

Managing Mandatory Reporting Requirements

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Outline for Today's Webinar

- Introduction
- Basic definitions
- Statutory negligence - defined standards
- Mandatory Report Checklist
- Discuss Psychologist Liability & Immunity
- Filing a report

The essential balance

- “**Confidentiality** is so important to the provision of effective psychotherapy that all state courts and the federal courts have created psychotherapist–patient privileges to prevent confidential information from being revealed in legal proceedings *except in limited circumstances.*” (Jaffee v. Redmond, 1996).
- And yet, there is a **duty to warn**: in all jurisdictions, mental health professionals are obligated to be:
 - Mandatory reporters of suspected child abuse, and
 - Meet the requirements of a duty to warn or protect when a patient makes a serious threat of harm against an identifiable potential victim.
- What if you were providing therapy to a family that included an abusive father and victimized child.
 - Would you initiate a report to the child protective services?
 - Would you initiate a report if it meant disintegration of the family (separation, divorce)?
 - Would you initiate a report if the parents and child strenuously objected (or made a veiled threat to sue for violation of treatment confidentiality)?

History of mandatory reporting requirement for child abuse

- 1960s child abuse prevention became a focus
 - Dr. Henry Kempe in 1962 coined the term “**The Battered Child Syndrome**”
- By 1967 every state required certain professionals to report suspected abuse or neglect
 - **Definitions were expanded** to include sexual abuse, emotional and mental abuse, neglect and threat of future harm.
 - The **purpose was paternalistic**, that is, to permit agencies to protect children not able to protect themselves.
- By the 1970s increased bureaucracy, variability in reporting laws, and diffusion of responsibility became evident
- The 1974 the Child Abuse Prevention and Treatment Act, CAPTA, made federal funding contingent upon the enactment of state level child abuse reporting statues and a new model law, **The Model Child Protective Act**, developed by the National Center on Child Abuse and Neglect, was applied.
 - It has been amended several times since.

1974 Federal Child Abuse Prevention and Treatment Act (CAPTA)

- Provide **assistance to the states** to develop child abuse and neglect identification and prevention programs
- **Authorized (limited) government research** into child abuse prevention and treatment
- **Created the National Center on Child Abuse and Neglect** within the DHEW to administer grants, identify issues and areas needing special focus for new research, provide education via dissemination of materials, and information on best practices to States and localities.
- **Created the National Clearinghouse on Child Abuse and Neglect**

See, National Child Abuse and Neglect Training and Publications Project 2014. Child abuse prevention and treatment act: 40 years of Safeguarding America's children, Washington DC, US Dept. HHS

Karly's Law in Oregon

- Kathy (Karly) Sheehan was a three year old girl who died in 2005 because of neglect and abuse by her mother's boyfriend. Karly's parents had been interviewed prior to her death, but no intervention was taken.
- In 2007, Karly's law required children with suspicious injuries reported for investigation receive **medical assessment and treatment for children** within 48 hours of the onset of an abuse investigation.
- After the law went into effect the volume of children assessed for abuse in Oregon rose by 140%.

Karly video: <https://www.youtube.com/watch?v=dNSu82y8Iek>
<http://www.childabuseintervention.org/karlyslaw/>

Rationale for mandatory reporting

- Rationale:
 - Required reporting **helps victims who are too dependent on their abusers**, and too afraid of them, to seek help on their own.
 - Domestic violence will not be curtailed unless it is reported and **legal consequences** are sought.
 - Protective services to the victim both **protect and empower the victim**
 - Batterer is forced to obey the rules, and **obtain needed treatment services**; victim is encouraged to receive treatment.

See, James T. R. Jones, Battered spouses' damage actions against non reporting physicians, 45 De Paul Law Review, Winter 1996, p. 191.

Objections to mandatory reporting

- Objections
 - The victim has a **right to self determination and confidentiality/** privacy, especially in the case of competent adult victims (spouses, elderly)
 - Reporting often **brings retribution**, alienation, and other negative consequences to the relationship between abuser and victim without providing a tangible benefit
 - Reporting expectations will **cause the victim to not seek treatment**
 - Reporting will **worsen an already bad situation** (further destroy the family)
 - Mandatory reporting **leads to defensive behavior by doctors** who over load agencies, and the serious cases get lost in the pile.

Ariella Hyman et al., Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?, 273 JAMA 1781, 1781 (1995)

Opposition to CAPTA

Those who oppose Mandatory Reporting Obligations summarize their objections as follows:

"Mandatory reporting may **threaten the safety of battered women**, discourage them from seeking care, fail to improve the health care of battered patients, lead to inadequate responses to reports of abuse, result in biased case identification, and violate patient autonomy and confidentiality." Ariella Hyman et al., Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?, 273 JAMA 1781, 1781 (1995)

Leads to an **over-reporting of unsubstantiated cases**: By the 1996, report from the National Committee to Prevent Child abuse indicated that the rate of reports averaged **only a 31% substantiation rate**. It seemed agencies were devoting their time to largely unsubstantiated reports. Tony Foreman and William Bernet, "A Misunderstanding regarding the duty to report suspected abuse," Child Maltreatment, Vol. 5, No. 2, May 2000, p. 190-96.

Under-reporting valid cases created by reporters' confusion.

- Mandatory reporters often fail to report because they:
 - Don't know the law
 - Believe the law is ambiguous, unclear, vague on definitions, e.g. "impairment of emotional health"
 - Harbor an attitude that disregards the law, ignores the potential consequences
 - Hold an attitude that there is a requirement to report whenever an allegation is raised in an effort to avoid personal liability (which leads to over reporting)
 - Apply "don't ask, don't tell" approach that impairs communication between client and psychologist.
- By one estimate, 30 to 40 percent of psychologists have elected

, see Kalichman SC,
Brosig CL: Practicing psychologists' interpretations of and compliance with child abuse reporting laws. *Law Hum Behavior* 17:83-93, 1993

Tony Foreman and William Bernet, "A Misunderstanding regarding the duty to report suspected abuse," *Child Maltreatment*, Vol. 5, No. 2, May 2000, p. 190-96.

The Duty to Warn: (Tarasoff vs. Regents of University of California)

- Prosenjit Poddar, a graduate student at the University of California (UC) Berkeley, told his therapist that he wanted to and planned to obtain a gun and kill Tatiana Tarasoff. The therapist informed the campus police about the threat, but neither the police nor the therapist specifically warned Tarasoff directly. Poddar then murdered Tarasoff when she returned to campus from summer vacation. It was two months after Poddar broke off contact with his therapist at the counseling center. Tarasoff's parents sued the University for the failure to warn their daughter of the danger.
- *Tarasoff I* court established that therapists have a “duty to warn” others who are in foreseeable danger from the therapists' patients.
- *Tarasoff II* court opinion made the “duty to warn” into a “duty to protect. It held the therapist has a duty to “use reasonable care to protect the intended victim against such danger,” which might include warning the alleged victim, telling the police, or taking whatever reasonable steps necessary.

Jablonski by Pahls vs. US: An application of Tarasoff

- Jablonski creates an affirmative duty by reporters to investigate a client's prior records.
- Mr. Jablonski and Ms. Kimball were dating. Jablonski threatened to kill Ms. Kimball and her mother Ms. Pahls. Ms. Kimball took Mr. Jablonski to the Loma Linda VA, where a doctor conducted a risk assessment, but did not consult prior records; which had documented a history of violent behavior. Based on incomplete data, the doctor determined erroneously that Jablonski was not a danger to others. He encouraged Ms. Kimball to leave Jablonski, but did not warn her of his potential for violence. After his release, he killed her.
- The court ruled that the doctor's failure to secure the patient's previous records constituted negligence, as the information in his files would have affected the risk assessment, and thus influenced and shaped his actions to protect the foreseeable victim. There is a **duty to secure previous records** when conducting a risk assessment, and the duty to protect can include the involuntary hospitalization of a dangerous individual.
- See, http://en.wikipedia.org/wiki/Jablonski_by_Pahls_v._United_States

Ewing v. Goldstein, 120 Cal. App. 4th 2004;
Includes family members as a source of
reportable information

- In 2004 Ewing v. Goldstein expanded the source of information to include their patient's family members upon which a therapist must exercise a duty of care. Geno Colello was Dr. David Goldstein's patient. He had been in treatment because he was depressed, his response to his breakup with his long standing girlfriend, Diana Williams. Colello asked his father to loan him his gun. The father refused. Colello told the father he would just get another gun and kill the kid (Ewing) who was then dating Williams. Colello's father told Goldstein.
- The therapist asked the father to take the patient to a hospital for commitment. At the hospital ER, the **father** told the hospital evaluator about the threat. The patient was admitted voluntarily and discharged the next day.
- The day after he was discharged, he shot and killed Ewing and then himself. Ewing's parents sued the hospital and the therapist. They claimed each had a duty to warn their son, as Colello posed a foreseeable danger directly to him.
- Goldstein claimed he was not liable because Colello had never directly disclosed to him any intention to harm Ewing. The case was dismissed but on appeal the court held the plaintiffs had a right to sue; that is, the father's information was sufficient to trigger the duty to warn and protect.

