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## Between a Rock and an Ethical Duty: Attorney Obligations Under the Reporting Requirement of New Mexico's Abuse and Neglect Act

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**BETWEEN A ROCK AND AN ETHICAL DUTY:  
ATTORNEY OBLIGATIONS UNDER THE  
REPORTING REQUIREMENT OF NEW MEXICO'S  
ABUSE AND NEGLECT ACT**

Kirsten Dick\*

*Every person in New Mexico has a statutory duty to report known or suspected child abuse or neglect to the proper authorities. Does this duty extend to attorneys who have their own set of ethical rules prohibiting disclosure of confidential client information? In State v. Strauch, the New Mexico Supreme Court held that the “every person” language of the Abuse and Neglect Act extends the mandatory duty to report to all persons, not just those professionals who work most frequently with children and are enumerated in the statute. This interpretation spurs an analysis of the interplay among the attorney-client privilege, the rules of professional conduct for attorneys, and the legislative authority to affect these rules of the court. Likely, the court rules governing ethical attorney conduct and the attorney-client privilege supersede the legislature’s attempt to require attorneys to report child abuse or neglect when doing so would violate attorney-client confidentiality.*

**INTRODUCTION**

“Thanks for coming in today. Before we get started, I want to make sure we are on the same page about a couple of things. First, I have agreed to represent you, so going forward, I will offer my advice and expertise pertaining to your legal issues, but you have the final say-so about what steps we take. Next, I want you to know that most everything we discuss together will be kept in the strictest confidence. I cannot share anything you tell me without your permission – unless you’re asking me to help you commit a crime, but of course, that’s not what we’re here to do. Oh, and I should mention that if you tell me anything that relates to the abuse or neglect of a child, I may be required to make a report to the police or social services. Alright, let’s get started. Tell me what’s going on in your case.”

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\* University of New Mexico School of Law, Class of 2018. I would like to thank Professor David Stout for his guidance and assistance in unpacking this tricky ethical question. I would also like to thank Matthew Bernstein for allowing me the opportunity to witness his untiring devotion to his young clients. Professor Walker Boyd, Javier Garcia, Ricardo Roybal, Jesse Montoya, John Pierce, and the students of the law review seminar, thank you for your precise edits and sound advice through this process. Finally, I wish to thank my friends and family, particularly my husband Jamie and my parents Lou and Darcy. You inspire me to learn more and work harder.

This would not be an unusual way for an attorney in New Mexico to begin a relationship with a new client. The language of the reporting statute of the Abuse and Neglect Act (“the Act”) seems to create a universal reporting requirement wherein all persons in the state must report when they know or suspect that a child might be abused or neglected.<sup>1</sup> The legislature did not specify whether an attorney is subject to the reporting requirement,<sup>2</sup> and the courts have not been presented with such a clear question for review.<sup>3</sup> Accordingly, New Mexico attorneys find themselves in an uncertain environment where the rules of professional conduct and the attorney-client privilege seem to instruct against a mandatory reporting duty for attorneys, but state law suggests otherwise.<sup>4</sup>

Attorneys as mandatory reporters cuts both ways in terms of benefitting child welfare in the state. On the one hand, informing clients of a potential duty to report child abuse or neglect at the outset of an attorney-client relationship could lead to chilled communications between the client and his attorney.<sup>5</sup> This is especially true in family and children’s law cases where abuse and neglect may be an important part of the client’s story, but the client is reluctant to share that information for fear of retribution or collapse of the family unit.<sup>6</sup> For example, a teenager with an abusive home life might seek out an attorney in his pursuit of emancipation or kinship-guardianship. When the attorney mentions that he must report child abuse or neglect to the authorities, the young client might be hesitant to share that he has been abused. If the client does tell his attorney and the attorney makes a report, the client will have indirectly implicated his parents and will likely become involved with social services. The solution he sought (living on his own or with family members) may become more difficult to achieve. If the client does not tell his attorney, the attorney does not have the complete story and may suggest a legal path that could be ultimately detrimental to the client’s interests.

On the other hand, attorneys may be in an ideal position to report child abuse and neglect. Family and children’s law attorneys come in more frequent contact with families who are seeking legal solutions to bad situations. Because children are more susceptible to abuse, an attorney rightly may be more concerned with protecting a young client than she is with protecting their confidential communications.<sup>7</sup> Returning to the example of the teenaged client seeking

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1. See N.M. STAT. ANN. 1978, § 32A-4-3(A) (2005).

2. See *id.*

3. See *State v. Strauch*, 2015-NMSC-009, ¶ 41, 345 P.3d 317 (explaining that the court would consider the rules of professional conduct in reviewing a case where an attorney seeks to protect confidential communications relating to abuse or neglect, though that situation was not before the court in the instant case).

4. See Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 520 (1997-1998) (pointing to New Mexico as a state with a universal mandatory statute that does not mention the attorney-client privilege, causing an attorney to be “legitimately confused over her responsibility.”).

5. See Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should not be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125, 140 (2006) (“Merely explaining the mandatory child abuse reporting obligations to clients affects the development of a meaningful attorney-client relationship.”).

6. See *id.* at 125.

7. See Marrus, *supra* note 4, at 526.

emancipation or kinship guardianship, the client may be afforded more advantageous options for his future if his attorney reports the abuse. His needs may be better served if he lives with a foster family where he could benefit from the state's social programs for abused youth.<sup>8</sup> Furthermore, if the attorney reports the abuse, the state would be in a better position to protect the client (and possibly other children) from continued cruelty at the hands of his parents.

