



The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know

The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know

Authored by the Standards and Best Practices Committee of the Defender Council
of the National Legal Aid & Defender Association

Adopted by

The Defender Council of the National Legal Aid & Defender Association,

The American Council of Chief Defenders,

The National Alliance of Indigent Defense Educators and

The National Alliance of Sentencing Advocates and Mitigation Specialists

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CONTENTS

Acknowledgements	1
Introduction.....	3
Resolution	5
I. General Principles of Defense Team Confidentiality	6
A. The Duty of Confidentiality and Attorney-Client Privilege.....	6
B. Defense Team Confidentiality and Privilege	8
C. The Right to Counsel	11
II. Practice Considerations for Defenders	14
A. Assess Local Law and Practice	14
B. Select a Practice Model.....	15
C. Implement a Practice Model	16
Conclusion	19
Appendix I: Bibliography	20
Books.....	20
Articles.....	20
Professional Standards & Ethics	21
Appendix II: 50-State Survey of Child Abuse Mandatory Reporting Laws (2015)	22

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INTRODUCTION

What does it mean to provide zealous public defense advocacy? For many, an active trial practice and emphasis on getting the lowest incarceration sentence is the hallmark of zealousness. But when you really listen to clients, and ask them what they want and what they need, you find a much more complex idea of how they view their criminal case and public defense representation.¹ When we think about factors underlying a client's criminal case, it is almost impossible to separate the criminal legal matters from what is happening in the client's life.² With this foundation, the holistic and community-oriented defense community has created a movement that shifts public defense from a pure focus on the immediate criminal case to a broader view of advocacy that seeks to improve both case and life outcomes for the client. As defender offices have embraced holistic and community-oriented principles, public defenders have increased engagement of non-lawyer professionals, social workers in particular,³ as part of the defense team.⁴ With this expansion, however, has also come new ethical and legal challenges.

Members of the American Council of Chief Defenders and the Community-Oriented Defender Network — both part of the National Legal Aid and Defender Association — have given special attention to the challenges of negotiating the duties of confidentiality of attorneys and social work, mental health, and other non-lawyer professionals working together in interdisciplinary defense teams. Foremost among these challenges is the application of mandatory reporting laws, which typically require social workers, among other professionals,⁵ to report suspected incidents of abuse.

All 50 states and the District of Columbia have mandatory reporting laws.⁶ Under these laws, a social worker or other mandatory reporter who does not report suspected abuse may face civil or criminal penalties, in addition to professional board sanction that may include the loss of his or her license. But when a social worker does report suspected abuse, and the social worker has learned of the abuse in the course of working on a defense team, he or she may severely prejudice the client, violating the ethical duties of the attorneys and the constitutional rights of the client.

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- 1 Robin Steinberg, "Heeding Gideon's Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm," 70 Wash. & Lee L. Rev. 961, 963 (2013). <http://bit.ly/1SCGh3d>.
 - 2 Melanca Clark and Emily Savner, "Community Oriented Defense: Stronger Public Defenders." Brennan Center for Justice (2010).
 - 3 While the role of social workers in a particular office may vary, social workers generally assist public defense delivery in the following forms: client needs assessment, mental health assessment, housing and treatment placement, identification of incarceration alternatives and diversion programs, sentencing advocacy and mitigation reports, and expert testimony.
 - 4 See "Community-Oriented Defender Network." *National Legal Aid & Defender Association*. <http://www.nlada100years.org/community-oriented-defender-cod-network>.
 - 5 Because holistic defense practitioners have primarily expressed concern about resolving this issue as it relates to social workers on the defense team, and because almost all mandatory reporting laws address social workers specifically, this report focuses on social workers. Other kinds of non-attorney professionals who are part of a defense team may also be named in reporting statutes, and similar analysis will likely apply to them. That in-depth analysis is, however, outside of the scope of this report.
 - 6 See *infra*, Appendix II: 50-State Survey of Child Abuse Mandatory Reporting Laws. The analysis of mandatory reporting laws contained in this document is limited to those laws which address child abuse — the most common formulation. States may also have mandatory reporting laws that address elder abuse or domestic violence.

The first step in resolving this conflict is understanding the legal landscape. This report describes general principles of confidentiality and privilege and their application to interdisciplinary defense teams. Importantly, every jurisdiction is different, so general principles will not map on exactly to state law or practice — especially where so many areas of law are implicated and so many individuals are vulnerable. This report also offers state-specific analysis and practice considerations for defenders to assist them in choosing the model of collaboration that will best serve their clients by both guarding their confidentiality and zealously advocating on their behalf.

RESOLUTION

Whereas social workers and other mental health professionals are necessary non-legal experts and agents of competent public defense attorneys;

Whereas such non-attorney agents are encompassed by the duty of confidentiality and attorney-client privilege; and

Whereas mandatory reporting laws may conflict with duties of confidentiality and competency so as to deny the right to effective assistance of counsel;

Interdisciplinary defense teams must abide by ethical and legal boundaries of confidentiality while zealously pursuing the defense of every client.⁷

⁷ This resolution will be presented to the board of NLADA for discussion during its November 2016 meeting.