Commonalities and differences between the Tarasoff case mandatory duty to warn & child abuse mandatory reporting

- Each require:
 - Breaching confidentiality for the good of a third party
 - Subject the client to potential harm in the form of criminal investigation
- The Tarasoff case is not a perfect analogy for mandated child abuse reporting. The scope of the information that triggers a child abuse report is broader than the scope of the information that triggers a Tarasoff warning.
 - Tarasoff situation does not require a mandatory report if the patient, currently incarcerated, discloses a past violence against a child (as long as there is no current threat), whereas a disclosure of this kind would likely trigger a mandatory report to a child protective agency.
 - Also unlike Tarasoff, child abuse reporting can lead to incarceration and punishment of the abusive individual for prior bad acts, regardless of the current threat to the child.

The Tarasoff case originally was important as having case law precedent.

1) A duty to warn or protect is **not codified in a statute**, but the court finds an obligation to be present in the *common law* supported by case law precedent (10 states);

- Almonte v. New York Medical College, a federal district court ruled that a common law duty exists to warn that to potential client that a resident had pedophilia, even though under Connecticut (whose state law applied) no statutory duty existed. In this case, the psychiatrist patient was in therapy with another psychiatrist. He admitted his sexual attraction to children, was recommended for a child psychiatry fellowship and raped a child. See, Almonte v. New York Medical College, 851 F. Supp. 34 (D. Conn. 1994)

2) A duty to warn or protect is neither codified in statute nor present in state case law.

- There is no reporting requirement, but continue treatment to contain the threat
- Inform patient about your dilemma; continue to work collaboratively with the patient
- Consider civil commitment

3) A duty to warn or protect is codified in a legislative statute – **statutory negligence** (23 states), but leaves to discretion of the courts whether the threat level is high enough to require a report,

- Requires an identifiable victim
- Imminence, as in the abuse will happen in a few days or weeks (or serious) danger;
- Confirmation of the client's capacity to carry out the threat (hx of violence, situational triggers)

A Statutory Negligence: the “Special” relationship

- Courts identified a special relationship in a variety of situational relationships (via case law):
 - Occupiers of land have the burden of shielding their invitees from harm;
 - A good Samaritan who tries to help assumes the risk of helping, etc.;
- **Common law negligence** is available in all jurisdictions and assumes there is no generalized duty to help others, no mandatory reporting obligation, absent existing case law.
- Whereas, **statutory defined negligence** provides a remedy for the client, and assigns a specific duty to the psychologist. This duty is specified in the law, and is specific to the jurisdiction. Thus, a mental health professional’s duty to report child abuse exists under rules defined by statutory negligence standards. The statutorily defined rule is a “**special**” **relationship** exception to the no duty rule.

See, James T. R. Jones, Battered spouses’ damage actions against non reporting physicians, 45 De Paul Law Review, Winter 1996, p. 191.

Special Relationship:
Is there is a parental liability for a failure to report
a sexually abused child?

- In re Katherine C., 122 Misc. 2d 276, 278-279 (N.Y. Fam. Ct. Richmond Co. 1984) the court found a **mother** guilty of neglect because she should have known that her daughter was being sexually abused by the stepfather and failed to act to protect her. Besharov, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 1012 at 314 (1999)
- 'Allowing' a child to be abused includes taking no appropriate protective (or preventive) action after being warned of the danger to a child.
- In re Katrina W., 171 A.D.2d 250 (2d Dept. 1991) a daughter was considered to be an abused child when her **mother** was either unwilling or unable to protect her from being sexually abused by her older brother.

Courts carve out new “special” relationships: J.A.W. v. Roberts, 627 N.E.2d 802 (Ind. Ct. App. 1994)

- In J.A.W. v. Roberts, 627 N.E.2d 802 (Ind. Ct. App. 1994) a child sexual abuse victim sued a number of individuals who knew about his abuse but did not report it, alleging they had a duty to act, they did not act, and were negligent. The trial court dismissed the case. The court held no duty exists to report the abuse in common law, and ignoring consideration of whether a “special” relationship duty existed.
- On appeal, the Court of Appeals of Indiana looked to see if there was a special relationship present. The court took the view that the sister of the abuser was obligated to report because, the court presumed a special relationship between **“level of interaction or dependency between the parties”** dependency had surpassed what is common or usual,” the test for a special relationship.
- Whereas, the court found there had been no special relationship between the plaintiff and a clergyman or a counselor who knew of the abuse, because that relationship lacked “a level of interaction or dependency which can be characterized as a special relationship.”

Special relationship case application

Case Example – Your client, an abusive spouse, has not spoken about the violent attacks perpetrated on his spouse. In fact, your client is a man of prominence in the community – a jurist. During the couple’s session, unexpectedly, the client’s spouse reveals the abuse but says she is unwilling to go to the police to report the problem. The both spouses fear the stigma of a revelation and public inquiry. Further, the alleged victim fears your client’s retaliation, their public humiliation, and indirectly her exposure to adverse financial consequences. You recognize the signs of a battered spouse syndrome. Your fear is that if you were to report the abuse it will incite further spousal violence, and generally make matters worse.

Does your client have a “special” relationship triggering a report of abuse?

Does that require you, the client’s therapist to report?

Does your answer change if the abuse were observed by the couple’s young child?

Or if the young child was herself hit?

Would your answer change if your client allegedly harmed his elderly mother, rather than spouse?

What the risk factors associated with child abuse?

- Physical neglect
- Physical abuse
 - In New Mexico, 1600 children die a year from physical abuse, which is four times the number that die in auto accidents
- Sexual abuse
- Psychological abuse
 - Witnessing domestic abuse is considered to be the most damaging psychological adverse impact for children
 - Medical neglect's psychological consequences
 - Educational neglect's psychological consequences
 - Parental fabricated illness

What risk factors cause abusers to act against children?

- Substance abuse , especially prescription drug abuse
- Domestic violence
- Lack of education by caretaker to foster inappropriate parental expectations (e.g., failure to achieve potty training, crying behavior)
- Leaving child alone in the presence of imminent danger
- Mental illness in the abuser, (e.g. ADHD)
- Large number of siblings in the household associated with increased risk
- Unrelated caretaker (e.g., boyfriend, girlfriend) in the household
- Victim precipitated behavior leads to “spanking,” “shaking,”
 - Incessant crying
 - Toilet training problems
 - Feeding difficulties
 - Interrupting parents who don’t want to be distracted (e.g., video game enthusiasts)
- Attitude about spanking as a form of discipline
 - Actually, spanking models aggressive behavioral responses, magnifying the problems

Myths and non-myths about child abuse

- Myths:
 - Infants bruise easily
 - Medical evaluators can date bruises by their color
 - Irritable behavior, lethargy, vomiting, apnea, seizures may not be signs of abuse
 - Children at risk for abuse will be afraid of their abusers (actually, abused children almost never act afraid of their abusers; they often ask for the person who put them in the hospital in the first place).
- Non-myths:
 - Bruises to ears, face abdomen, soft areas of lower back, back of hands are more highly correlated with abuse
 - The importance of determining when the child was last seen as “normal,” without problem behavior is critical to the interview
 - Abusive head trauma is the leading cause of morbidity from physical abuse, and is brought about often in response to crying.
 - Children can sustain terrible physical abuse without demonstrable signs or symptoms of injury
 - Changing stories, offering explanations that do not fit the medical signs of injury are important factors when thinking about abuse
 - Abusers will often encourage other family members (siblings may acknowledge withholding of food as punishment for a sibling as appropriate) to participate in the abuse as a learned behavior, making it difficult for family members to report.

Definitions

1. What is: Child Abuse, Perpetrator, Mandated Reporter
2. What constitutes a reportable condition?
 - How far in the past does abuse occur?
 - Special case of consenting teen sex
3. Who can be your informant? (*child victim, caretaker, abuser*)
4. Who can be the abuser? (only a fiduciary care taker or anyone)
5. Does the reporter have discretion about reporting? (what is the reflex requirement?)
6. Who does not qualify as being a mandatory reporter?
7. What is meant by acting in an official capacity?

