Salt in the Wounds: Why Attorneys Should Not be Mandated Reporters of Child Abuse

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Hundreds of thousands of domestic violence victims with children fail to realize that they subject themselves to civil and criminal liability by seeking legal assistance such as restraining orders. Although attorneys can provide concrete legal remedies to domestic violence victims, they are often prevented from doing so because of mandatory child abuse reporting laws that require attorneys to make child abuse reports against their clients or their clients’ abusive partners. Because exposing children to domestic violence may be considered child abuse, reporting laws may require attorneys to disclose details of their clients’ own abuse even though this disclosure conflicts with the attorneys’ duties to the clients.

This Article examines the problems with requiring attorneys to report child abuse, specifically in the context of representing domestic violence victims. Mandatory child abuse reporting laws present two primary harms. First, they impede the ability of attorneys to adequately represent domestic violence victims because they interfere with the attorney-client relationship by devaluing confidentiality and preventing open communication. Second, mandatory child abuse reporting by attorneys subjects domestic violence victims to real danger and harm. Women of color and women with limited economic resources who are victims of domestic violence are particularly harmed by mandatory child abuse reporting by attorneys. Because of the detrimental consequences to domestic violence victims, attorneys who learn about child abuse in the course of their representation should not be required to report the abuse.

Part I of this Article explains the relationship between mandatory child abuse reporting statutes and the professional obligations of attorneys, such as the attorney-client privilege and the duty of confidentiality. It examines the statutes in New Jersey to illustrate the interplay among the laws and explain the conflicts with requiring attorneys to report child abuse. Part II demonstrates how mandatory child abuse reporting by attorneys interferes with the attorney-client relationship. Part III discusses the harms to the attorney-client relationship, particularly where definitions of child abuse are ambiguous, and focuses on the issue of a child’s exposure to domestic violence. Part IV discusses the specific dangers to domestic violence victims caused by mandatory child abuse reporting by attorneys, including increased risks of physical danger and subjection to civil and criminal liability. Part V concludes that attorneys should not be mandated reporters of child abuse and offers several suggestions to improve protection for domestic violence victims and their children.

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1. See infra notes 133–183 and accompanying text.
2. See infra notes 23–63 and accompanying text.
3. See infra notes 49–63 and accompanying text.
4. See infra notes 133–147 and accompanying text.
I. THE RELATIONSHIP BETWEEN CHILD ABUSE REPORTING STATUTES AND PROFESSIONAL OBLIGATIONS OF ATTORNEYS

Mandatory child abuse reporting by attorneys involves the interaction of three types of legal rules: the state statutes that require child abuse reporting, the attorney-client privilege, and the rules of professional responsibility. Mandatory child abuse reporting is a complicated issue for attorneys because these rules may conflict with other professional obligations. Where there is a conflict, attorneys must determine which rules take precedence in resolving that conflict. New Jersey provides an illustrative case study of this conflict. The New Jersey child abuse reporting statute requires everyone to report child abuse, without specifically abrogating the attorney-client privilege. In addition, the statute does not clearly define the term “child abuse,” and interpretations of the scope of mandatory child abuse reporting by attorneys are limited.

A. Mandatory Child Abuse Reporting Statutes

Today all states have some form of child abuse reporting laws. Reporting laws are premised on obligations of third parties to report child abuse with the expectation that the state, through a child protective mechanism, will investigate and take corrective action when needed. Typically, legislators did not craft these laws with attorneys in mind.

Child abuse reporting laws take many forms, from permissive to mandatory. Approximately twenty-five states require specific persons, such as social workers,
psychologists, or physicians, to report child abuse. 11 Some statutes require reporting from persons ordinarily covered by specific privileges, such as priests. 12 A handful of state statutes specifically mention attorneys either to exempt or include attorneys in the reporting statutes, or to otherwise define the reporting responsibilities of attorneys. 13 Some statutes specifically abrogate the privilege while others require


12. For a discussion of the abrogation of the clergy privilege, see Mary Harter Mitchell, Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion, 71 MINN. L. REV. 723 (1987) (explaining the origins of the clergy privilege and how it should not be abrogated lightly).

13. ARK. CODE ANN. § 12-12-507 (2004) (mandatory reporting by specified professionals including domestic violence shelter staff, judges, and prosecuting attorneys and abrogating any privileges); MISS. CODE ANN. § 43-21-353 (2004) (mandatory reporting by specified professionals including attorneys); MONT. CODE ANN. § 41-3-201 (2005) (mandatory reporting by specified professionals including "a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged abuse or neglect"); NEV. REV. STAT. ANN. § 202.882 (LexisNexis 2001) (mandatory reporting by all persons who know or reasonably believe child abuse occurred); id. § 432B.220 (LexisNexis 2002 & Supp. 2003) (mandatory reporting by an attorney "unless he has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect"); N.Y. SOC. SERV. LAW § 413 (McKinney 2003) (mandatory reporting by specified professionals, including district attorneys); OHIO REV. CODE ANN. § 2151.421 (LexisNexis 2002 & Supp. 2002) (mandatory reporting by specified professionals including attorneys, but "[a]n attorney...is not required to make a report pursuant to...this section concerning any communication...from a client...in an attorney-client...relationship, if, in accordance with division (A) or (B) of section 2317.02 of the Revised Code, the attorney...could not testify with respect to that communication"); OR. REV. STAT. § 419B.010 (mandatory reporting by any public or private official but "an attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client"); TEx. FAM. CODE ANN. § 261.101 (Vernon 2002 & Supp. 2005) (mandatory reporting by professionals who are licensed by the state and have direct contact with children, and any "individual whose personal communications may otherwise be privileged, including an attorney").
Approximately fifteen state statutes require "all persons" or "everyone" to report child abuse. Under each of these reporting statutes, attorneys are required to report child abuse in some form. New Jersey enacted its reporting statute in 1964. While it originally required only reporting for physicians and hospital employees, the Act was expanded in 1971 to include all persons. The Act requires the following:

Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to the Division of Youth and Family Services by telephone or otherwise. Such reports, where possible, shall contain the names and addresses of the child and his parent, guardian, or other person having custody and control of the child and, if known, the child's age, the nature and possible extent of the child's injuries, abuse or maltreatment, including any evidence of previous injuries, abuse or maltreatment, and any other information that the person believes may be helpful with respect to the child abuse and the identity of the perpetrator.

Additionally, the Act provides statutory immunity to those who report child abuse.

14. Mississippi, for example, includes attorneys as mandated child abuse reporters without specifically abrogating the attorney-client privilege. See MISS. CODE ANN. § 43-21-353 (2004). Texas includes attorneys as mandated child abuse reporters and states explicitly that there is no privilege with respect to child abuse. TEX. FAM. CODE ANN. § 261.101(c) (Vernon 2002 & Supp. 2005).

15. In addition to New Jersey, the statutes that require all persons or everyone to report are the following:

ALA. CODE § 26-14-3(a) (LexisNexis 1992 & Supp. 2005) (mandatory reporting by specified professionals "or any person called upon to render aid or medical assistance to any child" when child abuse is known or suspected); DEL. CODE ANN. tit. 16, § 903 (2003 & Supp. 2004) (mandatory reporting by specified healing arts professionals and "any other person"); FLA. STAT. ANN. § 39.201 (West 2003 & Supp. 2006) (mandatory reporting by specified professionals, not including clergy, and by any person who suspects child abuse or neglect); IDAHO CODE ANN. § 16-1619 (2001) (mandatory reporting by specified professionals and "other persons" who suspect child abuse); IND. CODE ANN. § 31-33-5-1 (West 2003 & Supp. 2005) (mandatory reporting by any "individual"); KY. REV. STAT. ANN. § 620.030 (West 2004) (mandatory reporting by any person who knows or has reasonable cause to believe a child is abused including specific steps that some professionals must take); NEB. REV. STAT. § 28-711 (2004) (mandatory reporting by specified professionals and other persons with reasonable cause to suspect child abuse); N.H. REV. STAT. ANN. § 169-C:29 (2001) (mandatory reporting by specified professionals or any other person having reason to suspect that a child has been abused or neglected); N.C. GEN. STAT. § 7B-301 (1999) (mandatory reporting by any person or institution that suspects child abuse); OKLA. STAT. ANN. tit. 10, § 7103 (West 2005 & Supp. 2006) (mandatory reporting by specified professionals and any person who suspects child abuse and providing that no privilege relieves the reporting requirement); 23 PA. CONS. STAT. § 6311 (2001 & Supp. 2005) (mandatory reporting by specified professionals, not limited to the listed specific professionals, which does not include attorneys but applies to "persons who, in the course of their employment, occupation or practice of their profession, come into contact with children"); R.I. GEN. LAWS § 40-11-3 (2005 & Supp. 2005) (mandatory reporting by any person); TENN. CODE ANN. § 37-1-403 (2005) (mandatory reporting by any person who has knowledge of abuse); UTAH CODE ANN. § 62A-4a-403 (2000) (mandatory reporting by any person); WYO. STAT. ANN. § 14-3-205 (1999) (mandatory reporting by any person).


19. Id. § 9:6-8.13 (West 2002). The statute provides:

Anyone acting pursuant to this act in the making of a report under this act shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such person shall have the same immunity with respect to testimony given in any judicial proceeding resulting from such report.

Id.
Failure to report abuse is punishable as a disorderly persons offense and may constitute evidence of negligence.

By requiring all persons to report child abuse, the Act appears on its face to apply to attorneys. However, requiring attorneys to report child abuse that clients reveal in the course of representation conflicts with the attorneys' professional obligations, specifically the attorney-client privilege and the duty of confidentiality.

B. Attorney-Client Privilege

The attorney-client privilege, which has been given tremendous weight historically, is an evidentiary privilege that prohibits attorneys from disclosing confidential communication between the client and the attorney. The attorney-client privilege ordinarily applies to communications made in confidence when a client seeks legal advice from an attorney acting in a legal capacity and when the communications relate to the purpose of the advice. This privilege encourages clients to consult with attorneys freely. While there is some debate as to the extent

20. Id. § 9:6-8.14 ("Any person knowingly violating the provisions of this act including the failure to report an act of child abuse having reasonable cause to believe that an act of child abuse has been committed, is a disorderly person."). The maximum penalty for a disorderly persons offense is six months imprisonment. Id. § 2C:1-4(c) (West 2005). It is not clear whether any attorneys in New Jersey have been prosecuted for failing to report child abuse. Moreover, because failing to report child abuse is a disorderly persons offense in New Jersey, non-battering parents who fail to report child abuse may also be prosecuted under section 2C:1-4(c).

In Nevada, an attorney was charged with a misdemeanor for failing to report child abuse where the attorney waited two weeks before filing the report of suspected abuse. Sheriff of Washoe County v. Sferrazza, 766 P.2d. 896 (Nev. 1988). The Nevada Supreme Court held that the statute was unconstitutionally vague by requiring professionals to make reports "immediately." Id. at 897. The Nevada Legislature subsequently amended the statute to require that a report be made within twenty-four hours. Nev. Rev. Stat. Ann. § 202.882 (LexisNexis 2001); id. § 432B.220 (LexisNexis 2002 & Supp. 2003).

21. Frugis v. Bracigliano, 827 A.2d 1040, 1052 (N.J. 2003) (holding that school nurse and teachers should have reported conduct of school principal); J.S. v. R.T.H., 714 A.2d 924, 934 (N.J. 1998) (deciding wife's actual knowledge of sexual abuse of neighbor's children by husband created a duty of care to take reasonable steps to prevent harm, whose breach was a proximate cause of the injury).

22. See infra text accompanying notes 35, 51.

23. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2290-91 (McNaughton rev. 1961). Wigmore contends that as a matter of social policy the soundness of this privilege has rarely been disputed. Historically, the first duty of attorneys was to maintain the secrets of clients. Prior to the end of the eighteenth century, the privilege developed due to a consideration for the "oath and the honor of the attorney" rather than to encourage candid communication between attorneys and clients. Id. § 2290, at 543. However, by the end of the eighteenth century, the justification for the attorney-client privilege focused on the importance of providing an open forum for a client's freedom to consult with a legal advisor. Id. § 2291, at 545. Without the privilege, clients would only share partial information with their attorneys. Id. § 2291, at 552-53. Partial disclosure of information would limit attorneys' ability to perform their roles in the legal system and consequently undermine the ability of the system to accomplish the interests of justice. Id. § 2291, at 553. For a full discussion of the history of the attorney-client privilege, see Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061 (1978).

