CAUSING CONFLICT: INDIANA'S MANDATORY REPORTING LAWS IN THE CONTEXT OF JUVENILE DEFENSE

Megan M. Smith*

* J.D., 2013, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana; B.S., 2004, Indiana State University, Terre Haute, Indiana.

I. INTRODUCTION

Child abuse has occurred since the dawn of time; however, it was not recognized as a social problem until the early 1960s.[1] Today, most people recognize the need to criminalize child abuse and protect children from this repugnant act. However, many still fail to recognize children's rights within the legal system.[2] This polarization between protecting children and preserving children's rights could lead to a consequential clash within our legal system. The Supreme Court has established that children, like adults, have a constitutional right to counsel, which implicitly includes attorney-client privilege.[3] The importance of a juvenile client's ability to speak honestly and frankly with his or her attorney cannot be overstated. Juveniles have the same right as adults to fully participate in and direct their representation;[4] they should not be stunted in their defenses by laws that were created to protect them.

Each state throughout the United States has enacted what have become known as mandatory reporting statutes. These laws can, and certainly do in some states, have a direct effect on the attorney-client privilege. These laws have the ability to diminish, undermine, or remove the attorney-client privilege in certain contexts, particularly in the context of juvenile defense. While commentators agree the attorney-client privilege has never been afforded constitutional protection,[5] there could also be Sixth

---

1 Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 514 (1998).

2 Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 LOY. U. CHI. L.J. 259 (1995).

3 *In re* Gault, 387 U.S. 1, 4 (1967).

4 *See generally id.*

5 Camile Glasscock Dubose & Cathy O. Morris, *The Attorney as Mandatory Reporter*, 68 TEX. B.J. 208, 211 (2005); *see also* Upjohn Co.

Amendment implications for abused or neglected juvenile clients if the fear of that abuse or neglect being reported prevents them from fully communicating to their attorney everything necessary for effective representation. Without the benefit of the whole truth, the attorney may be unable to provide the client with a complete defense.

One of the most disconcerting aspects of mandatory reporting statutes, in general, is that they may "force attorneys to breach their clients' trust and confidence . . . or to face criminal liability."[6] The inherent conflict contained in mandatory reporting statutes is evident. On one hand, attorneys are prevented by the attorney-client privilege from revealing their client's confidences. On the other hand, however, public policy dictates that children must be kept safe from harm.[7] The point at which attorneys are permitted or required to break a client's confidence by reporting child abuse or neglect will depend upon the language of the state statute where the attorney is located.

Indiana requires that *any* person *must* report suspicions or knowledge of abuse or neglect.[8] The juvenile code in Indiana contains specific statutes abrogating certain communicative privileges for the purpose of complying with the mandatory reporting laws.[9] However, these statutes do not specifically abrogate the attorney-client privilege, causing a conflict between the privilege and the duty to report.[10] By not excluding attorneys as mandated reporters, Indiana's mandatory reporting laws fail to take into account the negative ramifications of attorneys reporting the abuse of their clients, especially if the clients do not want the

---

v. United States, 449 U.S. 383, 389 (1981) (quoting the Federal Rules of Evidence that "the privilege of a witness . . . shall be governed by the principles of the common law . . .").

6 Katharyn I. Christian, Comment, *Putting Legal Doctrines to the Test: The Inclusion of Attorneys as Mandatory Reporters of Child Abuse*, 32 J. LEGAL PROF. 215, 216 (2008).

7 *Id.* at 217.

8 IND. CODE § 31-33-5-1 (2013) (emphasis added).

9 Frances G. Hill & Derelle Watson-Duvall, CHINS DESKBOOK 2001, at 4-2 (2001 ed. 2001), *available at* www.kidsvoicein.org/programs/clci/chins/deskbook/2001/ch_4.shtml; *see also* § 31-32-11-1.

10 Hill & Watson-Duvall, *supra* note 9, at 4-2 to 4-3.

abuse reported. The inclusion of attorneys as mandated reporters undermines the attorney-client privilege between a juvenile client and his or her defense attorney while possibly violating his or her Sixth Amendment right to counsel.

This Note discusses how the conflict created by Indiana's mandatory reporting laws undermines the attorney-client privilege and possibly violates the Sixth Amendment right to counsel when the physical and sexual abuse or neglect of a juvenile is discovered by attorneys representing the victims. Part II of this Note looks at the history of child abuse and the subsequent development of mandatory reporting laws in the United States. Part III examines the laws and legal rules entwined with Indiana's mandatory reporting laws, and how Indiana addressed the conflict between them. Part IV of this Note discusses why attorneys, particularly those engaged in juvenile defense, should not be mandated reporters, while Part V explores how, and whether, other states have addressed this issue. Finally, Part VI argues that in order to alleviate these problems for juveniles and their defense attorneys, Indiana should amend its mandatory reporting laws to provide for permissive reporting for all attorneys or include an exception for defense attorneys.

II. THE HISTORY OF CHILD ABUSE AND MANDATORY REPORTING LAWS

The first recorded case of child abuse occurred in New York City in 1874 when Mary Ellen Wilson was removed from her adoptive mother due to extensive physical abuse.[11] At the time of her removal from the home, Mary Ellen had bruises and scars covering her body and gashes over one eye and on her cheek.[12] Although neighbors knew Mary Ellen was severely mistreated, even the authorities were reluctant to act until Elbridge T. Gerry, the attorney for the

---

[11] Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 832 (2010).

[12] *Id.* at 833.

American Society for the Prevention of Cruelty to Animals, intervened as a private citizen on behalf of Mary Ellen after receiving word of her story.[13] The publicity that stemmed from this case prompted the institution of charitable organizations aimed at preventing child abuse, including Mr. Gerry, who established the New York Society for the Prevention of Cruelty to Children.[14]

Even after the case of Mary Ellen Wilson, child abuse was still not a matter of much concern until Dr. C. Henry Kempe published an article in The Journal of the American Medical Association in 1962.[15] His article, *The Battered Child Syndrome*, became the catalyst for identifying and researching the effects of child abuse; within three years of its publication, over 300 scientific articles were published on child abuse.[16] Until publication of *The Battered Child Syndrome*, child abuse had largely been relegated to "disadvantaged families," and considered rare even in those circumstances.[17] This article brought child abuse and the need to address its devastating effects to the forefront of the medical and legal communities. However, as the title suggests, Dr. Kempe's article focused mainly on the physical abuse of children. Child abuse now encompasses a varying array of behaviors or omissions.[18]

In order to combat child abuse, states began enacting what have become known as "mandatory reporting laws." After the publication of *The Battered Child Syndrome*, reporting statutes began emerging in states throughout the country; by 1967, every state had at least some variation of a reporting statute.[19] Because of Dr. Kempe's article, these statutes were originally aimed at medical professionals and

---

13 *Id.* at 832-33.

14 *Id.* at 833.

15 Marrus, *supra* note 1, at 514; *see also* C. Henry Kempe et al., *The Battered-Child Syndrome*, 9 CHILD ABUSE AND NEGLECT 143 (1985) (reprinted with permission of the American Medical Association and first published in the Journal of American Medical Association).

16 Hafemeister, *supra* note 11, at 838.

17 *Id.* at 837-38.

18 *See* IND. CODE § 31-9-2-133 (2013).

19 Marrus, *supra* note 1, at 514.

serious physical or non-accidental injuries.[20] As the statutes developed, they began to follow one of two formats: (1) various professionals were listed as mandatory reporters, or (2) a catch-all provision required "any person," "all persons," or "any other person," to report child abuse.[21] Overtime, however, these statutes have transformed into broad, wide-ranging statutes. Some statutes, like Indiana's statute, still require "anyone" or "all persons" to report. Other states only require a report to be made if there are *suspicions* of possible abuse.

The federal government became involved in 1974 when Congress passed the Child Abuse Prevention and Treatment Act (the "Act"), which requires each state to enact some type of mandatory child abuse reporting statute in order to be eligible for federal funding.[22] The Act, however, did little to encourage uniformity of reporting statutes amongst the states. As such, child abuse reporting statutes vary widely from state to state, especially in regard to the professionals who adhere to confidentiality privileges; some states impose mandatory reporting requirements while others allow for permissive reporting.[23] Mandatory reporting laws regularly conflict with other professional obligations, such as the attorney-client privilege and the duty of confidentiality for doctors, clergy, and lawyers. Most states have created an exception to the rule of doctor-patient confidentiality, while the duties of confidentiality for clergy and lawyers are still widely debated.

The protection of children is the primary purpose of mandatory reporting laws.[24] Most of the time, the abuser is

---

[20] *See* Alison Beyea, *Competing Liabilities: Responding to Evidence of Child Abuse That Surfaces During the Attorney-Client Relationship*, 51 ME. L. REV. 269, 272 (1999).