Bell, L., & Tooman, P. (1994). Mandatory reporting laws: A critical overview. *International Journal of Law and the Family*, 8, 337-355

Child & Child abuse defined

- **Oregon statute:** A child is any unmarried person who is under 18 years of age. Youth participating in academic and athletic camps or high school students attended Advanced Placement courses on campus are covered. (Oregon Statue ORS 419B.005 – 419B.017)
- **Tennessee’s law defines abuse as:** “any wound, injury, disability, or physical or mental condition which is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or which on the basis of available information reasonably appears to have been caused by brutality, abuse, or neglect.” (Tenn. Code Ann. Sec 37-1-403, 1991)

Child Abuse as Defined by Child Protective Services Law (CPSL) Definitions

Child abuse is defined as:

- Causing or creating a reasonable likelihood of bodily injury to a child through any recent* act or failure to act.
- Creating a likelihood of **sexual abuse or exploitation** of a child through any recent* act or failure to act.
- Fabricating, feigning or intentionally exaggerating or inducing a medical symptom or disease, which results in a potentially harmful medical evaluation or treatment to the child through any recent* act.

*In this section of the law the term “recent” is defined as within two years of the date of the oral report made to ChildLine or the written report submitted electronically via www.compass.state.pa.us/cwis

Child Protective Services Law (CPSL) expanded definition of child abuse

In addition, child abuse, having an unlimited reporting requirement applies to:

- Causing or substantially contributing to **serious mental injury** to a child through any act or failure to act or a series of such acts or failures to act.
- Causing **sexual abuse or exploitation** of a child through any act or failure to act.
- Causing **serious physical neglect** of a child.
- Causing the death of the child through any act or failure to act.

There is no two year limitation for causation or substantial contribution to serious mental injury, sexual abuse or exploitation, serious physical neglect and deaths. These have no time limit.

Child Abuse operationally defined by Child Protective Services Law (CPSL)

Child abuse is also applicable to engaging in any of the following recent acts in which the act itself constitutes abuse without any resulting injury or condition:

- Kicking, biting, throwing, burning, stabbing or cutting a child in a manner that endangers the child.
- Unreasonably ***restraining or confining*** a child, based on consideration of the method, location or the duration of the restraint or confinement.
- Forcefully shaking a child under one year of age.
- Forcefully slapping or otherwise striking a child under one year of age.
- Interfering with the breathing of a child.
- Causing a child to be present during the operation of a methamphetamine laboratory, provided that the violation is being investigated by law enforcement.

Child Abuse as Defined by Child Protective Services Law (CPSL)

(cont.)

- Leaving a child unsupervised with an individual, other than the child's parent, who the parent knows or reasonably should have known:
 - Was required to register as a Tier II or Tier III sexual offender, where the victim of the sexual offense was under 18 years of age when the crime was committed.
 - Has been determined to be a sexually violent predator.
 - Has been determined to be a sexually violent delinquent child.

Oregon statute's operational definition of child abuse

- Statutes offer a list of behaviors consisted abuse: Oregon lists the following
 - Any assault of a child and any physical injury to a child caused by other than accidental means;
 - **Any mental injury to a child, which shall include only observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child;**
 - Rape of a child, which includes but is not limited to rape, sodomy, unlawful sexual penetration, and incest;
 - Sexual abuse;
 - Sexual exploitation, including contributing to the sexual delinquency of a minor; allowing, permitting, encouraging or hiring a child to engage in prostitution or patronize a prostitute;
 - **Negligent treatment or maltreatment of a child;**
 - Threatening harm to a child, which means subjecting a child to a substantial risk of harm to the child's health or welfare;
 - **Buy or selling a child;**
 - Allowing a child on the premises where methamphetamine is being manufactured;
 - Unlawful exposure to a controlled substance that subjects a child to risk of harm.

California's child abuse definitions

- **Physical abuse** (PC 11165.6) is defined as physical injury inflicted by other than accidental means on a child, or intentionally injuring a child.
- **Child sexual abuse** (PC 11165.1) includes sexual assault or sexual exploitation of anyone under the age of 14/14, 14 or 15 with adult 10 years older, under 16/over 21, under 14/significantly younger virgin, under 18 oral or anal sex, incest (sex between minors who are 1st degree relatives,
- **Sexual assault** includes sex acts with children, intentional masturbation in the presence of children, and child molestation. Sexual exploitation includes preparing, selling, or distributing pornographic materials involving children; performances involving obscene sexual conduct; and child prostitution. Downloading, streaming, digitally accessing sexual image of a minor
- **Willful cruelty or unjustified punishment (PC 11165.3) includes inflicting or permitting unjustifiable physical pain or mental suffering, or the endangerment of the child's person or health. "Mental suffering" in and of itself is not required to be reported; however, it may be reported.** Penal Code 11166.05 states: "Any mandated reporter who has knowledge of or who reasonably suspects that mental suffering has been inflicted upon a child or that his or her emotional well-being is endangered in any other way may report the known or suspected instance of child abuse or neglect to an agency specified in Section 11165.9". (The specified agencies include any police department, sheriff's department, county probation department, if designated by the county to receive mandated reports, or the county welfare department.)

California continued

- **Unlawful corporal punishment or injury** (PC 11165.4), willfully inflicted, resulting in a traumatic condition.
- **Neglect** (PC11165.2) of a child, whether “severe” or “general,” must also be reported if the perpetrator is a person responsible for the child’s welfare. It includes both acts and omissions that harm or threaten to harm the child’s health or welfare.
- **General neglect** means the failure of a caregiver of a child to provide adequate food, clothing, shelter, medical care, or supervision, where no physical injury to the child has occurred.
- **Severe neglect** means the intentional failure of a caregiver to provide adequate food, clothing, shelter, or is likely to occur. Severe neglect also includes those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered. Any of the above types of abuse or neglect occurring in out-of-home care must also be reported (PC 11165.5). (For a discussion of newborns with a positive toxicology screen, or for information on child abuse in relation to domestic violence, see the “Frequently Asked Questions” section.) medical care where injury has occurred or is likely to occur. Severe neglect also includes those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered. Any of the above types of abuse or neglect occurring in out-of-home care must also be reported (PC 11165.5). (For a discussion of newborns with a positive toxicology screen, or for information on child abuse in relation to domestic violence, see the “Frequently Asked Questions” section.)

What does not constitute child abuse!

- In California, child abuse does not include:
 - A **mutual affray between minors** (fighting by two or more persons,
 - **Reasonable and necessary force used by a peace officer** acting within the course and scope of his or her employment as a peace officer.
 - An amount of force that is reasonable and necessary for a person employed by or engaged in a public **school to quell a disturbance threatening physical injury to person or damage to property**, for purposes of self defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil.
 - A child receiving treatment by spiritual means... or **not receiving specified medical treatment for religious reasons**, shall not for that reason alone be considered a neglected child.
 - **Domestic violence not a mandatory reportable issue unless child affected by it**---causing mental suffering, then reported as child abuse

See, PC 11165

Child abuse: “Perpetrator” v. “Criminal actor”

- The respondent of a child abuse report (“the perpetrator”) must fit within one of the categories identifying abuser under the law. An incident abuse may constitute a crime, that is, have the mens rea & actus reus elements of crime, though, may not fit under mandatory reporting requirement.
- Exclusions include:
 - **Potential Kidnapping a child by a parent** who is accused of unauthorized visit would not be child abuse. A psychologist would **not** be obligated to report to child protective services a father who admits to the therapist in session that his child has over stayed a custody visit with the child.
 - **A person with pedophilia diagnosis who has received prior parental authorization to have the child visit his sports camp, under false pretenses** that the motivation of the pedophile is to run a sports camp.

Perpetrator as Defined by Child Protective Services Law (CPSL)

A perpetrator of child abuse can be:

- **A person 14 years of age or older and responsible for the child's welfare or having direct contact with children as an employee of child-care services, a school or through a program, activity or service.**
- **An individual 14 years of age or older who resides in the same home as the child.**
- **An individual 18 years of age or older who does not reside in the same home as the child but is related within the third degree of consanguinity or affinity by birth or adoption to the child.**

A perpetrator of child abuse for failure to act (an omission) can be a:

- Person 18 years of age or older and responsible for the child's welfare.
- Person 18 years of age or older who resides in the same home as the child.

A perpetrator of child abuse *or* perpetrator of child abuse for failure to act can be a:

- Parent (biological or adoptive parent or legal guardian) of the child.
- Spouse or former spouse of the child's parent.
- Paramour or former paramour of the child's parent.

The list of **Mandated Reporters** is expanded as Defined by Child Protective Services Law (CPSL)

The following adults must make a report of suspected child abuse if the person has reasonable cause to suspect that a child is a victim of child abuse:

- **A person licensed or certified to practice in any health-related field** under the jurisdiction of the Department of State.
- A medical examiner, coroner or funeral director.
- An employee of a health care facility or provider licensed by the Department of Health, who is engaged in the admission, examination, care or treatment of individuals.
- A **school employee**.
- An employee of a **child-care service** who has **direct contact with children** in the course of employment.
- A clergyman, priest, rabbi, minister, Christian Science practitioner, religious healer or spiritual leader of any regularly established church or other religious organization.
- An individual paid or unpaid, who, on the basis of the individual's role as an integral part of a regularly scheduled **program, activity or service**, is a **person responsible for the child's welfare** or has **direct contact with children**.