24. Because attorneys must be acting in their legal capacity for the attorney-client privilege to apply, attorneys who practice in states that require everyone to report child abuse would still need to report, even if they learn about the child abuse outside of the course of representing or advising a client or potential client. For example, an attorney who witnesses a neighbor abusing a child would be required to report that abuse. N.J. STAT. ANN. §§ 9:6-1 to -8.10 (West 2002).

25. See 8 WIGMORE, supra note 23, § 2991, at 554. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) [hereinafter RESTATEMENT] (stating that the privilege applies to a communication made between privileged persons in confidence for the purpose of obtaining legal assistance).

of the attorney-client privilege, it certainly applies to testimonial in-court disclosures. In *Upjohn Co. v. United States*, the U.S. Supreme Court explained the purpose of the attorney-client privilege:

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term...: "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."

...[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.

New Jersey courts share the underlying premise of the attorney-client privilege stated in *Upjohn* and recognize that the privilege is based on a premise of "preserving the sanctity of confidentiality of a client's disclosures to his attorney [to promote] an open atmosphere of trust." Any privilege "reflects a societal judgment that the need for confidentiality outweighs the need for disclosure." In order for the attorney-client privilege to encourage full disclosure, there must be a high degree of certainty that the privilege will protect the client. As stated in *Upjohn*,

be abrogated by attorneys who represent juvenile delinquents because open communication empowers juveniles within the system).

27. Mosteller, *supra* note 6, at 225. The privilege belongs to the client, but the attorney must assert it if asked to divulge confidential information. Moreover, the privilege does not extend to communications made in the presence of a third party. *Id.* at 239.
28. *Id.* at 224–25.
   Nevertheless, the privilege must be anchored to its essential purpose. Our courts have thus recognized that the privilege results in suppression of evidence and to that extent is at war with the truth.
[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.34

Although persons other than attorneys who have a privileged relationship must often report child abuse, the attorney-client relationship is fundamentally different in such a way that attorneys should not be mandated reporters of child abuse.35 The attorney-client relationship arguably relies on confidentiality to a greater extent than do other professions where confidentiality is important because it is an essential component of the service provided.36 Attorneys cannot represent clients adequately if they are required to take adverse actions against their clients. Further, in the domestic violence context, attorneys are different from other professionals who may also have an expectation of confidentiality because attorneys have the ability to provide concrete assistance that will improve victim safety, such as providing legal protection. For example, studies have shown that having an attorney is a key factor in enabling domestic violence victims to escape the violence.37 Attorneys are often the last resort for many clients; domestic violence victims frequently invoke the legal system only when all else fails. Additionally, although critics of the attorney-client privilege note that the privilege hinders access to truth, other avenues to obtain information about suspected child abuse exist. For example, those who have more frequent contact with children, such as schoolteachers, daycare providers, and doctors, are typically mandated reporters of child abuse.38 The attorney-client relationship is unique and relies upon confidentiality to carry out the purposes of representation. Therefore, attorneys should not be subjected to the same mandatory reporting requirements as other classes of people.

The attorney-client privilege in New Jersey is representative of the privilege in most states. In New Jersey, the attorney-client privilege is a rule established both

34. Upjohn, 449 U.S. at 393.
35. Even though attorneys are different from other professionals, there is scant evidence that professionals who are typically mandated reporters of child abuse are effective or accurate reporters of abuse. For example, in New York City, sixty-seven percent of child abuse reports were made by mandated reporters. Fact Sheet, Kathryn Krase, Mandated Reporting and Foster Care (June 14, 2005) (on file with author); see CITIZENS' COMM. FOR CHILD. OF N.Y., INC., KEEPING TRACK OF NEW YORK CITY'S CHILDREN: THE MILLENIUM EDITION (2003). Over half of those reports were not substantiated upon investigation. Id. Nationwide, over half of the unsubstantiated child abuse reports were made by mandated reporters. Id.; see ADMIN. FOR CHILD. & FAMS., U.S. DEP'T HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2003 (2005), available at http://www.acf.hhs.gov/programs/cb/pubs/cm03/.

36. For example, a doctor would still be able to perform the essential function of setting a broken leg if the doctor reported child abuse; a priest would still be able to perform the essential function of absolution if the priest reported child abuse. See, e.g., Thomas F. Guernsey, The Psychotherapist-Patient Privilege in Child Placement: A Relevancy Analysis, 26 VILL. L. REV. 955, 961 (1981) (stating that “few people would avoid seeking medical help for fear of disclosure”). Moreover, other professionals, such as doctors and therapists, are more frequently trained in identifying child abuse and assessing the risks of future harm.


38. See supra note 11.
by statute\footnote{39} and the New Jersey Rules of Evidence.\footnote{40} When the attorney-client privilege is applicable, "it must be given as broad a scope as its rationale requires."\footnote{41} However, in New Jersey, the attorney-client privilege is not absolute\footnote{42}—it requires disclosure in some circumstances.\footnote{43} The attorney-client privilege statute in New Jersey has a "crime-fraud" exception that permits the attorney to disclose if the client uses the attorney's services to commit a crime.\footnote{44} The crime-fraud exception applies when a client consults with an attorney with the purpose of furthering a crime. The misuse of the attorney's services to assist in the wrong-doing is key to the exception.\footnote{45} However, communications relating to past fraudulent conduct typically remain privileged.\footnote{46}

It is important to examine the crime-fraud exception and other exceptions to the attorney-client privilege because an attorney may have child abuse disclosure obligations even in the absence of reporting statutes.\footnote{47} However, under the attorney-client privilege, the privilege may be claimed by its successors, assigns or trustees in dissolution.

\begin{itemize}
\item \footnote{39} N.J. Stat. Ann. § 2A:84A-20(1) (West 1994 & Supp. 2005) provides the following:
Subject to...communications between attorney and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his attorney from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if incompetent or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

\item \footnote{40} N.J. R. Evid. 504 (providing that "communications between lawyer and his client in the course of that relationship and in professional confidence" are privileged).


\item \footnote{42} The New Jersey Supreme Court held that even where the privilege exists, it may be "pierced" where there is (1) a legitimate need of the party to reach the evidence sought to be privileged, (2) a showing of relevance and materiality, and (3) the information cannot be secured from any less intrusive source. In re Kozlov, 398 A.2d 882, 887 (N.J. 1979). It is unlikely that mandatory child abuse reporting by attorneys would fall under these exceptions because of the existence of less intrusive sources of information such as requiring other professionals to report abuse.

Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer.

\item \footnote{44} Fellerman v. Bradley, 493 A.2d 1239, 1245 (N.J. 1985) ("Public policy demands that the 'fraud' exception to the attorney-client privilege as used in [the New Jersey Evidence Rule] be given the broadest interpretation.").

\item \footnote{45} Mosteller, supra note 6, at 246.


\item \footnote{47} If the client communicates to the attorney that the client intends to commit future acts of child abuse, this would fall under the crime-fraud exception and would not be protected by the attorney-client privilege. Several authors have suggested that suspicion of future acts of abuse must be reported. See, e.g., Besharov, supra note 9, at 478.
client privilege, it is unlikely that a situation would exist that would permit or require disclosure of child abuse under the crime-fraud exception. For example, it is difficult to imagine a scenario in which a client would use the services of the attorney to commit future child abuse. Because information about prior fraudulent conduct remains privileged and does not fall under the crime-fraud exception, mandatory child abuse reporting statutes that require reporting prior acts of child abuse blatantly conflict with the attorney-client privilege. Therefore, typically any communication about child abuse from a client to the attorney who is acting in a professional capacity would be protected by the attorney-client privilege.

C. Duty of Confidentiality

Like the attorney-client privilege, the duty of confidentiality is an ethical rule that is based on standards of professional responsibility and is fundamental to the attorney-client relationship. Mandatory child abuse reporting by attorneys conflicts with the principles underlying the duty of confidentiality.

The duty of confidentiality is similar to the attorney-client privilege. However, the scope of the duty of confidentiality is broader than the attorney-client privilege. The duty of confidentiality extends to all information relating to the client regardless of the source from which it is acquired. For example, it covers information gathered from third persons, which would not ordinarily be protected by the attorney-client privilege. Moreover, the duty of confidentiality continues even when outsiders discover that information.

In New Jersey, the duty of confidentiality is set forth in Rule of Professional Conduct 1.6, which states that “a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).” New Jersey has one of the

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48. As will be discussed in Part III, this is especially true where the issue is children witnessing domestic violence.
49. In addition to the duty of confidentiality, other ethical rules may be implicated, such as those requiring candor toward the tribunal and counseling against fraud. Rosencrantz, supra note 9, at 358-59 (arguing that attorneys should be mandated reporters because child abuse is a unique crime and is distinguishable from other crimes).
50. Mosteller, supra note 6, at 230. Mosteller supports confidentiality on the basis that it encourages full disclosure of information.
51. The conflict between mandatory reporting and the duty of confidentiality may be more easily resolved because ethical rules ordinarily do not supersede statutes. See id. at 240.
54. RESTATEMENT, supra note 25, § 59.
55. Id. Typically the attorney-client privilege will not apply where the communication is voluntarily conveyed to a third party. See Mosteller, supra note 6, at 239. Under the duty of confidentiality, the communication remains confidential unless it is generally known. RESTATEMENT, supra note 25, § 59.
56. N.J. R. OF PROF'L CONDUcr R. 1.6(a) (2005). While Rule 1.6(a) “has its roots in the attorney-client privilege,” it "represents a significant departure" from the traditional parameters of that evidentiary rule. N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Op. 677, at * 5 (1994), available at 1994 WL 586297. Nevertheless, when the Debevoise Committee recommended the adoption of the Rules of Professional Conduct, it determined that the protection afforded to clients by Rule 1.6(a) "represented the dominant rule of public policy which was reflected in prior decisions of the New Jersey Supreme Court." Id.
broadest exceptions to the duty of confidentiality and requires disclosure in a broad range of circumstances. Most notably, exceptions to the duty of confidentiality exist for "future crimes." In New Jersey, the duty of confidentiality requires disclosure when the attorney has reasonable belief of the existence of a future crime or substantial bodily harm. The rule on confidentiality also contains permissive exceptions.

The future crime exception to the duty of confidentiality is broader than the crime-fraud exception to the attorney-client privilege. Because the future crime exception is broader, it presents more troubling disclosure issues for attorneys. For example, even without mandatory child abuse reporting, attorneys would be required to breach the duty of confidentiality when they have a reasonable belief that there will be future child abuse.

Based upon the duty of confidentiality, an attorney would not be required to disclose prior acts of child abuse. However, in New Jersey, the professional rule permits disclosure in order to comply with other laws, such as mandatory child abuse reporting.


58. N.J. R. OF PROF'L. CONDUCT R. 1.6(b)-(c) (2005) provides the following:

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

59. Rule 1.6 defines "reasonable belief" as "the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d)." Id. R. 1.6(e).

60. Rule 1.6(d) states the following:

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to comply with other law.

Id. R. 1.6(d)

61. Mosteller, supra note 6, at 246–49.

62. Even without mandatory child abuse reporting statutes, reporting future acts of child abuse is complicated. For example, would an attorney be required to report suspected future child abuse if the attorney knows that a batterer has been abusive to the children in the past or has been abusive to the victim in front of the children, and the victim of domestic violence remains or returns to her abusive partner? If so, this is a particularly troublesome conclusion given the obstacles battered women face in escaping from an abusive person. Additionally, attorneys are typically not trained in risk assessment to determine risks of future child abuse. Moreover, reporting future child abuse is especially problematic where definitions of child abuse are unclear, as will be discussed, infra, in Part III.
abuse reporting. Because of this exception, attorneys who report child abuse would not be subject to ethical sanctions. Although the rules of professional conduct permit disclosure to comply with mandatory child abuse reporting laws, requiring attorneys to report child abuse interferes with confidentiality, which is necessary for effective representation of domestic violence victims.

D. Resolving the Conflict

As discussed, mandatory child abuse reporting by attorneys frequently conflicts with the attorney-client privilege and the duty of confidentiality. In states that require "all persons" to report child abuse but do not exempt attorneys, the attorney is left to divine the relationship between the child abuse reporting statute, the attorney-client privilege, and the ethical guidelines to resolve a conflict when necessary. Attorneys practicing in states that require everyone to report child abuse often assume that they are mandated child abuse reporters.

