communications.³⁷ The honor justification was quickly replaced by a utilitarian justification.³⁸ Professor John Henry Wigmore intended these justifications to entail a balancing analysis between the overall benefit derived from the preservation of confidential communications against the overall cost of maintaining a privilege to the legal system.³⁹ Model Rules of Evidence (502) codified the attorney-client privilege: "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."⁴⁰

Courts have applied a cost-benefit analysis to the attorney-client privilege.⁴¹ In *Ford Motor Co. v. Leggat*,⁴² the Supreme Court of Texas stated, "[T]he purpose of the privilege is to ensure the free flow of information between attorney and client, ultimately serving the broader societal interest of effective administration of justice."⁴³ The Supreme Court hails the importance of the privilege in *Upjohn Co. v. U.S.*,⁴⁴ stating that "sound legal advice or advocacy serves public ends and . . . such advice or advocacy depends upon the lawyer's being fully informed by the client."⁴⁵

Although most commentators agree that the attorney-client privilege lacks constitutional protection,⁴⁶ the Sixth Amendment's right to effective assistance of counsel⁴⁷ has been interpreted to require confidential consultation with an attorney⁴⁸ (limited to criminal proceedings after formal accusation).⁴⁹ Conversely, the Supreme Court has ruled that the Fifth Amendment protection from self-incrimination⁵⁰ does not prevent the state from compelling an attorney to divulge confidential client information.⁵¹ In *Fisher v. United States*,⁵² the Supreme Court reasoned that requiring an attorney to reveal information that the client voluntarily gave to the attorney did not compel the accused in any way.⁵³ Therefore, the Constitution offers little protection for the attorney-client privilege, except in the case of certain criminal defendants.⁵⁴

Rules of Professional Conduct

The Model Rules of Professional Conduct apply the confidentiality rules

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more broadly than the attorney-client privilege. The requirement to maintain confidentiality is not limited to in-court disclosure. The rules provide that information gained by an attorney in the course of representation must be kept confidential and may not be revealed in any forum.⁵⁵

The American Bar Association has issued three model codes: the Canons of Professional Ethics in 1908, the Model Code in 1969, and the Model Rules in 1983.⁵⁶ Texas adopted the State Bar Rules (Texas Disciplinary Rules of Professional Conduct), effective Jan. 1, 1990.⁵⁷ Rule 1.05 relates to confidentiality and defines under what circumstances an attorney may reveal both privileged and unprivileged client information.⁵⁸

The comments to these rules support both utilitarian and humanistic justification for the significance of confidential communication between attorney and client. Comment 1 to Rule 1.05 states: “The ethical obligation of the lawyer to protect the confidential information of

the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.”⁵⁹

Texas Authority

An attorney’s duty to report suspected child abuse or neglect has not been directly addressed by Texas case law or an opinion by the Texas attorney general. The only direct reference to an attorney’s duty to report under Section 261.101 of the Family Code is found in footnote references in *In re Alfred Khulmann* and *T.D.P.R.S. vs Benson*,⁶⁰ where the courts indicate that “an attorney’s failure to report suspected abuse or neglect of a child constitutes a violation of the Texas reporting statute”⁶¹ and that the “only privileged communications recognized by the Family Code provisions governing child abuse are confidential communications between attorney and client.”⁶² This is further clarified by comments in Sampson & Tindall’s Texas Family Code Annotated, which states: “The only privileged communications recognized by this chapter are those between an attorney and client. This testimonial privilege protects confidential communications; it is not a blanket privilege that immunizes an attorney from responsibility to report injury to a child caused by abuse or neglect.”⁶³

Section 261.101 of the Family Code has been held as creating an exception to the clergy-communications privilege,⁶⁴ as well as the physician-patient privilege.⁶⁵ The Office of the Attorney General has addressed Section 261.101 in regard to the duty imposed on other professionals by its reporting requirement, stating that persons required to report under this section may not exercise discretion in determining whether to report suspected abuse or neglect.⁶⁶ In its evaluation of Section 261.101, the AG’s office determined that “the reporting requirement expressly applies *without exception* to any individual whose personal communications normally are privileged” (emphasis added).⁶⁷ In addition, a person who suspects child abuse and neglect shall report immediately.⁶⁸ “The term ‘shall’ ordinarily signals a mandate, and the term ‘immediately’ underscores the mandate with a sense of urgency.”⁶⁹