I. GENERAL PRINCIPLES OF DEFENSE TEAM CONFIDENTIALITY

Protections of attorney-client confidentiality are widely acknowledged, but not consistently applied.⁸ This section returns to first principles of confidentiality and privilege so as to more clearly define their scopes. It also explores their unique legal and ethical implications in the criminal defense context. In short, it demonstrates how defenders have a duty of confidentiality that extends to the non-attorneys who are necessary to fulfill the attorneys' ethical obligations and to ensure their clients' constitutional right to effective assistance of counsel.

A. The Duty of Confidentiality and Attorney-Client Privilege

i. Definitions and Sources of Law

According to the American Bar Association's Model Rules of Professional Conduct, every attorney owes to the client basic duties of competency,⁹ diligence,¹⁰ communication,¹¹ confidentiality,¹² and loyalty.¹³ These duties are based on a variety of rationales, but the essential function of all of them is to uphold the integrity of the legal profession and with it the integrity of the adversarial judicial system of the United States.¹⁴

Every state has codified the Model Rules in some form.¹⁵ States will further delineate the responsibilities of attorneys in other bodies of law, including rules of evidence. In addition to these statutory requirements, assigned counsel have a unique obligation to fulfill the professional requirements imposed on them by the Sixth Amendment's guarantee of the right to effective assistance of counsel.¹⁶ Effective assistance is, however, usually measured against the Rules of Professional Conduct and similar national and local standards.

Under the Model Rules, the duty of confidentiality is imposed on attorneys by Rule 1.6, which states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" for various purposes listed in the Rule, especially preventing substantial injury from future crime or fraud.¹⁷ This short text establishes that the

⁸ See Paul R. Rice, "Attorney-Client Privilege: Continuing Confusion about Attorney Communications, Drafts, Pre-Existing Documents, and the Source of Facts Communicated," *American University Law Review* 48, no.5 (June, 1999): 967–1005, 968, available at <http://bit.ly/1OKA6ck>.

⁹ American Bar Association (ABA), Model Rules of Professional Conduct [hereinafter "MRPC"], Rule 1.1. http://bit.ly/ABA_PR_Model_Rules.

¹⁰ ABA, *MRPC*, Rule 1.3.

¹¹ ABA, *MRPC*, Rule 1.4.

¹² ABA, *MRPC*, Rule 1.6.

¹³ ABA, *MRPC*, Rule 1.7.

¹⁴ See ABA, *MRPC*, *Preamble and Scope*. ("Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.")

¹⁵ See ABA, "State Rules Comparison Charts," available at <http://bit.ly/1ItYiN>.

¹⁶ See *infra*, Section C.

¹⁷ ABA, *MRPC*, Rule 1.6.

duty of confidentiality is based in attorney ethics; it extends to all “information relating to the representation of a client”; and it bars all forms of disclosure.

The attorney-client privilege, on the other hand, is one body of law that gives effect to the duty of confidentiality.¹⁸ It prevents the attorney, without the consent of her client, from testifying as to (1) communications; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.¹⁹ Attorney-client privilege is based in rules of evidence and common law; it extends only to communications (*not* “information”) with the client and for the purpose of legal assistance; and it bars disclosure only in the form of a compelled statement in a judicial proceeding.²⁰ The scope of attorney-client privilege is therefore much narrower than that of the duty of confidentiality, which is quite broad.²¹ The oldest of the common-law privileges for confidential communications,²² the attorney-client privilege has often been heralded by the Supreme Court as a means of facilitating attorney-client communication and thus improving the quality of the adversarial system as a whole.²³ The Court has not, however, formally constitutionalized the attorney-client privilege.²⁴

ii. Derivative Confidentiality

In addition to a personal duty to protect client information, Model Rule 1.6 states the lawyer’s duty to protect “against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”²⁵ Model Rule 5.3 describes the duties of managers, supervisors, and line attorneys to ensure that non-lawyer assistants in their practice do not violate the attorneys’ professional obligations.²⁶ While managers have a singular responsibility to design and enforce office policy,²⁷ under the Model Rules, every attorney can be held responsible for conduct by non-lawyers that the attorney ratifies which violates the Rules of Professional Conduct.²⁸ The Comment to the Rule states that “a lawyer must give ... assistants appropriate instruction and supervision concerning the ethical aspects of their employment, *particularly regarding the obligation not to disclose information relating to representation of the client.*”²⁹ The ABA Standing Committee on Ethics and Professional Responsibility has instructed that individuals to whom lawyers have “outsourced” aspects of their representation (not just employees) also fall under the Rule 1.6 obligation not to disclose client information; the Committee found that client consent is required — and confidentiality agreements are strongly advisable — in the outsourcing context.³⁰

iii. Derivative Attorney-Client Privilege

Again, the attorney-client privilege applies to (1) communications; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.³¹ The “privileged persons” of the second element include not only attorneys and client: the agents of attorneys and clients are included as well. As explained by Dean Wigmore, who wrote the classic formulation of the elements of the privilege: “The assistance of these agents being indispensable to the [the attorney’s] work and

18 See ABA, *MRPC, Comment to Rule 1.6*. The work product doctrine is another, distinct body of law that gives effect to the duty of confidentiality.

19 See Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 65 (5th ed., 2007); see also John Henry Wigmore, *Evidence in Trials at Common Law* § 2292, at 554 (McNaughton ed., 1961).

20 *Id.*

21 See ABA, *MRPC, Comment to Rule 1.6*.

22 Wigmore, *supra* note 16, § 2290, at 543.

23 *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826) (stating that the privilege “is indispensable for the purposes of private justice”).

