PROFESSIONAL ETHICS IN INTERDISCIPLINARY COLLABORATIVES: ZEAL, PATERNALISM AND MANDATED REPORTING

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In this Article, the authors, two clinical law teachers and a social worker teaching in the clinic, wrestle with some persistent questions that arise in cross-professional, interdisciplinary law practice. In the past decade much writing has praised the benefits of interdisciplinary legal practice, but many sympathetic skeptics have worried about the ethical implications of lawyers working with nonlawyers, such as social workers and mental health professionals. Those worries include the difference in advocacy stances between lawyers and other helping professionals, and the mandated reporting requirements that apply to helping professionals but usually not to lawyers. This Article addresses those concerns in a direct way, using social work as an exemplar for many kinds of interdisciplinary practices.

Part I of the Article explores the commitments of zeal and autonomy in interdisciplinary work involving lawyers and social workers. It acknowledges that social workers and lawyers receive differing training about advocacy stances, attention to the needs of the larger society, and concern for the best interests of clients, and therefore are apt to confront client interactions with dissimilar orientations. But the authors conclude that those differences in orientation in fact offer critical opportunities, when the professionals collaborate, for more effective lawyering, rather than posing a risk to a lawyer's or a social worker's ethical commitments. A lawyer and social worker team are likely to offer clients a richer brand of legal representation when working together than a lawyer working without the collaboration would provide. While some pointed ethical conflicts might arise, the authors contend that those conflicts are not unlike those faced by any reflective lawyer practicing without the benefit of collaboration.

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Part II of the Article addresses the mandated reporter issue. When lawyers and social workers (or other helping professionals) collaborate, lawyers tend to be prohibited from reporting suspected child abuse and neglect if learned during a client's representation, while social workers tend to be mandated by state law to make a report. The authors contend that when a social worker serves within a law firm or legal clinic as a consultant to the legal team, the social worker ought not be covered by the state mandated reporting laws if the lawyers are not so covered. If the social worker, by contrast, provides social work services to the law firm's client, the state reporting laws will apply, and the collaboration must account for the resulting conflict in confidentiality duties.

INTRODUCTION

It is a rare legal problem that is in fact purely "legal." As much literature shows, nearly all disputes which end up among lawyers and courts involve complex emotional and interpersonal dynamics,[1] and most involve "industries" other than the law.[2] To resolve those disputes successfully, or even to "win" before a tribunal, a lawyer must use skills other than those traditionally taught in law schools. Or, perhaps more likely, the lawyer must associate with persons who possess those skills. The benefits of an interdisciplinary law practice[3] are becoming more and more apparent to lawyers and law teachers alike.[4]

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[1] *See, e.g.,* Angela Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm Into the Clinical Setting*, 11 CLIN. L. REV. 15, 24-25 (2004); Melissa Nelken, *Negotiation and Analysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 427 (1996); Erin Ryan, *The Discourse Beneath: The Emotional Epistemology In Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 238 (2005); Marjorie A. Silver, *Emotional Competence and the Lawyer's Journey*, *in* THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 5 (Marjorie A. Silver, ed., 2006) [hereinafter THE AFFECTIVE ASSISTANCE OF COUNSEL].

[2] *See, e.g.*, DAVID A. BINDER, PAUL BERGMAN, SUSAN PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS 157, 159-61 (2d ed. 2004).

[3] For purposes of this article, we refer to the collaborative law practice about which we write, where a lawyer and a "helping professional," *see infra* note 5, work as a team to address the legal matters which the client has brought to the team, as *interdisciplinary practice*. We distinguish that phrase, for our purposes, from *multidisciplinary practice*, commonly known as "MDP," in which an institution, like a law firm, offers to its clients or customers more than one kind of direct service, like legal services and accounting services. In making this distinction we hope to keep separate the vast literature on MDP from the more narrow, and insufficiently explored, questions we attend to here. For a reference to some of the MDP literature, see *infra* note 9.

[4] *See, e.g., Special Issue on Legal Representation of Children: Proceedings of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years After Fordham, Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years after Fordham*, 6 NEV. L.J. 592, 598 (2006) (supporting interdisciplinary legal services for children); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*,

While lawyers tend to be well trained to identify and address specific legal issues of concern to their clients, they often feel ill-equipped to work with the more challenging relationship issues presented in their work with clients. These challenges affect all aspects of the lawyering process, including intake, interviewing, counseling, case planning, and legal strategy decisionmaking. The ambition of interdisciplinary collaboration is to provide lawyers with information and skills that will help them to understand better and work more effectively with clients throughout the lawyering process. Because of their specialized training in human behavior, interpersonal dynamics, mental health assessment, psychosocial assessment, and systems theory, social workers and similar "helping professionals"[5] are able to help lawyers develop their practice knowledge and skills. The potential benefits of collaboration with other disciplines include more effective management of the lawyer-client relationship, more effective interviewing and counseling, increased likelihood of a successful outcome for the client, increased client cooperation, increased efficiency, increased client satisfaction, enhanced client well-being, and reduced lawyer stress.[6]

This Article explores some pointed ethical predicaments which

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14 WASH. U. J.L. & POL'Y 249 (2004) (small business transactions); Randye Retkin, Gary L. Stein & Barbara Hennie Draimin, *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 FORDHAM URB. L.J. 533 (1997) (AIDS practice); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers In a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLIN. L. REV. 403 (2001) (domestic violence clinic); Annie G. Steinberg, *Child-Centered, Vertically Structured, and Interdisciplinary: An Integrative Approach to Children's Policy, Practice, and Research*, 40 FAM. CT. REV. 116 (2002) (child-centered interdisciplinary practice); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317 (2004) (family law and divorce practice).

[5] In this article we use the term "helping professional," as it recurs in social science literature, to refer to those caregivers and counselors trained in the dynamics of human relationships. *See, e.g.*, Chris A. Milne, *The Vermont Lead Law—An Opportunity to Serve as a Helping Professional*, 22 VT. B.J. & L. DIG. 17 (Dec. 1996) (distinguishing a "helping professional," concerned with a family as a whole from an advocate for a single member of a family). *Cf.* DEBRA A. POOLE & MICHAEL E. LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE FOR HELPING PROFESSIONALS (1998).

[6] *See, e.g.*, Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993) (describing collaboration with a psychologist); Claire Donohue, untitled paper (2005) (unpublished manuscript, on file with authors) (analyzing the author's experiences at a multi-service community-based clinic offering both counseling and legal services); Maryann Zavez, *The Ethical and Moral Considerations Presented by Lawyer/Social Worker Interdisciplinary Collaborations*, 5 WHITTIER J. CHILD & FAM. ADVOC. 191 (2005) (offering comments on experience practicing in an interdisciplinary family law clinic in Vermont); Christina Zawisza & Adela Beckerman, *Two Heads Are Better Than One: The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*, 7 FL. COASTAL L. REV. 631 (2006) (noting their experiences with interdisciplinary practice in children and family law matters).

arise in an interdisciplinary practice. The Article will focus specifically on two common ethical topics arising in the context of lawyers working with social workers, with the hope that the ideas included here will have implications beyond that collaboration. In law school clinic and poverty law settings, the lawyer/social worker collaboration is the most common variety of cross-disciplinary practice. The insights we discover from that setting ought to apply equally well to other common, even if less prevalent, cross-professional relationships, including lawyers working with doctors, nurses, psychologists, and similar helping professionals.[7] Our treatment here will not address some other equally interesting and challenging questions arising from multidisciplinary practice (MDP) in the business world, such as collaboration between lawyers and other professionals such as accountants, public relations specialists, financial planners, and title insurers.[8] Those topics, perhaps because of their sheer financial importance, have received substantial attention within ethics scholarship.[9] Our questions, by contrast, have begun to attract scholarly attention, but substantially less thus far than the corporate MDP questions.[10]

This article seeks to further the ongoing work of scholars of collaborative practice by honing in on two questions, the first general in scope and the second more discrete, which remain the subject of some

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[7] As we shall see below, *see* text accompanying notes 40 and 54 *infra*, some of our analyses of competing ethical responsibilities rely on the specific legal and professional obligations of social work, as the profession we chose to explore. To the extent that we have engaged in such profession-specific analysis, our conclusions may not be inevitably applicable to a different helping profession. That acknowledgement notwithstanding, we expect that the general suggestions and conclusions we offer here will have much relevance to collaboration between lawyers and any other helping professional.

[8] *See, e.g.*, the intra-firm entity established by the Boston law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., known as ML Strategies, LLC, and described at http://www.mlstrategies.com (last visited Feb. 18, 2007). For a general analysis of different models for organization of legal entities involved in MDP, see J. Michael Norwood & Alan Patterson, *Problem-Solving in a Multidisciplinary Environment? Must Ethics Get in the Way of Holistic Services?*, 9 CLIN. L. REV. 337 (2002).

[9] *See, e.g.*, Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice: Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787 (2002); Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217 (2000); Bryant G. Garth, *"From the Trenches and Towers": MDPs after Enron/Andersen, Multidisciplinary Practice after Enron: Eliminating a Competitor but not the Competition*, 29 LAW & SOC. INQUIRY 591 (2004); George C. Nnona, *Situating Multidisciplinary Practice Within Social History: A Systemic Analysis of Inter-Professional Competition*, 80 ST. JOHN'S L. REV. 849 (2006).

[10] We will find that some of the insights generated by the conventional MDP debates inform our discussion here. For instance, a significant worry within the MDP debate arises from the different ethical roles and duties of nonlawyer professionals and lawyers, and whether client interests will suffer as a result. *See* GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, ROGER C. CRAMTON & GEORGE M. COHEN, THE LAW AND ETHICS OF LAWYERING 1120-21 (4th ed. 2005).

uncertainty in the literature and the doctrine. Those questions are as follows:

1) *The Perceived Tensions Between the Lawyer's Zeal or Client Autonomy Commitments and the Social Worker's Attention to Broader Interests*: The first, broader inquiry of this Article explores a common understanding—or perhaps misunderstanding—of the effect of a lawyer/social worker collaboration. For some this understanding is a worry; for others, an opportunity. The basic idea is that a lawyer working with a social worker will adjust her role responsibilities away from the typical unfettered zeal and commitment to client autonomy that her legal training has taught her. Social workers attend to a larger "moral community" and to social justice concerns;[11] lawyers attend to the wishes of their clients. Surely, the argument goes, these two orientations must clash, and perhaps in ways which challenge a lawyer's ability to comply with her Rules-driven obligations, and which challenge the social worker's commitment to broader societal interests. We hope to understand this perceived tension, to assess its validity, and to compare carefully the rules governing lawyers' work with the messages offered by (and the rules and laws governing) the collaborating social workers.
2) *The Mandated Reporter Question*: The second topic of this Article is, seemingly, the most challenging analytical problem faced by non-lawyer professionals working within a law firm, or in conjunction with a lawyer. The question is simple, but its answer profoundly important: Is a professional who is otherwise mandated when acting in his professional role to report abuse to a state agency subject to that same command when consulting or collaborating with a lawyer? We will address that question directly and offer as clear an answer to it as the available doctrine and our imagination permit.

Part I of this Article will address the first of those two topics,

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[11] *See* CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, *available at* http://www.socialworkers.org/pubs/code/code.asp (last visited February 10, 2007) [hereinafter SOCIAL WORKER CODE]. While the NASW Code of Ethics is not binding on social workers directly (much like the ABA's Model Rules are not binding on lawyers until adopted by a state), the Code's provisions often serve as the basis for licensing regulations in a state. *See, e.g.*, ILL. ADMIN. CODE tit. 68, § 1470.96(2) (2007)(defining "unethical, unauthorized, or unprofessional conduct" of social workers); Ohio Counselor, Social Worker & Marriage and Family Therapist Board Laws and Rules §B(4) ("the board subscribes to codes of ethics and practice standards for . . . social workers . . . promulgated by the . . . National Association of Social Workers [among other associations], which shall be used as aids in resolving ambiguities which may arise in the interpretation of the rules of professional ethics and conduct"). The Code also captures the sentiments conveyed by social work training and philosophy. *See* Lisa A. Stanger, *Conflicts Between Attorneys and Social Workers Representing Children in Delinquency Proceedings*, 65 FORDHAM L. REV. 1123, 1140-48 (1996) (describing the influence and teaching of the NASW Code of Ethics).

after a preliminary exploration of the differences, as well as the commonality, between the role expectations of the two professions. Part I concludes that collaboration between lawyers and social workers is likely to encourage richer and more robust legal representation on behalf of the clients served by the collaboration. Part II then addresses the mandated reporter issue. It concludes that, while authority is sparse at best, in certain settings the most reasonable construction of the reach of the appropriate obligations would hold that a social worker employed by a law firm is not bound by a reporting requirement. In other settings, especially those in which the social worker provides services directly to the lawyer's client, the most plausible construction is that the reporting duty survives, notwithstanding the legal ethics rules.

I. ROLE TENSIONS IN LAW-SOCIAL WORK PRACTICE

A. The Perceived Lawyer/Social Worker Divide

A broad concern arising from interdisciplinary practice is the potential for a clash of professional orientations. From the lawyer's perspective, it appears possible, and perhaps even likely, that an attorney working in tandem with a social worker will tend to offer legal services which are less zealous than those offered by a "solo" lawyer, because social workers see disputes and problems with a more inclusive perspective, and care more about a broader audience, than do lawyers. It also seems possible, and perhaps even likely, that the lawyer collaborating with a social worker, and influenced by the social worker's best interests-focused orientation, will tend to be more paternalistic than the "solo" lawyer. Were these predictions true, perhaps a collaborating lawyer would need to obtain some explicit informed consent from her client to this different, less client-centered representation.[12] And, from the social worker's viewpoint, the legal collaboration could well produce analogous professional dilemmas were he to join the client's legal team as a consultant. We explore these worries in this part. We conclude that they are ultimately unfounded, although not without some substance. While lawyers and social workers may initially approach their work from different starting points, we maintain that any fear of irreconcilable professional

[12] While there is no explicit mandate that requires attorneys to embrace client-centered representation, *see* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 534 (1990), it is clear that attorneys must abide by clients' lawful decisions. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2003) [hereinafter MODEL RULES]. Thus, to the extent a collaborating lawyer might be less zealous, a client's decisionmaking could be adversely affected. As discussed more fully below in Section I.B., we conclude that this concern is ultimately unpersuasive.

conflict is overblown. Instead, the collaboration between the two professions offers the client the potential for an enhanced exploration of the client's goals and options during a comprehensive legal counseling session undertaken before the lawyers embark on their zealous advocacy with third parties.

Before turning to our analysis of the effect of interdisciplinary collaboration on the ethical duties lawyers owe their clients, it is important first to test the common assumption that the two professions' perspectives are fundamentally at odds. Were social workers and lawyers to be fully allied in their cultures and professional mandates, then any ethical concerns would disappear. Despite some shared professional values, social workers and lawyers do enter professional collaboration with different ethical mandates and distinct orientations to their roles in working on behalf of clients, and it is these differences that are potential sources of interdisciplinary tension.

Let us begin by acknowledging some shared fundamental values as reflected in the ABA Model Rules of Professional Conduct and the Social Worker Code of Ethics. Both lawyers and social workers identify as helping professionals. Both serve as counselors, advisors and advocates for their clients. Both attempt to facilitate conflict resolution, while respecting client self-determination and confidentiality. In addition, both strive to uphold fundamental societal values and promote public service.[13] These values are at the core of each profession's orientation to practice.

As important as it is to acknowledge the values shared by lawyers and social workers, it is equally important to appreciate certain fundamental differences in their professional cultures and their approaches to advocacy and problem-solving. Some of these distinctions reflect contrasting objectives of the professional intervention; others reflect differences in training and professional orientation. Both perspectives have much to offer to the process of advocating on behalf of clients.

While any shorthand summary risks obscuring the complexities of each profession's work, we have found the following chart useful as an introductory contrast of the two professional orientations to advocacy.[14] But it is the professions' contrasting trainings and perspectives

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[13] *See* MODEL RULES, *supra* note 12, Preamble, R. 1.2, 1.6, and 2.1; SOCIAL WORKER CODE, *supra* note 11, Ethical Standards 1.01, 1.02, 1.07. *See also* Jane Aiken & Stephen Wizner, *Law as Social Work,* 11 WASH. U. J. L. & POL'Y 63 (2003).

[14] We realize that the chart could mask the nuanced work of individual professionals. For example, a good lawyer will concern herself with client well-being and the impact of the case on third parties. She will also be a problem-solver to advance her client's interests. A good social worker will have an interest in protecting his client's legal rights and autonomy. While recognizing its limitations, the chart, we believe, is a useful shorthand description of the different trainings and orientations of the two disciplines.

that produce potential tensions in practice. Recognizing that no one list can capture the complexities of professional life, we offer this dichotomy to suggest the different points of view each specialist brings to the table.

Law	Social Work
Adversarial process / Litigation	Cooperative process / Problem solving
Zealous advocacy for stated interest	Safeguard best interest
Protect legal rights	Enhance client well-being
Protection of individual rights	Consideration of third parties and community
Address legal problem	Address underlying cause of problem
Analytic (break whole into parts)	Synthetic (put parts together to assess whole)
Focus on outcome	Focus on process
Value professional autonomy	Value professional collaboration

For those lawyers who might be considering interdisciplinary collaboration with social workers, a number of professional responsibility concerns arise. These include: the perceived tension between the lawyer's duty to represent the client's stated interest zealously and the social worker's duty to enhance the client's best interest and well-being,[15] the concern that consideration of the social work perspective will increase lawyer paternalism and inhibit client autonomy, and the worry that legal counseling will become legal "therapy." In addition to these specific concerns, interdisciplinary collaboration often raises concerns about potential role and goal confusion.