Expanded Mandated Reporters as Defined by Child Protective Services Law (CPSL) under the updated law (January 1, 2015)

- An employee of a social services agency who has **direct contact with children** in the course of employment.
- A peace officer or law enforcement official.
- An emergency medical services provider certified by the Department of Health.
- An employee of a public library who has **direct contact with children** in the course of employment.
- An individual supervised or managed by a person listed under (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11) and (13), who has **direct contact with children** in the course of employment.
- An ***independent contractor***.
- An attorney affiliated with an agency, institution, organization or other entity, including a **school** or regularly established religious organization that is responsible for the care, supervision, guidance or control of children.
- A foster parent.
- An **adult family member** who is a **person responsible for the child's welfare** and provides services to a child in a family living home, community home for individuals with an intellectual disability or host home for children

Who is not a mandatory reporter?

- Generally, volunteers and contractors or subcontractors, and are not mandatory reporters.
- **Psychology interns or psychology students** are mandatory reporters.
- Volunteers and contractors are expected to report to their supervisors.
- **Exempted professionals, like forensic professionals under attorney work product rule**

Mandatory Reporting checklist

- 1. Is there a reasonable cause to suspect? Is there an articulable reason to suspect? (*Test of reasonable suspicion*)
- 2. If so, then the reporter must apply either: a “reasonable person” standard, “subjective person” standard, or interpret the standard using common sense. (*Test of discretion as to reporting*)
- 3. Determine whether the alleged victim meets the criteria of suspected child abuse or neglect. (*Test of whether there is child abuse*)
- 4. Determine whether to report past abuse, and determine how far in the past is one obligated to report the abuse. (*Test of present abuse vs past abuse occurring*)
- 5. Determine whether there is an exclusion to reporting requirements for same age teenagers having sex, or whether the child is having sex with an older person. (*Test of exclusions, exceptions*)
- 6. Decide whether there is obligatory reporting if the source of the report is a parent or guardian or another source (e.g., father, friend). (*Test of who is the source of the information about abuse*)
- 7. Decide whether obligation applies if psychologist is working or not. (*Test of whether the psychologist is in official capacity*)

Employment triggers reporting relationship as Defined by Child Protective Services Law (CPSL)

Circumstances of reporting relationship:

- The mandated reporter comes into contact with the child **in the course of employment, occupation and practice of a profession** or through a regularly scheduled **program, activity or service**.
- The mandated reporter is directly responsible for the care, supervision, guidance or training of the child, or is affiliated with an agency, institution, organization, **school**, regularly established church or religious organization or other entity that is directly responsible for the care, supervision, guidance or training of the child.
- A person makes a specific disclosure to the mandated reporter that an identifiable child is the victim of child abuse.
- An individual 14 years of age or older makes a specific disclosure to the mandated reporter that the individual has committed child abuse.

What is a **reportable condition**? How to recognize it.

- **Answer: An articulable suspicion of abuse!**
 - If one suspects maltreatment, file a report. (Harper & Irvin, 1985; Spencer, 1996).
 - In deciding if a suspected incident warrants a report, **colleagues should be consulted** whenever possible (Ney, 1995). However, it should be mentioned that perceiving a need to consult with a colleague itself **may confirm one's suspicion**, and therefore dictate a need to report (Remley & Fry, 1993), and **delaying the report** to gather more evidence is beyond the role and legal duty of the clinician (Kalichman, 1999).
 - Only when the professional is **convinced without a doubt that no abuse occurred** should the decision be made not to report (Remley & Fry, 1993).
 - Such decisions not to report should be **thoroughly documented** by the professional (Besharov, 1990), including the specific circumstances that support why the report was not made. Many states will now accept reports of maltreatment even when the reporter has not seen the child firsthand (Kalichman, 1999).

Krisann M. Alvareza, Brad Donohuea, Maureen C. Kennyb, Nicole Cavanagha, Valerie Romeroa, "The process and consequences of reporting child maltreatment: A brief overview for professionals in the mental health field," *Aggression and Violent Behavior*, 10 (2005) 311-331.

“Reason to believe,” “Reasonable suspicion”

- **Apply a reasonable person standard:** If a mandatory reporter has “a reason to believe” that child abuse has occurred, then a report must be filed; other states require a “reason to suspect” in mandatory reporting statutes.
 - Reasonable is defined in law by an objective standard, that even were the reporter in question did not believe a child was abused, he or she could be found in violation of the law if a court later decided that a reasonable person, given the same set of circumstances and the same education, would have suspected child abuse...
 - California court defined **reasonable suspicion** as objectively reasonable for a person to entertain a suspicion, based on upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse.” (Cal. Pen. Code Sec 11166, Vol. 51C, 1995)
 - Minnesota law relies on “**knows or has reason to believe,**” and was tested in *Minnesota v. Grover*, 1989. It was challenged as unconstitutionally vague. The court disagreed and upheld the law.

Pennsylvania & NY use : “cause to suspect” definition

- Pennsylvania standard: Reasonable cause to suspect on the basis of reporter’s training or experience... The reporter is not obligated to conduct an investigation.
- NY law standard: “**reasonable cause to suspect**” a child is abused or maltreated.

Defining “Knows” or “Suspects”

- **Subjective standard:** Alabama and Ohio use a subjective standard (“Knows or suspects”) in which reporting is based solely on one’s own opinion.
- In Wisconsin, *Wisconsin v. Hurd*, 1986, the court held it was **not a term of art** requiring legal expertise to comprehend (no subjective standard here).

Sussman, A. (1974). Reporting child abuse: A review of the literature. *Family Law Quarterly*, 8, 245-313

The Illinois law criteria

- Determine whether the alleged victim meets the criteria of suspected child abuse or neglect.
- Criteria for Taking a Report of Suspected Child Abuse or Neglect
Criteria for Taking a Report of Suspected Child Abuse or Neglect:
 - Alleged Victim is under the age of 18
 - Alleged Perpetrator is an individual residing in the child's home, any person responsible for the child's welfare, or anyone who came to know the child through a position of trust.
 - Specific Incident that raises suspicion that a child has been abused or neglected
 - Harm or Substantial Risk of Physical or Sexual Injury

Does the lack of discretion equal a “reflex report” requirement?

Are mandatory reporters required to report all suspicions of a third party even when in spite of after conducting an assessment, the mandatory reporter does not suspect that abuse occurred?

- Zellman (1990) suggests clinicians reject the use of professional judgment in assessing allegations of child abuse.
- Wakefield and Underwater (1991) suggest if a parent in a divorce case mentions suspicions to a health professional, the suspected abuse will have to be reported to the police or child protective services.

Case Example: How would you advise your client, a mother, who out of fear for being reported by teachers at her child’s school for child abuse, she decides to keep her child home from school because the child had accidentally fallen and had ugly looking bruises on her face? The mother asks you: Aren’t all suspicious looking injuries reported?

Wakefield, H., & Underwager, R. (1991). Sexual abuse allegations in divorce and custody disputes. *Behavioral Sciences and the Law*, 9, 451-468

Zellman, G. (1990). Child abuse reporting and failure to report among mandated reporters. *Journal of Interpersonal Violence*, 5, 3-22.

Reporter using discretion in reporting abuse?

Can a mental health professional determine, in his or her discretion, whether or not to report?

Kimberly S.M. v Bradford Central School: The appellate court also ruled that the reporter had **no discretion** to determine whether the report would ultimately be substantiated. The court stated that "[i]f she has reasonable cause to suspect that a child has been sexually abused, the reporter must report immediately. It is the duty of the investigating agency to determine whether the report was founded." No discretion allowed on the part of the reporter:

People v. Cavaiani the court noted: Based upon the fact that defendant was told by his patient, the victim, that her father was fondling her breasts ... [d]efendant had reasonable suspicion of child abuse, but concluded that his suspicions were not factually founded... While defendant is free to decide that the victim's allegations are untrue for purposes of rendering professional treatment, he is not free to arrogate to himself the right to foreclose the possibility of a legal investigation by the state. *People v. Cavaiani*, 432 N.W.2d 409 (Mich. 1988), *Williams*, 488 N.W.2d at 469-70; But see *T.M. ex rel. E.N.M. v. Noblitt*, 650 So. 2d 1340 (Miss. 1995).

Discretion Case example: What if the teacher had been correct in her belief that no abuse occurred, but there had been a reasonable suspicion, would she still be liable for a failure to report?