In examining the conflict between the Polygraph Examiners Act and the reporting requirement, the attorney general states, “We believe that the legislature intended section 261.101 of the Family Code to prevail over any inconsistent statute, which includes section 19A of the Polygraph Examiners Act, unless the inconsistent statute explicitly recognizes and excepts itself from section 261.101.”⁷⁰ Using this logic, the reporting requirements of Section 261.101 also would prevail over the Texas Disciplinary Rules of Professional Conduct.

Conclusion

Consider again the two hypothetical situations. In examining the first hypothetical, you would not be a “professional” as defined in Section 261.101(b), as you were not appointed as an attorney ad litem for a child and are not a professional who has direct contact with children in the normal course of your official duties. You would, however, qualify under Section 261.101(a) as a “person.” The issue would then be whether you had cause to believe that the child’s physical or mental health or welfare had been adversely affected by abuse or neglect.

In reading the first hypothetical, the initial reaction might be to apply “some discretion” in making this determination. The family sought counseling, and no other instances of abuse or neglect are alleged. The injuries sustained by the child required medical treatment, although it is not clear if hospital officials reported the injury. The incident is somewhat removed in time, and the injury to the child was “inadvertent.” One might conclude based on those observations that you could use your “good judgment” in determining whether to report the injury to the child as required by Section 261.101.

However, this analysis would be incorrect pursuant to Attorney General Opinion DM-458. This opinion specifically indicates that even though the information received by the reporter may be “incomplete or dated,” if the reporter suspects that a child has been abused, the reporting requirement mandates that a report be made immediately. There is no language in Section 261.101(a) “indicating

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that reporting suspected child abuse is discretionary or establishing an exception where the suspicion is premised on information that is incomplete or dated.⁷¹

The final issue to address in the first hypothetical is the existence of the attorney-client privilege. Clearly, the information you received was given during the course of privileged communications. However, Section 261.101 has been held to prevail over any inconsistent statute, unless specifically excepted. Section 261.101(c) is clear that the requirement to report applies to any individual whose communications might otherwise be privileged, including an attorney. Your duty to report prevails over the attorney-client privilege as well as the Rules of Professional Conduct, but you may not testify to privileged information in any proceeding regarding the abuse or neglect of a child, as set forth in Section 261.202. Note that the information provided by an attorney to Child Protective Services or law enforcement regarding suspected abuse or neglect, if obtained during the course of privileged communications, must be substantiated or corroborated by additional information received during the course of the investigation for any legal proceeding to be initiated.

A concern in the first hypothetical might be your exposure to legal action by your client should you report the alleged abuse. Section 261.106 states that a person who reports suspected abuse or neglect of a child in good faith is immune from prosecution. This will not, of course, assure that you will not be the subject of legal proceedings, but as long as your actions are based on a good faith belief, you will have a legal defense.⁷² In addition, you would be able to recover reasonable attorney's fees and other expenses incurred in any claim filed against you for your good faith report of suspected child abuse.⁷³ In fact, failure to report suspected child abuse is an offense punishable as a class B misdemeanor.⁷⁴

In the second hypothetical, you would be required to report as a "person" rather than a "professional." The second hypothetical does not raise the issue of confidentiality. The information disclosed does not, on its face, indicate that Mrs. Smith has perpetrated any abuse or

neglect against her children. Substantial information is provided by Mrs. Smith, however, that her husband has physically, and perhaps sexually, abused their daughters. At this point, you should advise your client of your duty to report the suspected abuse or neglect. You should also advise Mrs. Smith of her duty to report pursuant to 261.101. You should not rely on Mrs. Smith to report the abuse and neglect, but should make a report yourself.