[21] Christian, *supra* note 6, at 218-19.

[22] Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5107 (2013); *see also* Ventrell, *supra* note 2, at 267; Brooke Albrandt, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX L. REV. 655, 656 (2002).

[23] Dubose & Morris, *supra* note 5, at 210.

[24] Beyea, *supra* note 20, at 288.

the child's parent or primary caregiver,[25] resulting in the victim being dependent on the abuser for support and care.[26] If the victim is dependent on the abuser, it is unlikely he or she would be willing to leave or report the abuse of his or her own accord. These mandatory reporting statutes were intended to resolve this struggle. Unfortunately, many of these statutes have simply replaced one conflict with another.

The Indiana legislature expressed that the purposes of its mandatory reporting statute are to

> (1) encourage effective reporting of suspected or known incidents of child abuse or neglect; (2) provide effective child services to quickly investigate reports of child abuse or neglect; (3) provide protection for an abused or a neglected child from further abuse or neglect; (4) provide rehabilitative services for an abused or a neglected child and the child's parent, guardian, or custodian; and (5) establish a centralized statewide child abuse registry and an automated child protection system.[27]

The Indiana Court of Appeals clarified that the purpose of the state's mandatory reporting laws was to identify children in need of immediate attention, not to provide a mechanism for prosecuting offenders.[28] The Seventh Circuit explained that the rationale behind enacting statutes that require individuals to report suspected or known child abuse stems from the characteristics special to abused children.[29]

---

[25] *See* Hafemeister, *supra* note 11, at 824-28.

[26] Beyea, *supra* note 20, at 275.

[27] IND. CODE § 31-33-1-1 (2013); *see also* Anonymous Hosp. v. A.K., 920 N.E.2d 704, 709 (Ind. Ct. App. 2010).

[28] Daymude v. State, 540 N.E.2d 1263, 1266 (Ind. Ct. App. 1989).

[29] Aylward v. Bamberg, No. 98-2119, 1999 WL 515203, at *2 (7th Cir. July 6, 1999). The Seventh Circuit listed the characteristics special to abused children as the inability to recognize their own abuse or

Mandatory reporting laws, understandably, arose in order to combat the prevalence of child abuse, a notable and necessary objective that could hardly be discouraged. However, regardless of the rationale or purpose stated to support a state's mandatory reporting statute, the substance of this type of law has a widespread effect on other areas of the law. Which areas of the law and how much they are affected will depend upon the specific language of each state's mandatory reporting statutes.

III. THE LEGAL RULES AT ISSUE

Indiana's mandatory reporting laws have implications far outside the statute itself. Mandatory reporting by attorneys in Indiana creates an interaction of three types of legal rules: the attorney-client privilege, the rules of professional conduct, and the state reporting statutes. In order to determine whether attorneys in Indiana are required to report child abuse under the mandatory reporting laws, one must read all three types of legal rules together.

A. Attorney-Client Privilege

The attorney-client privilege protects against judicially compelled disclosure of confidential communications made by a client to an attorney in order to procure legal advice or legal services.[30] It is generally recognized as the oldest existing common law privilege.[31] The importance of this privilege is evinced by its codification into state statutes, rules of professional conduct, and rules of evidence.[32] The attorney-client privilege has one major exception, which is commonly known as "the crime-fraud exception."

---

injury, the inability to report abuse due to age or fear of retaliation, the difficulty of third parties to detect the effects of abuse, the likelihood of physical and emotional scarring, and the limited ability of children to choose their own course of action.

[30] Colman v. Heidenrich, 381 N.E.2d 866, 868-69 (Ind. 1978).

[31] *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Marrus, *supra* note 1, at 521.

[32] Marrus, *supra* note 1, at 522.

Essentially, the attorney-client privilege is void if the communication between lawyer and client is in furtherance of ongoing or future criminal or fraudulent conduct.[33] This exception is aimed at public fairness; by ensuring that only communications made for the purposes of abiding by the law and receiving effective representation, it prevents criminals from hiding behind the veil of attorney-client privilege.[34]

This exception is not applicable where attorneys have garnered suspicions of abuse through the defense representation of juvenile clients. While it is possible that the abuse is ongoing and would meet the ongoing crime element, the juvenile is the victim, not the perpetrator of the crime; therefore, the attorney-client privilege should remain intact. One possible exception to this exception would be an attorney learning that the juvenile client was abusing another child and the attorney's communications were intended to further the abuse.[35] In this instance the crime-fraud exception would attach and the attorney-client privilege would no longer exist. However, any communications that took place after the abuse, and not in furtherance of, would remain privileged.

The attorney-client privilege was designed to "encourage full and frank communication between attorneys and their clients."[36] The Supreme Court stressed the need for the lawyer, as advocate and counselor, to know all information that relates to the client's representation in order to provide the appropriate, professional representation.[37] The Court furthered that "the privilege exists to protect not only the giving of professional advice . . . but also the giving of

---

[33] *Developments in the Law – Privileged Communications: Attorney-Client Privilege*, 98 HARV. L. REV. 1501, 1510 (1985).

[34] *Id.*

[35] While unlikely, it is possible that a consultation with a juvenile client could consist of strategies or tips on how to continue the abuse while avoiding detection. In this situation, the crime-fraud exception would apply, and the communication between the attorney and client would not be privileged.

[36] *Upjohn*, 449 U.S. at 389.

[37] *Id.* at 390.

information to the lawyer to enable him to give sound and informed advice. The first step in the resolution of any legal problem is ascertaining the factual background . . ."[38] The public is also served when an attorney is able to provide thorough legal advice and counsel, but this is dependent upon the attorney being fully informed by the client.[39]

Indiana has established the attorney-client privilege throughout its rules and statutes. One source of the attorney-client privilege in Indiana is found in Indiana Code section 34-46-3-1 which provides in part that "except as otherwise provided by statute, the following persons shall not be required to testify regarding the following communications: (1) Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases."[40] Another source for the attorney-client privilege is found in the Indiana Rules of Evidence, providing that information subject to the attorney-client privilege retains its privileged character until the holder of the privilege (client) has waived said privilege by consenting to disclosure.[41]

B. Duty of Confidentiality

The duty of confidentiality provides an outline for attorneys' ethical obligations regarding their clients' confidences.[42] While often used interchangeably with attorney-client privilege, the duty of confidentiality encompasses a broader category of communications and information, including information that would not be covered under the attorney-client privilege.[43] The major difference between the duty of confidentiality and the attorney-client privilege is that any information learned

---

[38] *Id.* at 390-91.

[39] *Id.* at 389.

[40] IND. CODE § 34-46-3-1 (2013).

[41] *See* IND. EVID. R. 501, 502.

[42] *See* IND. PROF. COND. R. 1.6.

[43] Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse,* 36 N.M. L. REV. 125, 133 (2006).

through the course of representation, *regardless of the source*, which includes information discovered from third persons or information learned during conversations occurring in front of a third party is protected;[44] whereas the attorney-client privilege applies only to information received from the client. Comment 3 to Rule 1.6 explains that the rule of client confidentiality applies outside the context of evidence seeking and that it is applicable to all information relating to representation and not just information received from the client.[45]

Every state has developed its own set of ethical guidelines to provide attorneys with guidance in their practice of the law. These rules are largely modeled after the American Bar Association's (the "ABA") Model Code of Professional Responsibility ("Model Code") or Model Rules of Professional Conduct ("Model Rules").[46] In 1987, Indiana enacted its Rules of Professional Conduct which included Rule 1.6 – Confidentiality of Information ("Rule 1.6").[47] As of 2005, Rule 1.6 prohibited a lawyer from revealing information relating to representation of a client unless the client gave informed consent, the disclosure was impliedly authorized in order to carry out the representation, or the disclosure was within one of the exceptions to Rule 1.6.[48] Only two of the six exceptions listed under Rule 1.6 are likely to become applicable regarding mandatory reporting statutes. A lawyer may reveal information to prevent reasonably certain death or substantial bodily harm or to comply with other laws or court orders.[49]

C. Indiana's Mandatory Reporting Laws

Under Indiana's mandatory reporting laws, *any individual* that has reason to believe that a child is a victim

---

[44] *See id.*; Beyea, *supra* note 20, at 280.

[45] *See* IND. PROF. COND. R. 1.6 cmt. 3.

[46] *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 2 (1980); MODEL RULES OF PROF'L CONDUCT (1983).

[47] *See* IND. PROF. COND. R. 1.6.

[48] *Id.* at 1.6(a).