The question of whether an attorney in New Mexico must report child abuse or neglect turns on an analysis of judicial authority to shield court rules from legislative action. After a background section describing the rules governing attorney-client confidentiality and the evolution of New Mexico's reporting statute, Part I of this comment will focus on the separate powers of the judiciary and the legislature to regulate attorney conduct and court procedure. Part II will explore various scenarios wherein the reporting statute is consistent with the court rules regarding attorney-client confidentiality, and scenarios where the reporting statute conflicts with the court rules. In instances where the latter is true, the reporting statute likely would not be given effect and the court rules would take precedence. Finally, this comment will suggest in Part III that the Act's reporting statute is a barrier to open and honest attorney-client communications. For this reason, attorneys should not be required to report child abuse or neglect when they learn of its occurrence in the context of a client relationship.

## BACKGROUND

### Ethical Duties and the Attorney-Client Privilege

Attorneys are bound by two rules governing disclosure of confidential client information. The first is the attorney-client privilege, a common law privilege codified in the New Mexico Rules of Evidence.<sup>9</sup> The common law attorney-client privilege typically protects communications made in confidence between a lawyer and a client for the provision of legal services.<sup>10</sup> New Mexico Rule 11-503(B) reflects the common law understanding of the privilege, "A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made for the purpose of facilitating or providing professional legal services to that client."<sup>11</sup> The purpose of the attorney-client privilege is to foster honest communications between the attorney and client and is "rooted in the imperative need for confidence and trust."<sup>12</sup>

The second rule protecting client confidences is Rule 16-106 of the New Mexico Rules of Professional Conduct.<sup>13</sup> Under this rule, attorneys "shall not reveal

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8. See e.g. Laura Thoren, *College Tuition Waived for Teens in Foster Care*, KOAT.COM (Mar. 12, 2014, 8:04 AM), <http://www.koat.com/article/college-tuition-waived-for-teens-in-foster-care/5055023>.

9. Rule 11-503 NMRA.

10. See DAVID A. SKLANSKY, EVIDENCE: CASES, COMMENTARY, AND PROBLEMS 632-33 (4th ed. 2016).

11. Rule 11-503(B) NMRA.

12. See *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 15, 120 P.3d 820 (explaining that the purpose of the psychotherapist-patient privilege is like the attorney-client privilege in promoting "confidence and trust.") (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

13. Rule 16-106 NMRA.

information relating to the representation of a client” unless the client gives informed consent, the attorney is impliedly authorized to disclose the information in the course of representation, or the disclosure fits into a number of exceptions to the rule.<sup>14</sup> This rule is mandatory. An attorney who reveals confidential client information outside of the allowable exceptions may face disciplinary action.<sup>15</sup>

The exceptions to the prohibition on disclosure allow attorneys to reveal confidential client information in order to prevent grave physical harm or comply with other laws.<sup>16</sup> Disclosure under these circumstances is permissive; an attorney is not required to reveal confidential information even when the exceptions to the general prohibition apply. Under Rule 16-106(B)(1), an attorney is allowed to reveal confidential information “to prevent reasonably certain death or substantial bodily harm.”<sup>17</sup> According to the rule’s commentary, “reasonably certain death or substantial bodily harm . . . is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.”<sup>18</sup> Under Rule 16-106(B)(6), an attorney may disclose confidential information “to comply with other law or a court order.”<sup>19</sup> The commentary to the rule notes that “[w]hether such a law supersedes Rule 16-106 . . . is a question of law beyond the scope of these rules.”<sup>20</sup> This paper will analyze this question as it pertains to the mandatory reporting statute in Part I.

### Reporting Child Abuse and Neglect in New Mexico

The reporting requirement of the Abuse and Neglect Act, part of the New Mexico Children’s Code, provides an opportunity to apply the aforementioned confidentiality rules and exceptions for attorneys in the context of child abuse and neglect. The primary purposes of the Children’s Code are to protect children from harm and provide them the opportunity to develop in a wholesome and safe environment.<sup>21</sup> To those ends, the Act facially requires that everyone report child abuse and neglect. The reporting statute states, “Every person, including [certain professionals], who knows or has a reasonable suspicion that a child is an abused<sup>22</sup>

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14. Rule 16-106(A) NMRA.

15. See Rule 16-804(A) NMRA; Rule 16-805 NMRA.

16. See Rule 16-106(B)(1), (6) NMRA.

17. Rule 16-106(B)(1) NMRA.

18. Comment 8 to Rule 16-106 NMRA.

19. Rule 16-106(B)(6) NMRA.

20. Comment 14 to Rule 16-106 NMRA.

21. See N.M. STAT. ANN. 1978, § 32A-1-3 (2009).

22. N.M. STAT. ANN. 1978, § 32A-4-2(B) (2016) (defining an “abused child” as a child who has suffered or who is at risk of suffering serious harm, such as physical, emotional, psychological, or sexual abuse, sexual exploitation, life endangerment, torture, cruel confinement, or cruel punishment, because of the action or inaction of the child’s parent, guardian or custodian).

or a neglected<sup>23</sup> child shall report the matter immediately to [local authorities].”<sup>24</sup> Failure to report known or suspected child abuse or neglect is punishable as a misdemeanor.<sup>25</sup>

The list of professionals in the reporting statute includes licensed physicians, nurses, and teachers, among others who are typically regarded as “mandatory reporters” of child abuse and neglect because of their frequent work with children.<sup>26</sup> The list also includes members of the clergy, but requires them to report only if they have information that is “not privileged as a matter of law.”<sup>27</sup> Attorneys are not specifically mentioned in the reporting statute.<sup>28</sup>