24 As will be explored, *infra*, however, both confidentiality and privilege should be considered necessary to effective assistance of counsel.

25 ABA, *MRPC, Comment to Rule 1.6*.

26 ABA, *MRPC, Rule 5.3*. Note the broad language of this rule, which applies explicitly to law firm employees, those associated with the law firm, and those retained by the firm. *Id.*

27 ABA, *MRPC, Rule 5.3(a)*.

28 ABA, *MRPC, Rule 5.3(c)*. For a detailed discussion of the Rule 5.3 responsibilities specific to various employees in a prosecutor’s office, as well as guidance on designing office policy that creates a “culture of compliance,” see generally ABA Standing Committee on Ethics and Professional Responsibility, *Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3*, Formal Opinion 467 (Sept. 8, 2014).

29 ABA, *MRPC, Comment to Rule 5.3* (emphasis added).

30 ABA Standing Committee on Ethics and Professional Responsibility, *Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services*, Formal Opinion 08–451 at 5 (Aug. 5, 2008).

31 See Epstein, *supra* note 16, at 65.

the communications of the client being often necessarily committed to [the agents] by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents."³²

This concept in American jurisprudence is often referred to as the Kovel doctrine, after *United States v. Kovel*, the landmark Second Circuit case in which Judge Friendly supplied a framework for determining who is an attorney's "agent" and thus may enjoy a derivative privilege.³³ While relying on the historical foundation of Wigmore, Judge Friendly also was informed by modern practice when he wrote that "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others."³⁴ Therefore, *Kovel* holds that when non-legal experts act as essential "interpreters" of client communications for the purpose of aiding the client's legal representation — for instance, accountants, in that case — they become cloaked by the privilege.³⁵

B. Defense Team Confidentiality and Privilege

Defenders have long relied on non-legal experts such as psychiatrists in order to represent clients effectively when there are matters at issue outside of an attorney's legal training and experience. More recently, practitioners of holistic and community-oriented defense have articulated the philosophical and pragmatic imperatives for incorporating non-lawyers into contemporary indigent defense to an even greater extent.³⁶ In light of both traditional practice and modern realities, the law and the legal profession have, at times, acknowledged the necessity of a "defense team" approach to representation and adopted protective stances toward confidentiality, which is essential to the function of an interdisciplinary defense team.

i. Legislation

Some states have codified the concept of derivative privilege and have ensured that it withstands possible disclosure requirements. In Nevada, for example, any person who knows that someone has committed a violent offense against a child is required to report the offense to a law enforcement agency.³⁷ If, however, the person learned of the offense "through a communication or proceeding that is protected by a privilege set forth in [the Nevada evidence code]," the requirement to report does not apply.³⁸ The Nevada evidence code's provision for attorney-client privilege explicitly includes communications between the client and "the lawyer's representative" and communications between the lawyer and the lawyer's representative.³⁹ This statute is consistent with *Kovel*'s agency framework, since the lawyer's representative is defined as "a person employed by the lawyer to assist in the rendition of professional legal services."⁴⁰

Other jurisdictions protect client confidentiality without specifically invoking privilege. In the District of Columbia, "social service workers" are required to report their suspicions of child abuse *unless* they are "employed by a lawyer who is providing representation in a criminal, civil, including family law, or delinquency matter and the basis for the suspicion arises solely in the course of that representation."⁴¹

ii. Case Law

Courts have widely recognized that psychiatrists retained by defense counsel are agents of attorneys for the purposes of the derivative attorney-client privilege.⁴² For example, in *United States v. Alvarez*, the Third

³² Wigmore, *supra* note 16, § 2301, at 583.

³³ *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

³⁴ *Id.* at 921.

³⁵ *Id.* at 922.

³⁶ See e.g., Robin Steinberg, "Heeding Gideon's Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm," 70 Wash. & Lee L. Rev. 961 (2013). <http://bit.ly/1SCGh3d>. See also Melanca Clark and Emily Savner, "Community Oriented Defense: Stronger Public Defenders." Brennan Center for Justice (2010). <http://goo.gl/JzKral>.

³⁷ See Nevada Revised Statutes (NRS) §202.882.

³⁸ NRS § 202.888.

³⁹ NRS § 49.105.

⁴⁰ NRS § 49.085.

⁴¹ D.C. Code § 4–1321.02.

⁴² See, e.g., *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976); *Houston v. State*, 602 P.2d 784 (Alaska 1979); *People v. Lines*, 13 Cal. 3d 500, 119 Cal. Rptr. 225, 531 P.2d 793 (1975); *State v. Toste*, 178 Conn. 626, 424 A.2d 293 (1979); *State v. Pratt*, 284 Md. 516, 398 A.2d 421 (1979); *People v. Hilliker*, 29 Mich. App. 543, 185 N.W.2d 831 (1971); *State v. Kociolek*, 23 N.J. 400, 129 A.2d 417 (1957); *Ballew v. State*, 640 S.W.2d 237 (Tex. Crim. App. 1980); *Miller v. District Court of Denver*, 737 P.2d 834, 837 (1987).