[49] *Id.* at 1.6(b).

of child abuse or neglect shall make a report.[50] The duty to report is absolute and applies to all persons.[51] For the purposes of this statute, "reason to believe" is defined as evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected.[52] The failure to make a report when required constitutes a Class B misdemeanor and may result in criminal sanctions.[53] Under this statute, any person who makes a report, in good faith, is immune from criminal and civil liability.[54] However, immunity will not attach and liability will be imposed if the report was made with malice or bad faith.[55] In order to encourage reporting, the legislature imputed a presumption of good faith in all reporters.[56]

Indiana's mandatory reporting laws do not exclude lawyers from the reporting mandate.[57] In 1998, Indiana amended its mandatory reporting laws to remove the chapter abrogating evidentiary privileges; however, it retained a provision elsewhere in the juvenile code that prohibits certain privileged communications from being excluded as evidence in "any judicial proceeding resulting from a report of a child who may be a victim of child abuse or neglect . . . or failing to report as required by I.C. 31-33."[58] Since "there is no statutory provision abrogating the attorney-client privilege for the purpose of reporting child abuse or neglect," such a report may constitute a violation of the attorney-client privilege.[59]

---

50 IND. CODE § 31-33-5-1 (2013) (emphasis added).

51 Aylward v. Bamberg, No. 98-2119, 1999 WL 515203, at *3 (7th Cir. July 6, 1999).

52 § 31-9-2-101.

53 *Id.* § 31-33-22-1.

54 *Id.* § 31-33-6-1.

55 *Id.* § 31-33-6-1, 2.

56 *Id.* § 31-33-6-3; *see* Kinder v. Doe, 540 N.E.2d 111, 115 (Ind. Ct. App. 1989).

57 Hill & Watson-Duvall, *supra* note 9, at 4-5.

58 Donald R. Lundberg, *Mandatory Child Abuse Reporting by Lawyers*, RES GESTAE, Dec. 2011, at 31, 32 (quoting IND. CODE § 31-32-11-1 (2011)).

59 Hill & Watson-Duvall, *supra* note 9, at 4-5.

D. How Indiana Addressed the Conflict Between the Duty of Confidentiality/Attorney-Client Privilege and Its Broad Mandatory Reporting Laws

There is little Indiana case law on this issue to help attorneys resolve possible conflicts and problems that arise in the course of representation.[60] The Indiana Court of Appeals made clear in *Daymude*, that attorneys who represent clients in cases involving child abuse will not be required to report any further information received from their clients about the alleged abuse.[61] The court stated that where the purpose of the reporting statue (to protect children from abuse) had already been met, there was no longer any justification for abrogating privilege.[62] While mandatory reporting laws inherently conflict with the principles underlying the duty of confidentiality, the resolution to this conflict could be drawn from the notion that the ethical rules do not supersede statutes.[63]

Indiana also established an abrogation statute and an exception to the duty of confidentiality. Indiana has provided exceptions to Rule 1.6 that allow an attorney to reveal confidential information under certain circumstances. The relevant exceptions allow an attorney to reveal confidential information to the extent the attorney reasonably believes it is necessary (1) to prevent reasonably certain death or substantial bodily harm or (2) to comply with other law or a court order.[64] Comment 12 refused to state equivocally when the other law would supersede Rule 1.6.[65]

Based on a plain language reading of theses exceptions, it appears that an attorney would be excepted from keeping confidential information pertaining to the abuse of a child

---

60 Lundberg, *supra* note 58, at 34.

61 Daymude v. State, 540 N.E.2d 1263 (Ind. Ct. App. 1989).

62 *Id.* at 1266 (abrogating privilege in the physician-patient context).

63 Lockie, *supra* note 43, at 133; *see also* IND. PROF. COND. R. 1.6 cmt. 2.

64 IND. PROF. COND. R. 1.6(b).

65 *See id.* at 1.6 cmt. 12.

because child abuse is a crime that could result in death or substantial bodily harm, and the mandatory reporting laws requiring any individual to report meet the exception for complying with another law. Because the communications provided for in the duty of confidentiality encompass the communications of the attorney-client privilege, one could argue that, by excepting the duty of confidentiality, Indiana automatically carved out an exception to the attorney-client privilege.

Indiana has also codified immunity from civil or criminal liability that might occur as a result of reporting child abuse or neglect.[66] The Seventh Circuit concluded that when the immunity statute is combined with the mandatory reporting laws, any person, even if he or she is subject to privileged communications, is required to make a report of reasonably suspected child abuse.[67]

Several different rationales have been put forth for the inclusion of attorneys as mandated reporters. Specifically, because other professionals who have a recognized privilege similar to the attorney-client privilege are mandatory reporters, attorneys should also be included.[68] Another rationale is that attorneys are officers of the court who owe a duty to society to protect it from imminent serious harm or death,[69] and if they are not included as mandated reporters of child abuse then this duty is somehow violated. Most of the discussion surrounding the concept of lawyers as mandated reporters revolves around the idea that the abuse will be discovered while the attorney is representing the child's parent or abuser.[70] This rationale is supported by the argument that attorney-client privilege does not apply in cases of ongoing or future crimes, which include

---

66 *See* IND. CODE § 31-33-6-1 (2013); Aylward v. Bamberg, No. 98-2119, 1999 WL 515203, at *3 (7th Cir. July 6, 1999).

67 *Aylward*, 1999 WL 515203, at *3.

68 Marrus, *supra* note 1, at 538.

69 Albrandt, *supra* note 22, at 660.

70 *See generally* Dubose & Morris, *supra* note 5; Beyea, *supra* note 20; Albrandt, *supra* note 22; Lockie, *supra* note 43; Lundberg, *supra* note 58; Robert P. Mosteller, *Child Abuse Reporting Laws and Attoreny-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992).

child abuse because it is rarely limited to isolated incidents.[71]

IV. WHY ATTORNEYS SHOULD NOT BE MANDATED REPORTERS

A. Mandatory Reporting Does Not Deliver Its Intended Effect

The hard-line mandatory reporting laws in Indiana provide little flexibility to attorneys representing juvenile clients. While these laws seem to have little downside, they can result in negative ramifications for the children in which they were designed to protect. A study conducted by the United States Department of Health and Human Services found that in 2009 over sixty-four percent of all alleged cases of child abuse were unsubstantiated.[72] It may be inferred from these results that mandatory reporting statutes do not provide a significant tool in the fight to combat child abuse. Such a large number of unsubstantiated reports indicates that mandatory reporting laws, in general, are written too broadly. This broad scope results in people reporting instances of non-abuse as abuse out of the fear of liability because the open language of the statute technically required a report. States are then wasting time and resources investigating tenuous reports instead of focusing that attention on the children and families who need it.

Forcing a juvenile defense attorney who suspects possible abuse or neglect to choose between complying with the mandatory reporting laws and their client's instruction is particularly problematic when the suspicions are minimal and such a high volume of unfounded abuse reports already exists. The ensuing investigation and possible removal of the juvenile from the family home could have negative consequences not considered by the Indiana legislature

---

[71] Albrandt, *supra* note 22, at 660.

[72] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009, 7-8 (2010), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf.

when enacting mandatory reporting laws with such expansive language, especially if the allegations are determined to be unsubstantiated.

A 2005 study on child maltreatment and juvenile delinquency found that abused children who are removed from the familial home are twice as likely to be subject to future delinquency petitions as children who remain in the family home.[73] The results of this study also suggested that while placement increased the risk of delinquency in both male and females, repeated placements further increase the risk for males.[74] The authors opine that removal from the family home and placement into substitute care weakens the social attachments and social controls of these children, which increases the risk of delinquency.[75]

Because removal is not always in the child's best interests, the juvenile client-victim, and his or her family, would likely benefit more from the attorney negotiating for alternative services in sentencing. Alternative services vary depending on the juvenile's need, but can include counseling, continued education, community service, short-term residential placement, substance abuse treatment, job training and placement, and mentoring programs.[76] Even though the majority of the reported cases are not substantiated, as the number of reported cases of child abuse continues to increase, fewer children are receiving subsequent services.[77] If an attorney reports possible child abuse discovered during the course of representing a

---

[73] Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 CHILD. AND YOUTH SERVS. REV. 227, 241 (2005).

[74] *Id.* at 243.

[75] *Id.* at 244.

[76] *See generally* Jerome R. Price, *Birthing Out Delinquents: Alternative Treatment Options for Juvenile Delinquents*, 4 CRIM. L. BRIEF 51 (2009) (arguing for an increased use of alternative treatments to lower the frequency of juvenile delinquency); Stephen A. Campbell, *Alternatives in the Treatment of Juvenile Offenders: Current Options and Trends*, 19 J. JUV. L. 318 (1998) (analyzing the alternative options for treating juvenile offenders).