Aside from New Jersey, fourteen other states require everyone to be reporters of child abuse. Do attorneys in these states consider themselves reporters, and what guidance do they have to determine whether attorneys must report child abuse? The answers to these questions fall into several categories. First, several states explicitly mention privileges in the child abuse reporting statute, either to abrogate or uphold specific privileges. In North Carolina, Oklahoma, and Pennsylvania, the reporting statutes specifically abrogate privileges, so it is fair to assume that attorneys are mandated child abuse reporters in those states.

As counter-examples, statutes in several other states, including Delaware, Florida, Kentucky, New Hampshire, and

63. N.J. R. OF PROF'L. CONDUCT R. 1.6(d) (2005).
64. Where the legislature has passed a mandatory child abuse reporting statute that conflicts with judicially created ethics rules, separation of powers issues may also exist. See Del. State B. Ass'n Comm. on Prof'l Ethics, Op. 2001-1, at 7 (2001), available at http://www.dbsa.org/AssocPubs/PDFs/2001-1.pdf (stating that the judiciary has the exclusive power to govern the Bar, and, therefore, "the Delaware Legislature, through the Child Advocate Statute or otherwise, may not modify or abrogate the ethical obligations imposed on lawyers"); Office of the Attorney Gen. of Neb., Op. 207, at *7 (1982), available at 1982 Neb. AG LEXIS 39 (stating that the Nebraska Supreme Court has the exclusive power to define and regulate the practice of law, and "any statutory attempts to cut down upon the common law privilege of the attorney/client relationship, at least as to communications concerning the interest of the client, would be held unconstitutional by the Nebraska Supreme Court as an invasion of the Doctrine of Separation of Powers").
65. For example, attorneys that the author has spoken with who practice in family court in New Jersey consider themselves to be mandated reporters. However, one could argue that the child abuse reporting statutes should not be seen as lightly abrogating the attorney-client privilege. Mosteller, supra note 6, at 209-10.
66. See supra note 15.
68. North Carolina abrogates the privilege "except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect, or dependency case." N.C. GEN. STAT. § 7B-310 (1999) (emphasis added). Similarly, Oklahoma's statute provides that "no privilege or contact shall relieve any person from the requirements of reporting." OKLA. STAT. ANN. tit. 10, § 7103(A)(3) (West 1998 & Supp. 2001). Finally, Pennsylvania's statute states: Except with respect to confidential communications made to an ordained member of the clergy which are protected...privileged communication between any professional person required to report and the patient or client of that person shall not apply to situations involving child abuse and shall not constitute grounds for failure to report....
Rhode Island, exclude attorneys from mandatory child abuse reporting requirements. Second, other states implicitly abrogate or uphold the attorney-client privilege. For example, in Utah, only priests are explicitly excluded from the "all persons" language, leading to the conclusion that attorneys are included. Third, some states, including Nebraska and Wyoming, preserve the attorney-client privilege regarding introduction of evidence of child abuse but are silent as to the duty to report. It is worth noting that no cases interpreting any of the fourteen state statutes hold that attorneys are mandated child abuse reporters. Additionally, ethics opinions frequently fail to provide clear guidance to attorneys though they often confirm the conflicts inherent in requiring attorneys to

69. Delaware's statute provides that "no legally recognized privilege, except that between attorney and client and that between priest and penitent in a sacramental confession, shall apply to situations involving known or suspected child abuse...and shall not constitute grounds for failure to report as required by § 903 of this title." DEL. CODE ANN. tit. 16, § 909 (2005). Florida's statute addresses this issue as follows:

The privileged quality of communication between husband and wife and between any professional person and his or her patient or client, and any other privileged communication except that between attorney and client shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect and shall not constitute grounds for failure to report.

FLA. STAT. ANN. § 39.204 (West 2004). Kentucky's statute states:

Neither the husband-wife nor any professional-client/patient privilege, except the attorney-client and clergy-penitent privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding a dependent, neglected, or abused child or the cause thereof, in any judicial proceedings resulting from a report pursuant to this section.

KY. REV. STAT. ANN. § 620.050(3) (LexisNexis 2001). The New Hampshire statute on this point reads: "The privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client and that between attorney and patient or client, shall not apply to any communication involving known or suspected child abuse, abandonment, or neglect and shall not constitute grounds for failure to report as required by this chapter." N.H. REV. STAT. ANN. § 169-C:32 (2001). Finally, Rhode Island too abrogates all privileges except attorney-client for purposes of child abuse reporting. R.I. GEN. LAWS § 40-11-11 (1997 & Supp. 2001).

70. Idaho implicitly includes attorneys as mandated reporters since its statute provides only that "[t]he notification requirements [of this statute] do not apply to a duly ordained minister of religion." IDAHO CODE ANN. § 16-1605(3) (2005). The Indiana statute abrogates privileges but does not list the attorney-client privilege among those privileges; thus, attorneys are arguably not required to report abuse. IND. CODE § 31-32-11-1 (2004). But see Hayes v. State, 667 N.E.2d 222 (Ind. Ct. App. 1996) (stating that the mandatory reporting statute is absolute in a case concerning therapist obligation to report). The Tennessee statute maintains the attorney-client privilege for child sexual abuse but is silent as to non-sexual abuse.

The privileged quality of communication between husband and wife and between any professional person and the professional person's patient or client, and any other privileged communication, except that between attorney and client, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any situation involving known or suspected child sexual abuse and shall not constitute grounds for failure to report as required by this part.


71. UTAH CODE ANN. § 62A-4a-403 (West 2004) (excluding clergymen).

72. ALA. CODE § 26-14-10 (LexisNexis 1992 & Supp. 2005) ("The doctrine of privileged communication, with the exception of the attorney-client privilege, shall not be a ground for excluding any evidence regarding a child's injuries or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter."); NEB. REV. STAT. § 28-714 (2005) ("The privileged communication between patient and physician, between client and professional counselor, and between husband and wife shall not be a ground for excluding evidence in any judicial proceeding resulting from a report."); WYO. STAT. ANN. § 14-3-210 (2004) ("Evidence regarding a child in any judicial proceeding resulting from a report...shall not be excluded on the ground it constitutes a privileged communication...claimed under any provision of law other than W.S. 1-12-101(a)(i) (establishing attorney-client privilege.").)
report child abuse. Similarly, though several bar committees and associations have developed guidelines by attorneys who are mandated child abuse reporters, attorneys are frequently left to their own devices to resolve the conflict.

In sum, it is clear that attorneys must report child abuse in North Carolina (except in pending child abuse cases), Oklahoma, Pennsylvania, and Utah; whereas, it appears that attorneys would not need to report child abuse in Delaware, Kentucky, Rhode Island, New Hampshire, and Florida.

1. Case Law Resolving the Conflict in New Jersey

In New Jersey, there are only limited interpretations of the mandatory child abuse reporting statute. Although the statute does not state whether attorneys are exempted from this requirement, the New Jersey courts have interpreted "any person" to require professionals and non-professionals to report child abuse. As

73. See, e.g., Del. State B. Ass'n Comm. on Prof'l Ethics, Op. 2001-1 (2001) (demonstrating that an attorney's ethical obligations may not be modified or abrogated by the legislature); Fla. B. Ass'n Comm. on Prof'l Ethics, Op. 65-54 (1965) (stating that an attorney does not act unethically when he refuses to disclose client information to a governmental agency if he believes it is privileged or if disclosure would be detrimental to his client); Ky. B. Ass'n Ethics Comm., Op. KBA E-360 (1993) (permitting but not requiring attorneys to report suspected child abuse learned of through their clients); Pa. B.' Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 94-111 (1994) (declining to answer whether the child abuse reporting statute supersedes the confidentiality rule of the Professional Rules of Conduct but stating that a presumption should exist against such a supersession); Utah State B. Ethics Advisory Op. Comm., Op. 97-12 (1998) (declining to answer whether the child abuse reporting statute supersedes the confidentiality rule of the Utah Rules of Professional Conduct and stating that it is neither a violation of the Utah Rules of Professional Conduct to report child abuse, nor a violation not to report child abuse); Utah State B. Ethics Advisory Op. Comm., Op. 95-06 (1995) (declining to answer whether an attorney is mandated to report child abuse but stating that an attorney may report child abuse by a non-client without violating the Utah Rules of Professional Conduct); see also Office of the Att'y Gen. of the State of Idaho, Op. 93-2 (1993) (reiterating that the statute applies to anyone who suspects child abuse but does not specifically mention attorneys); Office of the Att'y Gen. of the State of Neb., Op. 207 (1982) (stating that any statutory attempt to limit the attorney-client privilege in regard to communications concerning the interest of his client would be unconstitutional).

The opinions of the North Carolina State Bar illustrate the often-confusing "advice" rendered by ethical boards. See, e.g., N.C. State B. Ethics Comm., Op. RPC 175 (1994) (noting that, although reporting is within the attorney's discretion, if an attorney chooses not to report where there is a mandatory child abuse reporting statute because it would harm the client and interfere with professional obligations, doing so may subject the attorney to criminal liability for failure to disclose); N.C. State B. Ethics Comm., Op. RPC 120 (1991) (noting that the state statutes have not abrogated attorney-client privilege and recognizing that the ethics opinion cannot reach the legal questions the privilege raises, but stating that an attorney may not ethically be forced to reveal child abuse). This opinion is noteworthy because it mentions that an attorney may be prosecuted for failing to report child abuse even though the ethics board would not find that failure to report unethical conduct. Id.


the Appellate Division made clear, "any person" includes even those persons who have an expectation of confidentiality, such as physicians and psychiatrists. Nevertheless, the New Jersey courts have never specifically addressed the issue of mandatory child abuse reporting by attorneys.

In State v. Snell, the appellate division held that a psychiatrist's duty of confidentiality to a patient was not an impediment to the obligation to report child abuse, stating:

There is no mechanism built into the statute to relieve persons who may be privy to confidential communications from the duty to report child abuse to DYFS [Division of Youth and Family Services]. By mandating that "any person" having reasonable grounds to suspect child abuse report those suspicions to DYFS, the Legislature simply meant any person, without limitation.

Although Snell did not involve attorney communications, the court reached this result by expressly comparing the privilege at issue to the attorney-client privilege. In doing so, the court stated:

Privileges are justified in order to encourage candid and frank communication between attorney and client...because of the primary concern that the client or patient should receive informed legal advice....

...[T]he statute mandating the reporting of suspected child abuse is more particularized and specific than are the statute and rule pertaining to confidential relations and communications. The acute public policy behind N.J.S.A. 9:6-8.10 must override the public policy supporting the psychologist privilege statute and rule. The protection of children from injury, harm, or abuse by means of the statutory reporting requirement may not be blocked or hindered by the assertion of a blanket testimonial privilege....We stress that the statute requires only a report to DYFS in order to protect the child in danger; the privilege remains otherwise intact.

The Court concluded that even though the psychiatrist-patient privilege was more like the attorney-client privilege than the physician-patient privilege, the privilege did not create an exception to mandatory child abuse reporting. Based upon the dicta in Snell, although attorneys may not be compelled to testify against their clients, the attorney-client privilege is trumped by the mandatory child abuse reporting statute. Therefore, attorneys in New Jersey who have reasonable cause to believe that there has been child abuse may assume that they must report that abuse even in cases when the belief is based on information covered by the attorney-client privilege.


78. Snell, 714 A.2d at 979.


However, the court stated that the privilege could not be completely waived because the language waives the privilege "only as to the requirement of making an initial report to a public official." Snell, 714 A.2d at 979.

80. Snell, 714 A.2d at 980-81 (citations omitted) (finding that a psychiatrist may not be compelled by the State to testify to the content of privileged communications).

81. Id.
2. Ethics Opinions Resolving the Conflict in New Jersey

The ethics committee in New Jersey has not resolved the obvious conflict between mandatory child abuse reporting by attorneys and the professional obligations of attorneys. Only one ethics case discusses the child abuse reporting obligations of attorneys. The Ethics Committee stated that, in a custody case, an attorney is not required to report prior abuse. However, the supplement clarified that when the attorney believes that the client's activities demonstrate the "continued propensity" for abuse, the attorney-client privilege does not apply. Neither the ethics opinion nor its supplement mentioned the mandatory child abuse reporting statute, even though the statute had been amended to include all persons at the time of the opinions. Aside from the limited guidance that these ethics opinions offer, they are noteworthy because they demonstrate the existence of conflicting rules and obligations and the quagmire attorneys face in trying to ascertain their child abuse reporting obligations.