We are not the first to discuss the challenges posed by interdisciplinary collaboration between social workers and lawyers. As Jean Koh Peters described her experiences with social worker/attorney partnerships, "due to the distinct ethical mandates of the two professions[ ] legal and social work practitioners must expect conflict and

[15] *See, e.g.*, Jean Koh Peters, *Concrete Strategies for Managing Ethically-Based Conflicts Between Children's Lawyers and Consulting Social Workers Who Serve the Same Client*, 1 KY. CHILD. RTS. J. 15 (1991); St. Joan, *supra* note 4. Surveys of professional attitudes have shown that social workers and lawyers may need to build bridges toward greater understanding. *See, e.g.*, James L. Scherrer, *How Social Workers Help Lawyers*, 21 SOCIAL WORK 279 (1976) (noting conflicting professional attitudes which could undermine successful attorney/social worker teamwork); Franklin B. Fogelson, *How Social Workers Perceive Lawyers*, 51 SOCIAL CASEWORK 95 (1970) (survey of social workers suggested distrust of lawyers which would adversely affect interdisciplinary collaboration).

tension in cooperating to represent a common client."[16] Paula Galowitz confirmed those concerns in her review of interdisciplinary collaboration in legal services practice: "There is an inherent tension between a lawyer's and a social worker's ethical responsibilities. The lawyer's responsibility is to advocate zealously for the client's wishes, while the social worker's is to safeguard the client's best interests."[17] More recently, Kate Kruse reached a similar conclusion: "[T]he paternalism that the social work ethic entails remains in tension with the deference to client autonomy inherent in the zealous advocate's construction of what it means to act in a client's interest."[18] While each commentator proceeds to suggest protocols designed to resolve such tensions, their analyses are bottomed on the presumption that ethical conflicts must be expected in interdisciplinary practice.[19]

Our starting point is somewhat different. Rather than presume ethical tensions, we seek to explore those underlying assumptions. While we grant that social workers and lawyers join forces with distinct professional orientations, it is our experience that these differences do not interfere with effective lawyering as might be expected, but in fact serve to enhance lawyering. Ethical questions do arise, but when carefully scrutinized, those ethical issues prove not to be irreconcilable conflicts. Indeed, as developed below,[20] these questions are not qualitatively different from the ethical dilemmas faced by an attorney practicing without the benefit of another professional's wisdom.

With mutual understanding of one another's professional responsibilities, clearly stated role expectations, express administrative poli-

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[16] Peters, *supra* note 15.

[17] Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2140 (1999).

[18] Katherine R. Kruse, *Lawyers Should Be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith,* 14 WASH. U. J. L. & POL'Y 49, 76 (2004). Kruse's article offers important insights on the apparently competing views of professional role held by lawyers and social workers. Her analysis attempted a reconciliation of the views expressed in two articles presented at a conference held at Washington University School of Law in March 2003, entitled "Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship." The first article, by Jane Aiken and Stephen Wizner, challenged lawyers to think and act more like social workers. Aiken & Wizner, *supra* note 13. The second, by Abbe Smith, offered a contrary view based on criminal defense practice experience. Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J. L . & POL'Y 83 (2003).

[19] *See also* Joan L. O'Sullivan, Susan P. Leviton, Deborah J. Weimer, Stanley S. Herr, Douglas L. Colbert, Jerome E. Deise, Andrew P. Reese & Michael A. Millemann, *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLIN. L. REV. 109, 170 (1996) (describing teaching clinic with a social worker, and noting "the professions' conflicting ethical obligations"); Stanger, *supra* note 11, at 1143 ("[s]ocial workers' roles are inherently different from those of lawyers").

[20] *See* text accompanying notes 41-44, 72-75 *infra.*

cies and protocols, and effective communication, the team members can overcome the perceived tensions and anticipated concerns about interdisciplinary practice. We have found that both clients and the interdisciplinary practitioners benefit from the collaboration, making the investment in the process well worth the candle.[21]

In an effective interdisciplinary practice, it is expected that the lawyer will maintain her role as zealous advocate, advocating for the client's stated interests, and protecting the client's individual rights and legal interests, but the process and "professional conversation" will be qualitatively different from the process and dialogue of traditional lawyering practice. The lawyer will maintain her role as legal counselor, not therapist; she will "work with" the client's emotional concerns to provide effective legal representation, not "work through" them in the therapeutic sense. The social worker's role will be defined by the particular model of interdisciplinary practice being employed—social worker as direct service provider (counselor, therapist, social service/case management provider), social worker as expert consultant, or social worker as member of the legal team. The social worker will understand that, although the scope of the lawyer's counseling may be more comprehensive with social worker input, the lawyer's role is ultimately to represent her client's stated interest. Thus, when entering into collaborative practice, it is the responsibility of both the lawyer and social worker to clarify practice models, define role expectations, and identify potential professional responsibility concerns.

We now turn to two distinct ethical worries arising in interdisciplinary practice—those of possibly diminished zeal and possibly excessive paternalism.

B. The "Zeal" Worry

A hallmark of attorney-client relationships is the lawyer's duty to represent her clients zealously. Lord Brougham captured the standard years ago in his classic entreaty to his profession: "An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."[22] Modern supporters of partisan advo-

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[21] In this article, we do not presume to review the important field of therapeutic jurisprudence which seeks, among other things, to address the potentially adverse consequences to litigants' mental health and well-being occasioned by the legal system. *See, e.g.*, AFFECTIVE ASSISTANCE OF COUNSEL, *supra* note 1; DAVID WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990). However, advocates of that approach have long extolled the benefits of interdisciplinary collaboration.

[22] TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1820-21), *quoted in* DEBORAH RHODE & DAVID LUBAN, LEGAL ETHICS 137 (4th ed. 2004). It should be noted that Lord Brougham offered these remarks in the midst of contentious and politically charged, high stakes litigation. His Queen's head was literally on the line. Whether he would have de-

cacy defend their approach as instrumental in protecting client autonomy and in nurturing client loyalty and trust.[23]

Not surprisingly, professional rules governing lawyers have incorporated mandates related to lawyer zeal. For example, the Model Code of Professional Responsibility promulgated in 1969 included a specific directive on "Representing a Client Zealously."[24] Then, in 1983 the Model Rules of Professional Conduct ("Model Rules"), which serve as the framework for the disciplinary rules in the vast majority of jurisdictions, required lawyers to advocate for clients' goals, though arguably in a somewhat more muted fashion than earlier codes.

Model Rule 1.2 currently provides as follows: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."[25] Subject to the lawyer's companion duty of candor toward tribunals,[26] attorneys retain special duties within our adversarial system to press for their clients' goals.[27] Litigators are their clients' champions in the good fight to obtain the clients' desired outcomes.[28]

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scribed the role of an attorney as counselor the same as litigator has been frequently debated. *See* Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics*, 41 J. LEGAL EDUC. 29 (1991).

[23] For a recent review of the literature on the values inherent in client-centered representation, see Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLIN. L. REV. 369 (2006).

[24] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-101 [hereinafter MODEL CODE] (providing that "[a] lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B) . . ."). *See also* AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §16 (2001) [hereinafter RESTATEMENT] ("a lawyer must, in matters within the scope of the representation . . . proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation . . . .").

[25] Note that Model Rule 1.2 (c) allows a lawyer to limit client objectives if the client's informed consent is obtained. MODEL RULES, *supra* note 12, R. 1.2(c).

[26] *Id.* at R. 3.3.

[27] *See also id.* at Preamble ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."). The Comment to Rule 1.3 describes the duty of zeal: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* at R. 1.3, Cmt. [1].

[28] Particularly in the criminal defense context, some commentators have gone one step further and argued that the lawyer's role must be narrowly defined to focus on the rights and needs of the lawyers' client, to the exclusion of the larger community. *See generally*, Smith, *supra* note 18. Quite recently, advocates of zeal have found their view of the professional role of the criminal defense bar challenged. *Compare* Monroe Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771 (2006) and Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006) *with* Fred Zacharias & Bruce Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. L. REV. 1 (2005). Prof. Freedman suggests that Lord Brougham's conception of zeal is still the fundamental lawyering obligation. *See* Monroe Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319, 1319 (2006) (responding to Zacharias and Green).

Contrast the attorneys' professional role with that of social workers, who are ethically obligated to pursue their clients' best interests and are more attentive to the needs of others around the client. As provided in the National Association of Social Workers' Code of Ethics,[29] the professional charge of social workers is to:

> enhance human well-being and help meet the basic human needs of all people . . . . A defining feature of social work is the profession's focus on individual well-being in a social context and the well-being of society.[30]

Furthermore, social workers bear the responsibility of weighing their duties to the "larger society" against their clients' interests.[31] Indeed the social workers' code is clear that their duties to others may trump their duties to promote the well-being of their clients: "Social workers may limit clients' right to self-determination when, in the social workers' professional judgment, clients' actions or potential actions pose a serious, foreseeable, and imminent risk to themselves or others."[32]

Similarly, the existing literature on interdisciplinary collaboration generally presumes that ethical tensions will arise when social workers and lawyers join forces to represent a client. Professionals from both camps describe ethical concerns as inherent in interdisciplinary practice.[33]

Given the conflicting missions and professional dictates of attorneys and social workers, is legal collaboration likely to produce serious ethical tensions that undermine the collaborative project? While instances of joint delivery of services by both professionals raise the most challenging ethical tensions, even those interdisciplinary issues are not insurmountable. We need to start with a clear understanding of the role each member of the team is being asked to play. Once those duties are determined, then we can scrutinize their conduct to determine if ethical breaches are likely to occur. We conclude that clear definition of professional role and intra-team communication

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29 While the Social Worker Code is not in itself binding law, state professional licensure rules provide the basis for legal sanction. For additional discussion, see *supra* note 11.

30 *See* SOCIAL WORKER CODE, *supra* note 11, at Preamble. *See also* text accompanying note 14 *supra*.

31 *Id.* at 1.01 ("Commitment to Clients").

32 *Id.* at 1.02 ("Self-Determination").

33 *See generally* Peters, *supra* note 15, at 24 (noting that "inter-ethical tensions that many children's lawyers and their consulting social workers experience in working together for their clients are both inherent and manageable"); Galowitz, *supra* note 17. *See also* Jose Ashford, Mary Wirtz Macht & Melissa Mylym, *Advocacy by Social Workers in the Public Defender's Office*, 32 SOCIAL WORK 199, 202 (1987) (noting inherent difficulties in interdisciplinary collaboration if the competing views of the lawyer's "advocacy" role and the social worker's "best interest" approach are not resolved and suggesting that changes to the Social Worker Code may be required lest the social worker be relegated to a role tantamount to that of a secretary to the legal team).

will help ensure ethical conduct and effective representation by all professionals.

As in most clinical discussions, context is critical. Therefore, we offer the following scenario built off a clinic case we handled. That our examples involve law school clinics should not be surprising. As clinical teachers, we write most readily about our own work and our experiences in a storefront, civil legal services clinic engaged in poverty law practice.[34] We have also chosen to ground our discussions in our clinical work because much of the interdisciplinary collaboration that exists today occurs in those university settings and our audience is most likely to experience these issues in that context. However, the clinical setting is not central to our analysis.

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Jane was a feisty mother who came to the clinic seeking a divorce from her husband, John, of fifteen years. Jane had devoted her life to her family, particularly her two sons, having abandoned her career in the nursing field to put her children first. She was also a survivor: Jane wanted to ensure that her contributions were recognized and valued, something John had been loath to acknowledge over the years. John was a local firefighter, well-respected in the community and an actively involved father who coached their boys' Little League teams. It was clear to both parties that their marital relationship was over; years ago, both parties had alleged that the other was abusive and mutual restraining orders had been obtained, which had since expired. Reconciliation efforts were unsuccessful, and it was unclear which party would file first for divorce.

While no one doubted that Jane was a caring mother, Jane seemed ambivalent about seeking custody of the boys. She recognized that the boys were close, that they both had good relationships with their father, and that she was often overcome by the responsibilities of caring for teenage boys. Jane, however, was anything but ambivalent about her feelings toward John. The clinic team found that she became obstinate and abrasive whenever she sensed that John might have the upper hand in any aspect of the divorce proceeding.

Initially, Jane sought and won temporary custody orders over the parties' two sons, Albert fourteen, and Jeremy thirteen, despite the fact that both boys expressed a preference to be with their father. Jane's efforts to maintain the family home and thus stable schooling

[34] The authors practice at the Boston College Legal Assistance Bureau ("LAB"), a non-profit organization founded some 40 years ago to offer legal services to the surrounding community. Since the 1970s, a licensed independent clinical social worker has been on staff and served as a consultant to the legal team.

arrangements for the boys initially persuaded the judge to grant her physical custody. She shared joint legal custody with John, who obtained very liberal visitation rights. Once school closed for the summer, though, the boys voted with their feet and essentially moved in with their father.

As the time of the final divorce hearing approached, Jane's ambivalence resurfaced. She acknowledged being relieved at being freed of childcare responsibilities; however, she did not want to concede any ground to John. So, Jane suddenly adopted a new goal, which she acknowledged was motivated partly by spite: she asked the clinic team to help her maintain custody of just Jeremy. The team observed her actively trying to undermine the relationship between Jeremy and his father and between Jeremy and his brother. She began trying to bribe Jeremy's affections with gifts and preferential treatment. And, by her actions and words, Jane did her best to alienate the elder son. She was mean-spirited to Albert, cementing his desire to stay with John. Her instructions to her legal team were clear: "I want to keep Jeremy; his father can have Albert." John and his counsel argued for custody of both boys and marshaled significant evidence from teachers, neighbors, etc. that it was in the boys' best interests to stay together and with their father.[35]

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Let us assume that an interdisciplinary team comprised of a student lawyer, supervising attorney, and a consultant social worker has offered to represent Jane in her divorce. As they introduce themselves to Jane at the initial intake meeting, they explain their distinct roles. The team will be led by the clinic student and her supervising attorney; the social worker will not offer direct counseling services to the client, but rather will confer with the legal team as a consultant. Initially, Jane's goals are clear and unquestionably lawful; she has a legal right to divorce John given the irretrievable breakdown of their marriage. No ethical rubs so far.

If we fast forward, however, to the later chapters of the representation, we find that Jane's goals have become more complex. The divorce risks being stalled over a messy custody battle if Jane persists in her more recently announced goal of winning custody of Jeremy. Furthermore, the legal team has begun to question Jane's motives in claiming custody of Jeremy. When pressed during a counseling ses-

[35] We recognize that the Court would likely appoint a guardian ad litem (GAL) to represent the interests of the minor boys. However, for simplicity's sake, we have narrowed the cast of characters since we do not believe the presence of a GAL would change our analysis of this scenario.

sion, Jane has acknowledged that her new objective is motivated in part by revenge toward John.

At this juncture, let us pause and reassess the ethical duties of the interdisciplinary legal team. At first blush, one could envision an unworkable tension. On the one hand, a parent facing the loss of custody of her child is entitled to all the zeal her attorney can muster.[36] On the other, the social worker would be obligated to attend to the family's best interests post-divorce and would likely have real concerns about separating the boys.

Here is where skeptics who question the feasibility of interdisciplinary collaboration would call a halt to the teamwork or, at a minimum, raise serious questions about its efficacy. The doubters will foresee an irreconcilable clash of professional rules and culture that would interfere with the attorneys' duty to provide the zealous representation that Jane deserves. Since Jane's goal of obtaining custody of Jeremy is lawful,[37] her lawyers could champion her cause, unfettered by concerns about the impact of the lawyer's arguments on the boys' relationship to each other or Jeremy's connection with his father. And, they might argue, the lawyers certainly do not need one of their own firm members working to undermine their efforts by raising questions about the family's welfare.[38] Thus, a skeptic might conclude either that the collaboration is inimical to the most effective representation of Jane, or that the team ought to obtain Jane's informed consent, after adequate consultation, to this hobbled representation.[39]

Our assessment, bolstered by our own experiences with interdisciplinary collaborations, leads us to question the worriers' premises.

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[36] While a parent has no constitutional right to representation in a custody dispute, some have argued that the interests at stake are so fundamental as to require zealous representation akin to criminal defense. Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) (ultimately holding that no right to representation exists). For views on the zeal required in criminal representation, *see generally* Smith, *supra* note 18. *See also The Edward V. Sparer Symposium on Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 557 (2006).

[37] *See* MODEL RULES, *supra* note 12, R. 3.1 (prohibiting lawyers from bringing a frivolous claim); *id.* at Cmt. [2] ("The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person.").

[38] It should be noted that this description of attorney conduct assumes that a model of zealous representation presents a sharp contrast with the best interests approach of the social work profession. However, some commentators have urged lawyers to consider their responsibility to local moral communities in lieu of a model of pure client loyalty. *See, e.g.,* Thomas Shaffer, *Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics*, 51 ME. L. REV. 229 (1999).

[39] The critics might compare the collaborative team representation to a lawyer operating under a potential conflict of interests, which would require an informed waiver by the client before the representation could proceed. *See* MODEL RULES, *supra* note 12, R. 1.7(b).

If we analyze the perceived ethical rubs more closely, it is less apparent that an intra-team conflict would undermine the collaboration. Indeed, we believe that a reflective lawyer, operating without the benefit of collaboration with another professional, would likely recognize many of the same concerns that the team's social worker has flagged and navigate them successfully. Therefore, while challenging, the professional questions which arise in this case are not unique to interdisciplinary collaboration, but may be attended to more thoughtfully and effectively with the benefit of the collaborative process.

At the outset, however, we acknowledge that the skeptics have correctly defined the two disciplines' professional duties. We presume that the social worker on the legal team will be attentive to how all the family members will be affected by the divorce.[40] Jane's new goal of wresting custody of Jeremy from his dad will likely be of concern, especially if independent evidence and the social worker's own clinical assessment support a contrary decision. Therefore we should assume that the social worker will resist—or at least question—Jane's spiteful efforts to grab Jeremy from his father.

Similarly, during the court proceedings, we acknowledge that most conventional role definitions would say that Jane's lawyers must zealously advocate with John's counsel and with the judge for Jeremy to stay with mom. Our clinical team would be ethically bound to put John (and any witnesses testifying on his behalf) to the test when his attorney tries to prove that Jeremy should stay with his father.