To report child abuse or neglect, an individual may contact local law enforcement, the Children, Youth, and Families Department (CYFD), or tribal law enforcement or social services for Indian children living in Indian country.<sup>29</sup> Those agencies must make a written report that includes the child’s name, age, address, “the nature and extent of the child’s injuries, including any evidence of previous injuries,” and any other information the reporter thinks might be helpful in the investigation.<sup>30</sup> The report must also include the names and addresses of the child’s parents, guardian, or custodian.<sup>31</sup> All reports are then referred to CYFD which conducts an investigation and makes an action determination based on the best interests of the child.<sup>32</sup>

Child abuse and neglect as a social, legislative issue took hold of public interest in the 1960’s.<sup>33</sup> Medical professionals had compiled the first medical profile of an abused child and communities increasingly became aware of the problem.<sup>34</sup> Those working on the issue sought new laws to help identify incidents of child abuse so it could be treated and prevented.<sup>35</sup> The first child abuse reporting statutes were enacted by twenty states in 1964.<sup>36</sup> The following year, New Mexico passed its first child abuse reporting statute.<sup>37</sup> The state’s original reporting statute was permissive, not mandatory. It *allowed* any physician, nurse, teacher, social worker acting in an

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23. N.M. STAT. ANN. 1978, § 32A-4-2(F) (defining a “neglected child” as a child “who has been abandoned by the child’s parent, guardian or custodian” or whose parent, guardian, or custodian has failed to care and provide for the child’s “subsistence, education, medical or other care or control necessary for the child’s well-being” because of their own “faults or habits.”).

24. N.M. STAT. ANN. 1978, § 32A-4-3(A) (2005).

25. *See* N.M. STAT. ANN. 1978, § 32A-4-3(F) (2005).

26. *See* CHILD WELFARE INFO. GATEWAY, CHILDREN’S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2015) [hereinafter MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT].

27. N.M. STAT. ANN. 1978, § 32A-4-3(A).

28. *See id.*

29. *See id.*

30. *See* N.M. STAT. ANN. 1978, § 32A-4-3(B).

31. *See id.*

32. *See* N.M. STAT. ANN. 1978, § 32A-4-4(A) (2005).

33. *See* NATIONAL CENTER ON CHILD ABUSE & NEGLECT, CHILD ABUSE & NEGLECT: STATE REPORTING LAWS 2 (1979) [hereinafter STATE REPORTING LAWS].

34. *See id.*

35. *See id.*

36. *Id.*

37. Act of Mar. 25, 1965, ch. 157, § 2, 1965 N.M. Laws 409, 409-410.

official capacity, or ordained minister to report suspected child abuse without opening himself or herself up to civil liability.<sup>38</sup>

Reporting child abuse was not a nationwide obligation until Congress passed the Child Abuse Prevention and Treatment and Adoption Reform Act, which required all states to pass mandatory reporting laws.<sup>39</sup> The majority of states chose to limit the duty to report to specified professionals who frequently worked with children – the aforementioned mandatory reporters.<sup>40</sup> In 1973, New Mexico amended its statute to require the same set of professionals and “any other person having reason to believe” a child had been abused or neglected to immediately report.<sup>41</sup> Twenty years later, New Mexico amended the reporting statute again to read that “every person” had a duty to report child abuse and neglect.<sup>42</sup>

New Mexico’s current reporting requirement follows a general-specific construction.<sup>43</sup> Its combination of “every person” language with a specified list of professionals created confusion about who was actually required to report. The case of *State v. Strauch* illuminates this confusion, even among the state’s appellate courts.<sup>44</sup>

In *State v. Strauch*, the court was asked to determine whether a private social worker<sup>45</sup> was a mandatory reporter under the Act who must testify in court to his knowledge of child abuse. In this case, the defendant was accused of sexually abusing his daughter.<sup>46</sup> The prosecution sought the testimony of the defendant’s social worker.<sup>47</sup> In response, the defendant filed a protective order claiming the conversations with the social worker were confidential communications made for the purpose of diagnosis and treatment, which are privileged under the New Mexico Rules of Evidence.<sup>48</sup> The prosecution argued that the social worker must reveal any knowledge of abuse or neglect based on the Act’s requirement that “every person” report known or suspected child abuse or neglect.<sup>49</sup>

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38. *Id.*; see also *State v. Strauch*, 2015-NMSC-009, ¶ 22, 345 P.3d 317.

39. See 42 U.S.C. §§ 5101-5107 (2012).

40. See MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, *supra* note 26, at 2.

41. Act of Apr. 3, 1973, ch. 360, § 2(a), 1973 N.M. Laws 1653, 1657-58; see also *Strauch*, 2015-NMSC-009, ¶ 31, 345 P.3d at 325.

42. Act of Mar. 19, 1993, ch. 77, § 97(a), 1993 N.M. Laws 653, 793-794; see also *Strauch*, 2015-NMSC-009, ¶ 31, 345 P.3d at 325.

43. See N.M. STAT. ANN. 1978, § 32A-4-3(A) (2016); see also *Strauch*, ¶ 35, 345 P.3d at 327.

44. See generally *State v. Strauch*, 2014-NMCA-020, 317 P.3d 878; *State v. Strauch*, 2015-NMSC-009, 345 P.3d 317.

45. The statute names social workers “acting in an *official capacity*” as one of the groups of professionals specifically included in the reporting requirement (emphasis added). The district court determined that a private social worker does not act in an official capacity. *Strauch*, 2015-NMSC-009, ¶ 6, 345 P.3d at 320. The New Mexico Supreme Court considered the private social worker to be covered by the statute’s universal language and did not reach the issue of private versus official capacity. See *Strauch*, 2015-NMSC-009, ¶ 35, 345 P.3d at 327.