Due to limited guidance on resolving the conflict between professional obligations and mandatory child abuse reporting laws, attorneys must frequently draw their own conclusions. Uncertainty about how to resolve the conflict affects the ability to provide effective representation. If child abuse reporting obligations are imprecise, attorneys will not be able to provide explanations to their clients concerning the attorneys' or the clients' responsibility to report child abuse. Therefore, the reporting requirements interfere with the attorneys' ability to provide one of their essential functions—advising their clients.

82. The New Jersey Ethics Committee is appointed by the New Jersey Supreme Court. See N.J. Judiciary, Office of Attorney Ethics, http://www.judiciary.state.nj.us/oae/ (last visited Feb. 12, 2006).

83. Opinion 280, 97 N.J.L.J. 361 (1974). The Advisory Committee on Professional Ethics held that an attorney may not ethically reveal information about child abuse to the child abuse agency. The attorney was representing a parent who disclosed that the parent had abused the child in the past. Id. There are no ethics cases concerning reporting child abuse where there is a history of domestic violence.

84. Id.

85. Opinion 280 (Supp.), 97 N.J.L.J. 753 (1974). This distinction between past and future abuse seems disingenuous where, particularly as here, the statute makes no distinction between prior and future abuse. The Committee did say that the privilege in a custody issue is of a different character than when applied in a civil or criminal case. Id.

86. Attorneys practicing in New Jersey could ostensibly rely on these ethics opinions in refusing to report prior acts of child abuse. See supra notes 83–85.

87. Additionally, the assumption that child abuse reporting should take precedence over professional obligations is based on distinguishing children as "different" and relies disproportionately on the vulnerability of children. As several scholars have noted, framing the debate as one of children's safety versus historic notions of confidentiality sets up an unworkable comparison, in which confidentiality will typically fail. See, e.g., Justine A. Dunlap, Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect, 50 LOY. L. REV. 565, 577 (2004). Moreover, favoring children's safety over the safety of others ignores the harm to victims of domestic violence and ignores how children may be harmed by mandatory child abuse reporting by attorneys. See infra notes 158–160 and accompanying text. Although it may be argued that calling in a child abuse report to initiate an investigation is the only way to get services for the family, statistics show that in the majority of cases, no services are offered to families. See Krase, supra note 35. Lastly, there is scant evidence that mandatory child abuse reporting statutes have any effect on protecting children. See Albrandt, supra note 9, at 656.
II. MANDATORY CHILD ABUSE REPORTING BY ATTORNEYS HARMS THE ATTORNEY-CLIENT RELATIONSHIP

Mandatory child abuse reporting by attorneys interferes with the legal practice of all attorneys; even those who do not regularly represent domestic violence victims will face this issue. Because of the prevalence of violence against women, domestic violence surfaces in many situations other than those that are explicitly labeled “domestic violence” cases. The far-reaching impact of domestic violence indicates that attorneys who are mandated reporters of child abuse need to be aware of the result of their obligations on their practice.

Requiring attorneys to report child abuse tramples upon the value of confidentiality, which is fundamental to the attorney-client relationship. It harms that relationship by preventing open communication and leads to the inability of clients to be fully candid with their attorneys. This is a problem for domestic violence victims because civil domestic violence attorneys typically rely on learning as much as possible about the client’s situation in order to be effective advocates. Limiting the exchange of information is one of the key impediments to effective representation brought on by mandatory child abuse reporting by attorneys.

Merely explaining the mandatory child abuse reporting obligations to clients affects the development of a meaningful attorney-client relationship. For example, domestic violence attorneys typically explain confidentiality and the mandatory child abuse reporting requirement during an initial or early interview. Rather than using the first meeting to build trust and rapport, the attorney uses the early moments to explain often unclear and complicated reporting requirements. Instead of assuring the client that the attorney is her advocate, the attorney sends the message that the client’s children are more deserving than she is of protection. Turning attorneys into watchdogs over their clients harms the quality of the attorney-client relationship. What domestic violence victim would have enough trust to be completely open and honest with her attorney, knowing that the very person she came to for help would turn her in or file a child abuse report? It is precisely this scenario that interferes with the attorney’s ability to represent her client.

As a practical matter, a client whose attorney reports child abuse may lose trust and confidence in the attorney, particularly when the client faces new obstacles as

88. An estimated three to four million American women are beaten each year by their husbands or partners. Estimates indicate that a woman has between a one-in-three and a one-in-four chance of being physically assaulted by a partner or ex-partner during her lifetime. ABA COMM’N ON DOMESTIC VIOLENCE, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER’S HANDBOOK (2d ed. 2004).
89. For example, an employment attorney may be assisting someone who was fired because of excessive absences due to domestic violence. Id.
90. See supra Part I.B.
91. See supra notes 35–37 and accompanying text.
93. The problems with mandatory child abuse reporting by attorneys are exacerbated in a clinical setting where student attorneys struggle with developing a client-centered approach to lawyering along with the challenges of explaining confidentiality and mandatory child abuse reporting. Students frequently struggle with explaining their professional obligations. See Clark D. Cunningham, How to Explain Confidentiality?, 9 CLINICAL L. REV. 579 (2003) (analyzing the ability of attorneys to accurately and understandably explain confidentiality to clients).
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a result of the investigation. The client may then want a different attorney. Given the shortage of domestic violence attorneys and generally under-funded legal services, the client may not be able to find replacement representation.

Moreover, women of color and women with limited economic resources who are victims of domestic violence face additional hurdles within the legal system. For example, these clients are not accustomed to having their confidentiality, privacy, or autonomy valued. There is a common perception that domestic violence victims seeking legal assistance open their lives to inspection the moment they set foot into the courthouse. By intruding upon confidentiality, mandatory child abuse reporting by attorneys is disempowering to those who most need to be empowered, namely women of color or women with limited economic resources who are domestic violence victims.

III. THE HARMS TO THE ATTORNEY-CLIENT RELATIONSHIP ARE EXACERBATED WHEN THE DEFINITIONS OF CHILD ABUSE ARE NOT CLEAR

Mandatory child abuse reporting by attorneys is especially problematic when definitions of child abuse are not clear. Unclear definitions of child abuse compromise the ability of attorneys to provide effective legal assistance to domestic violence victims. This Part details the ways in which vague definitions of child abuse impede the ability to adequately represent these clients. The first section uses the New Jersey child abuse reporting statute to highlight the problems with unclear definitions. Specifically, the imprecision of the standard that triggers the obligation to report prevents attorneys from adequately advising their clients. The second section shows how ambiguity concerning the impact on children of witnessing domestic violence prevents the development of a meaningful attorney-client relationship, which harms domestic violence victims.

A. Statutory Problems Defining Child Abuse and the Obligation to Report Child Abuse

Mandatory child abuse reporting by attorneys is further complicated because of problems defining child abuse. Former Supreme Court Justice Stewart, in attempting to define pornography, once said that you "know it when [you] see it." Similarly, there is no significant clarification on which acts are sufficient to trigger

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94. See infra Part IV (discussing the disadvantages of being involved in child protection cases).
95. For example, New Jersey does not provide attorneys in domestic violence cases to indigent litigants. See Scalchi v. Scalchi, 790 A.2d 943, 945 n.1 (N.J. Super. Ct. App. Div. 2002) (stating that New Jersey only requires appointment of counsel in civil cases involving child abuse or termination of parental rights).
96. Furthermore, mandatory child abuse reporting laws may discourage attorneys from taking domestic violence cases when children are involved.
97. See generally ROBERTS, supra note 5.
98. Cf. Christine N. Cimini et al., Kathleen A. Sullivan: A True Teacher's Teacher, 8 CLINICAL L. REV. 13, 14 (2001) (explaining that clinical clients—clients who are often of the same socioeconomic status as poor women of color—are not used to having these notions valued).
99. Cf. id.
100. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("But I know it when I see it, and the motion picture involved in this case is not that.").
mandatory child abuse reporting.\textsuperscript{101} Because what constitutes child abuse is frequently unclear, attorneys cannot adequately advise their clients about what must be reported. Thus, the ability to provide effective representation is restricted when legal definitions of child abuse are not clear.\textsuperscript{102}

In New Jersey, the definition of abuse includes “the performing of any indecent, immoral, or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child.”\textsuperscript{103} Although the New Jersey statute purports to define abuse, it does not explain which facts might constitute child abuse. For example, is an open-hand slap child abuse?\textsuperscript{104} As a result of the vague definition of abuse, the attorney unwittingly sets a trap for the client by assuring confidentiality and then breaching those confidences when the attorney believes that the client’s confidences reveal child abuse.\textsuperscript{105} An attorney’s inability

\begin{footnotes}
\item[102] See supra Part I.B.
\item[103] The complete definition of abuse is as follows: Abuse of a child shall consist in any of the following acts: (a) disposing of the custody of a child contrary to law; (b) employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb, or contrary to the laws of this State; (c) employing or permitting a child to be employed in any occupation, employment or vocation dangerous to the morals of such child; (d) the habitual use by the parent or by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language; (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child; (f) permitting or allowing any other person to perform any indecent, immoral or unlawful act in the presence of the child that may tend to debauch or endanger the morals of such child; (g) using excessive physical restraint on the child under circumstances which do not indicate that the child’s behavior is harmful to himself, others or property; or (h) in an institution as defined in section 1 of P.L.1974, c. 119 (C. 9:6-8.21), willfully isolating the child from ordinary social contact under circumstances which indicate emotional or social deprivation. N.J. STAT. ANN. § 9:6-1 (West 2002).
\item[104] This is not meant to condone the use of physical discipline. However, child protective services would certainly be overwhelmed by reports if that type of conduct required reporting, though it might arguably fall under the definition of cruelty in the statute. See id. § 9:6-1.
\item[105] Mandatory child abuse reporting by attorneys is particularly problematic when attorneys do not resolve questions about their obligations in favor of their clients. For example, when attorneys report child abuse and an
\end{footnotes}
to explain the boundaries of what constitutes abuse interferes with the client’s decision making about what information to conceal or share with the attorney.

The child abuse statute in New Jersey requires reporting when there is "reasonable cause" to believe that a child has been subjected to child abuse or acts of child abuse. No case law interprets the meaning of reasonable cause. What is an attorney’s obligation to investigate whether there is “reasonable cause”? For example, suppose a client tells the attorney that she has been abused in front of her children. Must the attorney ask follow-up questions to ascertain whether the behavior constitutes child abuse? Does the attorney need to ask how frequently the children witnessed the abuse? Does the attorney need to ask if the children were harmed or could have been harmed?

In this situation, the civil domestic violence attorney is confronted with problems ordinarily only faced by criminal defense attorneys. As a result of ambiguous standards, attorneys are left without guidance both on what to report and how much to investigate. How can the attorney advise the client when the obligations of the attorney are not clear? When attorneys are mandated reporters of child abuse, the lack of clarity about what constitutes child abuse under the statute interferes with the attorney-client relationship and harms domestic violence victims.

B. Ambiguity Concerning the Impact on Children of Witnessing Domestic Violence

One area that demonstrates the way in which unclear definitions of child abuse interfere with the ability to provide effective representation is the uncertainty concerning how children who witness domestic violence are affected. Domestic violence attorneys will likely encounter clients whose children have witnessed investigation reveals that abuse is not substantiated, clients are harmed both by the breach of confidentiality and by the resulting investigation. Vague standards may contribute to over-reporting of child abuse. See Krase, supra note 35.