[77] *See* CHILDREN'S BUREAU, *supra* note 72, at 84-85; Hafemeister, *supra* note 11, at 824.

juvenile client, there is no guarantee that the juvenile will receive services. Therefore, by negotiating for alternative sentencing options, an attorney may be in a better position to help the juvenile than social services. When situations such as this arise, one can hardly argue that Indiana's mandatory reporting laws afford the protection they were designed to provide.

Additionally, the acknowledgment of a juvenile's individual autonomy can foster self-confidence and cultivate a sense of responsibility.[78] It is incongruous that a juvenile defendant is considered to have the capacity to stand trial and be adjudicated a delinquent or criminal while at the same time being told by mandatory reporting laws that he or she does not have the capacity to determine if his or her attorney may reveal private, confidential information. The goal of mandatory reporting laws is to protect and foster children, yet those laws too often function in a contrary manner.

B. Mandatory Reporting Undermines Attorney-Client Privilege

Attorney mandated reporting "would deny any discretion not to report abuse, would significantly and detrimentally alter the attorney-client relationship. It might also have the effect of thwarting the very goal of such legislation; namely the protection of children."[79] Victims of child abuse are more likely to engage in delinquent behaviors than the general population, therefore, it is highly likely that a juvenile defendant in delinquency proceedings will be the victim of some form of abuse.[80] The attorney-client privilege is "an essential component of our advocacy system and plays just as important a role in juvenile legal proceedings."[81]

---

[78] Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1268 (2000).

[79] Beyea, *supra* note 20, at 275.

[80] *See* Ryan & Testa, *supra* note 73.

[81] Marrus, *supra* note 1, at 520.

One of the most notable hallmarks of the attorney-client relationship is the fundamental principle that without the client's authorization, the attorney will keep his confidences.[82] It is this trust that allows clients to communicate fully and frankly with their attorney, providing the attorney with the information necessary to provide effective legal representation and advice.[83] A lawyer's need for the truth does not always revolve around the defense; the truth is necessary for the negotiation of settlements and services that are often involved in juvenile cases. As discussed above, many times a juvenile suffering from abuse could benefit substantially more from services negotiated for by defense counsel than from the subsequent actions of the state after a child abuse report. Unfortunately, Indiana's mandatory reporting laws fail to address this important situation.

Mandated reporting by attorneys could have a "chilling effect" on the interaction and communication between a juvenile client and his or her attorney.[84] If attorneys notify their juvenile clients of an attorney's duty under the exceptions to the duty of confidentiality, one of two scenarios is likely to occur.[85] The juvenile client does not comprehend the exception; the attorney reports abuse; and the client feels betrayed.[86] In the second scenario, the juvenile client understands the exception; the client does not trust the attorney; and consequentially withholds information from the attorney.[87] Neither scenario provides the juvenile client with the quality of representation to which they are entitled.

Because the development of trust between an attorney and client is so important to the attorney-client relationship, if a juvenile does not trust his or her attorney then he will be less likely to confide in the attorney. The lack of trust affects the quality of the representation, the

---

82 *See* IND. PROF. COND. R. 1.6 cmt. 2.

83 *See id.*

84 Marrus, *supra* note 1, at 527.

85 *Id.*

86 *Id.*

87 *Id.*

juvenile's dissatisfaction with the results, and his or her ultimate view of the legal system. Once a juvenile has developed a negative impression of the legal system, he or she is less likely to respect and abide by the laws implemented by that system.

If the attorney is uncomfortable with the juvenile's refusal to consent to disclosure, the attorney could withdraw from the case. However, this has the potential of leading to a revolving door of attorneys. Eventually, the juvenile would learn that if he or she wants to keep an attorney then he or she should not discuss the abuse, which will ultimately prevent the full and frank disclosure intended by the attorney-client privilege.

C. Indiana Legislature Did Not Intend to Abrogate the Attorney-Client Privilege

The legislature has the power to abrogate or modify common law rights.[88] Indiana statutes permit the inclusion of privileged communications as evidence in judicial proceedings when those proceedings are a result of a report of child abuse or a failure to report child abuse.[89] This provision, however, does not list the attorney-client privilege among the privileges that have been abrogated; therefore, it appears the legislature intended to preserve the attorney-client privilege over the duty to report child abuse.[90] This statute reveals the intent of the legislature to specifically include professionals who will be most likely to have significant contact with children.[91] While some attorneys may have significant contact with children, particularly those engaged in family law, the majority of attorneys will not. This is especially true when compared with the professions whose privilege has been expressly

---

[88] Kinder v. Doe, 540 N.E.2d 111, 114 (Ind. Ct. App. 1989).

[89] IND. CODE § 31-32-11-1 (2013).

[90] Lundberg, *supra* note 58, at 32 (citing IND. CODE § 31-32-11-1 (2013)).

[91] § 31-32-11-1 (including healthcare providers and mental health professionals).

abrogated, which are most notably the medical and mental health professionals.

"[P]rivilege[s] [are] unavailable in circumstances under which the privileged communication is abrogated under Indiana law."[92] In *J.B. v. E.B.*, the Indiana Court of Appeals specified that the statute abrogated the enumerated privileges.[93] The court further expounded that the abrogation statute was "designed to reconcile the operation of various privileges with Indiana's reporting statute."[94] Attorney-client privilege is not listed among those privileges abrogated by the statute. If the legislature has the power to abrogate the attorney-client privilege and it took the time to enumerate nine other privileges, then it would have included the attorney-client privilege if it had intended for attorneys to be mandated reporters. Additionally, the legislature knew the purpose of the abrogation statute was to resolve the conflict created by Indiana's mandatory reporting laws and other communicative privileges, nevertheless it still chose to exclude the attorney-client privilege from those privileges abrogated under the statute.

D. Mandatory Reporting Could Violate the Sixth Amendment

The inability of an attorney to provide effective legal representation to a juvenile client due to the mandatory reporting laws could possibly violate the Sixth Amendment. In certain situations, mandatory reporting laws constrain the ability of attorneys to provide juvenile clients with complete and effective assistance; specifically, when the juvenile cannot supply the attorney with adequate information without the fear of reporting. A statute limiting the scope or effectiveness of representation can violate the Sixth Amendment. Indiana's mandatory reporting laws can create a constructive denial of the right

---

92 J.B. v. E.B., 935 N.E.2d 296, 300 (Ind. Ct. App. 2010).

93 *Id.*

94 *Id.*

to effective assistance of counsel and an irreparable conflict of interest.

The Sixth Amendment provides that the accused in all criminal prosecutions "shall enjoy the right . . . to have the Assistance of Counsel for his defense."[95] The Supreme Court affirmed this provision of the Sixth Amendment was incorporated to apply to the States by the Fourteenth Amendment.[96] The Supreme Court has also extended certain constitutional guarantees, including the right to assistance of counsel, to juveniles in delinquency proceedings, reasoning that juveniles need the assistance of counsel to "cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[97] The *Gault* Court was clear that juveniles were entitled to the protections under the Bill of Rights and the Fourteenth Amendment.[98]

Although the Sixth Amendment does not say anything about effective counsel, it is implicit in the right to counsel that such counsel must provide effective assistance; otherwise the guarantee would be moot. The skill and knowledge of defense counsel create a critical role necessary to ensure the adversarial system produces just and fair results.[99] "For that reason, the court has recognized that the right to counsel is the right to the effective assistance of counsel."[100] While an adult's right to effective assistance of counsel is based on the Sixth Amendment, a juvenile's constitutional right to the same is rooted in the Due Process Clause of the Fourteenth Amendment.[101] Generally this distinction would narrow the scope of the right to effective

---

95 U.S. CONST. amend. VI.

96 Gideon v. Wainwright, 372 U.S. 335 (1963).

97 *In re* Gault, 387 U.S. 1, 36 (1967).

98 *Id.* at 13.

99 Strickland v. Washington, 466 U.S. 668, 685 (1984).

100 *Id.* at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

101 *In re Gault*, 387 U.S. at 4.

counsel in the juvenile context; however, this distinction has become "a distinction without a difference."[102]

Indiana has expressly codified a juvenile's right to counsel when charged with a delinquent act.[103] Courts have supported a juvenile's right to counsel on both a statutory and case law basis. In *N.M. v. Indiana*, the Indiana Court of Appeals recognized the juvenile defendant's right to counsel under the Sixth Amendment, the state statute, and prior court decisions.[104] Indiana has demonstrated a heightened importance for the right to counsel in juvenile delinquency proceedings by including additional requirements necessary for a juvenile to waive the right to counsel.[105] The Indiana Court of Appeals has acknowledged the magnitude of the right to counsel by both expressly and impliedly recognizing a juvenile's right to effective assistance of counsel in delinquency proceedings.[106]

The Supreme Court has consistently discussed the significant value of the right to counsel guarantee in both the adult and juvenile contexts. "Of all the rights that an accused person has, the right to be represented by counsel is *by far* the most persuasive for it affects his ability to assert any other right he may have."[107] The Report by the President's Commission on Law Enforcement and Administration of Justice, quoted at length by the Court in *Gault*, specifically emphasized the importance of a juvenile's right to counsel stating that "no single action holds more potential for achieving procedural justice for the child in the juvenile court than the provision of counsel" because independent counsel "is the keystone of the whole structure

---

[102] Gilliam v. State, 808 S.W.2d 738, 739 (Ark. 1991) (quoting *In re* Smith, 573 A.2d 1077, 1079 (Pa. 1990)).