Would you be in favor of a joint initiative by CPS workers & reporters that would create a system of a (discretionary) hierarchy whereby professionals can, through training, acquire higher levels of reporting discretion. See, D. Finkelhor & G. Zellman, *Flexible Reporting Options for Skilled Child Abuse Professionals*, CHILD ABUSE AND NEGLECT 335-341 (1991)

What goes into the requirement to conduct an evaluation

- **Environmental Problems**
 - Hazardous conditions (broken windows, faulty electrical fixtures, etc.)
 - Extreme dirt or filth
 - Medications, cleaners, toxins within reach of a child
 - Guns or other weapons that are not properly secured
 - Trash, rotted food, insects, or animal waste
 - Choking hazards within reach of an infant or toddler

Rady Children's Hospital, California Child Abuse
and Neglect Reporting Law

Requirement to conduct an evaluation (2)

- Parental or Caregiver Red Flags
 - Parent lacks understanding of normal child behaviors and development:
 - Has unrealistic expectations of child (e.g., toilet-training of a six-month-old)
 - Is unduly harsh and rigid about childrearing
 - Singles out one child as “bad”, “evil”, or “beyond control”
 - Attributes badness to child or misinterprets child’s normal behavior (e.g., interprets an infant’s crying as evidence that the child hates the parent)
 - Tells you of use of objects (belts, whips, clothes hanger) to discipline the child, or describes the use of inappropriate or extreme consequences (locking child in a closet, withholding meals)
 - Parent lacks understanding of parent child relationship and or perceives child in a negative light:
 - Is unable to describe positive characteristics of child
 - Berates, humiliates, or belittles child constantly
 - Turns to child to have his/her own needs met
 - Is indifferent to child

Requirement to conduct an evaluation (3)

- Parenting is impaired by:
 - Depression or other mental illness
 - Substance abuse
 - Poverty/unemployment
 - Lack of social support
 - Domestic violence
 - Parental history of abuse or inadequate care (Note: Most abused children do not become abusive parents.)
- Family Interactions
 - Coercive parent-child interactions
 - Limited positive parent-child interactions
 - Heightened family conflicts

Rady Children's Hospital, California Child Abuse and Neglect Reporting Law

Mandatory reporters report adult patients who talk about their childhood abuse victimization?

When is abuse “stale”?

Texas Case requires a report:

An adult patient revealed to her treatment provider that she had been sexually abused at Austin State Mental Hospital by a her treating psychiatrist years ago when she was a teenager. For example, the psychiatrist at the State Hospital in Austin had been accused by others after the release of the original report of abuse. The report led to additional abuse incidents allegations.

- **Psychologists are obligated to report.** Currently the Texas Psychology Board instructs psychologists to report “irrespective of whether the victim is now an adult.” Further, the law obligates the report be made within 48 hours of the disclosure.
- The report needs to be filed because there is concern that though the abuse may have stopped for the client, the abuser may have moved on to another victim.

But, often clients show a reluctance to talk about the child abuse history because they don't want it reported. Can the client veto the doctor's reporting?

The Texas State Board of Examiners of Psychologists petitioned for an Attorney General office opinion on the question. (see, Andrea Ball, Statesman, January 22, 2016, Psychologists question mandatory reporter law).

Nothing is stale rationale

- “If you believe that another person with whom you come in contact abused a child, you must report, for the obligation has no time limit.”

Oregon, Minnesota, Washington's laws are different as to what is "stale" reporting

- In Oregon, the obligation to report abuse is triggered when the person whom you think may have been abused (in the past) is still a child at the time you first gained the reasonable suspicion of abuse.
 - **If the person who had been abused in the past is now an adult, then there is no obligation to report.**
 - **However, the psychologist is encouraged to provide information to the DHS or law enforcement so as to avoid potential future harm by the accused against children currently covered by the law.**
- In Minnesota, if the psychologist knows or has reason to believe a child...
 - Currently neglected
 - Physically or sexually abused within **the proceeding three years**
- Washington statute states, the **mandate to report does not apply to the abuse or neglect that occurred during childhood if it is discovered after the child has become an adult.**
 - However, like Texas, Washington provides for an exception to no report, e.g. if there is reasonable cause to believe other children are or may be at continuing risk of abuse or neglect by the accused."

Colorado, Pennsylvania: no reporting requirement for stale information

Colorado: **If the client is over the age of 18 and discloses past abuse or neglect, the psychologist practicing in Colorado does not have a duty to report** the information as a mandated reporter, unless:

- The perpetrator who abused or neglected the client is abusing or neglecting another, or
- The perpetrator is in a position of trust (e.g., guardian, teacher, coach, camp counselor, childcare worker, parent) with any child under the age of 18.

Does mandatory reporting apply to teenage “consenting” sexual behavior?

- Under New York law, parental knowledge of a minor’s voluntary sexual activity does not necessarily give rise to reasonable suspicion of abuse or neglect and should not be reported, absent other indications of abuse or neglect.
 - Matter of Toni D. the court dismissed abuse and neglect charges against the parents of a 13-year-old girl whose boyfriend was 23, because no evidence had been presented to suggest the parents knew (or should have known) of the sexual relationship. In re Toni D., 179 A.D.2d 910 (3d Dept. 1992)
 - In re Philip M., a state appellate court affirmed a lower court's decision noting that a 15-year-old with a sexually transmitted infection could not be presumed to be the victim of child abuse because the minor's age indicated that he could have been engaged in "consensual sexual activity." 589 N.Y.S.2d 31, 32 (1st Dept. 1992) aff'd on other grounds, 82 N.Y.2d 238 (1993)
- The “mere reoccurrence” of the sexual activity "does not in and of itself” reportable. For it to be reportable, the parent's response need be inappropriate. A lack of parental support for the child to access sexual or reproductive health care services is likely unreasonable response, and may lead to a reasonable suspicion of child abuse or neglect.

Is a report required in circumstances when parents know of a their child's re-occurring sexual activity with an older partner?

- In re Leslie C., a mother was charged with abuse and neglect because her daughter was sexually active with, and became pregnant at the age of 14 by, a 20 years old boyfriend. The court dismissed the charges against the mother for neglect. Rather the court held statutory rape laws serve a strong social policy purpose. (Leslie C., 161 Misc. 2d at 608).
 - However, mandatory reporter can not report teen sexual activity to law enforcement as statutory rape without the patient's permission.

What if there were a 13 year difference (e.g., a 25 year old boyfriend with a 12 year old child)?

- But, the court concluded that any abuse or neglect charges should be "limited to those parents who fail to intervene in forced sexual relationships of which they have personal knowledge."

Is there a requirement of direct professional contact?

- Oregon statute limits reporting to situations requiring the reporter to have direct contact with the child abuse victim, or has a direct contact with a person who has abused a child. (see, ORS 419B.005 – 419B.017)
- New York statute provides for two separate sources upon which the psychologist may base his or her report.
 - The professional's received information from **a parent or guardian of the child** having personal knowledge, facts, conditions or circumstances which if correct would render the child abused or maltreated.... also requires a mandatory report (irrespective of his or her opinion about abuse) ... (NY Social Service Laws, Sec 413, 1995)
- In California, a mandatory reporter must report if he or she “has knowledge of or observes a child in his or her professional capacity...” (see, PC 11166(a))
- The CPSL law does not require that the mandated reporter directly interview or otherwise have contact with the alleged victim in order to make a report of suspected child abuse; nor is it required for the mandated reporter to identify the person responsible for the child abuse to make a report of suspected child abuse.

Case Example: What if the parent, guardian, or custodian were, in your opinion, delusional or grossly intoxicated at the time he or she makes the statement to the psychologist?

Is the abuser limited to a legal guardian (parent) or person responsible for the care and treatment of the child or can the abuser be anyone?

Kimberly S.M. v Bradford Central School. Kimberly was a sixth-grade student at Bradford School in New York, when she told her Social Studies teacher that she "had been touched and rubbed by her uncle in places where she should not be touched." Kimberly lived with her parents but visited her uncle in New Jersey during summer vacations and holidays. Kimberly alleged that after she complained to her teacher, her teacher told her "**there was nothing she could do because the Uncle was in New Jersey** but that, if it happened again, Kimberly should let her know."

The following year, Kimberly again told a school counselor about her uncle's behavior. The counselor notified Kimberly's mother, and a report was made. Kimberly, through her mother, sued the teacher for the delay in making a report for more than one year.

In her defense, Kimberly's teacher said that Kimberly "never talked about any improper touching; the children (Kimberly and her friends who were present) merely said that the uncle had kissed, hugged and touched Kimberly and made her feel uncomfortable." And, Kimberly convinced her teacher not to tell her mother, who was also a teacher at Bradford.

Kimberly S.M. v Bradford Central School

appellate decision overturned the trial court.

The statute requires a reporter to have "reasonable cause to suspect" abuse, and defined an abused child as "a child ... whose parent or other person legally responsible for his care ... commits, or allows to be committed, a sex offense against [a] child" The New York statute expressly created civil liability for failing to report. The parents sought damages for their daughter's "psychological and emotional trauma" from visiting her uncle the year between telling the first teacher and informing the counselor. The trial court dismissed the case. It held that the abuse must come from a "'person legally responsible' for the care and treatment of the child...]" and Kimberly's uncle was not such a person.