Changing the fact situation slightly, if Mrs. Smith had sought your services after charges of abuse and neglect had been reported to authorities and Mr. Smith was facing criminal or civil charges as a result thereof, common sense would indicate that your reporting requirement would be alleviated (assuming the information given by Mrs. Smith was essentially the same as that which had been previously reported). The authors cannot, however, find any legal or statutory authority to support this conclusion.

As discussed, the duty to report prevails over the attorney-client privilege, but the attorney-client privilege is still available to exclude communications between an attorney and client in an abuse or neglect proceeding. Also, immunity from liability is specifically available by statute to reporters who act in good faith in reporting child abuse or neglect.

In general, Section 261.101 of the Family Code requires all persons, including attorneys, who have a good faith belief that child abuse or neglect has occurred, to report that belief immediately, irrespective of whether the information obtained is incomplete or dated. If you qualify as a "professional" under Section 261.101(b) of the Family Code, because in the normal course of official duties you have direct contact with children, your duty to report is no later than the 48th hour after you first suspect than a child might be the victim of abuse or neglect. Reports by "professionals" under Section 261.101(b) of the Family Code may be made online.⁷⁵

To report abuse or neglect, call the Texas Department of Family and Protective Services at (800)252-5400 or visit www.txabusehotline.org.

NOTES

1. See Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney Client Confidences: The Reality and Specter of Lawyer as Informant*, 42 *Duke L.J.* 203, 203 (1992).
2. See Allison Beyea, *Competing Liabilities: Responding to Evidence of Child Abuse That Surfaces During the Attorney-Client Relationship*, 51 *Me. L. Rev.* 269, 272-275 (1999).
3. See Texas Dept. Protective and Regulatory Services Statistics, Fiscal Year 2002.
4. See *id.* (488 confirmed investigations reported).
5. See *id.* (1,275 confirmed investigations reported).
6. See *id.* (2,251 confirmed investigations reported).
7. See *id.* (24,229 confirmed investigations reported).
8. See *id.* (12,843 confirmed investigations reported).
9. See *id.* (6,767 confirmed investigations reported).
10. See *id.* (818 confirmed investigations reported).
11. See *id.* (7,317 confirmed investigations reported).
12. See Shawn P. Bailey, *How Secrets Are Kept: Viewing the Current Clergy-Penitent Privilege Through a Comparison with the Attorney-Client Privilege*, 2002 *B.Y.U.L.Rev.* 489, 492 (220).
13. *Id.* at 492.
14. See Code of Ala. Sec. 26-14-9 (2001)(Alabama); Alaska Stat. Sec. 47.17.050 (1999)(Alaska); A.R.S. Sec. 8-805 (2001)(Arizona); A.C.A. Sec. 12-12-517 (2001)(Arkansas); Cal. Pen. Code Sec. 11172 (2001)(California); C.R.S. 19-3-309 (2001)(Colorado); Conn. Gen. Stat., Sec. 17a-101e (2001)(Connecticut); 16 Del.C. Sec. 908 (2001)(Delaware); Fla. Stat. Sec. 39.203 (2002)(Florida); O.C.G.A. Sec. 19-7-5 (2002)(Georgia); H.R.S. Sec. 350-3 (Michie 2002)(Hawaii); Idaho Code Sec. 16-1620 (2002)(Idaho); 325 I.L.C.S. 5/9 (2002)(Illinois); Burns Ind. Code Ann. Sec. 31-33-6-1 (2002)(Indiana); Iowa Code Sec. 232.73 (2002)(Iowa); K.S.A. Sec. 38-1526 (2001)(Kansas); K.R.S. Sec. 620.050 (2002)(Kentucky); La. Ch. C. Art. 611 (2002)(Louisiana); 22 M.R.S. Sec. 4014 (2001)(Maine); Md. FAMILY LAW Code Ann. Sec. 5-708 (2002)(Maryland); ALM GL Ch. 119, Sec. 51A (2002)(Massachusetts); MCLS Sec. 722.625 (2002)(Michigan); Minn. Stat. Sec. 626.556 (2001)(Minnesota); Miss. Code Ann. Sec. 43-21-355 (2001)(Mississippi); Sec. 210.135 R.S. Mo. (2001)(Missouri); Mont. Code Anno. Sec. 41-3-203 (2002)(Montana); R.R.S. Neb. Sec. 28-716 (2002)(Nebraska); NRS Sec. 432B.220 (2002)(Nevada); 12 RSA 169-C:31 (2002)(New Hampshire); N.J. Stat. Sec. (9:6-8.13 (2002)(New Jersey); N.M. Stat. Ann. Sec. 32A-4-5 (2002)(New Mexico); NY CLS Soc. Serv. Sec. 419 (2002)(New York); N.C. Gen. Stat. Sec. 7B-309 (2001)(North Carolina); N.D. Cent. Code, Sec. 50-25.1-09 (2002)(North Dakota); ORC Ann. 2151.421 (Anderson2002)(Ohio); 10 Okl. St. Sec. 7105 (2002)(Oklahoma); ORS Sec. 419B.025 (2001)(Oregon); 23 Pa. C.S. Sec. 6318 (2002)(Pennsylvania); R.I. Gen. Laws Sec. 40-11-4 (2002)(Rhode Island); S.C. Code Ann. Sec. 20-7-540 (2001)(South Carolina); S.D. Codified Laws Sec. 26-8A-14 (2002)(South Dakota); Tenn. Code Ann. Sec. 37-1-