[103] IND. CODE § 31-32-4-1(2013).

[104] N.M. v. State, 791 N.E.2d 802, 805 (Ind. Ct. App. 2003).

[105] *See* R.W. v. State, 901 N.E.2d 539, 544-45 (Ind. Ct. App. 2009) (requiring the additional showing of an actual consultation with parent or guardian before a juvenile's right to counsel can be waived).

[106] *See* Perkins v. State, 718 N.E.2d 790 (Ind. Ct. App. 1999); S.E. v. State, 744 N.E.2d 536 (Ind. Ct. App. 2001).

[107] United States v. Cronic, 466 U.S. 648, 654 (1984) (emphasis added) (quoting Walter V. Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

of guarantees that a minimum system of procedural justice requires."[108] The vulnerability of juveniles combined with their lack of knowledge of the justice system further enhances the importance and need of the right to counsel for juvenile defendants, especially when the right to counsel invokes other state and constitutional rights.

In *Strickland v. Washington*, the Supreme Court established the two-pronged test to be used in analyzing a defendant's effective assistance of counsel claim.[109] The Court said a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense.[110] In order to prove counsel's performance was deficient, the defendant must show that counsel's representation fell below an objective standard of reasonableness, which will be determined by the prevailing professional norms of the legal profession.[111] The Supreme Court, however, has affirmed that prejudice is presumed in certain contexts, and it need not be shown. Prejudice is presumed when there is an actual or constructive denial of the assistance of counsel,[112] and when an actual conflict of interest adversely affects counsel's performance.[113] Due to the "near identity of interests" of defendants in criminal proceedings and juveniles in delinquency proceedings, the same standards used to determine the ineffectiveness for adults should be used for juveniles.[114]

---

[108] *In re Gault*, 387 U.S. 1, 38 (1967); *see also In re* Smith, 573 A.2d 1077, 1078 (Pa. Super. Ct. 1990). The Report enumerated certain rights that will only have a substantial meaning if the juvenile is also provided with competent counsel who can invoke those rights effectively; specifically these rights include: the right to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, and to make an appeal.

[109] Strickland v. Washington, 466 U.S. 668 (1984).

[110] *Id.* at 687.

[111] *Id.* at 687-88.

[112] *Id.* at 692.

[113] *See* Woods v. State, 701 N.E.2d 1208, 1223 (Ind. Ct. App. 1998).

[114] *In re* Smith, 573 A.2d 1077, 1081 (Pa. Super. Ct. 1990).

1. Constructive Denial

Sixth Amendment claims may be based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.[115] "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decision."[116] Indiana's mandatory reporting laws close off many of the options available for negotiation and settlement of a case, thereby reducing the amount of tactical decisions, and sometimes even removing the decision altogether, that an attorney may have otherwise made in the situation.

The "[g]overnment violates the right to effective assistance of counsel when it interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense."[117] Juveniles "require the guiding hand of counsel at every step in the proceedings against [them]."[118] Indiana's mandatory reporting laws inhibit and limit the guidance and effect counsel is able to provide by removing the attorneys' ability to make an independent assessment of their clients' needs and to determine the most beneficial defense therefrom. This ability is removed because Indiana's mandatory reporting laws give attorneys only one option when suspicions or knowledge of abuse arise; they must report. Attorneys are not given the option of evaluating the circumstances surrounding the situation and proceeding therefrom, nor are the attorneys given the option of determining what is in the best interest of clients or following their clients' wish that the abuse not be reported.

---

[115] *See Strickland*, 466 U.S. at 684; *see also* United States v. Cronic, 466 U.S. 648, 656 (1984).

[116] *Strickland*, 466 U.S. at 689.

[117] *Id.* at 686.

[118] *In re* Gault, 387 U.S. 1, 36 (1967); *see also In re Smith*, 573 A.2d at 1081; Gilliam v. State, 305 Ark. 438, 439 (1991).

The right to counsel is the most important tool for achieving accuracy; it is the glue that holds the criminal process together.[119] Mandating that attorneys reveal privileged information about their clients during the course of defense does not further any of the goals of the right to counsel guarantee, but significantly interferes with the process of defense. Indiana's mandatory reporting laws force some juveniles to choose whether they receive effective counsel and an accurate outcome or the free-flowing exchange of information intended by the attorney-client privilege.

The Supreme Court has determined on several occasions there was a constructive denial of the right to effective assistance of counsel where the state had impaired defense counsel's ability to independently direct the defense.[120] Particularly, in *Geders v. United States*, the Court held that a judicial order preventing the defendant from consulting with his attorney during a seventeen hour overnight, occurring between his direct and cross examinations, denied him the right to counsel.[121] The Court said that preventing a defendant from conferring with his counsel, when an accused would normally confer with counsel, impinged his Sixth Amendment right to the assistance of counsel.[122] The Court did, however, acknowledge the legitimate motive behind the order of preventing improper coaching prior to the prosecution's cross-examination.[123]

---

[119] JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PROSECUTING CRIME 1070 (West 4th ed. 2010).

[120] *See* Herring v. New York, 422 U.S. 853, 864-65 (1975) (holding a statute that allowed a judge to deny summation at bench trial denied a defendant, whose counsel was denied the right to be heard, the assistance of counsel under the Sixth Amendment); Brooks v. Tennessee, 406 U.S. 605, 613 (1972) (holding that a statutory requirement that defendant be the first defense witness to testify violated due process by restricting defense counsel in the planning of its case); Ferguson v. Georgia, 365 U.S. 570, 596 (1961) (holding that a statute rendering defendants incompetent to testify in their own defense denied defendants the right to be heard by counsel).

[121] Geders v. United States, 425 U.S. 80, 91 (1976).

[122] *Id.* at 91.

[123] *Id.*

Similar to the order in *Geders*, Indiana's mandatory reporting laws are based on a valid purpose that may result in an unlawful violation of rights; protecting children may ultimately prevent certain juvenile defendants from conferring with their attorney. This roadblock to conferring with counsel created by Indiana's mandatory reporting laws has a deeper impact on the two things the conference was designed to encourage: confidentiality and attorney-client privilege.[124] Encouraging a juvenile client to keep information about child abuse secret from his or her attorney obstructs the right to counsel "because the candor and quality of representation are hindered."[125]

The Court in *Geders* determined that a conflict between a valid basis for the order and the defendant's right to consult his attorney must be resolved in favor of the Sixth Amendment right to counsel.[126] The general principles adopted by the majority in *Geders* are applicable to the analysis of any order barring communication between a defendant and his attorney.[127] The implicit nature of the barrier caused by Indiana's mandatory reporting laws should not affect the analysis of the conflict this statute causes, nor should it affect the conclusion that the conflict should be resolved in favor of the juvenile's right to counsel.

"Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."[128] The right to effective assistance of counsel has been interpreted to "protect the confidentiality of communications between an accused and his attorney,"[129] which substantially departs from the requirement of Indiana's mandatory reporting laws. The current version of Indiana's mandatory reporting laws may prevent a juvenile client from revealing all information necessary to effectuate a reasonable or

---

[124] *See* Upjohn Co. v. United States, 449 U.S. 383, 389-91 (1981).

[125] *See* Albrandt, *supra* note 22, at 668.

[126] *Geders*, 425 U.S. at 91.

[127] *Id.* at 92 (Marshall, J., concurring).

[128] Strickland v. Washington, 466 U.S. 668, 691 (1984).

[129] *See* United States v. Henry, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting); *see also* Dubose & Morris, *supra* note 5, at 210.

appropriate defense under the circumstances. When this occurs, the attorney's ability to make an informed strategic choice is significantly inhibited. If defense attorneys are constructively prevented from providing their juvenile clients with effective representation due to the current language of Indiana's mandatory reporting laws, then the juvenile clients' right to effective assistance of counsel under the Sixth Amendment is violated.