We acknowledge that the legal team is ethically bound to be Jane's zealous champion in court. However, we do not believe that the interdisciplinary collaboration is fatally hobbled because the team's ultimate duty is zealous representation. Rather, we contend that the profound changes to the texture and nature of the team's representation of Jane would occur at the pre-hearing stage before the partisan advocacy with third parties begins. Specifically we invite closer scrutiny of the legal team's counseling with Jane and of the dialogue that would likely occur between the professionals in preparation for the counseling session itself. What would the lawyers and social worker be saying about their different perspectives within team meetings and with Jane? As developed below, we believe that the crux of the interdisciplinary collaboration would happen in those intra-team meetings and would foster the richer, more nuanced client interactions that are the hallmark of good lawyering.

If asked in the privacy of their office, it is hard to imagine that the lawyers would not admit some significant reservations with Jane's new

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[40] *See* SOCIAL WORKER CODE, *supra* note 11, § 1.01 (noting social workers' "responsibility to the larger society").

goal. They know that Jeremy's expressed preference is to stay with John; they have heard Jane admit that she has mixed motives in pursuing custody. These concerns will be further validated when they hear from the social worker on the team.

We find, as we explore this meeting, that the position the lawyers find themselves in is in fact no different from the position of any thoughtful "solo" lawyer faced with Jane's case.[41] What must (or can) these lawyers do when faced with their own internal struggles and differing perspectives within the interdisciplinary team?[42] First, a lawyer's duty of zealous representation is not without limits. In addition to her duty not to assist with illegality or frivolous claims,[43] counsel's obligations to clients are tempered in other ways. Under Model Rule 1.2 (c), Jane's lawyers have the right to seek her consent to limiting her objectives.[44] Thus, if the legal team is so distressed by her request for custody of Jeremy, the team members can counsel her about their reservations. It is this pre-trial process that deserves further scrutiny.

In preparing for such a client meeting, the team would undoubtedly convene to plan for the event. We can assume that any ethical rubs would surface in those discussions. The social worker might detail his concerns about Jane's plans for Jeremy, including the following: 1) the boys have a close bond; 2) John has demonstrated an ability to care appropriately for his teenage sons; 3) all the men profess strong desires to remain a family unit; and 4) Jane's sudden interest in custody of Jeremy is prompted in large part by her malice toward John. But it strains credulity to believe that only the social worker has identified these issues. Surely the lawyers will also have realized that any case plan will have to account for such adverse evidence.

The intra-team meeting would not conclude with a perfunctory recitation of the mounting evidence that is at odds with Jane's professed goal. Instead, let us look further at the interdisciplinary dialogue. The social worker might well urge the team to use the

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[41] A paradigm ethical dilemma about which many have written involves the tensions a lawyer faces when her client elects to make what she perceives to be a "bad" choice. *See generally* Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L. REV. 2665 (1993); Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1978-79).

[42] We have defined this collaboration as being chaired by the lawyers, with the social worker acting as a consultant. Under Model Rule 5.3, it is clear that the lawyer must ensure that the conduct of a non-lawyer assistant (i.e., the social worker) is compatible with the attorneys' professional duties. *See* MODEL RULES, *supra* note 12, R. 5.3. Therefore, our analysis presumes that it is the lawyer who must regulate the interdisciplinary team's conduct to ensure that no breach of legal ethics occurs.

[43] *See supra* text accompanying note 37.

[44] *See also* MODEL RULES, *supra* note 12, R. 1.3, Cmt. [1] ("a lawyer is not bound to press for every advantage that might be realized for a client").

upcoming meeting to explore with Jane the consequences of her professed goal. For example, what effect does she think her decision will have on the boys' relationship to each other and to her? He might ask the team to acknowledge the anger that Jane apparently feels toward John and to then inquire whether there are other ways to hold John accountable for his conduct that has pained Jane. Thus the social worker would redefine the team's focus from Jane's narrow stated interests to the larger questions of the long term needs and goals of all family members, including Jane herself. If Jeremy's stated desire of staying with his dad is in his best interests, and in the best interests of his brother, then the social worker would advocate at the interdisciplinary team meeting for a qualitatively different counseling session with Jane.[45] The social worker might provide a fuller assessment of the client's emotional landscape, a fuller exploration of the client's interests (both stated and unstated), a broader understanding of the legal "facts" that might be affecting the lawyering process, and suggestions for more nuanced communication with the client to elicit facts and facilitate decisionmaking.

If the interdisciplinary collaboration is to be embraced, the lawyers will seek to incorporate the social worker's insights, rather than ignore them. But how, given that his concerns run counter to Jane's professed goal? At the team's preparatory meeting, the members could develop strategies for counseling Jane about their concerns. Nothing in the Model Rules precludes attorneys from sharing reservations with their clients. Indeed Rule 2.1 expressly condones such counseling:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[46]

Therefore, in its role as advisor/counselor to Jane, the legal team has every right to share its concerns about her professed goal.[47] And any lawyer who neglected to address these concerns with Jane would, it

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[45] The social worker may well conclude also that the best interests of *Jane* coincide with the boys staying together, lest a "victory" in this custody battle prove purely Pyrrhic. We treat that question as a conceptually separate one—a question of paternalism rather than of concern for third parties—and we return to it in Part II.C. below.

[46] MODEL RULES, *supra* note 12, R. 2.1. *See also id.* at R. 1.2(a) (requiring attorneys to consult with clients as to the means by which their goals are to be pursued).

[47] While there is no rule which requires attorneys to counsel clients about any concerns the legal team has, we submit that good practice supports that view. As pointed out earlier, some commentators, especially when discussing the duties of the criminal defense bar, might question such a departure from zealous representation. *See* note 28, *supra*.

seems to us, be an ineffective lawyer.

In addition, any standard of good lawyering demands that Jane be counseled on the likely outcome of her custody battle.[48] Here, there is independent, contrary evidence which the judge will consider in reaching a decision on Jeremy's custody. It is the team's duty to assess the strength of all the testimony and evidence that will likely be introduced on the contested issue and to advise Jane about her likelihood of success. Whether Jane's resolve *would* change after being updated on the anticipated legal outcome is unclear; the point is that it *could* influence her decisionmaking and she should be fully informed of all of the implications of her choices.

Which leads to another wrinkle in this representation. Were the team to conclude that Jane's motivation is purely revenge, the lawyers would need to cease representing her in this spiteful mission. Pursuant to Model Rule 4.4, lawyers are forbidden from using means "that have no substantial purpose other than to embarrass, delay, or burden a third person . . .."[49] Here, if the lawyers were to learn from Jane that the custody goal is purely a ruse to harass John, they would need to advise Jane that they could not advocate the custody matter on her behalf.[50]

With these ethical parameters clarified, the team can then proceed to discuss the process by which the members can counsel Jane about the looming custody battle. Here the training and expertise of the social worker can be invaluable to the lawyers. How can the team package its information in a way that would optimize the likelihood that Jane could hear and comprehend it? Should the team ask Jane to reverify her goals, and, if so, how? What options can the team generate for Jane's consideration?

At the conclusion of the counseling session, Jane will make a choice. Perhaps she will elect to drop the custody fight if convinced that she is likely to lose and after having been advised of the potential consequences, both to her and to her family, of pursuing the custody fight. But, for purposes of our analysis, we have to assume that Jane will persist. If so, what must the team do? We contend that Jane's interests in zealous representation now trump the team's concerns.[51]

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[48] *See generally* MODEL RULES, *supra* note 12, R. 1.4 (obligating lawyers to keep clients appropriately informed about their case's status and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

[49] *Id.* at R. 4.4(a).

[50] *See id.* at Preamble ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others").

[51] It is possible that the conflict between the team and Jane is so profound as to prompt the team to withdraw its services. *See id.* at R. 1.16. However, it is unlikely that the court

Assuming that Jane does not seek custody of Jeremy principally to harass John,[52] the lawyers now must champion her cause, however ill-advised it may be. Jane may well lose, but her interests and the lawyers' duty of loyalty require that she go down swinging with good lawyers by her side.

But what, then, of our social worker's dilemma? Assuming (as is likely) that he continues to believe that Jeremy's best interests are to be in his dad's custody even after the counseling session, are we suggesting that he breaches his own professional duties by remaining part of the clinic team? We believe not, for two reasons. First, remember the construct of the interdisciplinary team. We defined the team from the beginning as a legal team in which the social worker is acting as a consultant. Therefore, under Model Rule 5.3, it is the lawyer who must ultimately bear the burden of defining the ethical path. The social worker is thus shielded from sanction within his profession because of his specially defined role in this engagement. But second, we are not persuaded that the social worker has otherwise breached his professional duties, even if he could not rely on the lawyers' rules as a defense. As we have described it, he has performed his social worker role as he ought to have done. He has cared for Jane and her family; he has sought to engender a holistic solution which minimizes harm to all involved. We can assume that he has done so with insight and compassion. The fact that Jane, who is not his client,[53] has opted to proceed in a way that the social worker may not prefer does not imply that he has failed in his role responsibilities.[54]

C. The "Paternalism" Worry

So far we have been concerned with whether lawyers leading an interdisciplinary team can provide sufficiently zealous representation to their clients. We have been intentionally outwardly focused as we

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would agree to the withdrawal on the eve of trial. Furthermore, for our analysis, withdrawal moots the conflict. Therefore we have assumed that the representation would continue.

[52] *See supra* text accompanying note 37 regarding prohibitions against pursuing means designed purely to harass a third party.

[53] Our discussions have assumed that the social worker is not providing direct services to his client, but rather serving as a consultant to the lawyers who represent their client, Jane. *See* text accompanying note 35 *supra*.

[54] The Social Worker Code lists respect for the "Dignity and Worth of the Person" as a core value and urges social workers to "promote clients' socially responsible self-determination." *See* SOCIAL WORKER CODE, *supra* note 11, "Ethical Principles." Here, where we have envisioned opportunities to counsel Jane on the consequences of her goal and to probe her rationales for seeking Jeremy's custody, we believe that the social worker will have complied with the dictates of his profession. *See also id.*, Ethical Standard 1.01 ("Commitment to Clients: Social workers' primary responsibility is to promote the well-being of clients. In general clients' interests are primary.").

investigated whether lawyers would soft peddle their advocacy as a result of being exposed to social workers' perspectives. Using the example of representation of a client whose objectives the team questions, we have explored the potential harm which could result to innocent third parties. While we have concluded that ethical concerns surrounding the duty of zeal can be overcome and are akin to those faced regularly by solo practitioners, our analysis would be incomplete if we did not also address the intra-team conflicts which might arise were the professionals to fail to respect their clients' autonomy in a different way by responding paternalistically.

In this section, we propose to look inward. The prior section chronicled the interdisciplinary consultations that would maximize the ability of Jane's lawyering team to advocate zealously for her express desires. We now shift the focus and investigate whether lawyers involved in an interdisciplinary collaboration will be more likely to treat their clients paternalistically. The concern can be simply stated: if the professional mandate of social workers is, at least in part, to attend to their clients' best interests,[55] will the lawyer members of the interdisciplinary team be so tainted by this perspective as to be unable to respect sufficiently their clients' decisionmaking?

Again, a case example drawn from our practice will help illuminate this ethical puzzle.

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An active sixteen-year-old with a winning smile, Rob was a sports star whose skills ranged from football to basketball. While no one doubted his athletic ability, his educational achievements were severely limited. Rob tried hard, but his school records showed a failing student with significant delays in reading, math and written expression. His mother had requested special education services for her son while he was still in elementary school. The minimal progress that he had accomplished with special services in the lower grades soon evaporated as Rob entered the public, neighborhood high school. Independent testing confirmed that he had a severe language-based learning disability and profound attention deficit/hyperactivity disorder ("ADHD"). The combination of those limitations often contributed to Rob's frequent violation of school rules. The pattern became all too predictable: Rob would have difficulty understanding the lessons, lose concentration, be reprimanded for being disruptive, and fail another class.

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[55] *See* text accompanying note 14, *supra*, regarding the ethical obligations of social workers.

Given the severity of his ADHD, Rob's mother sought advice from his pediatrician, who referred Rob to a pediatric neurologist for a pharmacological assessment. Over the next several years, Rob tried a range of ADHD prescribed medications with little evident success. Many carried side effects which worried the family (including a perceived concern that his growth was being stunted). And, even when medicated for ADHD, Rob did not see any measurable improvement in his educational progress. Therefore, at age fourteen and under medical supervision, Rob stopped taking any ADHD medications.

In desperation, the family contacted the local law school clinic with an interdisciplinary focus, which agreed to represent him[56] in his efforts to find an appropriate out-of-district school placement. After much investigation, an alternative high school with a comprehensive therapeutic approach agreed to accept Rob. But, all too quickly, Rob risked more failure. His new special education trained teachers reported that his ADHD was so severely compromising Rob's ability to learn that he could not be promoted and that high school graduation was unlikely; an independent neuropsychological evaluation confirmed that his ADHD was pervasive and warranted treatment. Further medical assessment and academic testing also recommended ADHD medication.

Throughout the lawyering team's work with Rob, he remained steadfast in his two goals: to get an education and to stay off medications. "I've tried all their pills and I just get more jumpy. I'm not putting any more stuff in my body." Rob's neurologist acknowledged that individual patient experiences with ADHD medications are quite varied; while some do report a decrease in symptoms with certain medications, others find little, if any, improved functioning. Further, he indicated that it is not unusual for it to take a few trials and errors to identify the medication that is optimum for any given patient. Therefore, he believed it was possible, though not guaranteed, that Rob could find significant relief were he to agree to try another ADHD medication. Rob, supported by his mother, declined any further medical interventions. However, as school progress continued to prove elusive, his mother grew increasingly frustrated. She knew she

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[56] In our example, Rob is a high school teenager with very clear goals. He had been making significant decisions regarding his medical care and had specific objectives for his education. Therefore we have assumed that the lawyering team might well define Rob as the client, even though his mother would still need to be consulted in educational decision-making in the special education process. *See* 20 U.S.C. §1414 (d) (1)(B) (defining the members of the "individualized education program team" to include the parents of the child with a disability and the child "whenever appropriate"). This question is complicated, and special education practitioners take different approaches to the question of whether the client is the parent or the child.

could not force her teenage son to accept the medications; long gone were the days in which she could overpower him. But she kept hoping, perhaps unrealistically, that some miracle cure could be found in time to help her son succeed.

While Rob's lawyers, in consultation with the clinic's social worker, did obtain an out of district placement in a specialized program designed for students with learning and behavioral disabilities, school success continued to elude Rob. At the end of his first term in the new school, his new special education teachers reported that they had never seen a student with such difficulty attending to task even where the class program had been modified in length and structure to accommodate Rob and other classmates with special needs. Rob risked failing two core subjects for the year, which would put in jeopardy his promotion to the 11th grade. In an effort to forestall another school failure, the legal team requested that Rob's individualized education program team ("IEP Team") reconvene to assess Rob's lack of progress.

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As in the zeal case study involving Jane,[57] we assume that, when the interdisciplinary legal team comprised of a student lawyer, supervising attorney, and a consultant social worker offered to represent Rob in his efforts to obtain a more appropriate educational program tailored to his special needs, each member advised Rob of her/his respective role. We trust that the legal team members described their particular responsibilities clearly to Rob at the intake meeting (and later to his mother[58]), expressly clarifying that the social worker would not be offering direct counseling services to Rob, but would instead be a consultant to the legal team.[59]

The initial work of the legal team would have proceeded relatively uneventfully for our purposes. Together the legal team members helped the family identify possible alternative school placements, while the lawyers advocated zealously with the school district that an

[57] *See supra* Part I. B.

[58] We will assume that any conversation with Rob's mother took place only after the lawyer/social worker team had obtained Rob's informed consent to discuss his case with her. *See* MODEL RULES, *supra* note 12, R. 1.6(a).

[59] Many commentators have identified the beneficial role which social worker consultants can play in special education cases. Lawyers can learn much from their social worker colleagues in the areas of deciphering educational testing, interviewing and counseling of minors, and building constructive working relationships with members of the educational IEP Team assembled to craft an Individualized Educational Plan ("IEP"). *See* Peters, *supra* note 15; *see also* Kristen Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of the Child's Counsel in Delinquency Cases* (2005) (unpublished manuscript, on file with authors).

out of district placement was required to meet Rob's significant learning needs. Given that Rob supported the transfer to a new school and his failures in the existing program were so well documented, the lawyers and social worker consultant were united in their objective of assisting Rob to obtain a new school placement.

But that cozy alliance risks ethical conflict when Rob is admitted to a new program and the old cycle of educational failure recurs. During the preparation for the upcoming IEP Team meeting, members of the interdisciplinary legal team begin to voice different perspectives on Rob's needs and goals. Given Rob's goal of succeeding in school, the social worker consultant points to significant evidence that Rob should be counseled on the option of another medication trial. Independent evaluations have recommended treatment for his ADHD; medical professionals have supported a new psychopharmacological assessment; and his current teachers attribute his educational failure largely to his inability to attend to task. He would alert Rob's lawyers that Rob's overall functioning, including academic progress, could improve were he to consent to another medication assessment and this would potentially address Rob's goal of graduating.

If, as developed above, Rob's lawyers are fulfilling their role of zealous advocacy, then their goals for the IEP Team meeting should be clear. Rob does not want to recommence ADHD medication; therefore his lawyers should respect Rob's stated interests unless this case falls into some exception to the normal attorney-client relationship. Some may argue that Rob's youth provides just such an exception. Indeed many jurisdictions have redefined the traditional lawyering role when an attorney is representing a minor.[60]

Lawyers' professional mandates contain provisions which place special duties on lawyers representing minors. Model Rule 1.14 recognizes that, on occasion, children's lawyers may need to take protective actions on behalf of a minor like Rob, which would be arguably at odds with zealous advocacy:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client . . . .[61]

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[60] *See* Peters, *supra* n. 15, at n. 20-21.

[61] MODEL RULES, *supra* note 12, R. 1.14(a). *See also* RESTATEMENT, *supra* note 24, §24 (outlining a similar view: "When a client's capacity to make adequately considered decisions in connection with the representation is diminished, . . . because of minority. . . the lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client as stated in Subsection (2)").