- 613 (2002)(Tennessee); TEX. FAM. CODE ANN., Sec. 261.106 (2001)(Texas); Utah Code Ann. Sec. 62A-4a-410 (2002)(Utah); 33 V.S.A. Sec. 4913 (2002)(Vermont); Va. Code Ann. Sec. 63.2-1512 (2002)(Virginia); Rev. Code Wash. (ARCW) Sec. 26.44.060 (2002)(Washington); W.Va. Code Sec. 49-6A-6 (2002)(West Virginia); Wis. Stat. Sec. 48.891 (2002)(Wisconsin); Wyo. Stat. Sec. 14-3-209 (2002)(Wyoming).
15. See Code of Ala. Sec. 26-14-3 (2001)(Alabama); Alaska Stat. Sec. 47.17.020 (1999)(Alaska); A.R.S. Sec. 13-3620 (2001)(Arizona); A.C.A. Sec. 12-12-507(Arkansas); Cal. Pen. Code Sec. 11166 (2001)(California); C.R.S. 19-3-304 (2001)(Colorado); Conn. Gen. Stat., Sec. 17a-101a (2001)(Connecticut); 16 Del.C. Sec. 903 (2001)(Delaware); Fla. Stat. Sec. 39.201 (2002)(Florida); O.C.G.A. Sec. 19-7-5 (2002)(Georgia); H.R.S. Sec. 350-1.1 (Michie 2002)(Hawaii); Idaho Code Sec. 16-1619 (2002)(Idaho); 325 I.L.C.S. 5/9 (2002)(Illinois); Burns Ind. Code Ann. Sec. 31-33-5-1 (2002)(Indiana); Iowa Code Sec. 232.69 (2002)(Iowa); K.S.A. Sec. 38-1522 (2001)(Kansas); K.R.S. Sec. 620.030 (2002)(Kentucky); La. Ch. C. Art. 609 (2002)(Louisiana); 22 M.R.S. Sec. 4011-a (2001)(Maine); Md. FAMILY LAW Code Ann. Sec. 5-705 (2002)(Maryland); ALM GL Ch. 119, Sec. 51A (2002)(Massachusetts); MCLS Sec. 722.623 (2002)(Michigan); Minn. Stat. Sec. 626.556 (2001)(Minnesota); Miss. Code Ann. Sec. 43-21-353 (2001)(Mississippi); Sec. 210.115 R.S. Mo. (2001)(Missouri); Mont. Code Anno. Sec. 41-3-201 (2002)(Montana); R.R.S. Neb. Sec. 28-711 (2002)(Nebraska); NRS Sec. 432B.160 (2002)(Nevada); 12 RSA 169-C:29 (2002)(New Hampshire); N.J. Stat. Sec. (9:6-8.10 (2002)(New Jersey); N.M. Stat. Ann. Sec. 32A-4-3 (2002)(New Mexico); NY CLS Soc. Serv. Sec. 413 (2002)(New York); N.C. Gen. Stat. Sec. 7B-301 (2001)(North Carolina); N.D. Cent. Code, Sec. 50-25.1-03 (2002)(North Dakota); ORC Ann. 2151.421 (Anderson2002)(Ohio); 10 Okl. St. Sec. 7103 (2002)(Oklahoma); ORS Sec. 419B.005, 010 (2001)(Oregon); 23 Pa. C.S. Sec. 6311, 12 (2002)(Pennsylvania); R.I. Gen. Laws Sec. 40-11-3 (2002)(Rhode Island); S.C. Code Ann. Sec. 20-7-510 (2001)(South Carolina); S.D. Codified Laws Sec. 26-8A-3 (2002)(South Dakota); Tenn. Code Ann. Sec. 37-1-403 (2002)(Tennessee); Tex. Fam. Code Ann., Sec. 261.101 (2001)(Texas); Utah Code Ann. Sec. 62A-4a-403 (2002)(Utah); 33 V.S.A. Sec. 4913 (2002)(Vermont); Va. Code Ann. Sec. 63.2-1509, 10 (2002)(Virginia); Rev. Code Wash. (ARCW) Sec. 26.44.030 (2002)(Washington); W.Va. Code Sec. 49-6A-2 (2002)(West Virginia); Wis. Stat. Sec. 48.981-3 (2002)(Wisconsin); Wyo. Stat. Sec. 14-3-205 (2002)(Wyoming).