"The adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate."[130] "To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court."[131] One of the vital elements of effective representation is the ability of defense counsel to "act independently of the Government."[132] While this advocacy is required, counsel is still prohibited from engaging in unethical behavior in order to provide a defense.[133] This is where Indiana's mandatory reporting laws create yet another conflict. While defense counsel is required to behave ethically and comport with other laws,[134] like Indiana's mandatory reporting laws, counsel must also advocate on behalf of his or her client. However, when these mandatory reporting laws require defense counsel to act in a manner that contradicts or conflicts with the advocacy of his or her juvenile client, these laws create a constructive denial of effective assistance of counsel.

"From counsel's function as assistant to the defendant derives the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."[135] When Indiana's mandatory reporting laws

---

[130] United States v. Cronic, 466 U.S. 648, 656 (1984) (quoting Anders v. California, 386 U.S. 738, 743 (1967)).

[131] Jones v Barnes, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting).

[132] Ferri v. Ackerman, 444 U.S. 193, 204 (1979).

[133] *Cronic,* 466 U.S. at 657.

[134] MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

[135] Strickland v. Washington, 466 U.S. 668 (1984).

require a juvenile defense attorney to disregard his or her client's request and report suspicions of abuse, counsel ceases being an assistant or advocate of the client and becomes a "friend of the State." When such a situation arises the function and meaning behind the right to counsel guarantee disappear. A breakdown in the adversarial process occurs when a statute requires defense counsel to act as a friend of the State in a manner which conflicts with the client's wishes, discretion, and advocacy.[136]

2. Conflict of Interest

Indiana's mandatory reporting laws can also create a conflict of interest between defense counsel's own interest in complying with those laws and the defendant's interests. When attorneys have to make a subjective determination about whether to report suspicions of abuse or to fully advocate on behalf of their clients, the attorneys are faced with a decision about whether to protect their client's interests or their own. The attorneys' interests may include comporting with the mandatory reporting laws, avoiding criminal sanctions, or retaining their license to practice law. When the juvenile's interest is in preserving his or her secret, for whatever reason, a conflict arises.

Representing conflicting interests becomes suspect "because of what it tends to prevent the attorney from doing."[137] The broad language of Indiana's mandatory reporting laws can prevent attorneys from complying with their clients' direction and from effectively advocating for the clients' wishes. When a juvenile client refuses to consent to his or her attorney revealing instances of abuse or neglect, unless the attorney violates the Indiana mandatory reporting laws, the attorney is prevented from complying with the client's direction. Furthermore, when

---

[136] *See generally Cronic*, 466 U.S. at 657 (stating the defense representation did not constitute a violation of the right to effective assistance of counsel because there was no breakdown in the adversarial process).

[137] *Id.* at 661 n.28 (quoting Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978)).

the juvenile defense attorney merely suspects abuse or neglect, the attorney may be forced to choose between complying with Indiana's mandatory reporting laws and effectively advocating on behalf of the client.

Representing defendants in criminal and delinquency cases requires counsel to adhere to certain basic duties, including the duty to assist the defendant, to consult with the defendant on important decisions, and to keep the defendant informed of significant developments in the case.[138] The duty to assist the defendant carries with it a duty of loyalty and a duty to avoid conflicts of interest.[139] Both the Indiana Court of Appeals and the United States Supreme Court have recognized that the right to effective assistance of counsel includes the right to have representation free from conflicts of interest.[140] There is a presumption of ineffectiveness when counsel "actively represent[s] conflicting interests."[141]

In *Cuyler v. Sullivan,* the Supreme Court determined that in order to establish that a defendant's Sixth Amendment right to effective counsel has been violated by a conflict of interests, the defendant must demonstrate that an actual conflict existed, and that conflict adversely affected his or her attorney's performance.[142] An actual conflict exists if, during the course of representation, the defendant's interests deviate in regards to the course of representation.[143] An adverse impact based on conflicts of interests must structurally infect the rest of the proceedings.[144] If attorneys are conflicted between their own interests and their clients' interests, this conflict inherently spreads throughout the representation. An adverse impact may be demonstrated by showing an inconsistency between a strategy or tactic and counsel's

---

138 *Strickland,* 466 U.S. at 688.

139 *Id.*

140 *See* Woods v. State, 701 N.E.2d 1208, 1223 (Ind. Ct. App. 1998); Wood v. Georgia, 450 U.S. 261 (1981).

141 Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

142 *Id.* at 350-51.

143 *Id.* at 356.

144 *Woods,* 701 N.E.2d at 1224.

other loyalties or that an alternative strategy or tactic was not undertaken due to the conflict.[145]

While some courts have rejected the two-part test established in *Cuyler v. Sullivan*, Indiana courts continue to follow the formation.[146] In *Tate v. State*, the Indiana Court of Appeals was careful to identify the distinction between the two prongs of *Cuyler*. The "actual conflict of interests" component refers to the competing interest arising from the representation, whereas the "adversely impacted performance" component refers to defense counsel's conduct.[147] Even though the analyses conducted in *Cuyler* and *Tate* were in regards to conflict of interests caused by the joint representation of more than one defendant, their analyses may be easily applied to the conflict caused by the over-arching language of Indiana's mandatory reporting laws.

Indiana's mandatory reporting laws have great potential for creating a clear example of an actual conflict. When the mandatory reporting laws require an attorney to report his or her knowledge or suspicions of abuse or neglect and the attorney knows or has reason to know that the juvenile client does not want the attorney to make such a report, there develops an obvious divergence in the interests between the attorney and client in the course of representation. Given the conflicting interests between the attorney and client in this scenario, counsel is inevitably placed in a situation where he or she cannot represent the interests of himself or the client without impairing the interests of the other.[148] Therefore, when the attorney chooses to protect his or her own interests, it can only be done at the impairment of the client's interests, causing an adverse effect and resulting in the presumption of prejudice.

Because a juvenile's right to counsel is rooted in the Due Process Clause of the Fourteenth Amendment, due process must also be considered when assessing a juvenile's right to counsel. "Due process of law is the primary and

---

145 *Id.* at 1223.

146 Tate v. State, 515 N.E.2d 1145, 1147 (Ind. Ct. App. 1987).

147 *Id.*

148 *Id.*

indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[149] Neither the 'civil' label given to delinquency proceedings nor the rehabilitative, as opposed to punitive, goal of the juvenile justice system shall be a justification for refusing to provide due process protections to minors.[150] Both the civil label and rehabilitative goal of the juvenile court system are means of protecting juveniles, similar to Indiana's mandatory reporting laws. Therefore, based on the language of the courts, protecting minors should not be a valid reason for denying them due process rights, including the right to effective assistance of counsel.

"Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[151] Indiana should not ignore the infringement its mandatory reporting laws have on the due process of juvenile defendants. The right to counsel is essential to ensuring the due process rights of juvenile defendants, maybe even more so than for adults.[152] Removing or limiting a juvenile's right to counsel, even under an umbrella of protection, creates injuries to the juvenile defendant that cannot be detected through the naked eye. "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[153]

V. HOW OTHER STATES HAVE ADDRESSED THE ATTORNEY AS A MANDATORY REPORTER

Every state currently has its own variation of a child abuse reporting statute; however, these statutes vary

---

[149] *In re* Gault, 387 U.S. 1, 20 (1967).

[150] *In re* Kevin S., 113 Cal. App. 4th 97, 109 (2003).

[151] *In re Gault*, 387 U.S. at 18-19.

[152] *See generally id.* at 38 (using The Report by the President's Commission on Law Enforcement and Administration of Justice to emphasize the additional impact that counsel has in juvenile cases).

[153] *Id.* at 18.

widely from state to state.[154] The majority of states have taken a combination approach to their mandatory reporting statutes and combine professionally mandated reporting with permissive reporting. Thirty-five states require persons in certain professions to report their suspicions of abuse or neglect.[155] These persons are referred to as professionally mandated reporters because the duty to report occurs through their occupation. Generally, these occupations include those professions that are likely to have regular contact with children; often this includes social workers, teachers and other school personnel, physicians and other health-care workers, mental health professionals, child care providers, medical examiners or coroners, and law enforcement officers.[156] Of those thirty-five states, twenty-six states also include permissive reporting statutes which provide that anyone who is not a professionally

---

[154] *See* Dubose & Morris, *supra* note 5, at 210; Albrandt, *supra* note 22, at 658.