If Rob's lawyers were to conclude that he is at risk of substantial harm, then they could choose to honor their sense of his best interests over his stated desire to avoid medication.[62]

Under that permutation, no ethical rift in Rob's interdisciplinary team would occur. All members of the legal team would share a common goal of helping Rob succeed in school. They would agree to confront Rob with the evidence in support of further medical intervention, and do their best to persuade him to reconsider another psychopharmacological consult. If Rob changed his mind, and decided to accept another medication assessment, then so much the better. If Rob remained unalterably opposed to medication, then the legal team would either withdraw or betray its client's wishes.[63]

But reliance on the special ethical rules applicable to children makes our analysis too easy. Any lawyer, even one representing a minor, has an ethical duty to attempt to maintain as normal a lawyer-client relationship as possible.[64] Not only do legal ethics require Rob's attorneys to normalize the professional relationship to the extent possible regardless of his minority status,[65] but Rob is also nearly an adult. By the age of 16, Rob has a voice in his medical care. Indeed some jurisdictions recognize that sixteen year olds have the right to refuse medical treatment.[66] Here, we know that Rob not only does not want to be medicated, but also will reject any efforts by his mother to force the issue.

If we proceed on the assumption that Rob is not an impaired client, but rather a youth who can participate fully in the lawyer-client relationship, the possible ethical tension within the interdisciplinary

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[62] *See also* MODEL RULES, *supra* note 12, R. 1.14, Cmt. [1] ("When the client is a minor . . ., however, maintaining the ordinary client-lawyer relationship may not be possible in all respects").

[63] Under Model Rule 1.16(b), counsel has discretion to withdraw if "withdrawal can be accomplished without material adverse effect on the interests of the client" or if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. . . ." *Id.* at R.1.16(b). In the alternative, one could posit a mandatory withdrawal scenario on these facts given that Rob might decide to fire counsel that proposed he accept ADHD medication. *See id.* at R. 1.16 (a)(3).

There is clearly a practical limit on attorney betrayal in our scenario. No one could force Rob at his age to take medication if he steadfastly refused. However, one could envision more subtle forms of attorney coercion, such as enlisting the help of his mother and his pediatrician to "encourage" Rob to accept another trial of ADHD medication.

[64] *See id.* at R. 1.14 (a).

[65] *See id.* at R. 1.14 (a) and Cmt. [1] ("children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody").

[66] *See generally* Baird v. Attorney General, 371 Mass. 741 (1977)(reviewing the mature minor rules as adopted in other jurisdictions); *see also* Arthur Murphy & Geoffrey Wermuth, *The Right to Decline Medical Treatment in Massachusetts*, 76 MASS. L. REV. 131, 142 (1991).

team becomes much clearer. We can assume that the social worker's position would remain focused on helping Rob resolve his apparently conflicting goals. On the one hand, Rob has said he wants to succeed in school; on the other, he rejects a medical option that could facilitate that success. The social worker on the team would conclude that Rob's best interests would be served by counseling him about the option of medical intervention to curb the adverse effects of his severe ADHD. Let us further assume that the lawyers decline to treat Rob as a client of diminished capacity. Instead the lawyers opt to respect Rob's express goal of rejecting medication due to his status as a mature youth and his wish that he have an advocate for that position at the upcoming IEP Team meeting. In this variation of our story, skeptics of interdisciplinary practice would fear that Rob's legal team would face an intra-team ethical dilemma.

Can the team members' distinct professional cultures and rules be harmonized consistent with their respective obligations to Rob and, if so, how? For this analysis, we need to detail the intra-team discussions that would ensue behind closed doors. We can envision an intra-team meeting convened to plan for the upcoming IEP Team meeting. The lawyers would state their intent to represent Rob's interests zealously by confirming that, if Rob so instructs them, they will resist any suggestions by third parties to force another medical assessment. On that score, the social worker would have no ethical qualms. As the team advised Rob at the outset, Rob is entitled to zealous representation undiminished by the interdisciplinary collaboration.[67]

Next, the legal team would consider how to counsel Rob on his choices and how to clarify his apparently conflicting goals. Undoubtedly, the social worker would note that absent medical intervention, the accomplishment of Rob's other stated goal of succeeding in school was in jeopardy. A litany of evidence supports his view. By all accounts, Rob's performance at the new placement is being undermined by his uncontrolled ADHD. Therefore, the consultant might urge the lawyers to counsel their client about the various professionals' opinions about medication and explain that, if he were to find an appropriate medication, he would likely find relief from some of his symptoms.

How would the lawyers respond? On our facts the social worker consultant has accurately relayed the medical evidence which is at odds with one of Rob's stated goals—avoiding medication. Furthermore, we must assume that the lawyers are reluctant to ignore their consultant's professional opinion. The social worker is their colleague; they have willingly joined an interdisciplinary team for the ex-

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[67] *See supra* Part I. B.

press purpose of eliciting insights from other professional quarters. To reject peremptorily their consultant's findings is directly to reject their client's interests and, indirectly, to reject interdisciplinary practice.

Instead, we should assume that the social worker's presentation has sorely tested the lawyers' resolve to plow forward at the IEP Team meeting with Rob's stated goal of no medication. Not only must the lawyers acknowledge the significant amount of expert evidence which contradicts Rob's objective of rejecting medication, but they would likely admit personal reservations about the propriety of a student risking his education when a medical intervention could possibly break the cycle of school failure. Especially here, where Rob's companion goal of getting an education is at risk, the lawyers would be tempted to betray Rob's medication position in order to maximize the likelihood that he would graduate.

Should the intra-team meeting adjourn with that result, the legal team will counsel Rob with its agenda front and center rather than Rob's. The counseling session would become a forum for persuading Rob that his rejection of medication is wrong-headed. In this scenario, the team members hope that they can persuade Rob into agreeing to another medication assessment. If successful, Rob will have lost his champion at the upcoming IEP Team meeting. Rob's lawyers will no longer be representing their client zealously; rather they will have succumbed to paternalism and risked betraying their client. As we have discussed above, in reviewing the dictates of Model Rule 1.16,[68] either they will recognize their duty to withdraw or they will be fired.

But let us propose a different, arguably more realistic, counseling scenario. If the team members acknowledge their concern with Rob's stated anti-medication goal, they owe a duty to Rob to discuss their reservations with him.[69] The process by which the legal team informs Rob of its concerns is key. In advance of that session, the legal team, including the social worker, would need to meet to plan the upcoming counseling session.

The more nuanced intra-team discussions might involve social work consultation on a number of issues related to process, as well as content. The social worker might share with the legal team specific information about Rob's ADHD and learning disabilities and how they might affect the counseling/decisionmaking process—both how

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[68] *See supra* text accompanying note 51.

[69] The lawyer's professional duty to counsel Rob is found in her duty to keep her client apprised of case developments and her duty to advocate for her client's goals. *See* MODEL RULES, *supra* note 12, R. 1.2(a) and R. 1.4. Similarly, the social worker's ethical code requires him to advise his client of likely outcomes. *See* SOCIAL WORKER CODE, *supra* note 11.

Rob is able to take in information and how the lawyers might present information most effectively. There may be special considerations with respect to the complexity of sentence structure, language, pacing and organization of information. The social worker could also provide some insight into developmental and emotional issues that might affect communications with an adolescent—the importance of being heard and respected, of feeling in control, of not feeling "different." The social worker could also suggest how the legal team might elicit and more fully explore Rob's underlying interests, as well as suggest how to respond more fully to Rob's emotional concerns.

After an intra-team consultation with the social worker, a more effective counseling session with Rob might proceed like this:[70]

> Student lawyer: Rob, we want you to know that we are here to represent you and what you want to happen at this point. You've mentioned two things that are important to you. One, you want to do well in school and graduate with your class, and two, you do not want to consider getting back on medication. Are we right about that?
>
> Rob: Uh huh.
>
> Student lawyer: As we've told you before, it will ultimately be your decision whether or not to take medicine for your ADHD. It is your body, your decision, and no one can physically force you to take medication. We understand that you had been on a number of medications in the past and some had some pretty significant side effects. A few of them made you feel jumpy and "out of it" and one in particular affected your growth. Were there any other particular concerns you had about medication?
>
> Rob: I don't like feeling that I might need to depend on medication for the rest of my life. It's a hassle. It makes me feel like I can't handle myself—like I'm weak.
>
> Student lawyer: With respect to the ADHD medication, would it make a difference to you if it was not a lifetime commitment? We could get information about that if it would be helpful to you. And when you say "It's a hassle"—are you thinking of anything in particular?

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[70] While this dialogue presumes that only the clinic student and client participated, we certainly encourage legal teams to include their social worker colleagues directly in client meetings to the extent that time and resources allow. We include this two-party dialogue to allow our readers to sample the more nuanced, process-conscious, client-centered discussion that can occur when the lawyer's approach is informed by the social work perspective.

[Assume here that Rob describes some "hassles" with the medication and his lawyer addresses them directly.]

It's not unusual for people to feel that way about medication, and it's not an easy decision. If you had a medical problem and there was medicine that would help ease the symptoms or the pain, would that seem "weak"? It might help us to understand how you think of this as different.

[The lawyer might then empathize with the added challenges of having to live with a special medical/learning problem; then there may be some discussion of ADHD as a medical/neurological condition—not something Rob can control fully or "will away" hard as he may try.]

You have some good reasons to think hard about whether taking medication makes sense for you at this point—how it makes you feel about yourself, the hassle and the side-effects.

As you know, Dr. Choi, the neurologist at Children's Hospital, Dr. Brodnosky, the school psychologist, and Dr. Hull, your pediatrician, have all said that they think that medication would very likely help with the problems you've been having at school, although there are no absolute guarantees. And here is why we bring it up—because we know you have said how much you want to do better at school so you can graduate with your class.

If you decide not to consider medication, do you see any other ways of getting the help you need to do better in school?

Rob: If the teachers would just get off my back and out of my face I could do the work.

[The social worker consultant might recognize that Rob is in part externalizing the problem and minimizing the effect of his ADHD.]

Student lawyer: I can certainly talk to your teachers about the importance of working with you in a way that respects your space. Realistically, we can't control fully how teachers respond to students and situations in their classrooms. But can you tell me what is most important to you about how your teachers work with you?

[Rob responds with some details; the student lawyer acknowledges and they plan on how to talk to his teachers.]

Student lawyer: I know how much you want to believe that if you

just try hard enough, you'll be able to manage school. I worry that you put too much pressure on yourself. After all these years, you've had to deal with the fact that no matter how hard you try, the ADHD sometimes gets in the way. You have learned some very helpful ways of dealing with it, but it never goes away.

So before we talk to the IEP Team, we want to be sure we understand what you want us to say. We know that you *want* both—no medication and a good school experience.

Unfortunately, realistically, it may be one or the other.

We can tell them that you don't want to consider taking the medication—even if that means that you will likely continue to have difficulty in school and may not be able to graduate with your class. So the decision comes down to this—neither option gets you everything you would like. By staying off medication, you will avoid the concerns you have about the medication, but you will likely continue having problems at school. By taking medication you may improve your chances of graduating with your class, but you will need to deal with the concerns you have about the medication.

It's not an easy decision.

Rob: Yep.

Student lawyer: I want to be honest with you—I would hate to see you have a tough time with school.

You are bright and talented and I know how much it means to you to graduate on time. I worry that if you don't consider the medication you may lose a critical window of opportunity to change things around for yourself. At the same time, I respect that you are the one who has to live with the medicine. This would be a tough decision for an adult, and you are just 16. But you are old enough for us to respect your decision.

So what are you thinking? Is there anything we can do to help with the decision?

Faced with the adverse evidence and the internal inconsistency of his goals, Rob might grudgingly agree to medication. He also might not budge. Should the latter be the case, the lawyers' duty is clear. Our reasoning at this juncture replays that described in the scenario involving Jane.[71] At the next IEP Team meeting, the lawyers' profes-

[71] *See supra* Part I.B.

sional duty is to advocate zealously for Rob's lawful goal. While the lawyers may have lingering doubts over the propriety of Rob's decision (and their role in enabling that course of action), they will know that the team did its best to apprise Rob of the risks. Rob will likely not be the first client, nor the last, to reach a decision that carries with it significant risks.

What of the professional obligations of the lawyers' social work colleague? He has conducted himself ethically. His duty to advise Rob of the potential adverse consequences of his decision and of an alternative course of action has been satisfied. The social worker's insights have enriched the counseling session with Rob by ensuring a more comprehensive discussion, including the risks and benefits of Rob's chosen path. But the consultant's input in planning the counseling session has also allowed the lawyers to accomplish their professional duties more effectively. While making the counseling session richer, the interdisciplinary collaboration has not undermined the lawyers' duty to remain Rob's zealous advocates.

The counseling session just described demonstrates how Rob's lawyers, having consulted with a skilled social work colleague, can assist their client's decisionmaking in a much more nuanced way than the approach that a "crude" professional would likely take.[72] But the vision of a crude professional is likely unrealistic. After all, even if a professional wanted to, neither the social worker nor the lawyer could *really* be actively paternalistic—they could not jab Rob with a needle and give him his meds, whether Rob wanted them or not. Rob, as a mature youth, will ultimately have the final say.[73]

The collaboration worry—and this may be the biggest worry—is that the teamwork with a skilled social worker will lead the lawyers to be more manipulative and non-neutral than they would be if they were not coupled with a social worker. Rob will always have his lawyers and will always get his legal defense at the IEP Team meeting if he needs it, but lawyers influenced by the wisdom of their social worker colleagues might work on him, and in ways that are much more likely to succeed—subtly, persuasively, kindly, *effectively*. They might make Rob believe that a decision to agree to a new round of medication is his choice, and a good choice.

So the questions are: Is it likely that this concern is valid? Will a

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[72] We borrow the term "crude" from William Simon, who used the word to describe different approaches to the ethical demands of lawyering. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084 (1988).

[73] One might argue that Rob's parent or guardian has the final say, and legally, as long as Rob is a minor, his rights would be voiced by the adult. However, medicating an active teenager against his will is so fraught with practical difficulties that Rob would need to buy into any medication regimen.

lawyer working with a caring, best interest-focused social worker be changed by him in a way that allows for more good-faith lawyer manipulation? If we think that answer is in some ways "yes," is that a bad thing professionally? If it is not, then the worry vanishes. But if we believe that such good intentioned, subtle persuasion is problematic because it disrespects client autonomy, then lawyers engaged in interdisciplinary practice do face another ethical tension.[74] Were this a novel issue unique to such collaboration, we might well worry that the concern is fatal to the interdisciplinary endeavor. However, attorneys have long recognized that they are capable of good-intentioned, effective manipulation.[75] The problem is not new or unique to interdisciplinary work. Thus, while collaboration might increase the risk of attorney manipulation, it is not its root cause.

Viewed from either side of the paternalism/zeal coin, lawyers consulting with social workers do risk becoming less zealous and more paternalistic. But, for the reasons we have outlined above, these concerns are neither new nor unique to interdisciplinary endeavors. If these risks are problematic, they do not stem from the interdisciplinary collaboration, but instead from the demands of effective lawyering. Whether practicing solo or with the benefit of social work colleagues, lawyers will continue to struggle whenever they are confronted with a client they feel is making a bad choice. At least in interdisciplinary practice, there is the solace of knowing that the counseling sessions have been enriched with multiple professional perspectives and that there are colleagues with whom to share the lawyers' angst.

II. THE MANDATED REPORTING CONUNDRUM

The preceding discussion has shown that lawyers working alongside a social worker or similar helping professional might offer a richer quality of legal services as a result of that collaboration. But the collaboration itself introduces a possibly insidious difficulty that arises when a helping professional works in tandem with lawyers—the

[74] While we focus here on a potential breach of the lawyer's professional duties, we also care about any resulting professional dilemmas which social worker colleagues could face. As the scenario has unfolded in this paternalism scenario, however, we submit that the social worker has not violated any of his ethical mandates. Indeed the social worker has advised the lawyers and client of the likely consequences of Rob's decision on himself and others. The social worker's professional duties remain subordinate to those of the lawyers because of the explicit structure of this legal team: the lawyers retained him as a consultant; he is not providing direct service. *See* MODEL RULES, *supra* note 12, at R. 5.3 and text accompanying note 42, *supra*.

[75] *See* Stephen Ellmann, *Lawyers and Clients*, 34 U.C.L.A. L. REV. 717, 721 (1987); Kruse, *supra* note 18, at 75.

worry about inconsistent duties regarding confidentiality of client information. This is an issue that interdisciplinary clinicians raise often, and the one seemingly most elusive in its resolution.[76]

For purposes of our analysis, we make some important preliminary distinctions which matter to our analysis. We first assess the responsibilities of a social worker working within a functioning law firm—an organization whose essential purpose is to provide legal services (even if richer, interdisciplinary legal services) to clients.[77] We then compare that setting to a second social worker placement, in an organization which offers both legal services and mental health services, side by side, and at times independent from one another.[78] Finally, we take up yet a third iteration—using the second placement example (a setting offering both legal and social services) we inquire about the social worker's duties when a lawyer and a social worker collaborate within that agency on the same matter.[79]

A. The Social Worker in a Conventional Law Firm

1. The Puzzle Described

We begin by placing a social worker in an office which is a functional law office. Since much of our audience works at law schools, we will use a clinical program as our example here, even though this analysis applies to any law firm which employs a social worker.[80] Let us assume, then, a law school clinic, operating as a self-contained law firm,[81] with four faculty supervisor/lawyers, twenty-five law students

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[76] We do understand from our conversations with social workers employed in legal settings that, while the question we raise is a very challenging one conceptually, it may in fact arise rather infrequently. We nevertheless believe that it deserves some careful, comprehensive analysis. In our assessment of this issue, we build on some existing scholarship which notes the tension but does not address it comprehensively. *See, e.g.*, Galowitz, *supra* note 17; Gerard F. Glynn, *Multidisciplinary Representation of Children: Conflicts over Disclosures of Client Communications,* 27 J. MARSHALL L. REV. 617 (1994); St. Joan, *supra* note 4; Lois G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practice for People,* 7 CLIN. L. REV. 227, 240 (2000); Heather A. Wydra, *Keeping Secrets Within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client*, 62 FORDHAM L. REV. 1517 (1994).

[77] *See infra* Part II.A.

[78] *See infra* Part II.B.1.

[79] *See infra* Part II.B.2.

[80] We situate the lawyer and social worker in a law school clinic for the reasons described in the previous part. *See supra* text accompanying note 34. The fact of the clinical setting does not affect our analysis of the mandatory reporting obligations in any way.