107. See, e.g., Randolph Braccialarghe, Why Were Perry Mason’s Clients Always Innocent? The Criminal Lawyer’s Moral Dilemma—The Criminal Defendant Who Tells His Lawyer He Is Guilty, 39 VAL. U. L. REV. 65, 72–73 (2004) (explaining the problems faced by criminal defense attorneys in deciding how much information to extract from their client). By requiring attorneys to be mandated reporters of child abuse, the state hijacks the attorney-client relationship to serve its own purpose. In requiring attorneys to report child abuse, attorneys act as agents of the state, which opens possible constitutional bases to challenge the mandatory child abuse reporting statute. Although ordinarily private actions are not subject to section 1983 claims, “a private party’s actions can be ‘fairly attributable’ to the state when they are compelled by state law.” Thomas v. Chadwick, 274 Cal. Rptr. 128, 135 n.12 (Ct. App. 1990) (noting that because “the statutory scheme both imposes criminal liability for failure to submit reports of known or reasonably suspected abuse, and encourages this compulsory reporting by condoning (through immunity) certain negligent or false reports, it can be argued that the making of the report takes on the color of state action”). In Lugar v. Edmonson Oil Co., the Supreme Court stated that a procedural scheme created by the statute was “obviously...the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well.” 457 U.S. 922, 941 (1982). Therefore, it could be argued that mandatory child abuse reporting statute did not convert a doctor into a state actor)

108. Reporting statutes like New Jersey’s have additional problems, such as the failure to differentiate between past abuse and future abuse. See N.J. STAT. ANN. §§ 9:6-1 to -8.44 (West 2002 & Supp. 2005). Requiring an attorney to report past abuse, particularly where there may be civil or criminal consequences for the non-abusive parent, punishes domestic violence victims for seeking help. A full discussion of the differences between past and future abuse is outside the scope of this Article.
domestic violence. When attorneys are mandated reporters of child abuse, they must consider what harms children suffer as a result of witnessing domestic violence.

Witnessing domestic violence certainly has some negative effect on children. No single theory can explain how children are affected by violence in the home. Studies confirm the negative effect of witnessing domestic violence, though experts disagree on the extent or consequences of that harm. Because the effect on children of witnessing domestic violence is not typically defined, attorneys are unable to provide accurate information about what must be reported and about the consequences of making a child abuse report.

The debate over the extent to which children are harmed by witnessing domestic violence has engaged not only scholars, but courts as well. For example, in Nicholson v. Scoppetta, a federal class action brought on behalf of mothers and their children separated because the mothers were victims of domestic violence, the highest New York court held that witnessing domestic violence could not create a

109. Given the frequency of domestic violence cases, attorneys in domestic violence practice will encounter children who have witnessed violence. See ABA COMM’N ON DOMESTIC VIOLENCE, supra note 88 (illustrating the numerous incidents of domestic violence).

110. Resolving the debate concerning the extent to which children may be harmed by witnessing domestic violence is outside the scope of this Article. The fact that there is a national debate about the harms of witnessing domestic violence, see infra notes 111–114 and accompanying text, demonstrates the lack of clarity about what constitutes child abuse, which compounds the problems with requiring attorneys to report child abuse.

111. N.J. STAT. ANN. § 2C:25-18 (West 2005) (emphasis added) provides the following:

The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spousal abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.


113. Social science research supports various conclusions about the effect of witnessing domestic violence. Lois A. Weithorn, Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes, 53 HASTINGS L.J. 1, 6 n.3, 85–92 nn.372–408 (2001) (evaluating the impact of exposure to domestic violence upon children’s psychological development and functioning and concluding that children who are exposed are more likely than non-exposed children to develop a range of psychological or emotional problems). Weithorn argues that juvenile court jurisdiction should be expanded so that exposure to domestic violence triggers child protection services or dependency court as long as agencies are given guidance. See also Leigh Goodmark, From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases, 102 W. VA. L. REV. 237, 242–52 (1999) (discussing the impact of domestic violence on children, including physical, behavioral, and emotional harm). But see Evan Stark, The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response, 23 WOMEN’S RTS. L. REP. 107 (2002) (arguing that indirect and direct risks to children in domestic violence cases are typically non-emergent and rarely rise to the level normally associated with abuse and neglect).
presumption of harm to the child.\textsuperscript{114} \textit{Nicholson} challenged the removal of children from their mothers on the basis that the mothers were victims of domestic violence and had therefore failed to protect the children from exposure to domestic violence.\textsuperscript{115} These removals frequently occurred without court order, without offering services to the victims of domestic violence, and without returning the children to the mothers promptly, even when ordered to do so by the court.\textsuperscript{116} The class action in \textit{Nicholson} challenged this alleged policy of the Administration for Children’s Services (ACS) under section 1983\textsuperscript{117} and several constitutional grounds, including allegations that the removals violated substantive and procedural due process.\textsuperscript{118}

The New York Court of Appeals found that a showing of neglect against a non-abusive parent requires more than exposure to domestic violence; the party must establish that a child’s physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired, and the party must establish a causal connection by showing that the harm to the child is a consequence of the failure of the parent to exercise a minimum degree of care.\textsuperscript{119} The court also stated that whether a battered mother has failed to exercise a minimum degree of care is “necessarily dependent on facts such as the severity and frequency of the violence,

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\item \textsuperscript{114} 820 N.E.2d 840, 854 (N.Y. 2004); see also Justine A. Dunlap, The “Pitiless Double Abuse” of Battered Mothers, 11 AM. U. J. GENDER SOC. POL’Y & L. 523, 529–30 (2003) (discussing Nicholson in light of a recent book, \textsc{Elizabeth M. Schneider, Battered Women and Feminist Lawmaking} (2000), to show the absurdity of charging a battered woman with failure to protect when she has sought protection for herself and her children).
\item \textsuperscript{115} Nicholson v. Williams, 203 F. Supp. 2d 153, 169 (E.D.N.Y. 2002). The testimony of the named plaintiffs, as summarized in the court’s preliminary injunction ruling, demonstrates the perils of removing children who have been exposed to domestic violence. For example, Sharwline Nicholson suffered a broken arm, fractured rib, and head injuries at the hands of her boyfriend when she told him that she was ending the relationship. \textit{Id.} at 169. While she was in the hospital recovering from these injuries, the children were removed from their babysitter’s home. \textit{Id.} Ms. Nicholson was not informed of where her two children were being held. Subsequently, even though Nicholson suggested several relatives with whom the children could stay, the children were placed in foster care with strangers. \textit{Id.} at 169–70. Ms. Nicholson was not permitted to return to her apartment with her children even though the abuser had never lived with her in the apartment, did not have a key to the apartment, and lived in South Carolina. \textit{Id.} at 171. No court order was sought to remove the children and a petition was not filed until five days after the children’s removal. Ms. Nicholson had previously been denied an order of protection due to problems with serving the abuser. \textit{Id.} Her children were not returned until twenty-one days later, after the children had been mistreated in foster care. \textit{Id.} at 172. Although the petition was ultimately dismissed, Ms. Nicholson remained on the state’s registry as a neglectful parent because the neglect report “indicated” her to be one. \textit{Id.} at 173.
\item \textsuperscript{116} \textit{Id.} at 168–93.
\item \textsuperscript{117} \textit{Id.} at 232–33.
\item \textsuperscript{119} Nicholson v Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004).
and the resources and options available to her." The court expressly recognized that factors to consider included the risks of leaving, whether or not the batterer threatened to kill the victim if the victim leaves, and the risks of seeking governmental assistance, criminal prosecution, or relocation.

New Jersey courts have followed the ruling in Nicholson. For example, a domestic violence victim in New Jersey Division of Youth and Family Services v. S. S., suffered at the hands of her husband who choked her, pulled her hair, attempted to punch her, and threatened to kill her. Some of this violence occurred in the presence of their two-year-old child. After a child abuse report was filed, the child was placed with relatives of the mother, who was not allowed unsupervised visitation with her child.

Despite testimony that the child was not harmed, the trial judge ruled that the mother’s conduct in allowing her child to witness domestic violence constituted abuse. The appellate division reversed, finding that the emotional harm of witnessing domestic violence cannot be presumed in the absence of evidence of its existence or potential harm. The appellate division overturned the finding of abuse, stating that none of the caseworkers, review boards, or judges were entitled to assume that witnessing domestic violence caused emotional harm, but instead that DYFS must demonstrate harm to the particular child.

120. Id. at 846.
121. Id. The New York Court of Appeals made several findings concerning removals, most notably that "when a court orders removal, particularized evidence must exist to justify that determination, including, where appropriate, evidence of efforts made to prevent or eliminate the need for removal and the impact of removal on the child." Id. at 854. Emergency removals without court order, though theoretically permissible, exist for only the "rare circumstance" when the danger is great and time is fleeting. Id. Finally, the court of appeals affirmed that "there can be no 'blanket presumption' favoring removal when a child witnesses domestic violence." Id.
122. Most recently in Division of Youth and Family Services v. D.F., 871 A.2d 699 (N.J. Super. Ct. App. Div. 2005), the appellate division held that the Division of Youth and Family Services (DYFS) could not bring an administrative action to place a mother’s name on the Central Registry for failing to protect herself and her six-month-old child from domestic violence. Id. at 706-07. The victim obtained a final restraining order after the most recent incident of violence. Id. at 701. This case is also noteworthy because it shows how poorly domestic violence victims may be treated in the child protection system. The only action taken by DYFS was this administrative action against the child’s mother, and the only result was limiting her employment opportunities. Id. at 700. No judicial action was taken against the abuser. Id. The court noted that it was “troubled by the fact that a person’s name may be placed in the Central Registry based solely on a determination by an individual caseworker,” which raises procedural due process and administrative fairness concerns. Id. at 704 n.2.
123. 855 A.2d 8, 10 (N.J. Super. Ct. App. Div. 2004). The police reported the matter to DYFS. When the mother inquired about reducing the defendant’s bail, a DYFS case-worker threatened to remove her child. Id. at 11.
124. Id. at 11.
125. Id. at 13.
126. Id. at 16.
127. The New Jersey court referenced Nicholson by noting the following:

In District Court Judge Jack Weinstein’s decision underlying his finding of constitutional violations, Judge Weinstein summarized evidence of a wide divergence among experts as to the effects of domestic violence on children, and concluded that “the children can be—but are not necessarily—negatively affected by witnessing domestic violence.”

We thus cannot assume (as did DYFS and the family court judge) that the present case was one in which witnessing domestic abuse had a present or potential negative effect on the child sufficient to warrant a finding of abuse against appellant—the battered victim. The assumption is particularly troubling in light of its substantial potential effect upon appellant’s reputation and to her employment prospects.

Id. at 16 (citations omitted).
Nicholson and S. S. demonstrate that at least some courts are moving away from the idea of punishing abused mothers for the acts of their abusive partners. Furthermore, these cases provide some guidance to mandated reporters of child abuse about what must be reported. However, questions regarding the specific legal consequences of witnessing domestic violence in child abuse and neglect cases remain unanswered in many states. These unanswered questions exacerbate the problems inherent in requiring attorneys to be mandated reporters of child abuse.128

Though Nicholson seems to be unique in specifically addressing the constitutional issues involved in removing children on the basis that the mothers were victims of domestic violence, other state cases have discussed the issue of witnessing domestic violence, most notably in the custody context.129 A handful of states have codified the harmful effects of witnessing domestic violence.130

Not only are Nicholson and S. S. clear victories for domestic violence victims, they also highlight the national debate concerning the impact of witnessing domestic violence. Even after cases like Nicholson and S. S., attorneys who are mandated reporters of child abuse must still consider the effect of witnessing abuse in individual circumstances. For example, although Nicholson and S. S. state that harm to a child who witnesses domestic violence cannot be presumed,131 circumstances may exist where a child has been harmed by witnessing violence such that child abuse should be reported.132 When a client tells an attorney in confidence that the client’s child has suffered emotional harm as a result of witnessing domestic violence, attorneys in these states are typically not mandated reporters of child abuse. However, even where a client tells an attorney in confidence that the client’s child has suffered emotional harm as a result of witnessing domestic violence, attorneys in these states are typically not mandated reporters of child abuse. However, even where a child abuse report is against the batterer, negative consequences exist for the victim of domestic violence. See infra notes 138–145 and accompanying text.
violence, the attorney must at least consider whether to make a child abuse report. When it is unclear whether witnessing domestic violence constitutes child abuse, there is a detrimental effect on the attorney-client relationship.

Whenever it is not clear what legally constitutes child abuse, the attorney-client relationship may be harmed. The relationship is harmed because attorneys who are mandated reporters encounter difficulties explaining the reporting requirement and properly advising their clients. This is particularly true when the definitions of child abuse are vague, when the standard to trigger an attorney's obligations is vague, and when the effect on children of witnessing domestic violence is uncertain.