Circuit addressed the validity of a subpoena of a defense-retained psychiatrist.⁴³ The court applied the *Kovel* framework to the case and stated, “We see no distinction between the need of defense counsel for expert assistance in accounting matters [at issue in *Kovel*] and the same need in matters of psychiatry,” because, in both instances, non-legal expertise is necessary to translating the facts of the client’s circumstances into legal argument.⁴⁴ Similarly, in *State v. Pratt*, the Court of Appeals of Maryland held that “in criminal causes communications made by a defendant to an expert in order to equip that expert with the necessary information to provide the defendant’s attorney with the tools to aid him in giving his client proper legal advice are within the scope of the attorney-client privilege.”⁴⁵

The Supreme Court echoed the “tools of defense” metaphor in *Ake v. Oklahoma*. In that case, the Court found that 40 states and the federal government already guaranteed the assistance of psychiatric experts to defendants, at least in certain circumstances, under their state statutes, judicial decisions, or constitutions.⁴⁶ The court found that this near national consensus reflected how crucial psychiatric expertise can be to the defense for gathering and analyzing relevant facts, for advising attorneys on effective cross-examination, and for “translating” their expert opinion for the jury and the court.⁴⁷ The Court therefore held that, where a criminal defendant’s mental condition is a significant factor in a capital trial, the due process clause of the Fourteenth Amendment requires the state to provide him with the experts who will aid him in developing his defense, both at the trial and sentencing phases.⁴⁸ The *Ake* decision situates mental health experts as “basic tools of an adequate defense,” alongside effective attorneys,⁴⁹ especially in consideration of the expanded rights of indigent defendants since *Gideon v. Wainwright* and the “extraordinarily enhanced role of psychiatry in criminal law today.”⁵⁰

Social workers, no less than psychiatrists, are non-legal members of defense teams whose expertise enables them to perform essential work for which an attorney is not sufficiently trained, such as investigating and analyzing a client’s psychosocial history. In *Jaffe v. Redmond*, the Supreme Court recognized that social workers serve a significant population of people who need mental health services, but cannot afford the assistance of a psychiatrist or psychologist.⁵¹ The court held that, because the counseling of social workers and psychiatrists serve the same public goals, “drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.”⁵² Although that case concerned the federal psychiatrist-patient privilege, its logic applies with equal force to the attorney-client privilege: there is no discernible reason to include defense psychiatrists within attorney-client privilege but not social workers.

iii. Standards

Competent representation is a basic duty of the attorney to the client under the ABA Model Rules.⁵³ Within the duty of competency are duties of “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁵⁴ “Thoroughness and preparation” encompasses “inquiry into and analysis of the factual and legal elements of the problem.”⁵⁵ For the competent defense attorney, the duty to investigate extends beyond questions of legal guilt or innocence, and includes questions of proportionate sentencing, for which the “defendant’s background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surround the commission of the offense itself. Investigation is essential to fulfillment of these functions.”⁵⁶

43 *Alvarez*, 519 F.2d at 1045.

44 *Id.* at 1046.

45 *Pratt*, 284 Md. at 521.

46 *Ake v. Oklahoma*, 470 U.S.68, 79 (1985).

47 *Id.* at 80.

48 *Ake*, 470 U.S. at 83. The *Ake* decision, importantly, also supports a procedure whereby defense counsel may approach the court *ex parte* to obtain additional funds to secure sentencing and mitigation experts without notice to the prosecution. *Id.*

49 *Id.* at 77.

50 *Id.* at 85.

51 *Jaffe v. Redmond*, 581 U.S. 1, 16 (1996)

52 *Id.* at 17 (quoting *Jaffe v. Redmond*, 51 F.3d 1346, 1358, n.19) (1995).

53 See ABA, *MRPC*, Rule 1.1.

54 *Id.*; see also *MRPC*, Rule 1.3.

55 See ABA, *MRPC*, *Comment to Rule 1.1*.

56 ABA, *Standards for Criminal Justice: The Defense Function*, *Comment to Rule 4-4.1*.

Investigation into matters such as a client's family background and mental health history is often performed by social workers. As noted in Ethics Opinion 14-1 by the National Association for Public Defense, "non-lawyer professionals provide essential services to the lawyers."⁵⁷ The ABA Standards for Criminal Justice recognize that thorough inquiries into the client's psychosocial history often require expertise beyond the attorney's competency. In those circumstances, the attorney has a duty to consult with non-legal experts, who are "a *sine qua non* of quality legal representation."⁵⁸ Moreover, "quality legal representation cannot be rendered by defenders or by assigned counsel unless the lawyers have available other supporting services [including] necessary expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and sentencing."⁵⁹

In addition to the duty to investigate, another aspect of the duty of competency is a duty to exercise independent judgment and render candid advice.⁶⁰ The ABA Model Rules state that "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."⁶¹ The commentary to Rule 2.1 further sets out that "matters that go beyond strictly legal questions may also be in the domain of another profession," so that "where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."⁶² Social work is specifically included as example of a non-legal profession which bears on legal matters.⁶³

In certain contexts, these duties are more pronounced and the role of the social worker is even more clearly established in standard defense practice. Death penalty mitigation is one such area. In *Wiggins v. Smith*, the Supreme Court found that defense counsel's investigation into mitigating factors was objectively unreasonable when it relied on only the behavioral report of a psychologist, a one-page presentence investigation report, and a record of the defendant's placements in foster care.⁶⁴ Indeed, what evidence these sources did give about the defendant's extensive history of abuse and neglect only prompted further investigation by a competent attorney.⁶⁵ The failure of the attorneys to retain a social worker to prepare a social and family history report amounted to an "abandonment of investigation" in clear dereliction of professional norms, including the ABA Standards for Criminal Justice and ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.⁶⁶ In addition, the ABA's Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases are devoted to defining the prevailing professional norms for capital defense teams.⁶⁷ The Guidelines dictate that capital defense teams must include qualified mental health experts and that, as agents of defense counsel, these experts bound by the attorney's rules of confidentiality and privilege.⁶⁸