[81] This assumption seems self-evident, but in fact the example of a law school clinic might introduce complicated questions about the identity of the "firm," especially when several clinics operate within some defined space in a law school. For discussion of this topic, a topic which we have no reason to address here, see Peter A. Joy & Robert B. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLIN. L. REV. 493 (2002).

practicing law under a state court rule treating them as lawyer-equivalents,[82] and a faculty social worker. And let us assume further that in the course of that clinic's work, one of its clients discloses to a law student and to the faculty social worker some details about the client's husband's aggressive physical punishment of the couple's children.

In all states, the law obligates a social worker acting in a professional capacity to report to a state agency evidence or suspicion of abuse or neglect of children or elders.[83] In Massachusetts, for example, a social worker who fails to comply with the mandated reporting statute risks a fine.[84] In other states a social worker who fails to re-

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[82] *See, e.g.,* MASS. SUP. JUD. CT. R. 3:03.

[83] *See* ALA. CODE § 26-14-3 (2001); ALASKA STAT. § 47.17.020 (Michie 1999); ARIZ. REV. STAT. § 13-3620 (2001); ARK. CODE ANN. § 12-12-507 (Michie 2005); CAL. PENAL CODE § 11165.7 (West 2007);. COLO. REV. STAT. § 19-3-304 (2001); CONN. GEN. STAT. § 17a-101 (2001); DEL. CODE ANN. tit. 16, § 903 (2001); D.C. CODE ANN. § 4-1321.02 (1990); FLA. STAT. ch. 39.201 (2002); GA. CODE ANN. § 19-7-5 (2002); HAW. REV. STAT. § 350-1.1 (2002); IDAHO CODE § 16-1619 (Michie 2002); 325 ILL. COMP. STAT. 5/4 (2002); IND. CODE § 31-33-5-1 (2002); IOWA CODE § 232.69 (2002); KAN. STAT. ANN. § 38-1522 (2001); KY. REV. STAT. ANN. § 620.030 (Michie 2002); LA. REV. STAT. ANN. § 14:403 (West 2002); ME. REV. STAT. tit. 22, § 4011-A (West 2001); MD. CODE ANN., FAM. LAW § 5-704 (2002); MASS. GEN. LAWS CH. 119, § 51A (2002); MICH. COMP. LAWS § 722.623 (2002); MINN. STAT. § 626.556 (2001); MISS. CODE ANN. § 43-21-353 (2001); MO. REV. STAT. § 210.115 (2001); MONT. CODE ANN. § 41-3-201 (2002); NEB. REV. STAT. § 28-711 (2002); NEV. REV. STAT. 432B.220 (2002); N.H. REV. STAT. ANN. § 169-C:29 (2002); N.J. STAT. ANN. § 9:6-8.10 (West 2002); N.M. STAT. ANN. § 32A-4-3 (Michie 2002); N.Y. SOC. SERV. LAW § 413 (Consol. 2002); N.C. GEN. STAT. § 7B-301 (2001); N.D. CENT. CODE § 50-25.1-03 (2002); OHIO REV. CODE ANN. § 2151.421 (Banks-Baldwin 2002); OKLA. STAT. tit. 10, § 7103 (2002); OR. REV. STAT. § 419B.010 (2001); PA. STAT. ANN. tit. 23, § 6311 (West 2002); R.I. GEN. LAWS § 40-11-3 (2002); S.C. CODE ANN. § 20-7-510 (2001); S.D. CODIFIED LAWS § 26-8A-3 (Michie 2002); TENN. CODE ANN. § 37-1-403 (2002); TEX. FAM. CODE ANN. § 261.101 (Vernon 2001); UTAH CODE ANN. § 62A-4A-403 (2002); VT. STAT. ANN. tit. 33, § 4913 (2002); VA. CODE ANN. § 63.2-1509 (Michie 2002); WASH. REV. CODE § 26.44.030 (2002); W. VA. CODE § 49-6A-2 (2002); WIS. STAT. § 48.981 (2002); WYO. STAT. ANN. § 14-3-205 (Michie 2002).

Our discussion uses a social worker as an example, but the statutes in question cover many, and indeed most, types of helping professionals, health care workers, school personnel, police, probation officers, and other persons who might encounter abuse and neglect in their occupational roles. *See, e.g.*, MASS. GEN. LAWS c. 119 § 51A, *quoted infra* at note 84. Some statutes include lawyers, as we discuss below (*see* note 96 *infra*), but those states offer an easy—if perhaps unsatisfactory—answer to the puzzle discussed here.

[84] *See, e.g.,* MASS. GEN. LAWS ch. 119 § 51A (2007) (requiring reporting of child abuse). Section 51A reads in relevant part as follows:

> Any physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, optometrist, osteopath, public or private school teacher, educational administrator, guidance or family counselor, day care worker . . ., probation officer, clerk/magistrate of the district courts, parole officer, social worker, foster parent, firefighter or policeman, licensor of the office of child care services or any successor agency, school attendance officer, allied mental health and human services professional as licensed pursuant to . . ., drug and alcoholism counselor, psychiatrist, and clinical social worker, priest, rabbi, clergy member, or-

port risks criminal[85] or (less often) civil[86] liability. In all states, a lawyer[87] is obligated by professional rules not to reveal such information without a client's consent unless some exception, largely not relevant here, may be found.[88] If the social worker employed by a law firm is bound by his statutory obligations, then his mandated reporting duties will control, and he must report to state authorities information learned from the lawyers' clients, without the consent of (and, indeed, over the express objections of) the lawyer and the lawyer's client. In that instance, where an employee of the law firm has revealed information when the lawyer lacks authority to do so, the lawyer will have breached a professional duty to the client. If, in contrast, the social worker's obligations are defined by his role as a member of a law firm team, then he, like the lawyers, will be obligated not to report that information to state authorities. The contrast in obligation and in behavior is dramatic, as is the effect on the client and, perhaps, on the victim of the abuse or neglect.

The social worker employed by the law firm thus needs to know

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dained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, ordained or licensed minister, leader of any church or religious body, or accredited Christian Science practitioner, or person employed by a church or religious body to supervise, educate, coach, train or counsel a child on a regular basis, who, in his professional capacity shall have reasonable cause to believe that a child under the age of eighteen years is suffering physical or emotional injury resulting from abuse inflicted upon him which causes harm or substantial risk of harm to the child's health or welfare including sexual abuse, or from neglect, including malnutrition, or who is determined to be physically dependent upon an addictive drug at birth, shall immediately report such condition to the [D]epartment [of Social Services] by oral communication and by making a written report within forty-eight hours after such oral communication; .... Any such person so required to make such oral and written reports who fails to do so shall be punished by a fine of not more than one thousand dollars. Any person who knowingly files a report of child abuse that is frivolous shall be punished by a fine of not more than one thousand dollars.

See also MASS. GEN. LAWS ch. 19A § 15 (required reporting of elder abuse and neglect).

[85] *See, e.g.* CAL. PENAL CODE § 11166(c) (West 2007) ("Any mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jail or by a fine of one thousand dollars ($1,000) or by both that imprisonment and fine.").

[86] *See, e.g.* Kimberly S.M. v. Bradford Central School, 649 N.Y.S.2d 588 (A.D. Dept. 1996); *see also* Steven J. Singley, Comment, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. JUV. L. 236 (1998) (listing seven states with statutory civil liability for failure to report). *See also* note 153 *infra* and accompanying text.

[87] In states where a student may practice as a lawyer, the student's obligations are equivalent to those of fully licensed lawyers. *See* Joy & Kuehn, *supra* note 81, at 497-98.

[88] *See, e.g.,* MASS. SUP. JUD. CT. R. 3:07, R. 1.6. The template for most states' confidentiality rules comes from the American Bar Association's Model Rules of Professional Conduct. *See* MODEL RULES, *supra* note 12, R. 1.6.

whether his obligations are governed by the statute requiring him, as a social worker, to report suspected abuse and neglect to the state, or by the legal profession's binding rules requiring him, as a member of a law firm team, to maintain the secrets of his clients. Much rests on the answer to that puzzle.[89]

2. *The Puzzle Assessed*

a. *The Duty of Lawyers*

Let us start by describing the scope of the lawyer's duty of confidentiality. It is obvious that if lawyers are required to report child or elder abuse and neglect, then the conflict of roles disappears, for both social workers and lawyers would be subject to the same reporting requirements. In fact, in most states lawyers have no such duty,[90] so the role tension for the social worker remains.

An assessment of a lawyer's responsibility requires that we start with the rules governing the ethical responsibilities of lawyers. In all states, a lawyer is prohibited, under penalty of professional discipline, from revealing her client's confidences unless the client consents or some exception to the duty of confidentiality exists.[91] Since it would

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[89] As Jacqueline St. Joan has written, in describing her interdisciplinary law school clinic's experience with this issue:

> What is a social worker in a law office to do when exposed to information that gives rise to a reasonable suspicion of child abuse or neglect? Report the information to authorities, as is required by mandatory reporting statutes, or keep the information confidential as attorneys are required to do? What is a lawyer who collaborates with a social worker required to disclose to clients about the mandatory reporting obligations of social workers in the office? Is the risk of disclosure too great to the client in the lawyer's view? Is the risk of nondisclosure too great to the child in the social worker's view? Whatever practices a clinic adopts with respect to collaborations, what are the effects of those practices on the well-being of children?

St. Joan, *supra* note 4, at 426-28 (footnotes omitted).

[90] *See* Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 516-20 (1998)(reviewing lawyers' obligations to report abuse and neglect).

[91] Most states have adopted some version of the ABA Model Rules, *see supra* note 12, and thus use an equivalent of Model Rule 1.6, which declares that lawyers shall not reveal "information related to the representation of a client" unless the client so permits, subject to some limited exceptions. *See* MODEL RULES, *supra* note 12, R. 1.6(a). *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2007) (47 states and the District of Columbia have adopted a version of the Model Rules as of 2006). Fewer states employ a version of the ABA's Model Code of Professional Responsibility, which offers a client similar protection for "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." *See* MODEL CODE, *supra* note 24, DR 4-101(A), (B)(1). *See* GILLERS & SIMON, *supra*, at 3 (2 states retain a version of the Model Code). California follows neither the Model Rules nor the Model Code, but by statute requires lawyers "[t]o maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client," *see* CAL. BUS. & PROF. CODE § 6068(e)(1), subject to one exception discussed below. *See* text accompanying note 93

be rare for a client to consent to disclosure of suspected abuse, the exceptions concerning future harm to third persons are more relevant. In states following the principles established by the ABA's standards, lawyers possess the *discretion* to reveal otherwise protected information "to prevent reasonably certain death or substantial bodily harm" (in Rules jurisdictions[92] and California[93]) or to disclose "[t]he intention of [a] client to commit a crime and the information necessary to prevent the crime" (in Code jurisdictions[94]). There are, no doubt, many situations involving suspected child or elder abuse which would satisfy these requirements,[95] affording lawyers permission to reveal the abuse to state authorities. But in states following the ABA's standards, and in California, no lawyering rule *requires* any such report.[96]

Nine states, though, depart from the ABA's principles and *mandate* that lawyers reveal information in some specified settings, almost always in an effort to prevent death or substantial bodily harm.[97] In those states, a lawyer's duties and a social worker's duties are nearly coexistent—but not entirely so, and thus the tension which we describe here would still exist. Consider, for instance, a state such as Connecticut, which has adopted a child abuse reporting statute[98]

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infra.

92 MODEL RULES, *supra* note 12, at R. 1.6(b)(1).

93 CAL. BUS. & PROF. CODE § 6068(e)(2) ("to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual").

94 MODEL CODE, *supra* note 24, at DR 4-101(C)(3). *See also* N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.19; DR 4-101(c)(3) (equivalent language).

95 *See, e.g.*, Howard Davidson, *Reporting Suspicions of Child Abuse: What Must a Family Lawyer Do?*, 17-WTR FAM. ADVOC. 50 (1995); Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992); Christine A. Picker, *The Intersection of Domestic Violence and Child Abuse: Ethical Considerations and Tort Issues by Attorneys Who Represent Battered Women with Children*, 12 ST. LOUIS U. PUB. L. REV. 69 (1993); Robin Rosencrantz, *Rejecting "Hear No Evil Speak No Evil": Expanding the Attorney's Role in Child Abuse Reporting*, 8 GEO. J. LEGAL ETHICS 327 (1995); Lisa Hansen, Note, *Attorney's Duty to Report Child Abuse*, 19 J. AM. ACAD. MATRIM. L. 59 (2004).

96 For an argument that lawyers should be mandated reporters, at least in the context of financial exploitation, see Carolyn L. Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?*, 38 AKRON L. REV. 707 (2005). For a contrary sentiment focusing on child abuse, see Adrienne Jennings Lockie, *Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse*, 36 N.M. L. REV. 125 (2006).

97 The nine states are Arizona, Connecticut, Florida, Illinois, Nevada, North Dakota, Texas, Virginia and Wisconsin. *See* GILLERS & SIMON, *supra* note 91, at 82-88. All but one of the nine states limit this duty to actions which are criminal, and most require a likelihood of death or substantial bodily harm. *Id. See, e.g.*, N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2005). The lone exception is Florida, which declares that a lawyer "shall reveal" information the lawyer believes "necessary (1) to prevent a client from committing a crime or (2) to prevent death or substantial bodily harm to another." FL. ST. BAR Rule 4-1.6 (2005).

98 *See* CONN. GEN. STAT. ANN. § 17a-101(b).

which covers social workers,[99] and also has a version of Rule 1.6 which states that "a lawyer *shall* reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."[100] It is easy to imagine a circumstance where a social worker and a lawyer working together in a law school clinic learn information from a client which the social worker would be obligated by the state statute to report, but which would not meet the standards of the lawyer's duty to report under Rule 1.6. Not all evidence of abuse covered by the social worker's reporting duty will qualify as a client's future "criminal act . . . likely to result in . . . substantial bodily harm."[101]

More specifically, the Connecticut statute imposes its duties upon any identified helping professional who "has reasonable cause to suspect or believe that any child under the age of eighteen years (1) has been abused or neglected, as defined in section 46b-120, [or] (2) has had nonaccidental physical injury . . . ."[102] A suspicion[103] that a client's child has suffered the abuse or the accident just described will frequently not be sufficient grounds for a lawyer to reveal that information to a state agency to prevent "likely . . . death or substantial bodily harm." Therefore, even in a "mandatory lawyer reporting" jurisdiction like Connecticut, the reporting duties of a lawyer and those of a social worker will often remain in conflict.[104] The question of whose duties control thus remains a critical one, even in such a jurisdiction.[105]

Several states either expressly define lawyers as mandated report-

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[99] *Id.*

[100] CONN. R. PROF'L CONDUCT R. 1.6(b) (emphasis added).

[101] *Id.*

[102] CONN. GEN. STAT. ANN. § 17a-101(b). Section 46b-120 in turn provides: "(4) 'abused' means that a child or youth (A) has been inflicted with physical injury or injuries other than by accidental means, or (B) has injuries that are at variance with the history given of them, or (C) is in a condition that is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation or exploitation, deprivation of necessities, emotional maltreatment or cruel punishment."

[103] Statutes commonly refer to reasonable cause to "suspect" child abuse. While the term "suspect" or "suspicion" has not been defined explicitly, the available authority implies that some reasonable inferences will be sufficient. *See, e.g.*, Wilkenson ex rel. Wilkenson v. Russell, 182 F.3d 89, 100 (2d Cir. 1999); Hawley v. Nelson, 968 F.Supp. 1372, 1386 (E.D. Mo. 1997); Hazlett v. Evans, 943 F. Supp. 785, 787 (E.D. Ky. 1996).

[104] Another example of the disjuncture between the lawyers' reporting discretion and the social worker's reporting obligation is that of emotional injury, which is expressly covered by mandatory reporting statutes but is not covered by Rule 1.6's exception for "death or substantial bodily harm."

[105] *See also* note 109 *infra* (noting the requirement in Connecticut's rule that *the client* intend the crime, thus not covering crimes intended against the client or her family).

ers along with social workers and similar helping professionals,[106] or require "all persons" to act as mandated reporters without exempting lawyers.[107] In such states, the problem we address here simply does not exist, of course. Lawyers and social workers' obligation in those states are by statute coextensive, and no role tensions (at least in this realm) exist in those law firms.

b. The Duty of Social Workers Employed By Lawyers

Let us proceed, then, with the working hypothesis that a social worker working as a staff employee in a law firm in a state such as Connecticut will, on occasion, encounter evidence within the law firm which qualifies as reportable events under the state's mandated reporting law, but which at the same time is protected from revelation by the state's version of Rule 1.6. To make this hypothesis more concrete, let us develop a bit more the simple fact pattern described earlier:[108]

> A student lawyer, a faculty supervisor, and the clinic social worker meet with a woman, Sally, whom the clinic represents in a contested divorce proceeding against her husband Ted. During the meeting, Sally tells her legal team that Ted, when drinking, sometimes hits his 6- and 8-year old children with his fists. The most recent incident of this violence occurred a month ago, when the family was reunited for a short spell. Right now the children stay with Sally, and visitation and custody are matters for which the clinic is working on Sally's behalf. Sally believes that the children are safe as long as they are not left unsupervised with her husband. She does not want the state Department of Children and Families ("DCF") to get involved in her life.

The student lawyer who has heard the information cannot reveal it unless Sally consents.[109] By contrast, unless his role within the clinic

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[106] *See* MISS. CODE ANN. § 43-21-353 (2001); NEV. REV. STAT. 432B.220 (2002); OHIO REV. CODE ANN. § 2151.421 (Banks-Baldwin 2002)(states identifying all attorneys as mandated reporters). *See also* ARK. CODE ANN. § 12-12-507 (Michie 2005); CAL. PENAL CODE § 11165.7 (West 2007); N.Y. SOC. SERV. LAW § 413 (Consol. 2002)(states identifying district attorneys/prosecuting attorneys as mandated reporters).