IV. DANGER OF MANDATORY CHILD ABUSE REPORTING BY ATTORNEYS TO VICTIMS OF DOMESTIC VIOLENCE AND THEIR CHILDREN

Mandatory child abuse reporting by attorneys has severe consequences for victims of domestic violence, including increasing the physical danger to victims and their children, subjecting domestic violence victims to ongoing state intervention and potential criminal prosecution for abuse or neglect, and discouraging victims of domestic violence from seeking legal assistance.\(^\text{133}\) These negative consequences exist even when the child abuse report is filed against someone other than the victim of domestic violence.\(^\text{134}\)

This Article's primary objection to mandatory child abuse reporting is that it is dangerous for domestic violence victims and their children. It is commonly accepted that the most dangerous time for a domestic violence victim is the point at which the victim attempts to leave or otherwise end the relationship.\(^\text{135}\) Attorneys should not be responsible for increasing this danger to their clients. Reporting child abuse leads to an investigation, which could further enrage the batterer and subject the domestic

\(^{133}\) These harms of mandatory child abuse reporting arise regardless of who makes the child abuse report. Those in favor of mandatory child abuse reporting frequently fail to consider how it affects victims of domestic violence. See Nancy E. Stuart, Note, Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality, 1 GEO. J. LEGAL ETHICS 243, 261–66 (1987) (arguing attorneys should be mandatory reporters of child abuse without discussing domestic violence). Domestic violence advocates may rightfully oppose mandatory child abuse reporting for anyone, especially where the child protection system fails to appropriately treat domestic violence victims. This Article supposes that attorneys should not be mandated reporters in part because of problems within the child protection bureaucracies. Where domestic violence victims will face obstacles as a result of mandatory child abuse reporting by anyone, attorneys are needed to guide victims through the child protection system. Attorneys cannot effectively provide legal assistance to their clients involved in the child protection system if attorneys are also charged with reporting suspected child abuse.

\(^{134}\) When the client is the child abuser, mandatory child abuse reporting by attorneys is still problematic. One wonders how an attorney would be able to represent a parent accused of abuse at all, especially when there is a risk that the client will disclose previous uncharged acts of child abuse. In these instances, mandatory child abuse reporting by attorneys may interfere with the right to counsel, raising constitutional concerns. As one New Jersey court stated, "[t]he attorney-client privilege is basic to a relation of trust and confidence that, though not given express constitutional security, is yet essentially interrelated with the specific constitutional guaranties of the individual's right to counsel and immunity from self-incrimination." State v. Kociolek, 129 A.2d 417, 425 (N.J. 1957); see also United States v. DiDomenico, 78 F.3d 294, 299–300 (7th Cir. 1996) (finding that undermining freedom of communication between defendants and attorneys limits efficacy of the right to counsel).

\(^{135}\) See State v. Reyes, 796 A.2d 879, 884 (N.J. 2002) ("Often victims are at greatest risk when they leave their abuser because the violence may escalate as the abuser attempts to prevent the victim's escape."); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L. REV. 1, 65–71 (1991).
violence victim and her children to further harm. If the attorney makes a child abuse report, the client may discharge the attorney or discontinue the legal matter because the client has lost trust in the attorney and the legal system. By requiring attorneys to report child abuse, society abandons domestic violence victims when they are most vulnerable.

Even when the child abuse report is against the batterer, the domestic violence victim will unquestionably be involved in the child protection system. Child protection cases often last for many years, subjecting the domestic violence victim to ongoing state intervention and supervision. Frequent court appearances may place the client's job in jeopardy, which exacts an uneven toll on women of color and women with limited economic resources. Moreover, child protection cases are frequently tracked via the mother's name even when the mother is not a party to the action. As a result, significant detriments to employment opportunities and earning potential for women whose children are involved in the child protection system arise. For example, the domestic violence victim may be prohibited from working in the school system or a daycare center, or otherwise working with children, a frequent employment opportunity for women. This is particularly troubling because lack of access to financial resources often results in a victim remaining with her batterer; conversely, a victim's increase in income often reduces domestic violence. Attorneys should not be required to report child abuse because reporting the abuse has such detrimental consequences for their clients.

Even as a non-battering parent, the domestic violence victim may be subject to criminal liability. Reporting abuse does not immunize a client from criminal prosecution, especially if the client is charged with endangering the welfare of a child or is charged as an accomplice. For example, in New Jersey, the immunity provision in the child abuse reporting statute applies only to reporting and not to the underlying act or conduct. A domestic violence victim who reports child abuse, or whose attorney reports child abuse, risks being criminally prosecuted. A client seeking civil legal assistance should not be subjected to criminal sanctions as a result of the attorney's mandatory child abuse reporting obligations.

136. For example, she may be called to testify against the batterer in court, which could jeopardize her safety.
138. See generally ROBERTS, supra note 5.
139. For example, New York tracks child protection cases by the mother's name, even if she is not the suspected child abuser. There are proposals pending to change this practice.
142. See supra note 37 and accompanying text.
143. See, e.g., N.J. STAT. ANN. § 2C:24-4 (West 2003) (endangering welfare of a child); id. § 2C:2-6.c(c) (liability for conduct of another; complicity).
144. Id. § 2C:2-6.c(c) (defining accomplice).
145. In State v. Hill, a mother who reported to the police that her daughter was abused by the mother's boyfriend was not entitled to immunity from prosecution for endangering the welfare of her child. 556 A.2d 1325, 1326 (N.J. Super. Ct. Law Div. 1989).
In addition to criminal liability, mandatory child abuse reporting by attorneys also exposes domestic violence victims to civil sanctions, such as an abuse or neglect charge of "failure to protect." Civil liability for victims of domestic violence should not be instigated by their attorneys.

The risk of failure to protect cases is particularly high where what constitutes child abuse is not clearly defined, such as the ambiguities concerning the impact of witnessing domestic violence. The problems with failure to protect cases for domestic violence victims include the following: encouraging unnecessary removal of children from their parents and placing children in foster care, taking responsibility away from the batterer, and perpetuating stereotypes about domestic violence victims.

As demonstrated in Nicholson, the child protection institutional response to children witnessing domestic violence has not focused on stopping the violent perpetrator. Instead, the child protection response has focused on separating caretakers from their children in failure to protect cases. As a result of failure to protect cases, children may be removed from their non-abusive parent and placed in foster care. A child who faces removal may be subjected to ongoing abuse in the foster care system, and the harms of removing children from the non-abusive parent are well documented. Misapplication of the failure to protect doctrine causes domestic violence victims, particularly women of color and women with limited economic resources, to lose custody of their children. Courts frequently rely on false assumptions that a domestic violence victim is capable of preventing the abuse or preventing the child from witnessing abuse, such as by taking the child

146. See, e.g., N.J. STAT. ANN. § 9:6-1 (West 2002) (referencing "allowing any other person" to "endanger the child" or "any willful act of omission").

147. Failure to protect cases have been written about extensively. See, e.g., The “Failure to Protect” Working Group of Child Welfare Comm. of N.Y. City Inter-agency Task Force Against Domestic Violence, Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim, 27 FORDHAM URB. L.J. 849 (2000). This Part of the Article is an overview of the issues and a discussion of how failure to protect cases intersect with the problems of mandated child abuse reporting by attorneys. A thorough discussion of the problems of failure to protect cases is outside the scope of this Article.

148. See infra note 158 and accompanying text.

149. Susan Vivian Mangold, Transgressing the Border Between Protection and Empowerment for Domestic Violence Victims and Older Children: Empowerment as Protection in the Foster Care System, 36 NEW ENG. L. REV. 69, 127 (2001) (offering ideas of renewed investment and creative permanency planning to empower both caretakers and children).

150. There are numerous potential harms for children placed in foster care, including neglect, physical abuse, sexual abuse, emotional abuse, and psychological harm. Research suggests that once a child is placed in foster care, the child may not be safer from harm than when the child was with the abusive parent. The failure of foster care systems to follow minimum standards of care that may otherwise ensure care and protection of children has led to increased rates of foster care abuse and neglect. See Emily Buss, Parents’ Rights and Parents Wronged, 57 OHIO ST. L.J. 431, 439 (1996) (stating that the child welfare system plays out abysmally for children, often exposing them to neglect, physical, and/or sexual abuse); Randi Mandelbaum, Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented by Lawyers, 32 LOY. U. CHI. L.J. 1, 15-19 (2000) (discussing the deficiencies of the child welfare system); Shana Gruskin, Advocate Sues State Foster Care, Children Put at Risk, Suit Contends, SUN SENTINEL (Ft. Lauderdale, Fla.), June 15, 2000, at 1B (reporting a state class action filed on behalf of over 14,000 children in the Florida child welfare system, alleging sexual abuse, beatings, malnutrition, torture, and neglect). See generally Michael B. Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 HARV. C.R.-C.L. L. REV. 199 (1988).

151. Stark, supra note 113 (noting that children in domestic violence situations are particularly vulnerable to the trauma associated with foster placement).

152. See generally ROBERTS, supra note 5.
away, removing the abuser from the home, or otherwise separating the child from the abuser. In practice, police, child protective services, and members of the community are frequently unsupportive and unresponsive to domestic violence victims who attempt to end their victimization. Failure to protect cases that lead to removal are harmful not only during the immediate removal, but also because of the time that it takes to get rightful custody back. These profound harms to the family should not be caused by domestic violence victims’ attorneys.

Failure to protect cases also deemphasize the responsibility of the batterers and fail to hold the correct party accountable. Batterers, rather than non-abusive parents, should be prosecuted. Society should be holding the batterers accountable rather than blaming domestic violence victims for failing to protect themselves and their children. Additionally, failure to protect cases assume that domestic violence victims have done nothing to protect their children. Domestic violence victims may, in fact, have a very accurate sense of when batterers are most likely to inflict violence upon them and may have taken steps to protect their children. Bringing a case against the non-abusive parent necessarily downplays the role and responsibility of the abusive party.

Child protection cases against non-abusive mothers based on the failure to protect doctrine also perpetuate stereotypes about battered women. These cases presume that the child’s safety is paramount to the mother’s safety. However, a child’s safety is typically inextricably linked to the mother’s safety. By favoring the child’s safety at the expense of the mother’s safety, failure to protect cases perpetuate the idea of the self-sacrificing mother. Motherhood holds a powerful ideology in our culture and is critical to women’s subordination because the identity of “woman” is often shaped by the identity of “mother.” Mothers are

153. V. Paulani Enos, Prosecuting Battered Mothers: State Laws’ Failure to Protect Battered Women and Abused Children, 19 HARV. WOMEN’S L.J. 229 (1996). Although the awareness of domestic violence has increased over the years, a victim of domestic violence is still subject to societal norms that question why she did not leave. For a discussion of the many barriers to leaving an abusive relationship, see Sarah Buel, Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay, COLO. LAW., Oct. 1999, at 19.


155. Peggy Cooper Davis & Gautum Barua, Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law, 2 U. CHI. L. SCH. ROUNDTABLE 139, 145–46, 157 (1995) (documenting the “sequentiality effect” of how decisions made at one stage of a child protective proceeding are likely to influence decisions at the next stage and that interim decisions are more likely to err on the side of intervention).

156. Audrey E. Stone & Rebecca J. Fialk, Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse, 20 HARV. WOMEN’S L.J. 205 (1997). Significant debate exists concerning the role of criminal prosecution of domestic violence cases and related policies, such as mandatory arrest; however, that discussion is outside the scope of this Article.


159. Id.

160. Odeana R. Neal, Myths and Moms: Images of Women and Termination of Parental Rights, 5 KANS. J.L. & PUB. POL’Y 61, 74 n.75 (1995) (stating that what constitutes a good mother is tied to what constitutes a good woman). Good mothers are altruistic and self-sacrificing, and a mother who is viewed as “bad” by a judge may often lose custody of her children even when there has not been a demonstrated risk of harm to the child. Id.