Mental health advocacy is not limited to the capital context, however.⁶⁹ The ABA has also promulgated Criminal Justice Mental Health Standards that apply to all cases. At the outset, these standards recognize the importance of mental health experts to the client, the attorneys, the court, and ultimately to the administration of criminal justice.⁷⁰ The Standards state that the evaluation by mental health professionals should be readily available to the defense, since mental culpability is almost always an issue relevant to criminal liability.⁷¹ The Standards also state that "all disclosures made by defendant or the attorney during the course of the evaluation are protected by the attorney-client privilege."⁷²

57 National Association of Public Defense (NAPD), Ethics Opinion 14-1. <http://bit.ly/1lSKBk7>.

58 ABA, *Standards for Criminal Justice: Providing Defense Services*, Comment to Rule 5-1.4.

59 *Id.*; see also *Standards for Criminal Justice: The Defense Function*, Comment to Rule 4-8.1(b) (duty of defense to investigate and present mitigating evidence).

60 See ABA, *MRPC*, Rule 2.1; *MRPC*, Rule 1.4.

61 *Id.*

62 ABA, *MRPC*, Comment to Rule 2.1.

63 *Id.*

64 See *Wiggins v. Smith*, 539 U.S. 510, 524-525 (2003).

65 *Id.*

66 *Id.*

67 See ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, Guideline 1.1.

68 *Id.*, Guideline 4.1.

69 The expanding opportunity for pretrial diversion, in particular, has elevated the significance of mental health evaluations by the defense team. See National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Diversion/Intervention*, Standard 4.1 (2008).

70 See ABA, *Criminal Justice Mental Health Standards*, Standard 7-1.1.

71 *Id.*, Standard 7-3.3(a).

72 *Id.*, Standard 7-3.3(b).

C. The Right to Counsel

As the professional and ethical rules recognize, confidentiality is fundamental to any attorney-client relationship.⁷³ Confidentiality between the attorney and client creates a relationship of trust, so that the client will share with the attorney all of the information relevant to his or her case. Without this information, the attorney will be an ineffective advocate, and the fairness of the proceedings will be undermined.

In the context of criminal defense, ineffectiveness has constitutional ramifications, because effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution.⁷⁴ There are essentially two ways that the Supreme Court has found attorneys to be ineffective. First, if the government interferes with the attorney-client relationship by outright denying access to counsel at critical stages, the attorney's assistance will be presumptively ineffective.⁷⁵ Second, if the attorney's representation fell below an objective standard of reasonableness, and the unreasonable representation prejudiced the defendant, the defendant may prove that his Sixth Amendment right was violated.⁷⁶ Under either standard, lack of communication between the attorney and client is a hallmark of ineffectiveness.

i. Government Interference

The first standard for ineffective assistance of counsel may be further delineated into claims of actual or constructive denial of counsel. When the government bars the attorney from communicating with his client at all during critical stages of trial, such as an overnight recess, actual denial occurs.⁷⁷ The Third Circuit *Alvarez* court suggested that constructive denial could take place when the government stifles attorney-client communication by requiring attorneys to disclose confidential information, either directly or through other members of the defense team; it stated that “the attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness.”⁷⁸ Similarly, the client must be free to share information without fear of the attorney using it against him by disclosing it to the government.

Where states require attorneys or social workers to report suspected abuse that was discovered in the course of representation, the government interferes with the representation so as to cause the actual or constructive denial of counsel; a showing of prejudice is not required in these circumstances, because prejudice is all but guaranteed to result.⁷⁹

ii. Deficient Performance

The second standard for ineffective assistance of counsel was famously set out by the Supreme Court in *Strickland v. Washington*. In *Strickland*, the Court explained that analysis of the “objective” prong of the test would largely rely on “prevailing norms of practice as reflected in American Bar Association standards and the like,” with an express reference to the ABA's Standards for the Defense Function.⁸⁰ Thus, while *Strickland* did not constitutionalize any specific ABA rule, it did elevate the significance of criminal justice standards for determining when a constitutional violation has occurred.⁸¹

Therefore, in the few states that specifically include attorneys as mandatory reporters of child abuse,⁸² there is a direct conflict with professional duty and a real danger to the right to counsel. For example, Mississippi's statute reads, “Any attorney [...] or any other person having reasonable cause to suspect that a child is a

⁷³ See ABA, MRPC, Comment to Rule 1.6; ABA, Code of Professional Responsibility DR4–101.

⁷⁴ See *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). Although the following analysis focuses on the United States Constitution, deprivation of an individual's right to effective assistance of counsel — either because he was not given access to adequate defense services (i.e. experts) or because his communications were not confidential — may also violate his rights under a state's constitution. See *Elijah W. v. Superior Court*, 216 Cal. App. 4th 140, 150 (2013); *State v. Pratt*, 284 Md. 516, 520 (Md. 1979).

⁷⁵ See *United States v. Cronin*, 466 U.S. 648, 668 (1984).