46. *Strauch*, 2015-NMSC-009, ¶ 4.

47. *Strauch*, 2015-NMSC-009, ¶¶ 3–4.

48. See *Strauch*, 2015-NMSC-009, ¶ 4; see also Rule 11-504 NMRA.

49. See Petition for Writ of Certiorari at 7, *State v. Strauch*, 2014-NMCA-020 (Ct. App. No. 34,435); see also *Strauch*, 2015-NMSC-009, ¶ 5 (explaining that the prosecution also argued that the social worker was bound by the Social Work Practice Act confidentiality exception that required disclosure of child abuse or neglect in court hearings).

On interlocutory appeal of the district court's finding that the social worker was not a mandatory reporter under the Act, the New Mexico Court of Appeals held that the reporting requirement did not apply to every person.<sup>50</sup> The Court of Appeals reasoned that despite the "every person" language, the legislature only intended to extend a mandatory reporting requirement to the statutory list of professionals and "others like them."<sup>51</sup> According to the Court of Appeals, "To do otherwise would render the inclusion of these specific categories of professionals essentially meaningless."<sup>52</sup>

The New Mexico Supreme Court found otherwise and reversed the Court of Appeals. It interpreted the statute to impose universal reporting requirements on all individuals in New Mexico, not just those professionals enumerated in the statute.<sup>53</sup> It held that the social worker was a mandatory reporter under the Act,<sup>54</sup> and must be compelled to testify to his knowledge of child abuse in the case against the alleged abuser.<sup>55</sup> The court explained that the legislature meant to include everyone when it added the words "or any other person" to the 1973 reporting statute.<sup>56</sup> Echoing the Court of Appeals, the Supreme Court inversely reasoned that "[i]nterpreted otherwise, the ["any other person"] amendment would have been meaningless."<sup>57</sup>

Though the *Strauch* court held that the reporting statute created a universal requirement for all individuals, it hinted at an exception for attorneys subject to the court rules of professional conduct.<sup>58</sup> This nod to conflicting statutory and regulatory requirements for attorneys highlights the crucial interplay between state law and court rules.

## ANALYSIS

### I. SEPARATION OF POWERS: RULES OF THE NEW MEXICO SUPREME COURT AND STATE LAW

The New Mexico Constitution vests the state courts with the power to enforce rules of procedure and practice,<sup>59</sup> including the rules of evidence,<sup>60</sup> common

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50. See *Strauch*, 2014-NMCA-020, ¶ 10.

51. See *id.* ¶ 12.

52. *Id.*

53. See *Strauch*, 2015-NMSC-009, ¶ 33.

54. *Id.* ¶ 38.

55. See *id.* ¶ 47.

56. See *id.* ¶ 35.

57. *Id.*

58. See *id.* ¶ 41.

59. See N.M. CONST. art. VI, § 3; *Hudson v. State*, 1976-NMSC-084, ¶ 4, 557 P.2d 1108 ("Pursuant to N.M. Const. art. 6, s 3 this court has superintending control over all inferior courts, and thus the power to regulate and to promulgate rules regarding the pleadings, practice, and procedure affecting the judicial branch of government."); see also *State v. Roy*, 1936-NMSC-048, ¶ 90, 60 P.2d 646 ("The powers essential to the functioning of courts, in the absence of the clearest language to the contrary in the constitution, are to be taken as committed solely to [the judiciary] to avoid a confusion in the methods of procedure and to provide uniform rules of pleading and practice.")

60. See *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, ¶ 8, 551 P.2d 1354 ("It is equally true that rules of evidence are procedural, in that they are a part of the judicial machinery administered by



law privileges,<sup>61</sup> and rules of professional conduct for attorneys.<sup>62</sup> The New Mexico Supreme Court has the power to regulate the attorney-client privilege as both a court rule and a common law privilege.<sup>63</sup>

Rules of privilege are rules of evidence under the purview of the judicial branch by virtue of the New Mexico Constitution.<sup>64</sup> The court addressed this assertion in *Ammerman v. Hubbard Broadcasting, Inc.*, where the plaintiffs sought a court order forcing the defendant journalists to name their confidential informants and produce all information received by said informants.<sup>65</sup> The defendants refused, asserting a journalist privilege, which the legislature had enacted to state law.<sup>66</sup> The law carved out a privilege in journalists not to disclose sources or unpublished information unless disclosure would be “essential to prevent injustice.”<sup>67</sup> The *Ammerman* court held that the defendants could not assert the journalist privilege in judicial proceedings.<sup>68</sup> The court explained that the legislative branch lacked the constitutional power to enact statutory rules of procedure, including rules of evidence.<sup>69</sup> It declared that “statutes purporting to regulate practice and procedure in the courts cannot be binding.”<sup>70</sup>

The *Ammerman* court relied heavily on *State v. Roy*, in which the court established the constitutional basis for its control of the rules of pleading, practice, and procedure.<sup>71</sup> In *Roy*, the court declined to hold that the legislature had no control over the same rules, but mentioned that should a conflict arise between a statute and a court rule,<sup>72</sup> the judiciary would have to determine which branch was “paramount in the rule-making field, the court or the Legislature.”<sup>73</sup>

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the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved.”).

61. *See id.* ¶ 7 (“[N]o officers of any department of government, other than the judiciary, have the constant opportunity to observe [common law privileges] in operation and the skill to determine how far and in what respects they interfere with the orderly and effective administration of justice.”) (quoting Edmund M. Morgan, *Rules of Evidence – Substantive or Procedural?*, 10 VAND. L. REV. 467, 484 (1957)).