[155] *See* ALA. CODE § 26-14-3 (2013); ALASKA STAT. § 47.17.020 (2013); ARIZ. REV. STAT. ANN. § 13-3620 (2013); ARK. CODE ANN. § 12-18-401 (2013); CAL. PENAL CODE § 11166 (West 2013); COLO. REV. STAT. § 19-3-304 (2013); CONN. GEN. STAT. ANN. § 17A-101A (2013); GA. CODE ANN. §19-7-5 (2013); HAW. REV. STAT. ANN. § 350-1.1 (West 2013); IDAHO CODE ANN. § 16-1605 (2013); 325 ILL. COMP. STAT. 5/4 (2013); IOWA CODE ANN. § 232.69 (West 2013); KAN. STAT. ANN. § 38-2223 (2012); LA. CHILD. CODE ANN. art. 603, 609 (2012); ME. REV. STAT. ANN. tit. 22, § 4011-A (2013); MD. CODE ANN. FAM. LAW § 5-704 (2013); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2013); MICH. COMP. LAWS ANN. § 722.624 (West 2013); MINN. STAT. ANN. § 626.556 (West 2013); MISS. CODE ANN. § 43-21-353 (West 2013); MO. REV. STAT. § 210.115 (2013); MONT. CODE ANN. § 41-3-201 (West 2013); NEV. REV. STAT. ANN. § 432B.220 (West 2013); N.Y. SOC. SERV. LAW § 413 (McKinney 2013); N.D. CENT. CODE ANN. § 50-25.1-03 (West 2013); OHIO REV. CODE ANN. § 2151.421 (West 2013); OR. REV. STAT. ANN. § 419B.010 (West 2013); 23 PA. CONS.STAT. ANN. § 6311 (West 2013); S.C. CODE ANN. § 63-7-310 (2013); S.D. CODIFIED LAWS § 26-8A-3 (2013); VT. STAT. ANN. tit. 33, § 4913 (2013); VA. CODE ANN. § 63.2-1509 (2013); WASH. REV. CODE § 26.44.030 (2013); W. VA. CODE ANN. § 49-6A-2 (West 2013); WIS. STAT. § 48.981 (2013).

[156] CHILDREN'S BUREAU , U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD WELFARE INFORMATION GATEWAY: MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2012), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm.

mandated reporter *may* report suspected abuse;[157] six states specifically include attorneys as mandated reporters,[158] but two of those include only prosecuting or district attorneys.[159] Wisconsin stands alone by expressly allowing permissive reporting for attorneys.[160]

On the other hand, fifteen states have enacted statutes similar to Indiana's and require that any or all individuals *shall* or *must* make such reports.[161] Of these fifteen states, six states specifically exempt communications covered by the attorney-client privilege,[162] while two specifically

---

[157] *See* ALA. CODE § 26-14-4 (2013); ALASKA. STAT. § 47.17.020 (2013); ARIZ. REV. STAT. ANN. § 13-3620 (2013); ARK. CODE ANN. § 12-18-401 (2013); CAL. PENAL CODE § 11166 (West 2013); COLO. REV. STAT. § 19-3-304 (2013); CONN. GEN. STAT. ANN. § 17A-103 (West 2013); GA. CODE ANN. §19-7-5 (2013); HAW. REV. STAT. ANN. § 350-1.3 (West 2013); IOWA CODE ANN. § 232.69 (West 2013); KAN. STAT. ANN. § 38-2223 (2012); LA. CHILD. CODE ANN. art. 603, 609 (2012); MICH. COMP. LAWS ANN. § 722.624 (West 2013); MINN. STAT. ANN. § 626.556 (West 2013); MONT. CODE ANN. § 41-3-201 (2013); NEV. REV. STAT. § 432B.220 (2013); N.Y. SOC. SERV. LAW § 414 (McKinney 2013); N.D. CENT. CODE ANN. § 50-25.1-03 (West 2013); 23 PA.CONS.STAT. ANN. § 6312 (West 2013); S.D. CODIFIED LAWS § 26-8A-3 (2013); VT. STAT. ANN. tit. 33, § 4913 (2013); VA. CODE ANN. § 63.2-1510 (West 2013); WASH. REV. CODE § 26.44.030 (2013); W. VA. CODE ANN. § 49-6A-2 (West 2013); WIS. STAT. § 48.981 (2013).

[158] *See* ARK. CODE ANN. § 12-18-402 (2013); MISS. CODE ANN. § 43-21-353 (2013); NEV. REV. STAT. § 432B.220 (2013); N.Y. SOC. SERV. LAW § 413 (McKinney 2013); N.C. GEN. STAT. § 7B-310 (2013); OHIO. REV. CODE ANN. § 2151.421 (West 2013).

[159] ARK. CODE ANN. § 12-18-402 (2013); N.Y. SOC. SERV. LAW § 413 (McKinney 2013).

[160] WIS. STAT. § 48.981 (2013).

[161] *See* DEL. CODE ANN. tit. 16, § 903 (2013); FLA. STAT. § 39.201 (2013); IND. CODE § 31-33-5-1 (2013); KY. REV. STAT. ANN. § 620.030 (West 2013); NEB. REV. STAT. § 28-711 (2012); N.H. REV. STAT. ANN. § 169-C:29 (2013); N.J. STAT. ANN. § 9:6-8.10 (West 2013); N.M. STAT. ANN. § 32A-4-3 (West 2013); N.C. GEN. STAT. § 7B-301 (2012); OKLA. STAT. ANN. tit.10, § 1-2-101 (West 2013); R.I. GEN. LAWS § 40-11-3 (2013); TENN. CODE ANN. § 37-1-403 (2013); TEX. FAM. CODE ANN. § 261.101 (West 2013); UTAH CODE ANN. § 62A-4A-403 (West 2013); WYO. STAT. ANN. §14-3-205 (2013).

[162] *See* DEL. CODE ANN. tit. 16, § 909 (2013); FLA. STAT. ANN. § 39.204 (West 2013); KY. REV. STAT. ANN. § 620.030 (West 2013); NEB.

abrogate the attorney-client privilege.[163] In total, sixteen states exclude communication covered by attorney-client privilege from the reach of their mandatory reporting laws; however, Nevada and North Carolina only uphold the attorney-client privilege under limited circumstances.[164] The Nevada statute provides that an attorney is required to make a report unless the attorney has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect.[165] While prohibiting the use of any privilege as a reason for failure to make a report under its mandatory reporting laws, North Carolina still retains the attorney-client privilege in any judicial proceeding where a juvenile's abuse, neglect, or dependency is in issue or in any judicial proceeding resulting from a report submitted in compliance with the mandatory reporting statute.[166]

It could be argued that an additional six states have excluded attorneys through implication.[167] These states have expressly abrogated similar communicative privileges that exist for professions other than attorneys, but they have chosen not to include the attorney-client privilege among those privileges that may not be used in order to prevent reporting. It can be inferred that if these states had wanted to ensure attorneys were included as mandatory reporters, they would have abrogated the attorney-client privilege when they abrogated the other privileges. Examining the mandatory reporting laws of other states does not provide Indiana with a precise path to follow.

REV. STAT. § 28-711 (2012); N.H. REV. STAT. ANN. § 169-C:32 (2013); R.I. GEN. LAWS § 40-11-3 (201387 U.S 3).

[163] OKLA. STAT. tit. 10, § 1-2-101 (2013); WYO. STAT. ANN. § 14-3-210 (2013).

[164] NEV. REV. STAT. ANN. § 432B.220(4)(i) (West 2013); N.C. GEN. STAT. ANN. § 7B-310 (West 2012).

[165] NEV. REV. STAT. ANN. § 432B.220 (West 2013).

[166] N.C. GEN. STAT. ANN. § 7B-310 (West 2013).

[167] ALASKA. STAT. § 47.17.20 (2013); COLO. REV. STAT. § 19-3-304 (2013); ME. REV. STAT. ANN. tit. 22, § 4011-A (2013); MINN. STAT. ANN. § 626.556 (West 2013); S.D. CODIFIED LAWS § 26-8A-15 (2013); TENN. CODE ANN. § 37-1-403 (2013).

Nonetheless, it does open the door for possibilities to refine the language of Indiana's mandatory reporting laws.

VI. WHAT INDIANA COULD DO TO RECTIFY THE PROBLEM

Based on the review and discussion of how mandatory reporting laws have been addressed in other states, Indiana has several options for relieving the conflict caused by the current statute while still retaining strict and effective mandatory reporting laws. Among the options are permissive reporting, exceptions to mandatory reporting, and the exclusion of attorneys as mandated reporters. These options all narrow, in varying degrees, the sweeping language of the current Indiana statute.

A. Permissive Reporting

Instead of requiring that *any individual shall* make a report,[168] Indiana could amend its child abuse reporting statute to simply allow persons who have reason to believe a child is being abused to make a report. By stating that individuals *may* report suspected abuse, Indiana would diminish the confusion surrounding its current mandatory reporting statute and permit attorneys to use their discretion when instances of abuse are revealed during the course of representation. Permissive reporting appears to be the most relaxed approach to mandatory reporting; however, this approach has several benefits aside from resolving the confusion surrounding the current statute.