⁷⁶ See *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

⁷⁷ See *Geders v. United States*, 425 U.S. 80, 91 (1976).

⁷⁸ *Alvarez*, 519 F.2d at 1046–1047; see also Megan M. Smith, “Causing Conflict: Indiana's Mandatory Reporting Laws in the Context of Juvenile Defense,” 11 *Ind. Health L. Rev.* 439, 462 (2014).

⁷⁹ See *Cronin*, 466 U.S. 648.

⁸⁰ *Id.* at 688.

⁸¹ See *Nix v. Witside*, 475 U.S. 157, 165 (1986).

⁸² See *infra*, Appendix II, 50-State Survey.

neglected child or an abused child, shall cause an oral report to be made immediately [...] to the Department of Human Services.”⁸³ Under Mississippi’s Rules of Professional Conduct, however, an attorney may disclose information related to representation only “to the extent the lawyer reasonably believes necessary [...] to prevent reasonably certain death or substantial bodily harm” (among other unrelated exceptions).⁸⁴ If the attorney learned of the abuse from information related to representation of a client, then, in at least two situations, compliance with the mandatory reporting law could cause the attorney to violate the rule of professional conduct: first, in a case where the abuse is not preventable, but rather occurred in the past; and, second, where the attorney had “reasonable cause” to suspect future abuse, but where the abuse is not “reasonably certain.”

Mississippi, like almost all states,⁸⁵ also includes social workers as mandatory reporters.⁸⁶ As under the Model Rules, the commentary to Mississippi Rule 1.6 explains that attorneys must also prevent “unauthorized disclosure by ... other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”⁸⁷ If Mississippi’s reporting statute were applied to social workers working for defenders, it would therefore cause the attorneys supervising them to violate their professional duty of confidentiality. Moreover, if a defender manager or supervisor had not created an office policy to prevent such disclosures, or had ratified a disclosure, he or she would likely have violated Mississippi Rule 5.3.⁸⁸

By violating Rules 1.6 or 5.3, an attorney would fall below professional norms and an objective standard of reasonableness. The attorney would also almost certainly prejudice the client’s case if the client was implicated by the attorney’s statement. The state mandatory reporting law would thus interfere with the client’s Sixth Amendment right to the effective assistance of counsel. Under the Supremacy Clause of the United States Constitution, a state law that interferes with a federal constitutional right must yield to that right.⁸⁹ Because of the essential nature of confidentiality in the Sixth Amendment context, the attorney must protect confidential information from disclosure, and state law must yield to the duty of confidentiality when it requires disclosure of confidential information that would prejudice the defense.

iii. Right to Counsel for Children and Youth

Over forty years ago, the Supreme Court affirmed that children charged in delinquency proceedings have fundamental constitutional rights coextensive with those of adults, including the right to “the guiding hand of counsel at every step in the proceeding against them.”⁹⁰ Accordingly, juveniles are entitled to zealous, holistic representation, including the basic duties of confidentiality and privilege that must not be undermined because of the client’s minority status. Specifically, there are no exceptions to confidentiality and privilege for parents or guardians or in service of what counsel, parents, guardians or other stakeholders deem to be in the child’s best interests.⁹¹

The role of the juvenile defender requires not only legal knowledge and courtroom skills, but also an understanding of child and adolescent development and an awareness of the many consequences that stem from court involvement, including, but not limited to, the child’s ability to continue his or her education.⁹² Legal teams for juveniles enhance their zealous advocacy by incorporating the Positive Youth Justice

⁸³ MS Code § 43–21–353.

⁸⁴ Mississippi Rule of Professional Conduct 1.6, available at https://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf.

⁸⁵ See *infra*, Appendix II, 50-State Survey.

⁸⁶ MS Code § 43–21–353.

⁸⁷ Mississippi Rule of Professional Conduct 1.6.

⁸⁸ Mississippi Rule of Professional Conduct 5.3.

⁸⁹ U.S. Const. art IV, cl 2.; *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁹⁰ *In re Gault*, 387 U.S. 1 (1967) (holding that juveniles have right to notice of charges, right to counsel, privilege against self-incrimination, and right to confrontation and cross-examination); see *Kent v. U.S.*, 383 U.S. 541 (1966) (holding that due process requirements apply to transfer proceedings); *In re Winship*, 397 U.S. 358 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications); *Breed v. Jones*, 421 U.S. 519 (1975) (rejecting the rigid categorization of juvenile proceedings as civil, and extending the protection offered by the Double Jeopardy Clause, which had traditionally been applied to criminal proceedings, to juvenile proceedings); but see *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (holding that a jury trial is not constitutionally required).

⁹¹ Robin Walker Sterling, *Role of Defense Counsel in Delinquency Court*, National Juvenile Defender Center (Spring 2009).

⁹² Adjudications of delinquency give rise to collateral consequences that may follow an individual into adulthood. The consequences may be immediate, as when a youth attempts to return to school, or it may be long-term, impacting an individual’s ability to secure college loans, join the military or qualify for subsidized housing. Ashley Nellis, *Addressing the Collateral Consequences for Young Offenders*, The Champion (Nat’l Ass’n of Criminal Def. Lawyers, D.C.), July & Aug., 2011.

research and framework into their approach to the practice.⁹³ Therefore, effective representation for the child client requires the assistance of social workers and other experts who can conduct a detailed assessment of the client's psychosocial, education, trauma, medical and mental health history, as well as identify, connect with, and advocate for state agency and community based services to address issues requiring intervention. Further, this information may be relevant to the commission of the crime or used in mitigation at the time of plea negotiation, sentencing, or disposition.