[107] States requiring "any person" to report abuse or neglect include Indiana, Louisiana, New Jersey, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, and Wyoming. *See* IND. CODE § 31-33-5-1 (2002); LA. REV. STAT. ANN. § 14:403 (West 2002); N.J. STAT. ANN. § 9:6-8.10 (West 2002); N.C. GEN. STAT. § 7B-301 (2001); OKLA. STAT. tit. 10, § 7103 (2002); OR. REV. STAT. § 419B.010 (2001); R.I. GEN. LAWS § 40-11-3 (2002); TENN. CODE ANN. § 37-1-403 (2002); TEX. FAM. CODE ANN. § 261.101 (Vernon 2001); UTAH CODE ANN. § 62A-4A-403 (2002); WYO. STAT. ANN. § 14-3-205 (Michie 2002).

[108] *See* text accompanying note 82 *supra*.

[109] Recall that in Connecticut a lawyer "a lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."

provides some exemption, the social worker must report what he has learned to the state agency authorized to investigate child abuse. Let us assume that, for now, Sally and her legal team believe it prudent not to report Ted to the state agency. Sally will not permit reporting, and the student and her supervisor respect Sally's wishes and agree with her judgment that DCF intervention is not necessary at this time.

Must the social worker nevertheless report the information? It is well accepted that a nonlawyer working as an employee in a law firm is bound to respect the lawyers' ethical obligations, and that lawyers must ensure that their employees do so.[110] According to Rule 5.3 of the Model Rules of Professional Conduct, lawyers must make reasonable efforts to ensure that nonlawyers working with them comply with the lawyers' ethical obligations.[111] The Restatement (Third) of the Law Governing Lawyers, a treatise with no independent authority[112] but which aims to summarize the common law of lawyering, affirms that a lawyer may be liable for a breach of professional obligation if a "nonlawyer's conduct would be a violation of the applicable lawyer code if engaged in by a lawyer," if the lawyer has sufficient knowledge of that conduct.[113] The Restatement does not directly describe the obligations of nonlawyers, but it plainly implies that nonlawyers, like the social worker in our example, must comply with the ethical obliga-

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CONN. R. PROF'L CONDUCT R. 1.6(b). In the example provided, the client has no intention to commit any crime, so the lawyer's obligation is not triggered, and the lawyer otherwise has no discretion to reveal the facts she learns from her client except if the client gives permission.

110 *See, e.g.*, RESTATEMENT, *supra* note 24, § 11(4)(a), (b).

111 See MODEL RULES, *supra* note 12, R. 5.3(c). It is true, though, that the text of Rule 5.3(c) is not without its own ambiguity. The Rule, of course, only applies to lawyers, so it cannot declare in any explicit fashion that nonlawyers working in law firms must comply with all the lawyers' standards of professional conduct. Instead, it establishes the duties of lawyers to insure that their nonlawyer assistants comply with the lawyer's obligations. But, in understandable fairness to lawyers, its language offers some wiggle room, lest a lawyer risk being disciplined for an employee's actions when the lawyer had no responsibility for nor control over that conduct. Thus, a lawyer is in violation of Rule 5.3 only if she "orders, or with knowledge of the specific conduct, ratifies the conduct" (*id.* at R. 5.3(c)(1)), or

> has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.

Id. at 5.3(c)(2).

112 *See* Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697 (1998) (review of the deliberation and debate about the Restatement); Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference Is Due to the Restaters or "Who are These Guys, Anyway?,"* 75 IND. L.J. 541, 548 (2000) (Restatement has no independent legal force); Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25, 30 (1993); Fred C. Zacharias, *Fact and Fiction in the Restatement of Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903, 926 (1993).

113 RESTATEMENT, *supra* note 24, § 11(4)(b).

tions of the law firm's lawyers.[114]

It may be tempting to conclude that the lawyer's Rule 5.3 obligation confirms that a social worker working within a law firm must comply with Rule 1.6 in all respects, but Rule 5.3's strictures cannot support that conclusion. A law firm might respond to the cross-professional role tension either by refusing to collaborate with any mandated reporter, and thus fully protecting its client's secrets, or alternatively by establishing stringent protocols ("walls"[115]) to deter access by any mandated reporter to the kind of disclosures which might trigger his reporting duty, combined with an informed consent protocol by which a client would authorize the reporting in those instances where the walls have failed.[116] Either stance seemingly would satisfy Rule 5.3. No commentator has ever proposed the former, but many commentators assume the latter as a given in interdisciplinary collaboration.[117] Both stances inhibit substantially the prospect of effective interdisciplinary lawyering work, the former inherently so, and the latter by its ineluctable interference with the free sharing of information among lawyers, clients, and law firm employees.[118]

Our aim here is to investigate whether a law firm indeed must make the choice either to eschew interdisciplinary work entirely or to establish internal walls to limit free communication about client information. If the mandate to report survives the collaboration, then a law firm must make that choice. If the mandate to report does not apply to law firm employees, then the firm is free to represent its clients in the conventional manner. The question we investigate, then, may be stated in this way: Where applicable law forbids a law firm,

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[114] The Restatement does not offer any direct authority for its proposition, but it is a non-controversial one. The cases it cites as authority tend to arise in the context of unauthorized solicitation—where a law firm clerical staff member has solicited business in a manner forbidden by the lawyers' professional codes. *See, e.g.*, Mays v. Neal, 938 S.W.2d 830 (Ark. 1997); Florida Bar v. Lawless, 640 So.2d 1098 (Fla. 1994); In re Schreiber, 632 N.E.2d 362 (Ind. 1994).

[115] *See* St. Joan, *supra* note 4, at 437-39 (describing her clinic's "confidentiality walls").

[116] No firm-wide protocols can ensure that a mandated reporter employed within the firm will never encounter client information triggering a reporting duty. That duty may be triggered by information learned from a client, from a third party, from a lawyer's or paralegal's conversations, or from a document in a client's file. *See* District of Columbia Bar Association Ethics Op. 282 (1998) [hereinafter DC Op. 282] ("the analysis [of a reporting obligation] does not change depending on the source of the information"). Because of the inherent risks involved in establishing such protective protocols, if the reporting duty in fact applies, a client must be informed of that risk and must consent to any resulting disclosures. Otherwise, a law firm will have breached its duties to maintain the confidentiality of its client's information.

[117] *See* Retkin, Stein & Draimin, *supra* note 4, at 556-57; St. Joan, *supra* note 4, at 437-39; Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J.L. & POL'Y 195, 222-26 (2003).

[118] *See infra* text accompanying notes 166-67.

including its staff, to reveal its client secrets, and where a member of the law firm's staff would, if employed in a professional capacity elsewhere, be required by applicable law to report suspected abuse and neglect, which of the competing legal obligations survives?

There exists some limited authority from ethics committees and attorney general opinions, but no reported appellate or trial court decisions, addressing this question.[119] Several law review articles note the tension between the duties, but without offering a discrete resolution to it.[120] None of the available authority offers any binding ruling on the question we investigate.[121] Because of the absence of any reliable authority, we address the question as though we were a court[122] hearing the matter as one of first impression. What ought to be the correct answer to this question?[123]

Our assessment is that a court facing this dilemma would likely conclude that a social worker employed within a law firm ought to be treated as a member of a legal team and not as a free-standing social worker.[124] We conclude that the arguments supporting this proposi-

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[119] *See* DC Op. 282, *supra* note 116; Kansas Att'y Gen. Op. No. 01-28, 2001 WL 930603 (2001) [hereinafter Kansas AG Op. 01-28]; Los Angeles County Public Defender, *Social Workers' Obligations When Confronted with Observations or Evidence of Reportable Child Abuse*, Policies and Procedures Opinion E-2 (2000) [hereinafter LAPD Op. E-2]; Maryland Atty. Gen. Op. 90-007, 75 Md. Op. Att'y Gen. 76, 1990 WL 595302 (1990) [hereinafter Maryland AG Op. 90-007]; State Bar of Nevada, Standing Comm. on Ethics and Professional Responsibility Op. 30 (2005) [hereinafter Nevada Op. 30]; *see also* Gina Yarbrough & Ann E. Tobey, *When Professional Responsibilities Conflict: Attorney-Client Privilege v. Mandated Reporting*, in WHO SPEAKS FOR THIS CHILD? (Mass. Cont. Legal Educ. 1999) (lawyer's obligations override statutory mandated reporting duties).

[120] Professor Jacqueline St. Joan implies that a social worker may report at his discretion, and offers reasons why he might not want to do so. Otherwise, she assumes that a social worker who actually possesses the reportable information will report it. *See* St. Joan, *supra* note 4, at 457. Professor Gerald Glynn reports that case law has not yet resolved this issue. Glynn, *supra* note 76, at 641.

[121] The Kansas Attorney General opinion, *see* note 119 *supra*, offers legal analysis but it does not have the force of law in that state. *See* Perry v. Board of County Com'rs of County of Franklin, 281 Kan. 801, 132 P.3d 1279 (2006)(Kansas Attorney General opinions are not binding on courts).

[122] We imagine ourselves as a court rather than an ethics committee, for two reasons. First, the opinions of ethics committees are usually entirely advisory and non-binding. *See* U.S. v. Smallwood, 365 F. Supp.2d 689 (E.D. Va. 2005); Papyrus Technology Corp. v. New York Stock Exchange, Inc., 325 F. Supp.2d 270 (S.D.N.Y. 2004). Second, the question posed in this Part has its most critical implications for matters governed by state courts—discipline for the lawyers or criminal or civil penalties for the mandated reporters.

[123] We note here our potential biases, given where we work and how we work. Lynn Barenberg is a social worker employed by the Boston College Legal Assistance Bureau, where Alexis Anderson and Paul Tremblay work as clinical instructors. Our comfort level, and that of our clients, favors a conclusion which protects Lynn from having to reveal client secrets. But we also emphasize our explicit aspiration, in the scholarly tradition, to be as dispassionate as possible in our assessment of the arguments we identify. We hope to be as transparent as possible as we assess the competing considerations.

[124] *See* Nevada Op. 30, *supra* note 119, at 9 (on the conflict between a Nevada attorney's

tion are not without considerable doubt, but on balance are more persuasive than their opposing counterparts. We also assert that this conclusion applies regardless of the role played by the social worker within the law firm, so long as he is in fact part of the interdisciplinary lawyering team which is representing the client. As we see below,[125] in hybrid offices offering separate social services and legal services, but not in an integrated fashion, the conclusion we draw likely cannot survive.

Our conclusion is grounded in two understandings, which together we find persuasive. First, we are by definition[126] concerned with jurisdictions in which lawyers are not obligated to serve as mandated reporters (and often would be prohibited from making such reports over a client's objection), reflecting a considered choice by the legislature that the benefits of the attorney-client confidentiality principle outweigh whatever benefits ensue from mandated reporting. Second, those relatively rare court decisions considering the scope of a lawyer's permission to reveal client secrets in order to prevent imminent harm tend to stress the importance of a client's trust that a lawyer will only breach confidences in the most extreme circumstances.[127] These two considerations, after weighing them against the competing contrary considerations, lead us to the conclusions we reach.[128]

We start with the recognition that in each of the statutory schemes with which we are concerned, a state legislature has imposed upon certain identified helping professions a requirement that their members breach whatever preexisting confidentiality duties they might have to their clients or patients and report to some authorities any suspected abuse and neglect of children and elders. In each of the jurisdictions in that universe, the legislature has opted to exclude the

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Rule 1.6 duties and mandated reporting duties, predicting that "when faced with the issue the Nevada Supreme Court will place the duty of confidentiality ahead of the statutory reporting obligation").

125 *See* text accompanying notes 156 *infra*.

126 *See* text accompanying notes 97-107 *supra*.

127 *See, e.g.,* Purcell v. Dist. Atty., Suffolk, 676 N.E.2d 436, 440 (Mass. 1997) (concluding that the Rule 1.6 exceptions "chill[ ] free discourse between lawyer and client and reduc[e] the prospect that the lawyer will learn of a serious threat to the well-being of others").

128 In arriving at our conclusion, we accept a premise which we ought to make explicit here. We assume that in the settings where the statutory mandate will not apply, the social worker's "client" is essentially the lawyers, or the law firm. As we see below, *see infra* text at note 156, our conclusion changes when the social worker has established a professional relationship with the lawyer's client independent of the lawyer's consulting with the social worker. Thus, to the extent that the social worker must have some client when he offers his assistance, we assume that his client is the lawyer or the law firm. *See* Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert Witness*, 13 GEO. J. LEGAL ETHICS 405, 410-15 (2000) (noting that lawyers serving as expert witnesses do not establish an attorney-client relationship with the client of the lawyer hiring the expert).

legal profession from this requirement. One might debate the wisdom of that exclusion as a principled matter,[129] or one might cynically wonder whether the exclusion is indeed principled at all, but instead a reflection of the political and contributory clout of lawyers relative to those professions which were not excluded.[130] But, as a matter of substantive law, the distinction between the professions is unambiguous.

The inferences that flow from that distinction are relatively unambiguous. The state legislatures have concluded that confidentiality within the attorney-client relationship is more sacred than that within the other helping professions. The state lawmakers have decided that, whatever the benefits might be to actual or potential victims of reporting suspected abuse or neglect, those benefits do not outweigh the harm such reporting would cause to the lawyer/client relationship.[131] Perhaps the legislators understood that lawyers already have express discretion to disclose the information necessary to prevent serious, imminent harm to victims,[132] and thus did not perceive the need for additional reporting obligations. We might speculate about the reasons, but the baseline conclusion is plain—lawyers are exempt from the broader helping professions' duties to report abuse.

Given this premise, it is difficult to conclude that a legislature intended that lawyers who hire social workers on staff should, simply because of that fact, suddenly be governed by the reporting duty. A report by a social worker is, of course, identical to a report by a lawyer. The confidentiality and privilege duties otherwise applying to the lawyer/client interaction would be breached.

The limited authority available from agencies, bar associations and attorney general offices does not undermine this conclusion, although that authority confirms the thorniness and the ambiguity surrounding this question. In addition, while some precedent on the relationship between the attorney-client privilege and mandated reporting duties might appear inconsistent with the conclusion we arrive at, on reflection that precedent is distinguishable, as we address be-

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129 For a rich discussion of the skeptical basis for the confidentiality principle, see Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

130 Were doctors not included as mandated reporters, the cynic's argument would be more substantial. But in all of the states where our question matters, physicians and psychiatrists of every stripe are mandated reporters, and lawyers are not. *See, e.g.,* CONN. GEN. STAT. § 17a-101 (2001); FLA. STAT. ch. 39.201 (2002); MASS. GEN. LAWS ch. 119, § 51A (2002). Because doctors as a professional group seem to be as politically and financially endowed as lawyers, the cynic's view is interesting but not persuasive.

131 *See* Brook Albrandt, Note, *Turning in the Client: Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX. L. REV. 655, 666-672 (2002) (presenting policy arguments against making attorneys mandatory reporters in the specific context of family/domestic violence cases).

132 MODEL RULES, *supra* note 12, at R. 1.6(b)(2).

low. We first look at the few published pronouncements on the question we are attempting to answer.

At least two sources have questioned whether a social worker employed by a law firm ought to be deemed as practicing in a "professional capacity" for purposes of a state's mandated reporting law. The Los Angeles County Public Defender (LAPD) issued a formal opinion addressing the mandated reporting obligations of social workers working within the Public Defender's office. That agency concluded that a social worker working within the LAPD office is not a "health care practitioner" when serving as a consultant to the LAPD lawyers, and thus is not subject to the California statute.[133] The opinion stated that:

> There is nothing in the Child Abuse and Neglect Reporting Act which indicates that the legislature intended to abrogate the firmly-established rules regarding the attorney-client relationship and the application of that privilege to experts. . . . [I]t is thus apparent that the legislature intended the attorney-client privilege to remain intact. Indeed, given the strong policy basis for the attorney-client privilege, and the long history of that provision, it should not be found to be repealed without a specific statement by the Legislature to that effect.[134]

Similarly, the ethics committee for the State Bar of Nevada, describing a legal aid organization which used teams of lawyers, law students, and social work students to provide interdisciplinary legal services (but no direct social work services) to clients, concluded that for purposes of the state's reporting laws "the social work students are legal assistants in this context, [and] they are bound by [the attorneys' rules] to the same extent as the lawyer."[135]

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[133] *See* LAPD Op. E-2, *supra* note 119. The California statutes interpreted by the LAPD in its opinion imposed a reporting duty on a "health care practitioner . . . in his or her professional capacity or within the scope of his or her employment." CAL. PENAL CODE §§ 11164, 11165.8(a). The Public Defender concluded that these statutes did not apply to a social worker working as a consultant to the Public Defender, reasoning:

> The ultimate conclusion to be drawn from this [analysis] is that the Legislature has taken no action to affirmatively abrogate the attorney-client privilege [sic] in the child abuse reporting statutes. . . . A person who might come within the definition of a "health care practitioner" if employed for the purposes of providing health care *cannot* be found to remain a "health care practitioner" when employed for the purpose of assisting in the provision of legal representation to a litigant.

LAPD Op. E-2, *supra* note 119, at 4 (emphasis in the original). The opinion's reference to the "attorney client privilege," and not to the ethical obligation, is not a mistaken use of terms. In California, the "privilege" established by statute covers both evidentiary matters and an attorney's out-of-court ethical obligations of confidentiality. CAL. EVID. CODE § 955.

[134] LAPD Op. E-2, *supra* note 119, at 3.

[135] Nevada Op. 30, *supra* note 119, at 3. The committee wrote that "[t]he policies and practices of the organization are clearly designed to require the social work students to

The reasoning of the two opinions supports the reasoning we offer here, and helps account for the distinction developed below between social workers employed in-house as consultants to lawyers and those offering some social work services to the lawyer's clients. Since those mandated reporting statutes which impose a duty on certain identified helping professionals (and not on the population at large) tend to require that the actor serve in some professional capacity before the reporting duty is triggered,[136] the position of the LAPD and the Nevada ethics committee would apply to most consulting social workers employed by law firms.