First, it would allow attorneys to use their discretion to determine how best to cope with their client's circumstances. The attorney may use his or her judgment to evaluate the situation and determine whether or not to make a report based on the client's age and maturity level; the type, severity, and frequency of the abuse; and the client's reasons for not wanting the abuse reported (e.g. the client may be protecting a parent or sibling from being abused also). This also permits the attorney time to counsel

---

168 *See* IND. CODE § 31-33-5-1 (2013).

the client to reveal the abusive situation on his or her own or consent to the attorney reporting it to the proper authorities.

Attorneys would also be able to engage in negotiations with the prosecutor for alternative sentencing options that could benefit the client and/or his or her family. This approach also helps to preserve the trust between the attorney and the juvenile client, and it gives the juvenile a positive view of attorneys, the law, and the justice system. Fostering a positive outlook towards the juvenile justice system in juveniles is more likely to result in children who respect the laws of society and are less likely to commit crimes.[169]

Permissive reporting encourages the open communication between the attorney and juvenile client intended by the attorney-client privilege. This open communication helps empower juveniles within the delinquency system.[170] Giving a juvenile client, who is the victim of abuse, power over his or her situation and legal decisions is more likely to have a positive impact; empowering victims of abuse may help reduce future incidents of abuse.[171] "Empowered children are . . . more likely to stand up for themselves and remove themselves from an abusive situation,"[172] leading to the ultimate goal of the mandatory reporting laws: removing children from abusive or neglectful situations.

B. Exceptions to Mandatory Reporting

Another possibility for Indiana would be to provide exceptions to its mandatory reporting laws for situations that may not necessarily further the statutes' goals, specifically when abuse is uncovered during the defense representation of a juvenile client who does not want the abuse reported. This approach also alleviates the confusion created by Indiana's current statute because it creates the

---

169 Marrus, *supra* note 1, at 541, 544.

170 *Id.* at 541.

171 *See id.* at 541-44.

172 *Id.* at 544-45.

enumeration of the specific situations in which an attorney will not be required to make a report under the statute; providing specific exceptions to the mandatory reporting laws has the benefit of providing clarity to Indiana's attorneys. This objective approach removes the attorney discretion allowed for in the permissive reporting approach; either the attorney/client situation meets one of the enumerated exceptions or it does not.

This approach, however, has the downside of requiring the legislature to make subjective determinations about a multitude of situations in which the mandatory reporting statute may not be wholly beneficial. It is possible, even likely, that the legislature would not be able to include all possible scenarios which should be excluded. Permissive reporting would be the less painstaking way of accomplishing this goal; nevertheless, if permissive reporting seems insufficient, the legislature has the option of excluding attorneys from the mandatory reporting laws.

C. Exclusion of Attorneys as Mandated Reporters

1. Full Exclusion

The most commonly used form of attorney exclusion appears to be the express preservation of the attorney-client privilege; most states excluding attorneys either expressly retain or prohibit the exclusion of the attorney-client privilege from those privileges abrogated under the mandatory reporting statute.[173] This approach works with most mandatory reporting statutes, whether they contain professionally mandated reporters or not. Even those states

---

[173] *See* ALA. CODE § 26-14-10 (2013); ARIZ. REV. STAT. ANN. § 13-3620 (2013); DEL. CODE ANN. tit. 16, § 909 (2013); FLA. STAT. ANN. § 39.201 (West 2013); KY. REV. STAT. ANN. § 620.030 (West 2013); MICH. COMP. LAWS ANN. § 722.631 (West 2013); MO. REV. STAT. § 210.140 (2013); MONT. CODE ANN. § 41-3-201 (2013); NEB. REV. STAT. § 28-711 (2013); N.H. REV. STAT. ANN. § 169-C:32 (2013); N.D. CENT. CODE ANN. § 50-25.1-10 (West 2013); OR. REV. STAT. § 419B.040 (2013); 23 PA. CONS. STAT. § 6311 (2013); R.I. GEN. LAWS ANN. § 40-11-3 (West 2013); S.C. CODE ANN. § 63-7-420 (2013); W. VA. CODE ANN. § 49-6A-7 (West 2013).

that do not include professionally mandated reporters, like Indiana, often include an abrogation provision in their statutes where certain professional privileges may be retained or abolished.[174]

The full exclusion of attorneys as mandated reporters allows Indiana to retain its narrow mandatory reporting laws while affirmatively eliminating the confusion caused by the current version of the statute. By retaining the *any individual shall report* language of the statute, Indiana's laws would remain more stringent than its permissive counterparts. However, by explicitly preserving the attorney-client privilege, Indiana will have effectively reconciled the conflict created by its current version. Maintaining the attorney-client privilege with a juvenile client will present many of the benefits discussed with permissive reporting: preserving the trust between the attorney and the juvenile client, giving the juvenile a positive view of those in the justice system, giving a juvenile client power and control over his or her situation, and permitting the attorney time to counsel his or her client to reveal the abusive situation on his own.

2. Limited Exclusion

If the first three options reveal to be too narrow for the Indiana legislature, it could follow in the footsteps of Arkansas and New York to maximize the amount of appropriate mandated reporters and still prevent the confusion and conflicts arising from the current mandatory reporting laws. The State of Arkansas provides a list of professionally mandated reporters who are required to report suspected child maltreatment.[175] This statute specifically proscribes prosecuting attorneys as professionally mandated reporters, but does not include defense attorneys among those required to report.[176]

---

[174] *See* IND. CODE § 31-33-5-1 (2013); *id.* § 31-32-11-1.

[175] ARK. CODE ANN. § 12-18-402 (2013).

[176] *Id.* § 12-18-402.

However, anyone not listed as a professionally mandated reporter *may* report suspicions of child abuse.[177]

The State of New York has enacted a similar statute, including district attorneys or assistant district attorneys among its list of professionally mandated reporters.[178] While neither statute specifically excludes defense attorneys, that is the implication from the inclusion of the "prosecuting" language. Like Arkansas, New York also allows for permissive reporting for any other person who has reason to believe a child is being abused or neglected.[179] Because Indiana's current statute currently does not contain an express list of professionally mandated reporters in which to include only prosecuting or district attorneys, Indiana could accomplish this same goal by expressly excluding defense attorneys from the mandatory reporting laws. This type of approach has the benefit of removing the possible conflicts incurred by defense attorneys, while still retaining a significant portion of the legal profession under the mandatory reporting laws.

VII. CONCLUSION

Child abuse and neglect are serious societal problems that should not be taken lightly. Children should be afforded as many protections as society can muster, but not at the expense of their constitutional rights or by undermining the attorney-client privilege. When this occurs, we may injure the children whom we are trying to protect. Indiana is in the minority when it comes to the treatment of its mandatory reporting laws. The goal of protecting children should not dissuade us from re-evaluating and adjusting laws that no longer function as intended. "[T]he claimed benefits of the juvenile process should be candidly appraised. Neither sentiment nor folklore should cause us to shut our eyes. . . ."[180]

---

177 *Id.* § 12-18-401.

178 N.Y. SOC. SERV. LAW § 413 (McKinney 2013).

179 *Id.* § 414.

180 *In re* Gault, 387 U.S. 1, 21 (1967).

As the oldest of the privileges for confidential communications known to the common law, the attorney-client privilege should not be so easily annulled as it has been done in Indiana's mandatory reporting laws. As a privilege "founded upon the necessity, [and] in the interest and administration of justice,"[181] the attorney-client privilege should be preserved but for a showing of a heavy burden. Indiana's mandatory reporting laws could not meet such a burden because the intended goals would continue to be met even if the attorney-client privilege was expressly retained with the statutes.

"Lawyers in criminal cases are necessities, not luxuries."[182] Juveniles, like adults, have the right to have their attorney advocate to their fullest benefit. The presence of defense attorneys is so essential because they are the means through which all other rights of the juvenile are secured.[183] The juvenile defense attorney should be free to weigh the consequences of disclosure against the need for agency intervention, and determine the path most likely to benefit the client; these benefits can include the juvenile developing a positive outlook towards the criminal justice system, the juvenile receiving much needed treatment to which he or she otherwise would not have been exposed, and reducing the amount of minors who return to the juvenile or criminal justice system.

In order to alleviate confusion and resolve the conflict surrounding its mandatory reporting laws, Indiana should amend the current statute to reinforce the attorney-client privilege and avoid possible Sixth Amendment violations. "[G]ood intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts."[184] The good intentions of Indiana's mandatory reporting laws do not negate the necessity of a juvenile's constitutional rights or the historic importance of the attorney-client privilege.

---

[181] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (quoting Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

[182] United States v. Cronic, 466 U.S. 648, 653 (1984) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

[183] *Id.*

[184] *In re* Winship, 397 U.S. 358, 365-66 (1970).