⁹³ See <http://positiveyouthjustice.org>; <http://www.americaspromise.org>; <http://www.search-institute.org/developmental-assets/lists>; <http://www.laccr.org/what-we-do/defending-children/childrens-defense-team/>

II. PRACTICE CONSIDERATIONS FOR DEFENDERS

This section shifts from explaining general principles of confidentiality to pragmatic analysis of how these principles can shape defense team practice. Defenders are advised to thoughtfully design their practice and clearly define the duties of each member of the defense team. The operative question is how to balance the risk of sanction under mandatory reporting statutes (for clients as well as social workers and attorneys) against the risk that clients will not receive zealous and effective assistance of counsel. The answer to this question is intensely jurisdiction-specific, but the following models and comparisons can help inform the deliberation.

A. Assess Local Law and Practice

Defenders' first step must be to familiarize themselves with their local laws, which may be more or less restrictive than they imagine. The 50-State Survey of Child Abuse Mandatory Reporting Statutes (2015) attached to this report as Appendix II directs defenders to where to find mandatory reporting statutes in their state codes and gives an overview of what these statutes explicitly require in terms of who must report, what is the standard of knowledge for reporting, and whether attorney-client privilege is specifically recognized.

Defenders may begin by referring to first principles of statutory construction⁹⁴ to determine whether their statute is relatively protective of defense team confidentiality and indeed whether it even reaches their work. Defenders should keep in mind that rules of statutory construction are often opposed, so that, for example, an explicit exception for one kind of privilege might be construed by the courts as either supporting or undermining an implicit exception for another kind of privilege.

Defenders will be on surest legal ground when they have researched their local case law for authoritative interpretations of the statute, which may have construed it more or less broadly than the text alone might suggest. Case law may also have reconciled the mandatory reporting statute with constitutional law, common law, or other statutes, especially a provision of the Social Worker Act (defining who is considered a social worker for purposes of the law), evidence code (defining the scope of privileges), or rules of ethics and professional responsibility (defining duties and limits of confidentiality for attorneys and social workers). Defenders should also familiarize themselves with advisory ethics opinions or attorney general opinions.⁹⁵

Even where the law seems clear, defenders must pause to consider their local courts' general attitude toward the right to counsel and attorney-client confidentiality. Defenders should ask themselves whether judges will be likely to protect confidentiality against legal challenge if a

⁹⁴ There are a wealth of resources available for free online on this topic. <http://georgetownlawjournal.org/files/pdf/98-2/Scott.PDF>; <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf>

⁹⁵ See e.g. Kan. Atty. Gen. Op. No. 01-28, 2001 WL 930603 (2001) (responding to the inquiry of the Kansas Behavioral Sciences Regulatory Board); 75 Op. Atty Gen. Md. 76 (1990) (responding to an inquiry from the State's Attorney for Baltimore County, Maryland); State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 30, (2005) (responding to the inquiry of the director of an unidentified Nevada legal services organization).

conflict should arise. Alternatively, defenders can gauge their local political climate for its receptiveness to legislative advocacy on this issue. As in any reform effort, it will be critical to account for the potential for political backlash.

B. Select a Practice Model

Once defenders have a better sense of the exposure of their clients and team members, they should decide how to structure the integration of social workers into their practice. Three common models⁹⁶ are interdisciplinary, multidisciplinary, and consultancy collaboration.

i. Integrated Model

Under this model, also called the “hand-in-hand” model, the social worker is fully integrated into the defense team. He or she is a contractor with an explicit engagement agreement or an employee of the defender, and thus fully under an attorney’s supervision and direction. One benefit of this model is its clarity of purpose and authority. Because it clearly meets the requirements of agency under the attorney’s Rules of Professional Conduct and the *Kovel* doctrine of derivative attorney-client privilege, this model ensures the greatest likelihood that the court would recognize that the defense team social worker is not a mandated reporter. In part because of these protections, this model also allows for the greatest degree of openness and communication between the social worker and the client, which will make the entire defense team more effective. The potential downside to openness is, of course, that it broadens exposure for clients and defense team members in jurisdictions where the law of confidentiality is unsettled.

ii. Parallel Services Model

Under this model, also called the “side-by-side” model, the social worker and attorney work independently in the same office or legal community. The defender recognizes social service needs of the client and refers the client to social workers for appropriate services to assist in both case and life outcomes. However, without an employment relationship, explicit engagement letter or contract laying out the social workers duty of agency to the attorney, it is unclear whether some courts would construe consultations about social services as part of the lawyer’s professional duties and by extension, as protected by the attorney-client privilege.

iii. Consultancy Model

Under this model, the social worker consults only with the attorney on legal matters. The two professionals may or may not work in the same office. The social worker’s role can include advising the attorney on a treatment plan for a client or informing case protocols, such as to what matters to address in intake interviews. The social worker typically will not meet with the client except in sharply limited circumstances. This model offers the clearest protection against mandatory reporting sanctions in jurisdictions where attorney-client confidentiality is not well established in law, because the client does not communicate with the social worker. This lack of communication, however, inhibits a full understanding of issues that may be relevant to the criminal case and would certainly be relevant to promoting client-centered, holistic representation to improve the client’s overall life circumstances that underlie the criminal matter. To the extent that this lack of communication impairs the defense it may deprive the client of the Constitutional right to effective assistance of counsel.