The District of Columbia Bar Association Ethics Committee is the only authority thus far to issue a formal ethics opinion on the precise question addressed here.[137] That committee assessed the role of Rule 1.6 of the D.C. Rules of Professional Conduct and its applicability to a social worker employee of a law firm. Its opinion concluded that, for purposes of the lawyers' confidentiality duties, the social worker is a lawyer equivalent, and is bound by Rule 1.6 and the attorney client privilege:

> [W]e conclude that in the circumstances presented here Rule 1.6(e) allows no exception to the duty to ensure that the social worker preserves the confidences and secrets of the lawyer's client. We believe this interpretation of Rule 1.6 is consistent not only with its strict limitations on disclosures of client confidences and secrets but also with its recognition that lawyers require assistance of other professionals and lay people to represent their clients properly.[138]

The committee concluded that "[i]t is arguable that the social worker has no mandatory reporting obligations in these circumstances."[139] It also concluded, however, that "[t]he Rules of Professional Conduct cannot insulate a social worker from obligations

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limit their participation to that of a legal assistant and to require them to understand and observe the rules of attorney-client confidentiality applicable to legal assistants." *Id.* at 1. However, because in Nevada lawyers are also mandated reporters under the state reporting statute, the committee's opinion did not address the stark difference in reporting duties that the text addresses.

136 *See, e.g.*, CAL. PENAL CODE §§ 11164, 11165.8(a); CONN. GEN. STAT. ANN. § 17a-101(b); MASS. GEN. LAWS ch. 119, § 51A.

137 DC Op. 282, *supra* note 116. The State Bar of Nevada's Committee on Ethics and Professional Responsibility issued an opinion relating to this topic, but focusing on a different question. *See* Nevada Op. 30, *supra* note 119. Because in Nevada lawyers are mandated reporters, the Nevada ethics committee was asked to decide whether the mandatory obligation of lawyers to maintain the confidences of their clients trumped the statutory obligation to report possible child abuse or neglect learned during the professional relationship.

138 DC Op. 282, *supra* note 116, at 2-3.

139 *Id.* at n.4.

otherwise imposed by law,"[140] and that

> the social worker *may* have a statutory duty to report child abuse or neglect that is inconsistent with the duty of both the lawyer and the social worker to preserve confidences and secrets imposed by the Rules of Professional Conduct.[141]

Noting the "quandary" the law firm finds itself in, with the "anomaly" of the social worker obligated by the lawyers' code to remain quiet, but obligated by a statute to reveal suspected abuse, the committee suggests that the lawyers and social workers warn clients that the social worker "may have a statutory duty to report" suspected abuse revealed by the clients.[142]

This otherwise thoughtful opinion ends up straddling the question we hope to answer here. A plausible reason for its reluctance to decide the question outright is reflected in the following caveat from the opinion:

> The Committee is limited to expressing opinions concerning lawyers' ethics, and therefore *cannot decide the scope of the social worker's obligations* under the mandatory reporting law.[143]

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[140] *Id.* at 3.

[141] *Id.* (emphasis added).

[142] *Id.* at 4. The reluctant conclusion offered by the DC panel is essentially that option prudently chosen by the interdisciplinary clinic at the University of Denver School of Law, described in a recent article by Professor Jacqueline St. Joan. *See* St. Joan, *supra* note 4.

[143] DC Op. 282, *supra* note 116, at 2 (emphasis added). As a pure aside, we have long been puzzled by this common but rather arbitrary and not entirely sensible distinction drawn by writers of ethics opinions. Ethics committees regularly draw a clear distinction between "ethics," represented by the Rules or Code in effect in the panel's jurisdiction, and "law," represented by everything else that would constitute "law"—statutes, common law, administrative regulations, and the like. The writers accept full responsibility for complex and, at times, effectively binding analysis about the former, *see* Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 335-37 (2002), but deny any authority for interpretations, binding or otherwise, about the latter.

We do not see such a clear distinction at all. Ethics committees draft opinions to assist lawyers in making difficult ethical decisions in their work. Frequently, the difficult choices facing lawyers implicate ethical rules and other state and federal law. To assume, as committees do, that the ethical rules are not substantive law is misguided. The rules governing lawyers are important and complicated, and represent a serious manifestation of substantive law. *See, e.g.*, Hamilton v. State Bar of California, 591 P.2d 1254, 1259 (Cal. 1990) (disbarment for violation of professional rules); Stanley v. Richmond, 41 Cal. Rptr. 2d 768, 776 (Cal. Ct. App. 1995) (breach of rule is breach of fiduciary duty); Attorney Grievance Comm'n v. Pennington, 387 Md. 565, 589, 876 A.2d 642, 656 (2005) (attorney disbarred for violating several rules of professional conduct); *see also* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005) (describing Huber v. Taylor, No. 02-0304 (W.D. Pa. Feb. 6, 2002), where plaintiffs sued their lawyers for return of millions of dollars in fees paid, alleging a violation of the rules of professional conduct). The ethical rules and codes are just as much "law" as a mandatory reporting statute. *See* W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY: EXAMPLES AND EXPLANATIONS 4 (2004) (describing the "legally binding rules"). The members of an ethics committee are equally qualified to develop opinions about the latter as they are to develop opinions about the

The implication from the committee's opinion is that, if it had jurisdiction to address the legal question, it would hold that social workers working within a law firm are not mandated reporters. But lacking the authority to make such a holding, the committee stakes out a conservative stance.[144]

No other published decision or opinion has addressed the question as directly as do the LAPD's opinion or the Nevada and D.C. ethics committees' opinions.[145] These few available sources of reference[146] persuade us that the analysis presented here is not inconsistent with the limited authority available on this question. We also note that some doctrine has developed surrounding the interplay of abuse and neglect reporting statutes and the attorney-client privilege.[147]

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former. And yet, as we see in this case, the distinction remains a formidable one.

[144] The Ethics Committee also relies on Comment [27] to D.C.'s Rule 1.6, "expressing a presumption against other laws superseding a lawyer's obligation of confidentiality." DC Op. 282, *supra* note 116, at n. 5. This comment is based on former Comment [21] to the ABA Model Rules, which was eliminated in the Ethics 2000 Commission's revisions to Rule 1.6.

[145] Two attorney general opinions have dealt with the question, but neither offers any further insights beyond those already identified. *See* Kansas AG Op. 01-28, *supra* note 119; Maryland AG Op. 90-007, *supra* note 119.

The Kansas Attorney General opinion addressed the same question as the D.C. ethics committee, and relied explicitly on that committee's opinion without any independent analysis. *See* Kansas AG Op. 01-28, *supra.* That result is unfortunate, because while the DC ethics committee lacked authority to handle questions of law outside of the lawyer's rules, the Kansas Attorney General seems to possess such authority. The language of its opinion supports this inference: "While we typically leave issuance of lawyer ethics opinions to the Kansas Bar Association and the Disciplinary Administrator's Office, because your question is directed more toward the social worker's obligation under the law, we offer the following analysis." *Id.* at 2. *See also* KAN. STAT. ANN. §75-704 (authorizing the Attorney General to offer legal opinions).

The Maryland Attorney General opinion concerned mental health providers who received referrals from lawyers, rather than working within the lawyers' offices. *See* Maryland AG Op. 90-007, *supra*, at 1. The opinion concluded that those providers were "acting in a professional capacity" and therefore were bound by their statutory reporting duties. *Id.* at 2. The opinion did conclude, though, that as a matter of Sixth Amendment constitutional doctrine the providers' reporting duties were trumped by the lawyer's privilege and ethical obligations "after the initiation of a criminal proceeding." *Id.* at 3.

[146] We note that one further source addresses this question, but in a rather limited fashion. *See* Yarbrough & Tobey, *supra* note 119. In their chapter in a Massachusetts practitioner manual, Yarbrough and Tobey conclude that a social worker serving as a consultant or agent in a law firm is not bound by that state's mandatory reporting statute, which covers social workers explicitly but does not mention lawyers. *Id.* at 74. The authors focus in their analysis on the attorney-client privilege and the work product doctrine, however, without addressing the separate ethical obligations lawyers face under Rule 1.6. *See* MASS. RULES OF PROF'L CONDUCT, R. 1.6 (2005). For that reason their input is of less direct relevance here, but their conclusion is consistent with that developed here.

[147] *See, e.g.* Carolyn L. Dessin, *Protecting the Older Client in Multi-Generation Representations*, 38 FAM. L.Q. 247, 259 (2004); Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243, 245-46 (1987); *Professional Liability for Failure to Report Child Abuse*, 38 AM. JUR. TRIALS 1 (2007).

That doctrine, however, is sufficiently distinct from the present question, and thus does not compel a change in the conclusion we reach here.[148]

Our analysis may offer some benefit to a social worker or lawyer[149] who follows it in good faith while acknowledging a reporting

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[148] For a rich example of that interplay, see, e.g., Matter of a Grand Jury Investigation, 437 Mass. 340 (2002). This criminal proceeding involved charges filed against a private high school after several students reported "hazing" practices which included sexually abusive activity. The prosecution alleged that the school criminally failed to report the sexual abuse of its students in violation of its mandated reporting obligations. *Id.* at 341. During pretrial proceedings, the school objected to production of internal investigative reports from teachers to the school's lawyers, claiming that the papers were privileged under the doctrine of Upjohn Co. v. United States, 449 U.S. 383 (1981). After concluding that the reports contained information the teachers were required to disclose under the state's mandated reporting law, the court declared:

> [U]nquestionably the attorney-client privilege may conflict with a different public policy where the Legislature has determined that an institution *must* disclose certain information to others. Here, it is clear on the record that under any reasonable view of the attorney-client privilege, the school's internal investigation documents are not protected. . . . The teachers and school officials . . . knew, or should have known, that they would have no "right to keep secret" any information disclosed by the internal investigation concerning possible abuse victims . . . .

Id. at 351-52 (emphasis in original). One might read the quoted language as deciding directly the question we face here, but that reading would be mistaken. The teachers' obligations accrued when they learned of the abuse in their capacity as teachers. That obligation cannot be extinguished by later sharing the known information with a lawyer. Because the obligation to report preceded any claim of privilege, the privilege claim must fail. The question would be completely different if a student had reported the abuse to his lawyer, with a social worker sitting in as a consultant to the lawyer. Of course, no charges were ever lodged against the lawyers for failing to report the abuse learned from the teachers, because, the worries about the children notwithstanding, the lawyers had no obligation to report that information without their clients' consent.

[149] One might assume that the question we address has its greatest personal implications for the *social worker*, who faces possible prosecution for violation of the mandatory reporting statute. It also has indirect implications for the law firm, whose clients' secrets may be disclosed. But does the presence of the mandatory reporting statute present any personal risk to the *lawyer*? We cannot confidently say no. Here's why. Assume that a law firm employs a social worker, and the lawyers advise the social worker, relying on the kind of analysis developed here, that he does not need to report suspected child abuse notwithstanding the language of the state statute. If the firm guesses wrong, the social worker is of course at risk. But the lawyers may be at some risk as well for assisting in a criminal act. The lawyers conceivably could face sanctions under the governing Rules of Professional Conduct. Rule 1.2(d) prohibits a lawyer from assisting a client in illegal conduct, *see* MODEL RULES, *supra* note 12, at R. 1.2(d), and if the lawyers advise the social worker about his legal rights and obligations, the latter seems to become the client of the former. (Note that Rule 8.4(b), prohibiting a lawyer from "commit[ing] a criminal act *that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer* . . . ." does not seem to apply here. *Id.* at R. 8.4(b)(emphasis added).) Other criminal law doctrine or state statutes might criminalize a lawyer's assisting another in criminal conduct. *See, e.g.*, United States v. Benjamin, 328 F.2d 854 (2d Cir. 1964)(lawyer convicted for assisting client with financial fraud). Of course, the requirement of criminal intent for any such prosecution seems very difficult to meet, if the lawyers in fact are relying upon a careful analysis as we have tried to provide here.

statute's plain language. It appears unlikely that a social worker employed within a law firm who does not report suspected abuse, but acts in reliance on a legal opinion from his law firm colleagues,[150] has committed a criminal act, especially if the "crime" requires some *mens rea*.[151] Indeed, few reported cases can be found involving prosecution of a professional for failing to report suspected abuse under the 51 mandatory reporting statutes existing across the United States.[152] We have discovered more instances, though, of a non-reporting social worker encountering a civil claim for damages from an injured victim, a claim which most often has not succeeded.[153]

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[150] Another interesting question arising here is whether a lawyer from the law firm employing the social worker may offer advice to that social worker about his obligations under the applicable state statute. The question is one of permissible conflicts of interest. We might assume that the interests of the lawyer's clients favor advice to the social worker not to report, while the social worker needs an independent assessment of his rights and obligations. If the lawyer offers an opinion to the social worker about the applicability of the statute, then the social worker becomes a "client" of the lawyer for that purpose. *See, e.g.*, RESTATEMENT, *supra* note 24, at § 14 (defining who qualifies as a client). In advising her social worker client, the law firm member might then face "a significant risk that the representation of one . . . client[ ] [i.e., the social worker] will be materially limited by the lawyer's responsibilities to another client, . . . or by a personal interest of the lawyer." MODEL RULES, *supra* note 12, at R. 1.7(a)(2). The limitations arise from the lawyer's commitment to preserve her client's secrets, and her personal interest in working in a law firm with an unconstrained social worker.

If the interaction does qualify as a conflicted one, the question turns to whether the conflict is waivable by the social worker. *See id.* at R. 1.7(b). Our reasoning is that it is indeed a waivable conflict, because the lawyer can conclude reasonably that she has the capacity to "provide competent and diligent representation to" the social worker. It is not at all inconceivable to imagine that the lawyer desires genuinely to arrive at the *right* answer to the social worker's question, not simply an answer that makes her clients most happy. The risks of offering wrong advice are profound, and not just to the social worker. A competent client, like the social worker, may reasonably accept the representation of the potentially-conflicted lawyer, and thus the conflict may be waived. *See also* RESTATEMENT, *supra* note 24, at §122 (describing the conditions of permissible waivers of conflicts of interest).

[151] *See generally*, 22 C.J.S. CRIMINAL LAW § 37 (2005) ("the word 'willfully' generally means a voluntary, intentional violation of a known legal duty in bad faith or with evil purpose").

[152] *See* Arthur Gross Schaefer & Darren Levine, *No Sanctuary From The Law: Legal Issues Facing Clergy*, 30 LOY. L.A. L. REV. 177, 183 (1996)("Mandatory reporters face possible criminal liability for failure to report"), *citing* Stecks v. Young, 45 Cal. Rptr. 2d 475 (Cal. App. 1995); People v. Hodges, 13 Cal. Rptr. 2d 412 (Cal. App. 1992).

[153] Our research has found a considerable number of cases involving tort damage claims against mandated reporters or their employers for failure to report suspected abuse or neglect adequately. Many of those claims are unsuccessful, but not all. For a sampling of the decisions, see, e.g., Cooper Clinic, P.A. v. Barnes, 366 Ark. 533 (2006) (no private right of action against social worker); Ward v. Greene, 839 A.2d 1259 (Conn. 2004) (liability runs only in favor of children about whom report was mandated, not to parent of a child later abused); Manifold ex rel. Zaks v. Ragaglia, 2006 WL 1828461 (Conn. Super. 2006) (no liability on the facts; immunity found); McGarrah v. Posig, 635 S.E.2d 219 (Ga. App. 2006) (no private right of action); Estate of Peasant v. County of Seneca, 768 N.Y.S.2d 69 (N.Y. App. 2003) (civil liability when a mandated reporter "knowingly and willfully" fails to re-

The conclusions we have just drawn apply only to the settings with which we began—where a social worker (or similar covered professional) serves as an employee of or as a consultant to a law firm representing clients in legal matters. For our purposes, the distinction between a true employee of a law firm and a one-shot or occasional consultant to a law firm is of no matter.[154] The critical element is that the covered professional (here, the social worker) has no separate or preexisting professional relationship with the client whose secrets are at risk. The "trump" that we perceive occurring where the lawyers' rules control the social worker's rules arises not because of some imperialistic hegemony which lawyers merit over other professionals, but instead simply because we understand the social worker to be operating as part of a *lawyering* team.[155]

These conclusions do change, though, if the social worker does not clearly operate in the role of a member of the legal team. In the next section, we discuss, in much briefer fashion, three versions of that variation.

B. The Duty of Social Workers Offering Direct Services

For this subpart, we draw a distinction between a social worker serving as a member of a legal representation team, and one whose relationship with the lawyer's client is more ambiguous, or multifaceted. Let us separate out three scenarios.

1. The Multi-Service Agency

Compare the examples described earlier with the following: An innovative social services agency establishes a street-level office

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port). *See also* Singley, *supra* note 86.

We opt not to pursue here the question of how, if at all, the *Tarasoff* doctrine might apply to the case of a child or elder injured after a law-firm-employed mandated reporter concludes that he cannot report suspected abuse or neglect, except to point out that liability ought not apply if, in fact, the professional is forbidden to report by the application of the lawyers' duties. *See, e.g.*, R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1684 (2004) ("Thus far, there have been no reported cases in which the court has extended the *Tarasoff* duty to lawyers."); Divalent Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 481 (2000). For a discussion of the *Tarasoff* doctrine generally, see, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41 (Proposed Final Draft No. 1, 2005); Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 314-318 (1982); Robert F. Shop, *The Psychotherapist's Duty to Protect the Public: The Appropriate Standard and the Foundation in Legal Theory and Empirical Premises*, 70 NEB. L. REV. 327 (1991).

154 *See* LAPD Op. E-2, *supra* note 119.

155 *Id.*

> which offers to its customers legal services and an array of social services, including mental health counseling through social workers. This agency, which we will call Essex County Community Multi-Service Agency ("ECCMA"), touts its advantage in problem resolution by its ability to offer genuinely "holistic" care to its customers. Lawyers and social workers and educational specialists can work as a team to solve problems in ways which have a greater chance of long term success. ECCMA especially contrasts its offerings with conventional law firms, which may provide skilled legal products, but which may miss a client's larger picture by the blinders the legal training tends to produce.
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> At ECCMA, persons may receive just legal services from the lawyers, or may receive just mental health or crisis counseling from its social workers, or may receive a collaborative team's attention in situations which require the assistance of both a lawyer and a social worker. Thus, at times the lawyers collaborate in their work with social workers; at times they do not.