 16. See O.C.G.A. Sec. 19-7-5 (2002); H.R.S. Secs. 350-1.1; 350-1.3 (Michie 2002); 325 I.L.C.S. 5/4 (2002); Iowa Code Sec. 232.69 (2002); K.S.A. Sec. 38-1522 (2001); La. Ch. C. Arts. 603, 609 (2002); 22 M.R.S. Sec. 4011-A (2001); MCLS Sec. 722.623 (2002); Minn. Stat. Sec. 626.556 (2001); Sec. 210.115 R.S. Mo. (2001); Mont. Code Anno., Sec. 41-3-201 (2001); NY CLS Soc Serv Secs. 413, 414 (2002); N.D. Cent. Code Sec. 50-25.1-03 (2001); 23 Pa. Cc.S. Secs. 6311, 6312 (2002); S.C. Code Ann. Sec. 20-7-510 (2001); S.D. Codified Laws Sec. 26-8A-3 (2002); Tenn. Code Ann. Sec. 37-1-403 (2002); 33 V.S.A. Sec. 4913 (2002); Va. Code Ann. Secs. 63.2-1509, 1510 (2002); Rev. Code Wash. (ARCW) Sec. 26.44.030 (2002); W. Va. Code Sec. 49.6A-2 (2002); Wis. Stat. Sec. 48.981-3 (2002).
 17. See ALM GL Ch. 199, Sec. 51A (2002).
 18. See Burns Ind. Code Ann. Sec. 31-33-5-1 (2002); Utah Code Ann. Sec. 62A-4a-403 (2002); Wyo. Stat. Sec. 14-3-205 (2002).
 19. See 16 Del. C. Sec. 903 (2001); Fla. Stat. Sec. 39.201 (2002); Idaho Code Sec. 16-1619 (2002); KRS Sec. 620.030 (2002); R.R.S. Neb. Sec. 28-711 (2002); 12 R.S.A. 169-C:29 (2002); N.J. Stat. Sec. 9:6-8:10 (2002); N.M. Stat. Ann. Sec. 32A-4-3 (2002); N.C. Gen. Stat. Sec. 7B-301 (2001); 10 Ok. Stat. Sec. 7103 (2002); R.I. Gen. Laws Sec. 40-11-3, 6 (2001).
 20. See Wis. Stat. Sec. 48.981-3 (2002).
 21. See 16 Del. C. Sec. 903 (2001); Fla. Stat. Sec. 39.201 (2002); Idaho Code Sec. 16-1619 (2002); Burns Ind. Code Ann. Sec. 31-33-5-1 (2002); KRS Sec. 620.030 (2002); R.R.S. Neb. Sec. 28-711 (2002); 12 R.S.A. 169-C:29 (2002); N.J. Stat. Sec. 9:608:10 (2002); N.M. Stat. Ann. Sec. 32A-4-3 (2002); N.C. Gen. Stat. Sec. 7B-301 (2001); 10 Ok. Stat. Sec. 7103 (2002); R.I. Gen. Laws Sec. 40-11-3 (2001); Utah Code Ann. Sec. 62A-4a-403 (2002); Wyo. Stat. Sec. 14-3-205 (2002).
 22. See 16 Del. C. Sec. 909 (2001); Fla. Stat. Sec. 39.204 (2002); R.R.S. Neb. Secs. 28-707, 714 (2002); 12 R.S.A. 169-C:32 (2002); N.M. Stat. Ann. Sec. 32A-4-5 (2002); N.C. Gen. Stat. Sec. 7B-310 (2001); 10 Ok. Stat. Sec. 7103 (2002); R.I. Gen. Laws Sec. 40-11-11 (2001); Wyo. Stat. Sec. 14-3-210 (2002).
 23. See Md. Family Law Code Ann. Sec. 5-705 (2001); Miss. Code Ann. Sec. 43-21-353 (2001); NRS Sec. 432B.220 (2001); ORC Ann. 2151.421 (2002); O.R.S. Secs. 419B.005,010 (2001); Tex. Fam. Code Ann. Sec. 261.101 (2001).
 24. See Md. Family Law Code Ann. Sec. 5-705 (2001); NRS Sec. 432B.220 (2001); O.R.S. Sec. 419B.010 (2001).
 25. See ORC Ann. 2151.421 (2002).