161. SCHNEIDER, supra note 114, at 149, 152, 178.
expected to place their needs second to those of their children.\textsuperscript{162} Society often blames mothers for the problems faced by children, while fathers are not as often subjected to a similar “good” versus “bad” dichotomy.\textsuperscript{163}

For example, the facts of Nicholson demonstrate that the named plaintiff was a victim of stereotyping and illustrate the biases against victims of domestic violence in the child protection system.\textsuperscript{164} First, the child protection agents presumed that, as a victim of domestic violence, Ms. Nicholson could not care for her children.\textsuperscript{165} Her autonomy and her ability to assess the risks to herself and her children were neither considered nor valued.\textsuperscript{166} Moreover, the system repeatedly failed her; she sought legal assistance and attempted to obtain a restraining order, but these attempts were ignored.\textsuperscript{167} Ms. Nicholson was charged with neglect based on the assumption that she was as equally culpable as her batterer and that she failed to live up to the expectations of motherhood.\textsuperscript{168}

Because Ms. Nicholson was an African-American woman, the case also demonstrated how stereotypes about domestic violence victims are exacerbated by class and race stereotypes.\textsuperscript{169} Race biases are particularly troublesome because African-American children are disproportionately represented in the child protection system.\textsuperscript{170} Scholars, most notably Dorothy Roberts, have pointed out that the child welfare system has systematically dismantled the African-American family.\textsuperscript{171} Stereotypes about women who “expose” their children to domestic violence or child abuse ignore the very real obstacles that domestic violence victims face when seeking to protect their children, such as the absence of social and legal support for leaving their abusers.\textsuperscript{172} The legal system propagates stereotypes about

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\textsuperscript{162} Martha L. Fineman, \textit{Images of Mothers in Poverty Discourses}, 1991 DUKE L.J. 274, 284, 291. As Professor Fineman notes, mothers are classified in their relation to men; “single” mothers are the “bad” mothers and the ones who are abused.


\textsuperscript{165} Id. at 170–71.

\textsuperscript{166} Id.

\textsuperscript{167} Id. at 171.

\textsuperscript{168} Id.

\textsuperscript{169} Becker, supra note 163, at 16.


\textsuperscript{171} See generally ROBERTS, supra note 5. See Annette Appell, \textit{Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System}, 48 S.C.L. REV. 577 (1997).

\textsuperscript{172} Becker, supra note 163, at 17.
\end{flushleft}
women by how it treats victims of domestic violence. Both the child protection arena and the domestic violence arena are "‘mother-blaming’ institutions where fathers are absent and larger social forces are virtually invisible.” Failure to protect cases perpetuate stereotypes about the “good mother” by blaming battered women for the harms perpetrated by abusive men. Because of the harms to domestic violence victims and their children in failure to protect cases, attorneys who are mandated to report child abuse rightfully fear that they will do harm to their client by reporting abuse.

Domestic violence victims are also harmed by mandatory child abuse reporting by attorneys because attorneys cannot provide sufficient advice when their clients face civil or criminal sanctions. Domestic violence victims, particularly women of color, have historically been treated poorly within the child protection system. An attorney who is required to report child abuse can offer no assurances that a client’s case will be handled uniformly, fairly, efficiently, or effectively by child protection services. For example, in New Jersey, the child protection agency, DYFS, has limited protocols for handling domestic violence issues.

Moreover, requiring attorneys to report child abuse ignores the ongoing presence of the batterer in the child’s life and the hurdles a domestic violence victim faces in future or ongoing custody and visitation disputes. In many jurisdictions, parents’ rights to visitation or “parenting time” can only be eliminated in extreme situations. Therefore, a domestic violence victim will be forever tied to the child’s other parent even if that parent has been abusive and even if that abuse occurred in the presence of the child. The client who reports an abusive partner will frequently be required to interact with the abuser, to take the child or children to visit the abuser, and to discuss parenting decisions with the abuser.

173. Bernardine Dohrn, Bad Mothers, Good Mothers, and the State: Children on the Margins, 2 U. Chi. L. Roundtable 1 (1995) (pointing out the invisibility of children in domestic violence cases, the silencing of women in juvenile cases, and the fragmented systems of both).

174. Id. at 5–7. Dohrn also notes that juvenile courts come from a misogynist tradition that punished deviant mothers who were poor, single, and who worked outside the home. Id.

175. See Becker, supra note 163.

176. See supra Part II.

177. See generally Roberts, supra note 5.

178. See generally Child & Fam. Servs. Rev., Domestic Violence Work Group, Protecting New Jersey’s Children and Families from Domestic Violence (Nov. 2003), http://www.state.nj.us/humanservices/Reports/Domestic%20Violence/CFSR-WorkgroupReport%20_Final_%20Domestic%20Violence1.pdf. In New Jersey, DYFS has been working with domestic violence providers for a number of years. However, a comprehensive policy for addressing domestic violence in the child welfare caseload was not approved until January 2003. Id. at 25. In November 2003, as part of the impending transformation of the child welfare system, members of the child and family services review domestic violence working group recommended increased coordination between the courts, child protection and domestic violence advocates, specialized domestic violence training, consideration of safety of adults and children, and batterer accountability. This report recognizes that DYFS should adopt a “family-centered” practice and sets forth a roadmap for such a plan. It acknowledges that the DYFS assessment process focuses on the “needs of the child in isolation of the non-offending parent.” Id. at 14. As New Jersey grapples with an overhaul of its child welfare system, it remains to be seen whether DYFS will be able to carry out the aforementioned recommendations. See also Governor’s Blue Ribbon Panel on Child Prot. Servs., Final Report (1998), available at http://www.state.nj.us/humanservices/dyfs/blue%20ribbon/BRRTOC.html.

Additionally, experience shows that judges do not understand the dynamics of domestic violence and rarely consider domestic violence outside the context of restraining order hearings. Requiring domestic violence victims to "protect" their children is not realistic in a system that favors parental equality. Domestic violence victims with children face an unworkable dilemma: they are required to leave their abusers to protect their children, yet they are prohibited from interfering with the abuser's parental rights. These consequences for domestic violence victims are troubling no matter who initiates the child abuse investigation and should not be initiated by domestic violence victims' attorneys.

The numerous harms detailed above have a chilling effect on domestic violence victims who are seeking legal assistance. Mandatory child abuse reporting by attorneys discourages domestic violence victims from seeking legal assistance because domestic violence victims know that attorneys must report suspected child abuse. In almost all regards, requiring attorneys to be mandated reporters of child abuse is harmful to domestic violence victims and their children. Although domestic violence victims with children often need the most legal assistance, mandatory child abuse reporting laws punish domestic violence victims seeking help. Attorneys cannot be expected to provide meaningful representation to domestic violence victims while at the same time being responsible for increasing the danger to their clients and subjecting their clients to civil sanctions or criminal prosecution.

V. SOLUTIONS

This Article has explained how mandatory child abuse reporting compromises the attorney-client relationship and is dangerous and harmful to domestic violence victims and their children. Because of the problems inherent in requiring attorneys to report child abuse, attorneys should not be mandatory reporters. Where attorneys are explicitly mandated reporters of child abuse, several suggestions have been made to improve child abuse reporting statutes or the legal system. Some of these suggestions lack merit while others are worth considering. Two proposals in particular may exacerbate problems for domestic violence victims. First, at least one author has suggested that attorneys should be appointed to represent children in all domestic violence cases. This is problematic, however, because of the difficulty with finding and paying appointed attorneys for children.

181. Id. at 676–81.
182. Martha A. Fineman, Fatherhood, Feminism, and Family Law, 32 McGEORGE L. REV. 1031, 1034 (2001) (arguing that gender neutrality in family law, where there is an existing unequal distribution of labor and sacrifice, further disadvantages women and children).
183. See supra Part II.
184. See supra notes 133–157 and accompanying text.
185. However, these improvements should complement but not replace the need to exempt attorneys from mandatory child abuse reporting.
186. Picker, supra note 6, at 109.
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and because this may needlessly and increasingly complicate a case.\textsuperscript{187} It is easy to envision a domestic violence case where there is simply no need to appoint an attorney for the children.\textsuperscript{188} Moreover, this suggestion adds to the overall assumption that litigants in the family court system, who are typically women of color or poor women,\textsuperscript{189} subject their lives to never-ending scrutiny upon entering family court.\textsuperscript{190} Requiring children to be represented in a straight-forward restraining order case needlessly prolongs the process, tramples on the privacy of litigants, implicitly presumes harm to children exposed to domestic violence, and reinforces mother-blaming.\textsuperscript{191} Furthermore, appointing an attorney for the child does nothing to address the harms to the attorney-client relationship and the harms of mandatory child abuse reporting by attorneys on domestic violence victims.

Another potential response to the ambiguities of mandatory child abuse reporting laws is to clarify the child abuse reporting statutes. The child abuse definitions could be more clear and specific.\textsuperscript{192} For example, statutes could be amended to include a clearer definition of the effect of witnessing domestic violence on children. However, statutory changes will not eliminate many of the problems with mandatory child abuse reporting by attorneys, such as infringing upon confidentiality, preventing open communication, discouraging clients from seeking legal assistance, and increasing the physical danger to domestic violence victims and their children. Because domestic violence victims are harmed by mandatory child abuse reporting by attorneys, even when it is clear that there has been child abuse, clearer statutes, though certainly an improvement, will not solve the problems.\textsuperscript{193}

Other improvements within the legal domestic violence and child protection court systems offer more promise in assisting domestic violence victims while protecting their children. Any such improvements should include client counseling,\textsuperscript{194} client empowerment,\textsuperscript{195} and improved coordination between child

\textsuperscript{187} Children who are themselves victims of child abuse would obviously be entitled to representation.

\textsuperscript{188} For example, a child whose mother seeks a restraining order where there has been no physical violence and whose father neither lives with the family nor seeks visitation would have no need for an attorney.

\textsuperscript{189} See generally ROBERTS, supra note 5.

\textsuperscript{190} See Cimini et al., supra note 98.

\textsuperscript{191} See supra notes 158–175.

\textsuperscript{192} For example, in New Jersey, one improvement would be to change the reporting statute to require reporting only for future harm rather than for past harm. However, attorneys are not trained in assessing risk or in determining the likelihood of future abuse.

\textsuperscript{193} Efforts to clarify the abuse statutes also run the risk that the revised statutes will define abuse in ways that are harmful to domestic violence victims such as including witnessing domestic violence as part of the definition for per se child abuse.

\textsuperscript{194} Through client counseling, attorneys can work with their clients to develop safety plans for the victims and their children. Short of requiring reporting, attorneys can take an active role in enabling domestic violence victims to protect their children. Certainly circumstances exist where attorneys may encourage or even require their clients to report child abuse. Even when attorneys are mandated reporters of child abuse, it is certainly preferable to give the client notice and the opportunity to report rather than having the attorney make the report. Additionally, attorneys who are not mandatory child abuse reporters but who collaborate with social workers who are mandatory child abuse reporters have been faced with the dilemma of reporting and developing responses. See, e.g., Jacqueline St. Joan, Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality, 7 CLINICAL L. REV. 403 (2001) (arguing for interdisciplinary collaboration by social workers and attorneys and maintaining that the conflict between a social worker’s duty to report and an attorney’s duty of confidentiality can be addressed by a confidentiality wall that would protect confidential disclosures by a client to their attorney).

\textsuperscript{195} Empowerment has been described as:
protection workers and domestic violence advocates. Rather than blaming domestic violence victims for not leaving, the legal system should be giving domestic violence victims with children the tools required to achieve safety and self-sufficiency. Collaborative projects should make services available to domestic violence victims, including assistance with relocation, welfare, education, safety planning, and counseling. One collaborative solution to the problems of both child abuse and domestic violence is to explore the strengths and weaknesses

[A] theory and practice that deals with issues of power, powerlessness, and oppression and how they contribute to individual, family, or community problems and affect relationships...[and] consists of the following subprocesses: development of group consciousness, reduction of self-blame, assumption of personal responsibility for change, and enhancement of self-efficacy. Lorraine M. Gutierrez et al., Understanding Empowerment Practice: Building on Practitioner-Based Knowledge, 76 FAMS. IN SOC’Y 534 (1995); see also Mangold, supra note 149, at 104 (offering renewed investment and creative permanency planning to empower both caretakers and children). One key problem with mandatory child abuse reporting is that it takes away the agency of the client. Its blatant paternalism removes all decision-making power from the victim. This is not the way to empower victims, particularly where such forced decision making has proven to be harmful. Empowerment strategies must not be blind to the role of race and class in shaping responses to violence. See Donna Coker, Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color, 33 U.C. DAVIS L. REV. 1009, 1009–11 (2000).