On Appeal, the New York appellate court held that a mandatory report must be filed even if the alleged abuser is the Uncle, not the fiduciary caretaker of the alleged child victim.

The appeal court rejected the NY State Law's definition of what constitutes an abuser. The NY Law limited abuser to fiduciaries (that is, those who are legally responsible for the care of the child).

Canadian cases offer a more limited definition of what is an abuser

In Ontario, a person must have “**charge of the child**” in order for the reporting law to apply. The Act applies only to an adult exercising authority over a child.

- R. v. Stachula (1984), a 14 year old girl and her mother went to Dr. Stachula, their family doctor, to report that she was pregnant, and she had been having sex with her older brother over the past several years. The doctor reported the incident of sexual abuse to CPS three months later. He was charged with failing to report. He was not guilty. The court held the abuser was not in a guardian relationship with the victim, which was needed for the duty to apply; and the doctor was not a pediatrician, but a family practitioner.
- R. v. Rahalkar (1995), a young girl told her mother and Dr. Rahalkar about an incident of sexual touching by her uncle three weeks after it had occurred. The doctor did not report. He was acquitted because the judge ruled that he could not conclude the doctor had reasonable grounds to suspect that a person in charge of the child had molested her.
- R. v. Cook, (1985), a medical doctor, Dr. Cook, was charged with failing to report child abuse after she learned tht her patient’s daughter was sexually abused by her stepfather over the past two years. Dr. Cook advised her patient to confront her husband. The mother did so and hten told Dr. Cook that the abuse had stopped. Dr. Cook did not make a report of child abuse. At trial, Dr. Cook was acquitted, because the only evidence was the child was abused in the past, and that abuse was not established.

Acting in official capacity or regardless of whether on the job?

- Choices:
 - Psychologist acting in an official capacity?
 - In Pennsylvania, psychologists who, in the course of their employment, occupation or practice of their profession, come into contact with children shall report or cause a report to be made...
 - Psychologist regardless of whether he or she is on the job
 - In Oregon, a mandatory reporter (psychologist) must report whether or not the knowledge of the abuse was gained in the reporter's official capacity or not.

Reporting checklist reviewed

- 1. Is there a reasonable cause to suspect? Is there an articulable reason to suspect?
- 2. Reporter must apply either a “reasonable person” standard, “subjective person” standard or interpret the standard using common sense.
- 3. Determine whether the alleged victim meets the criteria of suspected child abuse or neglect.
- 4. Determine whether to report past abuse, determine how far in the past is one obligated to report the abuse.
- 5. Determine whether there is an exclusion to reporting requirements for same age teenagers having sex, or whether the child is having sex with an older person.
- 6. Decide whether there is obligatory reporting if the source of the report is a parent or guardian or other source.
- 7. Decide whether obligation applies if psychologist is working or not.

Reasons for Failure to report among psychologists

- Reluctance to become involved in legal proceedings
- Unfamiliarity with the reporting process
- Fear about negative consequences to the alleged victim, the alleged victim's family
- Fear of being sued; Fear of being prosecuted for making an unfounded report in spite of immunity protections
- Ineffectiveness of child protection services; concern about mishandling or ignorance on the part of CPS

Krisann M. Alvareza, Brad Donohuea, Maureen C. Kennyb, Nicole Cavanagha, Valerie Romeroa, "The process and consequences of reporting child maltreatment: A brief overview for professionals in the mental health field," *Aggression and Violent Behavior*, 10 (2005) 311-331.

Kirk Beck, A decision model, Dissertation Thesis, Department of Education and Counseling Psychology, Simon Fraser University, 2000

Liability:
Civil consequences for a failure to report

Under the general principles of the law of negligence, civil liability is possible if someone with a duty to report fails to do so, a child is injured or harmed, the injury or harm to the child was caused by the failure to report, and the type of injury or harm the child suffered was a foreseeable consequence of the failure to report.

Penalties as Defined by Child Protective Services Law (CPSL)

- Failure to report or refer:
 - A person or official required to report a case of suspected child abuse or to make a referral to the appropriate authorities commits an offense if the person or official willfully fails to do so.
 - An offense is a felony of the third degree if:
 - the person or official willfully fails to report;
 - the child abuse constitutes a felony of the first degree or higher; and
 - the person or official has direct knowledge of the nature of the abuse.
 - An offense not otherwise specified is a misdemeanor of the second degree.
 - A report of suspected child abuse to law enforcement or the appropriate county children and youth social service agency by a mandated reporter, made in lieu of a report to the The Department of Human Services of the Commonwealth, shall not constitute an offense, provided that the report was made in a good faith.

Liability: Jury Nullification & Differentiating Willful act (intentional) from negligent acts

- A mandatory reporter who suspects abuse or neglect and deliberately fails to report it may be guilty of a class A misdemeanor and can be sued for damages resulting from the failure to report (for example, the continued abuse of the child).
- However, under **Bowes v. Noone**, 748 N.Y.S.2d 440, 444 (4th Dept. 2002). The case focused on alleged sex abuse by the child's father. The victim's mother sought damages on her daughter's behalf. But in this case, the Plaintiff sued the doctor and hospital ER that examined the alleged victim. The case was brought against health care professionals, asserting they should have detected and reported suspected child abuse to the statewide central register of child abuse and maltreatment (central register) as a result of indications of such abuse that were present when the child was examined by her pediatrician, and later at a hospital ER.
 - The jury initially returned a verdict finding that defendant **Thomas Noone, M.D.**, the resident on duty at the Hospital when Chelsea was examined... , **had reasonable cause to suspect abuse but that his failure to report the abuse was not willful and thus not actionable.**
 - The jury further found that the Hospital was negligent in failing to provide Dr. Noone, its employee, with continuing education to enable him to recognize signs of child abuse, but that its negligence was not a proximate cause of Chelsea's injuries.
 - In addition, the jury found that the Hospital was negligent in failing to provide Chelsea's pediatrician, Dr. Noone, with a copy of the emergency room record of January 6, 1990 and that its failure to do so *was* a proximate cause of Chelsea's injuries.

Bowes Case Outcome

- The jury apportioned 25% to Dr. Noone and 75% to the Hospital.
- However, the jury asked the court during its further deliberations whether its answer to a question that affected apportionment could be changed, the court permitted the jury to do so. The jury thereafter returned a verdict finding none of the defendants liable, and the court denied plaintiff's motion to set aside the verdict.
- Plaintiff further contends that the jury's findings that Dr. Noone and the nurses employed by the Hospital had "reasonable cause to suspect" abuse was inconsistent with the jury's findings (that Dr. Noone and the nurses had not deviated from accepted medical standards and thus were not negligent). Plaintiff failed, however, to object to the verdict on that ground before the jury was discharged. "Because the issue was not raised until * * * after any steps could have been taken by the trial court to cure the [alleged] inconsistency, it cannot serve as a predicate for a reversal" (*Barry v. Manglass*, [55 N.Y.2d 803, 806](#), *reag denied* 55 N.Y.2d 1039). In any event, plaintiff's contention lacks merit.
- The court in *Bowes* held, a showing of a "reasonable cause to suspect child abuse" was insufficient to establish civil liability when the evidence did not demonstrate a finding that the failure to report was a knowing and willful act.

Liability:

A. Defining if one “knew or should have known.”

- **Fischer v. Metcalf**, two minor daughters represented by their mother sued their father and his psychiatrist, Dr. Metcalf, alleging that Dr. Metcalf knew or should have known that his patient, [the children's father], physically and mentally abused his daughters; that Dr. Metcalf, in violation of the child abuse reporting provisions; and that, as a result of this omission, the children suffered physical and emotional injuries.
- One of the daughters appealed from the trial court's granting of Dr. Metcalf's motion to dismiss for failure to state a cause of action. The District Court of Appeal of Florida, Third District, affirmed the dismissal of the case and held that Florida's mandatory child abuse reporting law "does not provide a right of action for violation of a statutory duty to report an alleged abuse."

Fischer v. Metcalf, 543 So. 2d 785, 786-87 (Fla. Dist. Ct. App. 1989)

Liability:

Duty to perform an investigation or inquiry

- *Vacchio v. St. Paul's United Methodist Nursery School*, 1995.
 - A nursery school teacher observed that a child in her care had a black eye. The teacher notified child protective services. The parents of the child sued the teacher and the school, alleging that the report was unfounded, false, and made without any attempt to determine the circumstances of how the child sustained the injury. The school and the teacher defended by saying each had immunity. It was ruled that reporting suspected abuse without performing an investigation was itself gross negligence. The school and teacher were liable.