The agency we have described represents a common service delivery model, and we can see its obvious benefits.[156] The critical question is whether a social worker employed by ECCMA would be required by a state mandatory reporting statute to report suspected information relating to abuse and neglect obtained during the social worker's separate counseling session, even when working with a lawyer.

The first conclusion (of three we develop here) is that a social worker treating social work clients as a therapist within ECCMA is bound by his statutory duties to report abuse and neglect. The mere fact that EECMA contains a legal services component within its operations does not bring the social worker into the ambit of the law firm. Thus, if an ECCMA social worker sees a family for purposes of mental health counseling, and while working with that family comes to suspect abuse or neglect, the obligation to report would still apply. This is the easiest of all of the conclusions we develop. In this straightforward scenario, the social worker is acting directly as a social worker, and we see no argument which would take him out of his traditional role, with its standard reporting obligations.

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[156] As we've described it, ECCMA resembles several existing clinics operating across the country. In Cambridge, Massachusetts, the Community Legal Services and Counseling Center ("CLSCC") offers services similar to those offered by ECCMA, and also engages in occasional collaborative efforts. We do not, however, intend our discussion here to refer directly to the practices of CLSCC, whose precise configurations may be different from the fictional ECCMA here.

2. *The Interdisciplinary Collaboration*

Our next question addresses the duties of the professionals when, in the true spirit of ECCMA, the lawyers and the social workers function as a team to assist a client. Let us imagine the following unexceptional example:

> Joan Miro, a thirty-nine-year-old mother of three adolescent children, comes to ECCMA for help with her depression and hopelessness. She is assigned to see Linda Laker, a social worker, who later refers her to the agency's lawyers for help with her claim for state general assistance (GA) benefits. (Joan has exhausted her lifetime limit of TANF welfare benefits, and so GA is the only state welfare program for which she might qualify.) Because the state awards GA benefits only to "disabled" individuals, the lawyers cooperate with Linda to develop evidence proving that Joan cannot maintain employment in the regional economy in light of her depression and anxiety. While working with Joan and the team, Linda learns that Joan's poor parenting skills likely qualify as "neglect" under the state statute. Unless her working relationship with the ECCMA lawyers changes something, she is obligated to report Joan to the state Department of Social Services (DSS). Given the work that the team is engaged in with Joan, and Joan's vulnerability, Linda believes that a report to DSS would not be in the best interest of Joan or of her children.

In this story, the initial relationship between Linda, the social worker, and Joan is a therapeutic one, a relationship arising out of Linda's role as a therapist. As in the previous example,[157] before Linda collaborates with the ECCMA lawyers, there is no question that she remains a mandated reporter. The question—and it is an important one which will arise not infrequently—is whether the collaboration with the legal team changes Linda's duties.

Our understanding here is that the collaboration *does not* relieve Linda of her duty to report Joan's neglect to DSS. The critical consideration is the nature of the relationship between Linda and Joan. Here, that relationship is one of a social worker and her client. The collaboration with the lawyering team does not, and cannot, change that reality. We must proceed on the understandable assumption that the mandated reporting statute will always apply unless some superseding argument renders it inapplicable. In our first example, of the social worker/employee of the law firm,[158] we conceived the social worker as a member of the legal team, as a lawyer-surrogate, if you will (in the same manner that a paralegal or law clerk is a lawyer sur-

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[157] *See supra* Part II.B.1.

[158] *See supra* Part II.A.

rogate). Here, that conception is not reasonably available. Linda remains Joan's social worker, and the statute continues to apply to her.[159]

If that conclusion is sound, the lawyers within ECCMA must adjust their client interactions accordingly, lest they breach a duty to their clients. Just as the D.C. Ethics Committee[160] and several commentators[161] have suggested, the agency must warn its clients that some of what they reveal to their lawyers may not remain protected, but (if our earlier conclusions are sound) only those clients for whom the social worker is a member of the legal team.[162] This warning will mimic the warning which the social workers will already have provided to their clients at the beginning of their work with them, as standard social worker protocol requires.[163]

Note, though, an important complicating consideration for all involved in a team endeavor, with social workers working side-by-side with lawyers on their respective client's case. The client need not only fear that information disclosed *to the social worker* risks becoming subject to the mandated reporting. The client must be aware that information disclosed *to the lawyers* also risks becoming subject to the social worker's mandatory reporting duties, if the lawyers allow the social worker to learn that information. Because of the breadth of the mandatory reporting schemes, which encompasses information lead-

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159 Another permutation of these scenarios presents itself at this point. Might ECCMA offer Joan the choice of terminating her therapy relationship with Linda, with the understanding that Linda will then become a member of the legal team and as a result will no longer be subject to the mandated reporting statute, based on the earlier analysis? Conceptually that proposition makes sense, if indeed Linda ceases serving as an ongoing therapist and then establishes a new role as a legal consultant. Analytically, it seems to follow that facts she learned while serving as a therapist would be subject to the state reporting law; facts she learns while serving as a legal team consultant would not. Whether Linda would be prudent in attempting this transition of roles is a different question entirely, especially if she were defending, after the fact, a decision not to report some imminent danger to Joan's children.

160 DC Op. 282, *supra* note 116, at 3.

161 *See, e.g.*, Brustin, *supra* note 9, at 847-48; Donohue, *supra* note 6; St. Joan, *supra* note 4, at 437-39.

162 A prudent office offering both legal and social services will establish protocols designed to ensure that clients understand these risks and the differentiation of role responsibilities. While written notices or consent forms might be necessary, they may not be sufficient to caution clients adequately of the reporting duties of some members of the organization. The protocols thus may well include conversations with clients about the nuances of this issue.

163 *See* SOCIAL WORKER CODE, *supra* note 11, at § 1.07(d)("Social workers should inform clients, to the extent possible, about the disclosure of confidential information and the potential consequences, when feasible before the disclosure is made. This applies whether social workers disclose confidential information on the basis of a legal requirement or client consent."). *See also* MASS. REGS. CODE tit. 258 § 20.09 (2007) (same).

ing the social worker to "suspect" abuse or neglect,[164] a social worker's duties would surely be triggered by facts learned from the lawyers' files or the lawyers' conversations.[165]

This reality is a sobering one for the prospect of truly effective interdisciplinary practice.[166] Consider the practical implications of the understanding we have arrived at. While a lawyer and a social worker work together to assist a client with complex psycho-social and legal difficulties, the lawyers must vigilantly monitor and cull what they share with the social worker, lest they reveal some facts which would trigger the mandatory reporting duties. The "team" can never *truly* collaborate, because the social worker can never know confidently that the lawyers have not held back certain information to protect the client from the social worker's obligations. We assume, although the answer is not entirely evident, that it is *not* an effective measure for the lawyers essentially to "toggle" each collaborative team effort with an ongoing classification of "redacted" and "not redacted." In other words, we doubt the effectiveness of a solution where the lawyers say to the social worker collaborator something like the following: "In this case we're holding back nothing, so we're truly a team until we tell you otherwise," or (for the others) "In this case we'll tell you up front that we have learned some information from our client which we unfortunately cannot open up to you, so our 'teamwork' will be a bit hobbled here—not worthless, but not ideal either."[167]

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164 *See, e.g.*, CONN. GEN. STAT. § 17a-101a; Ward v. Greene, 839 A.2d 1259 (Conn. 2004).

165 While a mandated reporter's actions must be based upon reliable evidence underlying the "suspicion," *see, e.g.*, Gucci v. Conn. Dept. of Children & Fam., 2003 WL 22853895 (Conn. Super. 2003)(overturning abuse finding in light of insufficient evidence), there seems no requirement that a reporter have direct, non-hearsay evidence of the underlying facts. *See, e.g.*, O'Hare v. Blamey, 583 S.E.2d 834 (Ga. 2003) (finding report reasonable even in the absence of direct observations). Evidence in a file made available to a social worker would thus trigger the social worker's reporting obligations.

166 Besides the difficulties addressed in the text, one wonders how effectively any lawyer can explain to a client the nuances of the possible risks of an inadvertent disclosure of the client's secrets. Besides the risks to the client's confidences, this difficulty creates serious risks for the lawyer's exposure to discipline should information be reported without a client's knowing and informed consent. *See* MODEL RULES, *supra* note 12, at R. 1.6(a)(client must give "informed consent" to disclosure of information); R. 1.0(e) (defining "informed consent" as including communication of "adequate information and explanation about the material risks").

167 The difficulty with this "toggle" concept is apparent. Not only does the disclosure taint the working relationship, but the client may share some secret information after the "all clear" statement has been given. For a discussion of this difficulty in the context of a medical-legal collaborative, see Pamela Tames, Paul R. Tremblay, They Wagner, Ellen Lawton & Lauren Smith, *Commentary: The Lawyer Is In: Why Some Doctors Are Prescribing Legal Remedies for Their Patients, and How the Legal Profession Can Support this Effort*, 12 B.U. PUB. INT. L.J. 505, 514-15 (2003).

3. *The Interagency Consultation*

Let us end our discussion of the mandatory reporting phenomenon with a treatment of the last iteration we can imagine occurring in an agency such as ECCMA—where the agency staff social worker "parachutes into" the lawyering sector to assist with a case. Our conclusion here is that the consulting social worker, like in the very first examples, is best described as a member of the legal team, and the conclusion we first drew applies here—that is, the lawyering roles trump the state statute if lawyers are otherwise exempt from that statute.

Let us amend our last example, involving the client Joan Miro, in the following way:

> In this iteration, the lawyers have agreed to represent Joan in her disability benefits appeal. With Joan's medical history and hospital records in hand, the lawyers decide to ask Linda Laker, a staff social worker at ECCMA, for expert assistance in understanding the nature of Joan's illnesses and how her illnesses ought to affect her functioning. Linda agrees to join the lawyers in this role. While working with Joan and the team, Linda learns that Joan's poor parenting skills likely qualify as "neglect" under the state statute. Unless her working relationship with the ECCMA lawyers changes something, she is obligated to report Joan to the state Department of Social Services (DSS). Given the work that the team is engaged in with Joan, and Joan's vulnerability, Linda believes that a report to DSS would not be in the best interest of Joan or of her children.

Once again, the question is whether this employment role for Linda affects in any way her otherwise existing duties to report suspected abuse and neglect. Relying on our initial analysis, we analogize Linda in this setting to the social worker employee of a law firm. The critical consideration, again, is the nature of the relationship between Joan and Linda. In the example of the interdisciplinary collaboration, just above, we concluded confidently that Linda was Joan's therapist, and so her duties remained in place, even when working with the lawyers. Here, by contrast, Linda has no relationship with Joan except as an expert consultant hired by a law firm to assist it in its legal representation. If our initial analysis is sound, then there is no principled distinction between the social worker employee and the social worker "parachuting" consultant.[168]

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[168] It is entirely possible that the conclusion just expressed would change if Linda served as a *testifying* expert witness for Joan's case. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 411 (1998) ("Ethical Issues in Lawyer to Lawyer Consultation"); Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 So. Tex. L. Rev. 421 (2001)(expert witness is not necessarily a member of the hiring lawyer's legal team); Selinger, *supra* note 128, at 410-15 (arguing

C. Suggestions for Responding Ethically and Responsibly to Suspicions of Abuse and Neglect

In this final subpart we address briefly an important practical issue: How the lawyer/social worker team might proceed when confronting otherwise reportable evidence of abuse or neglect, even if the laws do not require a formal report.

To conclude, as we have done, that social workers working in law firms at times are not bound by state reporting statutes answers one set of important questions, but leaves another set of important questions unanswered. Even if a social worker need not report evidence of abuse or neglect, and even if the lawyers are bound by their ethical obligation to maintain client confidentiality, how might a lawyer/social worker team respond in a responsible and ethical fashion to such evidence? Do we mean to suggest that ignoring the evidence of abuse or neglect is a form of "best practices"?

Our phrasing the inquiry in that fashion telegraphs its answer. A responsible and effective lawyer, working with a responsible and effective social worker, will not and cannot simply ignore the information which might require an independent helping professional to file a report. While this issue may deserve its own separate article, we offer some preliminary reflections on it here. As context for our reflections, consider the following story:

> The same law school clinic team that represented Sally in her divorce proceedings[169] has been appointed to represent Joe, a fifteen-year-old 9th grader who lives with his mother, step-father and ten-year-old sister. Because of Joe's recent truancy, Joe's school filed what is known as a Child in Need of Services (CHINS) petition with the local District Court.[170] In an upcoming hearing, a Judge will order a service plan of sorts, recommending particular interventions to address the truancy.
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> In the course of the team's interview with Joe he mentions that his step-father is an alcoholic, and when drinking he has a "bad temper." Joe informs the team that his step-father has hit him on several occasions in the past two years. These incidents have been escalating in frequency and intensity. The most recent incident occurred four weeks ago when his step-father slapped him in the face

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against a consultant to a legal team serving as an expert witness in the same case).

[169] *See supra* Part II.A.2.b.

[170] In many states, legislation authorizes school officials, parents, and others to institute a court action intended to deliver services to children at risk. *See, e.g.*, MASS. GEN. LAWS ch. 119 § 39E. In such proceedings, the child is the subject of the proceeding and serves in some respects as a "defendant," even though the proceedings are intended to help, and not to punish, him. In many states the child is also entitled to appointed counsel. *See, e.g., id.* at § 39F.

> and pushed him against a wall. This was about the time Joe stopped going to school. Joe's mother is not aware of these incidents and Joe states emphatically that he does not want the team to tell anyone about the incidents. He does not want the state's Department of Social Services (DSS) involved, he wants to stay at home (and does not want foster care or residential placement), and wants to try to graduate with his friends. He is also concerned that if his mother learns about these incidents it would create more tension between her and his step-father.
>
> The student attorney and supervising attorney feel strongly about representing Joe's stated interest. He wants to stay at home and says he will make every effort to attend school.

If Joe told his story to a social worker therapist, the social worker would be required to report the step-father's violent behavior to DSS. When Joe tells the story instead to his lawyer team, the team has no such obligation. The lawyers have discretion not to disclose the violence, although the story just told possibly provides the lawyers with discretion to reveal the information even without Joe's consent.[171] And if the above analysis is cogent, the social worker working as part of the team is not obligated to disclose the violence to DSS, but shares the same discretionary judgments as the lawyers.

Even if the lawyers have no discretion at all to disclose the step-father's behaviors, they cannot act as though they never learned about the violence. While they may opt not to make a report, they will acknowledge the difficult position in which Joe finds himself. Effective legal representation will include careful, thoughtful counseling of Joe about his needs, wants and interests, including his safety, as he lives with the step-father. As developed above, the lawyers in this setting may actually have an advantage by working with a social worker on their team in achieving their counseling goals.[172]

What might this counseling look like? The lawyers will want to ensure that Joe understands that they are his allies and his confidants, but that they still worry about his protection. They will explore with him his competing needs to remain in his current home and at the same time not to be hurt. The lawyers may not persuade Joe that a report to some authority will serve his longer term interests, but they must be sure that Joe understands that option and its potential advantages. His perceptions and his predictions may not be realistic ones—not necessarily because he is a child, but because many clients, young

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[171] *See* MODEL RULES, *supra* note 12, at R. 1.6(b)(1) (lawyer may disclose "to prevent reasonably certain death or substantial bodily harm"). The judgment calls revolve around predicting whether the previous violence makes it "reasonably certain" that Joe will be hit, and whether the violence constitutes substantial bodily harm.

[172] *See supra* text accompanying notes 70-75.

and old, can benefit from a more objective viewpoint. This is simply good legal counseling.

The lawyers may hope that Joe will give them permission to intervene to protect him against the step-father (while they simultaneously hope that some intervention will actually lead to his protection).[173] But, unless their worry about his well-being is immediate and desperate, we might assume that the lawyers will not betray Joe's wishes about confidentiality, and will not disclose the violence to any other person.[174] That result may be more comfortable for the lawyers to accept than for the social worker, who has been trained differently and who sees his role as more paternalistic. If the lawyers opt not to exercise discretion and report the violence (or if the lawyers have no such discretion in their judgment), the team members need to engage in a soul-searching conversation about their respective roles and the lawyers' reasons for so acting. The social worker may come to agree that the lawyers have made the best decision possible under the circumstances. The lawyers may come to conclude that their decision is in fact not justified. Or the two professionals may agree to disagree, respecting the role differences between the professions. If this process works well, the lawyers will understand better the implications of their role obligations, and the social worker will feel heard and respected in the process.

CONCLUSION

Our musings have served to cement our respect for and delight with interdisciplinary collaboration. This survey of certain key ethical mandates has confirmed that lawyers and social workers can satisfy their respective professional duties in several of the critical areas viewed by many as suspect: mandated reporting, zealous advocacy, and client autonomy. Thanks to an interdisciplinary team's complementary professional orientations and trainings, the legal counseling will be richer and more comprehensive, while the representation re-

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[173] We include this parenthetical simply as a reminder of the blunt fact that reporting dangerous situations to authorities like DSS will not assuredly change Joe's life for the better. Joe's embeddings in his relationships with his mother, step-father, school friends, and the like means that any changes in his life conditions, while well meant, may have many unintended reactions.

[174] The assertion in the text may require a more extended explanation. We approach Joe's counseling with an understanding that ethical lawyers tend toward the anti-paternalism stance—that arguments suggesting betrayal of a client's wishes carry with them a heavy burden of proof. *See, e.g.*, BINDER, BERGMAN, PRICE & TREMBLAY, *supra* note 2, at 4-8, 379-97; Kruse, *supra* note 23, at 426-440. The operating presumption against acting against a client's stated wishes is hardly irrebuttable, of course. If the lawyers fear for Joe's safety in a palpable and urgent way, we trust that they will seek outside intervention even if their client refuses to authorize them to do so.

mains steadfastly zealous, rather than fatally hobbled.

We hesitate to predict whether all ethical dilemmas which may arise in interdisciplinary practice are similarly capable of satisfactory resolution. What for example of the statutory and ethical bars against unauthorized practice of law? What of the ethical and moral barriers against deceiving third parties? Further investigation lies ahead. While we do not prejudge those debates, we do embrace their exploration to ensure that interdisciplinary collaboration can flourish.