62. *See Strauch*, 2015-NMSC-009, ¶ 41 (suggesting that Rule 16-106 of the New Mexico Rules of Professional Conduct for attorneys fall under the regulatory authority of the New Mexico Supreme Court).

63. *See Ammerman*, 1976-NMSC-031, ¶¶ 7-9.

64. *See id.* ¶ 6, 551 P.2d at 1356 (“There can be no real question about rules of privilege being rules of evidence, when considered in the context of being exceptions to the general requirement and liability of everyone to give testimony or furnish evidence upon all facts inquired of in a court of justice.”).

65. *See id.* ¶ 1.

66. *See id.* ¶ 2.

67. *See id.*

68. *See id.* ¶ 4.

69. *See id.* ¶ 17.

70. *Id.*

71. *See id.* ¶ 10; *State v. Roy*, 1936-NMSC-048, ¶¶ 89-90, 60 P.2d 646.

72. When such a conflict between the legislature and judicial branches arose over procedural requirements for the appointment of a district judge in *State ex rel. Anaya v. McBride*, the New Mexico Supreme Court found that the court was paramount. 1975-NMSC-032, ¶ 11, 539 P.2d 1006. Though the legislature had attempted to regulate rules of practice and procedure in the past, it lacked the constitutional authority to do so. *Id.* Setting up the holding in *Ammerman*, the *McBride* court stated that the constitutional power to regulate judicial practice and procedure is “vested exclusively in this court.” *Id.*

73. *Roy*, 1936-NMSC-048, ¶ 83; *see Ammerman*, 1976-NMSC-031, ¶ 12 (discussing the holding of *State v. Roy*).

In the event that a statutory privilege *conforms* with the purpose of a court-governed evidentiary privilege, the court will likely give effect to the statutory privilege.<sup>74</sup> In *Albuquerque Rape Crisis Center v. Blackmer*, the defendant, charged with rape, sought to compel testimony from counselors at the Albuquerque Rape Crisis Center, with whom the alleged victim had conferred.<sup>75</sup> The counselors asserted that communications with the alleged victim were protected by the Confidentiality Act, a law protecting communications made during the course of treatment for an emotional or psychological condition.<sup>76</sup> The district court granted the defendant's order to compel, but the New Mexico Supreme Court stayed the order and ultimately reversed the district court with instructions to give merit to the Confidentiality Act.<sup>77</sup>

The *Blackmer* court held that the Confidentiality Act's non-disclosure provisions were to be given effect because their purpose aligned with the purpose of the psychiatrist-patient privilege promulgated in evidentiary Rule 11-504.<sup>78</sup> The court relied on Professors Browde and Occhialino's analysis that "'the supreme court intended not to exclude the legislature from the rule-making process but only intended to assure judicial supremacy in any clash between legislative and judicial rules of procedure.'"<sup>79</sup>

Though the Confidentiality Act and Rule 11-504 did not clash in *Blackmer*, that court nonetheless considered the result of such a legislative-judicial conflict. It explained that if the legislature enacted a privilege affecting the same subject matter as a judicial or constitutional privilege, then the court would "analyze the statutory privilege to determine whether it is *consistent* with the purpose of the constitutional or court rule privilege."<sup>80</sup> If the legislative privilege is consistent with the court rule, then both privileges would be given effect.<sup>81</sup> If, however, "the statutory privilege is *not* consistent, the statutory privilege is *not* given effect and the constitutional or court rule privilege prevails."<sup>82</sup>

Ten years after *Blackmer*, the New Mexico Supreme Court met again at the intersection of legislative and judicial law regarding privilege in *State v. Strauch*. The supreme court found that the court's own evidentiary rule governing a privilege for physical and mental health professionals<sup>83</sup> "den[ie]d protection from in-court disclosure of matters that are required by law to be reported out of court."<sup>84</sup> Thus, the communications between the social worker (as a mental health professional) and the defendant were "not shielded from compelled disclosure by evidentiary

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74. See *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 13, 120 P.3d 820.

75. See *id.* ¶ 2.

76. See *id.* ¶¶ 3, 13; see also N.M. STAT. ANN. 1978, § 31-25-1 to § 31-25-6 (1987).

77. *Blackmer*, 2005-NMSC-032, ¶¶ 4, 21.

78. See *id.* ¶ 21; see also Rule 11-504 NMRA.

79. *Blackmer*, 2005-NMSC-032, ¶ 5 (quoting Michael B. Browde & M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407, 437 (1985)).

80. *Blackmer*, 2005-NMSC-032, ¶ 11 (emphasis added).

81. See *id.*

82. *Id.* (emphasis added).

83. Rule 11-504 NMRA.

84. *State v. Strauch*, 2015-NMSC-009, ¶ 47.

privilege.”<sup>85</sup> In *Strauch*, the two rules at issue were consistent with each other, so the court gave effect to the legislative act.

The *Strauch* court’s comparison of social workers and officers of the court (i.e. attorneys) is notable for the purposes of assessing attorney requirements under the Act. The court mentioned, *in dicta*, that social workers are not governed by “any nonevidentiary rule of this Court” that would guard against disclosure of the state-sought evidence distinguishing social workers from “officers of the court subject to the regulatory authority of the Supreme Court” (e.g. attorneys).<sup>86</sup> The court noted that attorneys, as officers of the court, are subject to Rule 16-106, “providing that no attorney may disclose protected information concerning a client, whether in or out of court, except in accordance with the rule.”<sup>87</sup> Here, the court indicated that attorneys are subject to a rule of the court that may *conflict* with a legislative statute.