196. See Linda Spears, Nat’l Resource Ctr. on Domestic Violence Et Al., Building Bridges Between Domestic Violence Organizations and Child Protective Services (2000), available at http://www.vawnet.org/NRCDVPublications/BCSDV/Papers/BCS7_cps.pdf; Janet Carter & Susan Schechter, Fam. Violence Prevention Fund, Child Abuse and Domestic Violence: Creating Community Partnerships for Safe Families: Suggested Components of an Effective Child Welfare Response to Domestic Violence (Nov. 1997), http://www.mincava.umn.edu/link/documents/fvpsi/fvpsi.shtml; see also Randy H. Magen et al., Domestic Violence in Child Preventative Services: Results from an Intake Screening Questionnaire, 22 CHILD. & YOUTH SERVS. REV. 251, 251–74 (2000) (finding that women who went through training had enhanced identification skills, appreciated being asked about present and past incidents of domestic violence, and felt safer after disclosing incidents of domestic violence); Mangold, supra note 149, at 104 (arguing that protection and empowerment of both caretakers and older children are complementary goals for families with multiple forms of violence and that protection of children via removal should only be an extreme remedy necessary when efforts at supporting the non-offending parent have failed); Linda Mills, Child Protection and Domestic Violence: Training, Practice and Policy Issues, 22 CHILD. & YOUTH SERVS. REV. 315, 315–32 (2000) (exploring the connection between child abuse and domestic violence and the tension between battered women, their advocates, and child protective services workers); Laudan Y. Aron & Krista K. Olson, Urban Inst., Efforts by Child Welfare Agencies to Address Domestic Violence: The Experiences of Five Communities (Mar. 1997), available at http://www.urban.org/publications/406798.html (identifying the need for child protective services, domestic violence service providers, law enforcement officials, and other service providers to work together and co-educate each other in order to develop a system that can address the needs of families that are affected by multiple forms of violence).

197. Many of these solutions are premised on attorneys following models of "problem-solving," which may not be practiced by all domestic violence attorneys. See, e.g., Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and Negotiating: Skills for Effective Representation (1990); David A. Binder et al., Lawyers as Counselors: A Client-Centered Approach (2d ed. 2004). Moreover, even where attorneys embrace problem solving, the limitations of civil domestic violence remedies reduce the ability of attorneys to provide effective legal assistance. For example, in some states, restraining orders last for a very limited time. See, e.g., N.Y. FAM. CT. ACT § 842 (McKinney 2004) (providing for two-year orders and orders for up to five years when "aggravating circumstances" exist). For an explanation of the remedies that are available in some states, see Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law, 21 HOFSTRA L. REV. 801 (1993). Where the civil legal remedies may not provide an adequate ability to terminate an abusive relationship or provide adequate protection, domestic violence victims are harmed even more by mandatory child abuse reporting by attorneys.

198. See Meier, supra note 180, at 718; Spears, supra note 196, at 17 (stating that child safety "can often" be improved by helping the mother).
of a unified domestic violence and child protection court. Principles of therapeutic jurisprudence may be especially helpful in this context.

Though improvements to the court systems may assist domestic violence victims, the only solution to the problems brought on by mandatory child abuse reporting by attorneys is to exclude attorneys from mandatory child abuse reporting requirements. In states where child abuse reporting statutes list specific professionals that are required to report but do not list attorneys, no further action is needed. However, attorneys or legislators in the remaining states should consider taking corrective action to explicitly exempt attorneys from mandatory child abuse reporting statutes. As mentioned previously, several states specifically include attorneys as mandatory child abuse reporters, at least in some manner.

199. It is worth noting that unified family courts (UFCs) may be even more problematic where some participants, such as prosecutors or social workers, are mandated child abuse reporters. See, e.g., James W. Bozzomo & Gregory Scolieri, A Survey of Unified Family Courts: An Assessment of Different Jurisdictional Models, 42 FAM. CT. REV. 12 (2004) (surveying UFCs and finding that they are better able to address the family’s long-term needs, as well as the problems of the individual litigants, than traditional, fragmented family court systems); Deborah J. Chase, Pro Se Justice and Unified Family Courts, 37 FAM. L.Q. 403 (2003) (describing effective pro se programs as having significant cost benefits for courts and arguing that a UFC would further the objectives of existing pro se programs and provide better access to justice for pro se litigants); Deborah Epstein, Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System, 11 YALE J.L. & FEMINISM 3 (1999) (advocating for the creation of integrated, specialized domestic violence courts that can provide comprehensive responses to family violence); Mark Hardin, Child Protection Cases in a Unified Family Court, 32 FAM. L.Q. 147 (1998) (citing the ability of the courts to understand and consider issues important to victim protection litigation, including custody, child support, guardianship, domestic violence, and adoption as a significant advantage of UFCs in child protection litigation); Andrew Schepard & James W. Bozzomo, Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts, 37 FAM. L.Q. 333 (2003) (discussing the evolution of UFCs utilizing the results of a multi-state survey, which finds that many states are moving vigorously in the direction of creating a single court for family problems and assigning a single judge to a single family); Carolyn D. Schwarz, A Saving Grace for Victims of Domestic Violence Living in Nations with Fragmented Court Systems, 42 FAM. CT. REV. 304 (2004) (arguing in support of UFCs in order to provide victims of domestic violence with the orders and services they need, as well as prevent conflicting orders from being issued). But see Billie Lee Dunford-Jackson et al., Unified Family Courts: How Will They Serve Victims of Domestic Violence?, 32 FAM. L.Q. 131 (1998) (questioning the willingness of UFCs to adjust their jurisprudential goals and methods for victims of domestic violence, citing alternative dispute resolution as one example of a method that could be used to further victimize the victim of domestic violence rather than achieve the therapeutic goals of UFCs); Anne H. Geraghty & Wallace J. Mlyniec, Unified Family Courts: Tempering Enthusiasm With Caution, 40 FAM. CT. REV. 435 (2002) (suggesting that there is scant evidence to show that a unified family court can produce better results than current functioning courts of general jurisdiction).

200. "Therapeutic jurisprudence" investigates the law’s impact on the emotional lives of participants in the legal system. Bruce J. Winick & David B. Wexler, Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts (2003) (describing the newly emerging problem-solving courts, such as drug treatment courts and domestic violence courts, and how judges can encourage offender compliance with release conditions and serve as effective risk managers); Bruce J. Winick & David B. Wexler, Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence (1996) (discussing the application of therapeutic jurisprudence to issues such as domestic violence, family, and juvenile law); Barbara A. Babb, Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court, 71 S. CAL. L. REV. 469 (1998); Susan L. Brooks & Dorothy E. Roberts, Social Justice and Family Court Reform, 40 FAM. CT. REV. 453 (2002); Randal B. Fritzler & Leonor M.J. Simon, Creating a Domestic Violence Court: Combat in the Trenches, 37 FAM. CT. REV. 28 (2000) (discussing the advantages of a domestic violence court that was developed on principles of therapeutic jurisprudence, preventive law, and restorative justice, with the joint goals of holding the batterer accountable, ensuring the safety of the victims, and providing satisfaction to the victims when dealing with the justice system); David Rottman & Pamela Casey, Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts, NAT’L INST. OF JUST. J. 13 (1999) (advocating for court and community collaboration to better address community-wide problems in the aggregate, such as domestic violence).

201. See supra note 11 and accompanying text.

202. See supra notes 13–14 and accompanying text.
Attorneys in those states should lobby for legislative changes to exempt attorneys from the mandatory child abuse reporting statutes. The most difficult states to tackle are those in which everyone is required to report child abuse. In states in which the attorney-client privilege has not been explicitly abrogated by statute, attorneys are entitled to assume that they are not obligated to report child abuse that they learn about in the course of their representation when it conflicts with their professional obligations. Alternatively, attorneys in those states could seek guidance from courts, bar associations, and ethics committees about resolving the conflict between the professional obligations of the attorney and the mandatory child abuse reporting requirements. Attorneys in states where everyone is required to report child abuse could also seek legislative change to specifically exempt attorneys from the mandatory child abuse reporting statutes. Another avenue of change is to consider bringing legal challenges to statutes in states where attorneys are either explicitly or implicitly mandated reporters of child abuse. Additionally, attorneys who are prosecuted for failing to report could challenge the reporting statutes on due process grounds.

203. See Mosteller, supra note 6, at 223, 236.

204. A review of the state statutes shows that only the Nevada child abuse reporting statute has been challenged by an attorney. This challenge did not raise any issues with the attorney-client privilege because the Nevada statute does not require that an attorney make a report if the knowledge is acquired from a client who may be accused of abuse or neglect. See Sherif of Washoe County v. Sferrazza, 766 P.2d. 896 (Nev. 1988) (charging attorney with a misdemeanor for failing to report child abuse after the attorney waited two weeks before filing the report of suspected abuse). None of the other state statutes that either implicitly or explicitly require attorneys to report child abuse appears to have been challenged by attorneys. However, several state cases contain language that recognizes the problems of requiring mandated child abuse reporting when it conflicts with privileges. See, e.g., State ex rel. Juvenile Dep’t v. Spencer, 108 P.3d 1189, 1194 (Or. Ct. App. 2005) (upholding but criticizing the abrogation of the psychotherapist-patient privilege for its chilling effect on those seeking help); Rodriguez v. State, No. 05-95-01356-CR, 1997 WL 527843, at *7 (Tex. Ct. App. Aug. 27, 1997) (stating that “[t]here is no attorney-client privilege that applies to reporting but the privilege does apply in a child abuse proceeding where an attorney might be called to testify” and declining to address any Sixth Amendment issue).

Numerous grounds for challenges to mandatory reporting statutes exist. For example, the compulsory speech required by mandatory child abuse reporting statutes raises First Amendment issues and could be challenged on those grounds. But see State v. Grover, 437 N.W.2d 60, 66 (Minn. 1989) (holding that mandatory child abuse reporting obligation poses no First Amendment violation); White v. State, 50 S.W.3d 31, 47–48 (Tex. Ct. App. 2001) (holding the same). When a reporting statute requires, compels, or prohibits expression of a specific ideological view, it may rise to the level of a constitutional violation. Cf. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546 (2001) (noting that a restriction on attorney’s speech by restricting funding is “even more problematic because in cases where the attorney withdraws from a representation, [an indigent] client is unlikely to find other counsel”). Additionally, requirements for mandatory child abuse reporting by attorneys could be challenged for violating the Sixth Amendment right to assistance of counsel or for violating the protections against self-incrimination in the Fifth Amendment. See supra note 134.

205. It is a crime in several states to fail to report suspected child abuse. See, e.g., supra note 20 and accompanying text. These statutes may violate due process where they do not give fair notice of the conduct that is criminally protected. Where the definitions of reasonable cause or child abuse are not clear, defendants who are prosecuted may claim that the statutes are unconstitutionally vague. For example, the Nevada Supreme Court struck down the reporting statute that required “immediate” reports but did not define “a reason to believe” that abuse occurred. Sherif of Washoe County, 766 P.2d. at 897. The Nevada Supreme Court reasoned as follows: The statute does not attempt to define the type of knowledge that might satisfy that standard, nor does the statute leave any room for investigation and the exercise of professional judgment. If, for example, a professional person, in the course of counseling a client, is told that an abuse has taken place, it could be argued that the professional had “a reason to believe” an abuse has occurred and was therefore under a duty to report the alleged abuse even though, based on his or her experience, observation of the demeanor of the complainant, and professional judgment, the professional person believes the report to be untrue and unreasonable. If this construction
VI. CONCLUSION

Mandatory child abuse reporting by attorneys limits the ability of attorneys to provide effective representation to domestic violence victims by interfering with the attorney-client relationship. Mandatory child abuse reporting by attorneys also subjects domestic violence victims to severe negative consequences, particularly to women of color and women with limited economic resources. Where definitions of child abuse are ambiguous, notably in the area of the effect of witnessing domestic violence, mandatory child abuse reporting by attorneys further jeopardizes the ability to provide meaningful representation to domestic violence victims and compromises the safety of domestic violence victims. Because of the harms to the attorney-client relationship and the risks to domestic violence victims and their children, attorneys should not be mandated reporters of child abuse.

were accorded the statute, then the professional would be forced to report the alleged abuse, or run the risk that a prosecutor, with the aid of hind sight, might second guess the professional’s judgment and charge him or her with a serious criminal offense. However, in light of our conclusion that [the statute] is unconstitutionally vague, we need not now consider such other concerns which are raised by placing professionals under burdens that may conflict with their duties to behave in a responsible manner.

Id. But see White, 50 S.W.3d at 47–48 (holding that the reporting statute provided clear enough standards of what constitutes child abuse in a case where the non-attorney defendant was convicted for failure to report).