 26. See Miss. Code Ann. Sec. 43-21-353 (2001); Tex. Fam. Code Ann. §261.101 (Vernon 2002).
 27. See *Texas v. Harrod*, 81 S.W.3d 904, 907 (Tex. App. — Dallas 2002, no pet.).
 28. *Id.* at 908.
 29. *Id.*
 30. *Id.*
 31. Tex. Fam. Code Ann. §261.101 (Vernon 2002).
 32. Tex. Fam. Code Ann. §261.202 (Vernon 2002)
 33. See Tex. Fam. Code Ann. §261.101 (Vernon 2002)
 34. See Mosteller, supra, at 239.
 35. *Id.* at 240.
 36. *Id.* at 244.
 37. See Bailey, supra, at 492.
 38. *Id.* at 500.
 39. *Id.*
 40. Model Code of Prof'l Conduct (1983).
 41. 904 S.W.2d 643 (Tex. 1995)
 42. *Id.*
 43. *Id.*
 44. 449 U.S. 383 (1981)
 45. *Id.*
 46. *Id.* at 233-24.
 47. See U.S. Const. amend. VI, which states in part: "in all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defense."
 48. See *United States v. Henry*, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting)
 49. See *Moran v. Burbine*, 475 U.S. 412, 432 (1986) (stating that the right to effective assistance of counsel only applies after the initiation of adversarial proceedings); *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (stating that the right to effective assistance of counsel applies only when judicial proceeding have been initiated by "formal charge, preliminary hearing, indictment information, or arraignment.")
 50. The Fifth Amendment states in part that: "[no person] shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.
 51. 425 U.S. 391 (1976).
 52. Fisher at 402.
 53. *Id.* at 397.
 54. See Moran and Kirby, supra.
 55. See Model Code of Prof'l Conduct (1983); Bruce A. Boyer, Ethical Issues in the Representation of Parents in Child Welfare Cases, 64 Fordham L. Rev. 1621.
 56. See Canons of Prof'l Ethics (1908)(amended until 1969); Model Code of Prof'l Responsibility (1969); Model Code of Prof'l Conduct (1983).
 57. Tex. Disciplinary R. Prof'l Conduct reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Vernon Supp. 1997) (Tex. State Bar R. art. X, § 9).
 58. Rule 1.05 states in full:
 - (a) Confidential information includes both "privileged information" and "unprivileged client information." "Privileged information" refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney client privilege governed by Rule 501 of the Federal rules of Evidence for United States Courts and Magistrates. "Unprivileged client information" means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
 - (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:
 - (1) Reveal confidential information of a client or a former client to:

- (i) a person that the client has instructed is not to receive the information; or
 - (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
- (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.
 - (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
 - (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation;
- (c) A lawyer may reveal confidential information:
- (1) When the lawyer has been expressly authorized to do so in order to carry out the representation.
 - (2) When the client consents after consultation.
 - (3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
 - (4) When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.
 - (5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
 - (6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
 - (7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
 - (8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.
- (d) A lawyer also may reveal unprivileged client information:
- (1) When impliedly authorized to do so in order to carry out the representation.
 - (2) When the lawyer has reason to believe it is necessary to do so in order to:
 - (i) carry out the representation effectively;
 - (ii) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
 - (iii) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (iv) prove the services rendered to a client,
- or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.
- (e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.
- (f) A lawyer shall reveal confidential information when required to do so by Rule 3.03(a)(2), 3.03(b), or by Rule 4.01(b).
59. Tex. Disciplinary R. Prof'l Conduct 1.05 & cmt. 1.
 60. *See In Re Alfred Kuhlman, Jr.*, 1998 Tex. App. Lexis 7140 (Tex. App. — Austin 1998); Texas Department of Human Services v. Benson, 893 S.W.2d 236 (Tex. App. — Austin 1995, writ ref'd).
 61. *See In Re Alfred Kuhlman, Jr.*, 1998 Tex. App. Lexis 7140,1747 (Tex. App. — Austin 1998).
 62. *See Texas Department of Human Services v. Benson*, 893 S.W.2d 236 (Tex. App. — Austin 1995, writ ref'd). An Attorney General opinion does directly indicate that in an abuse or neglect proceeding, "evidence may not be excluded on the ground of privileged communication except in the case of communications between attorney and client." *See* Op. Tex. Atty. Gen. No. JM-342 (1985).
 63. John J. Sampson, Harry L. Tindall, and Robert O. Dawson, Texas Family Code Annotated Subchapter C, Sec. 261.201 (11th ed. 2001).
 64. *See Carol Bordman v. The State of Texas*, 56 S.W.3d 63 (Tex. App. — [14 Dist.] Houston 2001, no writ).
 65. *See Alvarez v. Anesthesiology Assoc.*, 967 S.W. 2d 871, 878 (Tex. App.—Corpus Christi 1998, remanded in part on other grounds).
 66. *See* Op. Tex. Atty. Gen. No. DM-458 (1997) (discretion rests with those authorized to file charges, not with those who suspect abuse or neglect).
 67. *See id.* *See also* Op. Tex. Atty. Gen. No. JC 0538 (2002); Op. Tex. Atty. Gen. No. JC 0070 (1999).
 68. *See* Op. Tex. Atty. Gen. No. DM-458 (1997). The term "immediately" as applied in 261.101 is not unconstitutionally vague. *See Rodriguez v. State*, 47 S.W.3d 86, 88-89 (Tex. App.—[14th Dist.] Houston 2001, writ ref'd).
 69. *See* Op. Tex. Atty. Gen. No. DM-458 (1997).
 70. *See* Op. Tex. Atty. Gen. No. JC 0070 (1999).
 71. *See* Op. Tex. Atty. Gen. No. DM-458 (1997).
 72. Absolute immunity for physician reporters has been advocated due to the "discouraging" effect the fear of litigation can have on a physician's decision to report suspected child abuse. *See* Ellen Wright Clayton, Children's Health Symposium: To Protect Children From Abuse and

Neglect, Protect Physician Reporters, 1 Hous.J. Health L. & Pol'y 133 (2001).

73. *See* Tex. Fam. Code Ann. §261.108 (Vernon 2002).

74. *See* Tex. Fam. Code Ann. §261.109 (Vernon 2002).

75. Attorneys who qualify as "professionals" under Section 261.101(b) of the Family Code may report online at <https://reportabuse.ws> [Login: Professional. Password: report1].



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