Vacchio v. St. Paul's United Methodist Nursery School. (1995, July 21). *New York Law Journal*, p. 32.

Penalties as Defined by Child Protective Services Law (CPSL)

- If a reporter were to know a failure to report when a child is continuing to be abused, then the reporter is subject to a **misdemeanor of the first degree**,
- except if the child abuse constitutes a felony of the first degree or higher, then the failure to report involves a felony of the third degree.

California Civil Liability Cases

- The first case to hold a mandated reporter liable in civil damages for failing to report suspected abuse was **Landeros v. Flood**. The California Supreme Court ruled that a physician and hospital who had negligently failed to diagnose battered-child syndrome and report the case to the proper authorities would be liable for the injuries caused to the child as a result of returning her to her abusive mother. The guardian ad litem of the child sued Dr. Flood and the hospital for both common law negligence and statutory liability (negligence per se).
- In that case, the mother of an 11 months old child and her common law husband took the child to a California hospital for treatment. The child suffered battering, but the examining doctor failed to diagnose batter child syndrome, and did not report. Rather, the child went home with the mother. Later, another doctor at another hospital corrected diagnosed and reported. The child was taken into protective custody. The non reporting doctor was sued, charged with negligence.
- Even though the California reporting statute did not contain an expressed provision for imposing civil liability, "violating a statutory duty, in this instance the required reporting of suspected abuse and neglect, may be negligence per se. No legislation creating civil liability is needed. Failure to comply with a statutory mandate itself establishes the negligence.
- Damages would increase especially if the child-victim or another child is further victimized because of the failure to report.

Landeros v. Flood, 551 P.2d 389 (Cal. 1976)

Liability: Criminal consequences for a failure to report

- In Landeros case the criminal consequences were spelled out:
- “Additionally to being sued, a mandatory reporter who fails to report is subject to prosecution of a violation of the law, which can result in the imposition of a substantial fine under the law. In California: The statute reads: A person who fails to make a required report is guilty of a misdemeanor punishable by up to six months in county jail and/or up to a \$1000 fine (P.C. 11166[c]). Furthermore PC 11166.01[b] states that “any mandated reporter who willfully fails to report abuse or neglect, or any person who impedes or inhibits a report of abuse or neglect... where that abuse or neglect results in death or great bodily injury, shall be punished by not more than one year in a county jail, by a fine of not more than five thousand dollars (\$5,000), or by both that fine and imprisonment.”

Criminal liability in NC

The law in NC does not provide for criminal punishment sanctions. However, two cases were brought under the common law.

- In 1986, an assistant school superintendent was convicted of a misdemeanor for not reporting suspected sexual abuse of students by a substitute teacher. **State v. Freitag** (Wake County District Court, January 31, 1986). See “Assistant Superintendent Convicted for Not Reporting Suspected Child Abuse,” *School Law Bulletin* 17 (Spring 1986): 46–47. Under current law, a report to the department of social services would not be required in the circumstances of that case, because a teacher is not a “caretaker” as the Juvenile Code defines that term. (See Chapter 4.) Under current law, however, a report to law enforcement officials might be required, at least by the principal, since a principal has a duty to report to law enforcement certain criminal offenses that occur on school property. (See Chapter 14.)
- A psychologist was convicted of a misdemeanor for not reporting suspected child abuse. The case was dismissed because the judge on appeal held the law had not intended criminal consequences for failing to report. **State v. Gray** (Durham County District Court, February, 1986; Durham County Superior Court, January 14, 1987). See “Charges against Chapel Hill Psychologist Dismissed,” *Durham Morning Herald*, 15 January 1987, 1A.

Defenses: “I thought a report had already been filed”

- In response to the psychologist’s argument that he had not reported because **“he thought the matter was already in the judicial system and the parents and attorneys knew of the alleged sexual abuse,”** the court of appeals stated that the reporting law “makes no exceptions for extenuating circumstances in reporting suspected child abuse.” 97 N.C. App. at 165, 388 S.E.2d at 161.

See, White v. North Carolina State Board of Examiners of Practicing Psychologists, 97 N.C. App. 144, 165, 388 S.E.2d 148, 161, cert. denied, 326 N.C. 601, 393 S.E.2d 891 (1990).

In reviewing the revocation of a psychologist’s license based on multiple alleged violations of the Ethical Principles of Psychologists, the court held that the psychologist “technically” had violated both one of the ethical principles and the child abuse reporting law by failing to report suspected child abuse.

Immunity from Liability Defined by Child Protective Services Law (CPSL)

A person, hospital, institution, **school**, facility, agency or agency employee acting in good faith shall have immunity from civil and criminal liability that might otherwise result from any of the following:

- Making a report of suspected child abuse or making a referral for **general protective services**, regardless of whether the report is required to be made
- Cooperating or consulting with an investigation, including providing information to a child fatality or **near-fatality** review team.
- Testifying in a proceeding arising out of an instance of suspected child abuse or **general protective services**.
- Engaging in any action relating to photographs, medical tests and X-rays of child subject to report, taking child into protective custody, admission to private and public hospitals or mandatory reporting and postmortem investigation of deaths.

Immunity provisions

- All statutes provide a reporter participating in good faith in making a report of child abuse and who has reasonable grounds for making the report will have immunity from any liability, civil or criminal, that might occur with respect to the making or content of such report.
 - Criminal liability can include the failure to report but also making a false report.
- Good faith is defined as the absence of malicious intent.

Immunity and Exemptions from Liability:
Attorney client privilege and Attorney work product

- **The attorney-client privilege**, which made its way into American law by the 1820s (Green, 2004), prevents client confidences from being revealed in legal proceedings, which encourages full and frank conversations between clients and their attorneys.
- **The attorney work product rule** is broader than the attorney client privilege. It protects tangible things and information collected or prepared by an attorney or an agent of the attorney in anticipation of litigation. (see *Hickman v Taylor* 1947, and *US v Nobles* 1975.)

Forensic practitioner exception:

Example: A forensic psychologist is retained by a **defense attorney** to evaluate a client who is facing criminal charges after allegedly molesting a young child. The client is a man with a long history of a psychotic illness, and the attorney is requesting an evaluation to establish an insanity defense. During the evaluation, which occurs at the detention center where the client is incarcerated awaiting trial, the client reveals that at the time of the alleged offense, voices in his head told him to molest the child. The doctor further inquires about other instances when voices have commanded him, and the client discloses that he has recently as last week molested other **another child**, whom he identifies by name.

Is there are reporting requirement consistent with the Tarasoff duty to warn, or under a statutory requirement to report child abuse?

When the forensic psychologist is retained by the evaluatee's own attorney, the psychologist typically tells the evaluatee that the information learned during the evaluation will be disclosed to others only if the evaluatee and his attorney believe it will be helpful to the legal case. The implication is then that otherwise there is a **de facto confidentiality associated with the evaluation**. Is this reasonable?

Reena Kapoor, MD, and Howard Zonana, MD, Forensic Evaluations and Mandated Reporting of Child Abuse, J Am Acad Psychiatry Law 38:49-56, 2010

Reporting v. Privilege: Attorney Work Product (Agency)

- In 2013, the California Court of Appeals heard a case that squarely addressed the issue of mandated reporting for forensic psychologists when they are retained by criminal defense attorneys (**Elijah W. v. Superior Court, 2013**).
 - Facts were that Elijah was a 10 year old charged with arson in LA. The attorney, a public defender, asked Dr. Catherine Scarf conduct a competency evaluation. The doctor completed the evaluation. The issue arose as to whether the doctor would satisfy the mandatory reporting requirements by telling the child's attorney of the child's danger to others.
 - Issue: Whether an expert psychologist or psychiatrist appointed or retained by the defense in a criminal or juvenile matter in California must comply with the mandated reporter requirements under the Child Abuse and Neglect Reporting Act or the Tarasoff decision?
- Holding: The court indicated the expert does not have to report, because the expert work is under the attorney client privilege. The court reasoned to do otherwise would lead the child to refuse to talk honestly to the expert, and deprive the child of ancillary defense services. The court also held the forensic expert evaluator's relationship to the client is not a therapeutic one. The duty is to notify the attorney, who will determine under his or her privilege rule whether to report.
- Of interest, the court also held that "nothing in this decision prevents any person from making a report when he or she suspects child abuse or neglect." The forensic expert is held to the mandatory reporting standards of the retaining attorney, and if the attorney and client agree to permit reporting of suspected abuse by agreement with the mental health professional, the professional can report the suspected abuse voluntarily. If the attorney were mandated to report child abuse, then the expert would be mandated to report.
- (see C.R. Lareau, "Attorney work product privilege trumps mandatory reporting," *International Journal of Law and Psychiatry*, 42-43 (2015), p. 43-48.)