## II. DOES THE COURT OR THE LEGISLATURE CONTROL ATTORNEY CONDUCT RELATED TO THE ACT’S REPORTING REQUIREMENT?

The mandatory reporting requirement of the Act may effectively abrogate the attorney-client privilege and force attorneys to disclose confidential client information despite the ethical court rule prohibiting disclosure generally.<sup>88</sup> The attorney-client privilege is not mentioned within the Act,<sup>89</sup> but the statute’s broad, inclusive language may be read to encroach upon an abrogation of the attorney-client privilege in the context of child abuse and neglect.<sup>90</sup>

Because of this potential conflict, the reporting statute should be subject to the *Blackmer* court’s consistency analysis to determine whether the statute is given effect in light of the court rules governing attorney-client confidentiality.<sup>91</sup> This analysis consists of three steps. First, does the reporting statute affect the same subject matter as a court rule?<sup>92</sup> Next, is the reporting statute consistent with the court rule?<sup>93</sup> Finally, if the reporting statute is consistent, then both the court rule and state statute are given effect.<sup>94</sup> If the reporting statute is inconsistent, then the court rule takes precedence and the legislative act cannot be binding.<sup>95</sup> This analysis yields three possible results for attorney obligations under the reporting statute depending on the facts of the attorney-client relationship: (1) the attorney-client privilege and its crime-fraud exception may be consistent with the reporting statute, (2) the

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85. *Id.*

86. *Id.* ¶ 41.

87. *Id.*

88. See Rule 16-106 NMRA.

89. See N.M. STAT. ANN. 1978 § 32A-4-3 (2005).

90. See Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L. J. 203, 223 (positing that the overbroad language of New Mexico’s reporting statute apparently abrogates all privileges, but ultimately stating that it should not be read to eliminate the attorney-client privilege).

91. See *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 11, 120 P.3d 820.

92. See *id.*

93. See *id.*

94. See *id.*

95. See *id.*

attorney-client privilege and the reporting statute may be in conflict, or (3) the reporting statute may conflict with Rule 16-106 and its exceptions.

**A. The reporting statute may be consistent with the attorney-client privilege and its crime-fraud exception if a client is seeking legal advice in order to commit child abuse or neglect.**

By virtue of its requirement that every person report knowledge or suspicion that a child is an abused or neglected child,<sup>96</sup> the reporting statute affects the same subject matter as the attorney-client privilege. That is, the statute could pertain to confidential communications between a lawyer and her client for the purpose of obtaining legal services by mandating that the attorney share with authorities information about child abuse or neglect she received from her client.<sup>97</sup> If the client is sharing the confidential information with his attorney in an effort to obtain legal advice in furtherance of committing a crime, then the crime-fraud exception to the attorney-client privilege takes effect.<sup>98</sup> In such a case, the privilege would not attach to the communications, therefore, the attorney-client privilege would not prevent an attorney from disclosing the information shared by the client.<sup>99</sup>

If a client was seeking legal advice in order to carry out child abuse or neglect, the court rule governing the attorney-client privilege and its crime-fraud exception is consistent with the reporting requirement of the Act. Both rules serve the purpose of gathering truth and preventing crime.<sup>100</sup> Since the reporting statute and the crime-fraud exception are in harmony with one another, both would be given effect by the court.<sup>101</sup>

**B. The reporting statute may not be consistent with the attorney-client privilege if the client is not seeking legal advice in furtherance of the crime of child abuse or neglect.**

Again, the language of the reporting requirement could affect confidential information that is protected by the attorney-client privilege,<sup>102</sup> so the first step of the analysis is satisfied as both rules affect the same subject matter. If the attorney receives confidential client communications about abuse or neglect, but the client is not seeking assistance in committing child abuse or neglect, the crime-fraud exception does not apply.<sup>103</sup> In this scenario, the attorney-client privilege likely would take precedence over the reporting statute.<sup>104</sup>

Let us return to the example of the teenager seeking emancipation who secures an attorney to assist in the proceedings. Assuming the client is over fourteen

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96. See N.M. STAT. ANN. 1978, § 32A-4-3(A) (2005).

97. See Rule 11-503(B) NMRA.

98. See Rule 11-503(D)(1) NMRA.

99. See *id.* The attorney may still be subject to the requirements of Rule 16-106. See Rule 16-106 NMRA.

100. Cf. N.M. STAT. ANN. 1978 § 30-6-1 (2009).

101. See Albuquerque Rape Crisis Ctr. v. Blackmer, 2005-NMSC-032, ¶ 11, 120 P.3d 820.

102. See Rule 11-503(B) NMRA.

103. See Rule 11-503(D)(1) NMRA.

104. See *Blackmer*, 2005-NMSC-032, ¶ 11.

years of age, the attorney is not a guardian *ad litem* who must act in the child's best interest.<sup>105</sup> Instead, the attorney is bound by the rules of professional conduct to abide by the client's decisions, just as he would an adult client.<sup>106</sup> In the course of discussing the client's home life and reason for the emancipation, the attorney learns his client has been abused in the past. At this point, the client would likely be considered an "abused child" for the purposes of the reporting statute.<sup>107</sup> The attorney likely would run afoul of the attorney-client privilege if he reported the abuse against his client's wishes.