People v Clark

- People v. Clark, 25 Cal 1990 California Supreme Court decision, a defendant was charged with first-degree murder, arson, and attempted second-degree murder after allegedly burning down the house of his former therapist and killing her husband in the fire.
- At the request of his attorney, the defendant was examined by a forensic psychiatrist. He told the psychiatrist about plans to kill two additional persons, and the psychiatrist issued a Tarasoff warning to those individuals. The psychiatrist later testified about the threats at the defendant's trial, and the defendant was convicted on all counts.
- Defendant appealed, and claimed the expert should not have been permitted to reveal his communications as they were privileged under attorney client privilege (psychiatrist was hired by his attorney). The court agreed, invoking agency under the attorney client relationship.

Do reporting statutes exempt forensic experts?

- Nobody expects a psychiatric evaluation to result in the filing of additional charges against the defendant. To report violates the principle of non-maleficence. Furthermore, such an action is contrary to the original intent of the psychiatric consultation.
 - U.S. v. Alvarez, 519 F.2d 1036 (1975) held that a psychiatrist who is retained by a defense attorney as part of a criminal defense cannot be compelled to disclose the results of the evaluation in a judicial proceeding if doing so would be harmful to the client
 - Oregon, recognize both physician-patient and attorney-client privileges as exceptions to mandatory reporting
 - In Maryland, State v. Pratt, 398 A.2d 421 (Md. 1979), exempted forensic professionals from reporting. In 1990 Maryland clarified by an attorney general's opinion that psychiatrists (and psychologists) retained as part of an *ongoing criminal defense* are exempt from mandated reporting. 75 Md. Op. Att'y Gen. 76 (1990)
- Whereas, in Mississippi, specifically deny both privileges and require reporting by physicians and attorneys. Miss. Code Ann. § 43-21-353 (2008)
- What about civil cases in which psychologists are retained by attorneys?

Reena Kapoor, MD, and Howard Zonana, MD, Forensic Evaluations and Mandated Reporting of Child Abuse, J Am Acad Psychiatry Law 38:49-56, 2010

Maryland's experience with the Pedophile protection bill

- In the late 1980s Maryland amended its mandated reporting statute so that physicians who were treating patients with pedophilia were not required to report abuse that had occurred prior to the beginning of the treatment. This change was made to encourage patients with problematic sexual behavior to seek treatment without fear of criminal prosecution for past acts. Berlin FS, Malin HM, Dean S: Effects of statutes requiring psychiatrists to report suspected sexual abuse of children. *Am J Psychiatry* 148:449 -53, 1991(p 450). Md. Code Ann. Fam. Law § 5-704(b) (1988)
- However, even before the strategy's efficacy could be assessed, the law was dubbed the "Pedophile Protection Bill" in the lay media, and it was so politically unpopular that it was repealed the following year. 1989 Md. Code Ann. Adv. Legis. Serv. 730 One could reasonably assume that the reaction in other states would be similar.

Reena Kapoor, MD, and Howard Zonana, MD, Forensic Evaluations and Mandated Reporting of Child Abuse, *J Am Acad Psychiatry Law* 38:49-56, 2010

What if the forensic evaluator is performing an rebuttal style evaluation?

- If the client being examined by an expert hired by the state – independent psychological examination (when the defendant has asserted a mental health defense), the question of whether mandatory reporting applies is more complex. The standard of practice is to notify the defendant’s attorney as well as the examiner’s retaining attorney is a reasonable first step. Also, if available, the examinee’s treating professional should also be informed.
- Whether giving a warning, taking other action, or deciding not to take action, the examiner will clearly benefit from the twin pillars of liability prevention: documentation and consultation.

Thomas G. Gutheil, MD, and Archie Brodsky, BA, “Commentary: Tarasoff Duties Arising From a Forensic Independent Medical Examination,” *J Am Acad Psychiatry Law* 38:57-60, 2010

Forensic Evaluator's confidentiality warning in light of child abuse and Tarasoff reporting requirements

- First, remind the attorney to discuss the forensic psychologist's obligation as a mandated reporter with his client before proceeding with the evaluation, particularly in cases involving known child abuse.
- Review with the client prior to proceeding that while the information learned during the evaluation will be disclosed to others only if the evaluatee and his attorney believe it will be helpful to the legal case, there is a controversy surrounding whether information about child abuse (whether past abuse and present abuse) or potential future violence behavior may be an exception that requires mandatory reporting.
 - “I am not your doctor, but under certain circumstances I have have to act as though I were”
 - “If certain conditions arise that might raise a concern about your injuring yourself or someone else, I may have to intervene, that is, take steps to prevent that and to protect both that person and you.”

What happens when a report is made?

- A report concerning possible child abuse triggers a response from a caseworker from the appropriate agency within 24 hours, and is completed within thirty days. The result may be referral to police and the prosecuting attorney for possible criminal investigation. Agency staff is required by law to make immediate telephone reports, followed by a written report, when suspicions involving risk of permanent disability, disfigurement or protracted loss of function of an organ or bodily members, or when the alleged perpetrator is not related to the child by blood or marriage.
- The parents of the child will be informed by the caseworker within hours of receiving the report (and written notice is given within 72 hours).
- The case worker can take custody of the child or remove the child from the home or school only with court approval.
- Mandated reporters may receive information from the county agency regarding the final status of the report, whether it was unfounded, indicated, or founded.

A mandated reporter is expected to provide the following information, if known:

- The names and addresses of the child and his parents or other person responsible for his care;
- The age of the child; gender of the child;
- The nature and extent of the child's injury or injuries, maltreatment or neglect;
- The approximate date and time the injury or injuries, maltreatment or neglect occurred;
- Information concerning any previous injury or injuries to, or maltreatment or neglect of, the child or his siblings;
- The circumstances in which the injury or injuries, maltreatment or neglect came to be known to the reporter;
- The name of the person or persons suspected to be responsible for causing such injury or injuries, maltreatment or neglect;
- The reasons such person or persons are suspected of causing such injury or injuries, maltreatment or neglect;
- Any information concerning any prior cases in which such person or persons have been suspected of causing an injury, maltreatment or neglect of a child;
- Whatever action, if any, was taken to treat, provide shelter or otherwise assist the child (PA 11-93 §15).

How a report is to be made as defined by Child Protective Services Law (CPSL)

A mandated reporter must immediately:

Either:

Make an oral report of suspected child abuse via ChildLine, the Statewide toll-free telephone number (1-800-932-0313), **and** make a written report (CY-47), which may be submitted electronically, within 48 hours to the The Department of Human Services of the Commonwealth or the county children and youth social service agency assigned to the case in a manner and format prescribed by the Department

OR

Make a written report electronically via
www.compass.state.pa.us/cwis

In addition, if the mandated reporter is a member of the staff of a medical or other public or private institution, school, facility or agency, then he or she must immediately thereafter notify the person in charge of the institution, **school**, facility or agency or the designated agent of the person in charge.

What is the best response to a child who has spoken about his or her abuse?

- Tell the child you believe him or her and you are going to contact people who can help. Don't press the child for details. You need only to suspect abuse to make the report. Don't place blame or make judgments about the child or parent.

Is there over reliance upon physical abuse vs. emotional or mental abuse when deciding to report?

Assume the law excludes reasonable physical discipline as a basis for mandatory reporting of child abuse.

- 8 year old child Taylor is your client. You learn he has been exhibiting angry and aggressive behavior both at home and at school. He is also often withdrawn, wets the bed, had many childhood accidents, school absences, etc. Taylor's play contains themes of violence, and Taylor has a high startle response. Taylor has a healed scar visible on his body, but also bruises. When you ask about it, Taylor says, "I got it when I was playing." When you ask about forms of punishment at home, Taylor states, "I get spankings when I am bad." When you meet with Taylor's parents, they state that they employ physical discipline (corporal punishment – they use objects to spank Taylor) as their main form of discipline.
- Determine whether you would consider this emotional or mental abuse, physical abuse or reasonable physical discipline?

Non disclosure of Mandatory Reporter's name:

- Unless a reporter gives written consent, his or her name will not be disclosed except to:
 - a DCF employee
 - a law enforcement officer
 - an appropriate state's attorney
 - an appropriate assistant attorney general
 - a judge and all necessary parties in a court proceeding
 - a state child care licensing agency, executive director of any institution, school or facility or superintendent of schools
- **Alternatively:** The law requires that mandatory reporters identify themselves and where they can be reached. If clarification of the situation is needed, the caseworker will be able to contact the reporter.
- If Department of Child Family Services suspects or knows that the reporter knowingly makes a false report, his or her identity shall be disclosed to the appropriate law enforcement agency and the person may be subject to the penalty described in the next section.

Mandated reporters right to know

- Immunity from civil and criminal liability unless the reporter acted in bad faith or with a malicious purpose
- A right to have his or her identify kept confidential unless a court orders the reporter's identity be revealed or the reporter consents to reveal his or her identity
- A right to know whether the report was investigated