In this case, the reporting requirement is inconsistent with the attorney-client privilege. The reporting statute seeks information from everyone regarding child abuse and neglect, but the attorney-client privilege requires that the attorney keep confidential his client's communications relating to legal services. When attorneys are made mandatory reporters of child abuse or neglect, the validity and certainty of the attorney-client privilege is thrown into question.<sup>108</sup>

According to the U.S. Supreme Court in *Upjohn Co. v. United States*, for the attorney-client privilege to serve its proper purpose, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected."<sup>109</sup> If the attorney is required to report otherwise privileged client information, the confidentiality required for the attorney to carry out the representation is no longer a sure-thing.<sup>110</sup> This "uncertain privilege . . . is little better than no privilege at all," according to the Court.<sup>111</sup> Because the reporting statute would implicitly abrogate the attorney-client privilege under these circumstances, throwing both rules into conflict, the court privilege rule would likely supersede the statute, and the attorney would not be bound by the reporting requirement of the Act.<sup>112</sup>

**C. The reporting statute is facially inconsistent with Rule 16-106, but may be given effect in certain circumstances.**

The reporting statute of the Act purports to require attorneys to report child abuse or neglect even if doing so would force the attorney to disclose confidential client information. For this reason, the reporting requirement and Rule 16-106 – a court rule – pertain to the same subject matter. The first prong of the *Blackmer* analysis is fulfilled.

The next step is to assess whether the statute and the rule are consistent with one another. Here, the universal reporting requirement is in direct conflict with Rule

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105. See N.M. STAT. ANN. 1978 § 32A-1-7.1(A) (2005) ("The [child's] attorney shall provide the same manner of legal representation and be bound by the same duties to the child as is due an adult client, in accordance with the rules of professional conduct.").

106. See Rule 16-102(A) NMRA ("[A] lawyer shall abide by a client's decisions concerning the objective of representation.").

107. See N.M. STAT. ANN. 1978 § 32A-4-2(B) (2016); N.M. STAT. ANN. 1978 § 32A-1-4(B) (2016) ("[C]hild" means a person who is less than eighteen years old.").

108. See Lockie, *supra* note 5, at 131.

109. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

110. See Lockie, *supra* note 5, at 131.

111. *Upjohn*, 449 U.S. at 393.

112. See *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 11, 120 P.3d 820.

16-106. Because attorneys are required under the rule to maintain client confidences, it would be inconsistent to also mandate lawyers to report known or suspected child abuse and neglect learned within the attorney-client relationship. Rule 16-106(B) permissively *allows* attorneys to make such reports to (1) prevent against reasonably certain death or substantial bodily harm,<sup>113</sup> or (2) comply with another law,<sup>114</sup> but the rule does not *require* disclosure under those circumstances.<sup>115</sup> The universal reporting statute and Rule 16-106 are facially irreconcilable, though they may comport with each other in certain situations.

Consider the scenario presented by the court in *Strauch*, where an officer of the court must consider whether to disclose protected information.<sup>116</sup> Imagine an attorney learns of past<sup>117</sup> child neglect through confidential conversations with her client. According to Rule 16-106(A), that information must not be disclosed unless it fits within the exceptions in Rule 16-106(B). The following two sections analyze those exceptions within the foregoing scenario.

*i. Disclosure is permitted to prevent reasonably certain death or substantial bodily harm.*

Under the first exception, the attorney would have to assess whether disclosing the information by reporting the past neglect would prevent reasonably certain death or substantial bodily harm in the *future*.<sup>118</sup> If there is no indication that the neglect of the past will occur again, reporting the information would not likely “eliminate the threat or reduce the number of victims.”<sup>119</sup> In this case, disclosure would not be permitted under Rule 16-106(B)(1), so the reporting requirement and the court rule would come into conflict. Here, the court rule would supersede the reporting statute,<sup>120</sup> and the attorney likely would not be required to disclose confidential information in order to report past neglect.

If, however, the past neglect indicates a pattern of behavior that may endanger the lives or physical safety of children in the future, the attorney would certainly be allowed to report what she knows to the authorities, even if doing so would require her to share confidential information.<sup>121</sup> In this instance, Rule 16-106(B)(1) conforms with the purpose of the reporting statute to protect the safety of children. Both rules likely would be given effect under the *Blackmer* consistency test.<sup>122</sup>

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113. Rule 16-106(B)(1) NMRA.

114. Rule 16-106(B)(6) NMRA.

115. See Rule 16-106(B) NMRA.

116. See *State v. Strauch*, 2015-NMSC-009, ¶ 41, 345 P.3d 317.

117. The reporting statute broadly defines what must be reported - “knowledge or reasonable suspicion that a child is an abused or neglect child.” N.M. STAT. ANN. 1978 § 32A-4-3(A) (2005). Absent from the statute are temporal considerations. The statute seems to contemplate required reporting of past abuse and neglect, as well as ongoing and future abuse and neglect.

118. See Rule 16-106(B)(1) NMRA.

119. See Comment 8 to Rule 16-106 NMRA.

120. See *Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 11, 120 P.3d 820.

121. See Rule 16-106(B)(1) NMRA.

122. See *Blackmer*, 2005-NMSC-032, ¶ 11.

ii. *Disclosure is permitted to comply with another law or court order.*

The other relevant exception to Rule 16-106(A) permits disclosure to comply with another law or court order.<sup>123</sup> There is room under this exception for an attorney to comply with the reporting statute. If an attorney, who believed himself to be a mandatory reporter under the Act, reported his knowledge or suspicion that a child was an abused or neglected child, he likely would not face disciplinary action by the New Mexico Supreme Court because his actions would be allowable under Rule 16-106(B)(6).<sup>124</sup> Under these circumstances, the reporting statute and Rule 16-106(B)(6) are not in conflict and both would be binding on the attorney.

Because the exception is permissive, however, reporting cannot be mandatory for attorneys who learn of abuse or neglect within an attorney-client context. If the attorney chose not to report his knowledge of abuse because reporting would disclose confidential client information, he likely would not be held to disciplinary action.<sup>125</sup> Rule 16-106(B)(6) allows the attorney the *discretion* to choose whether to comply with a law that may contradict the rules of professional conduct. As stated above, the *requirement* of the reporting statute does not comport with the *permissive* exceptions to the rule not to disclose confidential client information. In this situation, Rule 16-106 would likely take precedence over the reporting statute.<sup>126</sup>

### III. REPORTING REQUIREMENTS HINDER THE ATTORNEY-CLIENT RELATIONSHIP

If attorneys are required to report child abuse and neglect within the context of the attorney-client relationship, their role as advisor and counselor could be transformed into a role of informant and investigator.<sup>127</sup> The mere mention of the potential need for the attorney to report child abuse and neglect could chill the attorney-client relationship, and may lead the client to believe that her wishes are not as important as the state's pursuit of information about child abuse or neglect.<sup>128</sup>

The attorney-client privilege, as both a common law privilege and a codified state evidence rule, helps maintain societal order and fairness. In *Upjohn Co. v. United States*, the Supreme Court explained that the attorney-client privilege exists "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."<sup>129</sup> New Mexico attorneys rely on this open

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123. See Rule 16-106(B)(6) NMRA.

124. See *id.*

125. It is possible he would be subject to the ethical rule requiring attorneys to follow the law. See Rule 16-804(B) NMRA.

126. See *Blackmer*, 2005-NMSC-032, ¶ 11.

127. See Mosteller, *supra* note 91, at 208.

128. See Lockie, *supra* note 5, at 140 (explaining that in cases of domestic violence, the attorney may be viewed as more concerned with the children than with the client suffering the abuse. "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.").

129. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

communication, insured by the attorney-client privilege and Rule 16-106, in order to thoroughly represent, advise, and advocate for their clients.<sup>130</sup>

A fully intact attorney-client privilege, unhindered by mandatory reporting, is socially beneficial for three reasons. First, it helps attorneys achieve the best outcome for their clients armed with the complete facts of their clients' cases.<sup>131</sup> If attorneys must report the mere suspicion of child abuse, clients would likely guard themselves in discussing the treatment of their children.<sup>132</sup> This could mean that a divorce lawyer does not know all the facts before a custody hearing,<sup>133</sup> or a domestic violence lawyer does not hear the extent of an abuser's ill treatment.<sup>134</sup> Society values the attorney-client privilege as a measure to advance our adversarial system.<sup>135</sup> Without it, lawyers may not be able to fully represent their clients in the same capacity we have come to expect.<sup>136</sup>

Second, the full attorney-client privilege enables attorneys to direct clients to comply with the law.<sup>137</sup> In the abuse and neglect context, this means that an attorney might be able to counsel his client to avoid instances of child abuse or neglect.<sup>138</sup> It should be noted that in New Mexico, however, if an attorney encouraged her client to seek treatment for abusive behavior, the conversations between the client and the psycho-therapist relating to the abuse would not be privileged.<sup>139</sup>

Finally, the attorney-client privilege protects clients from state encroachment on their rights.<sup>140</sup> Lawyers help individuals maintain autonomy from the state, but can only do the best version of their job if they have complete information.<sup>141</sup> We have chosen to afford representation and privilege to even the potentially criminally guilty in society.<sup>142</sup> To require attorneys to report child abuse and neglect when their clients may not have committed a crime – or are the victims themselves – conflicts with American society's most individualistic ideals.<sup>143</sup>

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130. See *Trammel v. United States*, 445 U.S. 40, 51 (1980); Comment 4 to Rule 16-106 NMRA.

131. See *Mosteller*, *supra* note 91, at 260.

132. See *id.* at 262 (“[I]t is easy to see how a lawyer’s duty to reveal even a ‘reason to suspect’ child abuse might inhibit the client’s candor in describing unconventional treatment of his children.”).

133. See *id.*

134. See *Lockie*, *supra* note 5, at 148 (“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.”).

135. See *Marrus*, *supra* note 4, at 522 (“Without the existence of [the attorney-client privilege], it would be difficult for our adversarial system to exist as it does today.”).

136. See *id.* (“It is the privilege that enables attorneys to fully represent their clients within our present-day legal system.”)

137. See *Mosteller*, *supra* note 91, at 260.

138. See *id.* at 262.

139. See *State v. Strauch*, 2015-NMSC-009, ¶ 41, 345 P.3d 317.

140. See *Mosteller*, *supra* note 91, at 266.

141. See *id.*

142. See *id.* at 267.

143. See *id.* (“Indeed the rights-based theory remains the bedrock, and perhaps the only viable justification for protecting the attorney-client privilege in the area of child abuse.”).



Ultimately, attorneys should not be required under the Act to report known or suspected child abuse outside the parameters already established by the crime-fraud exception to the attorney-client privilege and the exceptions for disclosure of client confidences in Rule 16-106(B). Child abuse and neglect are terrible societal ills, but it would be a greater ill if individuals no longer felt able to fully communicate with their lawyers, free from state intervention.

### CONCLUSION

In *State v. Strauch*, the New Mexico Supreme Court held that the reporting requirement of the Abuse and Neglect Act applies to all people in New Mexico. This blanket requirement likely does not apply to attorneys in situations where their clients share information about child abuse or neglect typically protected by attorney-client confidentiality rules. Court rules of practice and procedure, such as the evidentiary rule of attorney-client privilege and the rules of professional conduct governing client confidences, supersede state statutes when the court rules and state laws come into conflict. As the attorney-client privilege and Rule 16-106 prohibit attorneys from disclosing confidential client information outside of limited exceptions, these rules may conflict with the universal reporting statute which requires disclosure in all circumstances. The court rules likely take precedence over the reporting requirement in most situations, thereby relieving attorneys of their duty to report child abuse and neglect within an attorney-client relationship.