⁹⁶ These models are derived from the scholarship of legal aid attorneys and social workers on this issue. See Thea Zajac, “Social Work and Legal Services Integrating Disciplines: Lessons from the Field” (2011). Legal Aid Association of California. http://www.calegaladvocates.org/library/item.399712-Social_Work_and_Legal_Services_Integrating_Disciplines_Lessons_from_the_Fie; M. T. Block & A. Soprych, A., “Beyond Advocacy Alone: Incorporating Social Work into Legal Aid Practice,” Clearinghouse REVIEW Journal of Poverty Law and Policy, 44(9,-10), 465–470 (2011). The descriptions of the models in this report reflect common indigent defense practice.

C. Implement a Practice Model

i. Establish Office Policy and Culture

Perhaps the most effective way of limiting exposure to mandatory reporting sanctions is to establish and support a clear policy on collaboration and confidentiality. Every law office must assure that all employees and agents — attorneys and non-attorneys — are apprised of the rules of legal ethics which bind them all.⁹⁷ Defender offices should thoroughly train and evaluate all members of the defense teams along these lines.⁹⁸

a. Select

This conversation should begin at the interview stage for new hires by defender offices or when assigned counsel is engaging the services of a social worker. Attorneys must assess all potential defense team members, including non-attorneys, for their understanding of the unique ethical and legal context of criminal defense work, as well as for their commitment to the general principles of zealous advocacy. Interviews are an ideal setting to communicate the defender's vision of to what extent social workers are integrated into the legal practice. If prospective hires express reticence or refuse to comply with official confidentiality policy, an attorney who chooses to employ such staff invites inter-office conflict, while also exposing other staff to ethical and legal violations and endangering clients.

b. Direct

Once selected, a defense team social worker should promptly receive clear direction on confidentiality and privilege. The general principles described in Section I, especially the purpose and boundaries of attorney-client privilege, are applicable in this context. Direction regarding confidentiality and privilege for defense team social workers should address the procedures to follow regarding any potentially reportable client information, ensuring social workers understand and employ all ethically required measures to protect the rights of the client.

The direction to be given depends on local law and the defender's practice model. In an interdisciplinary model, the defender may explain that the social worker's communications with clients are privileged and that social workers on the team are not allowed to disclose communications about abuse they would otherwise have to report. In a multidisciplinary or consultancy model, the direction by the defender may delimit the social worker's interactions with clients and may emphasize the need to inform clients of the social worker's duty to report.

c. Document

In the event that an attorney or social worker is challenged in court, the protection of the attorney-client privilege will be clearest if they have written proof of the nature of the work for the defense team. Guidance on the *Kovel* doctrine for other kinds of non-attorney assistants (such as accountants) generally recommends recording in contracts, billing, and office policy the overriding legal purpose of the professional collaboration; the necessity of the assistance; and the agency relationship between attorney and non-attorney.⁹⁹

⁹⁷ See *supra* Section I.A.ii; see also ABA, *MRPC*, Rule 5.3.

⁹⁸ Many mandatory reporting laws specifically address the employer's duty to facilitate reporting. A typical provision from Massachusetts states that an employer who "discharges, discriminates or retaliates against [a] mandated reporter [who files a report] shall be liable to the mandated reporter for treble damages, costs and attorney's fees." Mass. Gen. L.ch. 119, § 51A(h). Restrictive or punitive reporting procedures (and training based on those procedures) could be alleged to be discriminatory or retaliatory, thus exposing the employer to significant liability. Moreover, in a state like Alaska, state agencies that employ mandated reporters have specific affirmative training requirements for reporting. See Ala. Code § 47.17.022 (detailing timing and content requirements of training, with curriculum to be filed with the Council on Domestic Violence and Sexual Assault). Although these provisions would conflict with attorneys' professional and constitutional duties were they applied to defense team social workers, employers must nevertheless factor their own risk of liability into their hiring, training, and evaluation strategies.

⁹⁹ Michael N. Levy and Todd A. Ellinwood, *The Applicability of the Attorney-Client Privilege to Non-Attorney Members of the Legal Team*, McKee Nelson LLP Newsletter at 3 (2005); Cheryl C. Magat, *How Attorney-Client Privilege and the Work Product Doctrine May Apply to Third Parties in Tax Law*, The Practical Tax Lawyer at 23 (2011) (accountants); Mark A. Segal, *The Kovel Doctrine: Issues and the Perils of Discovery*, The Journal of Applied Business Research at 13 (2011).

ii. Inform Clients

No matter what model of collaboration defenders choose, they must inform clients of the defense team's duty of confidentiality as well as its limits, as determined in part by local law. Under an interdisciplinary model, this may be an explanation that the social worker as well as the attorney is bound by a duty of confidentiality and attorney-client privilege, and will not report abuse that he discovers from client interviews, except that which is reasonably certain is result in substantial bodily harm. Under a multidisciplinary model, the defense team may instead explain to the client that the law does not clearly protect their confidentiality or that social workers may be required to report abuse of which they are informed. Another option under a multidisciplinary model is to first screen clients in an interview with an attorney for a history of abuse, so as to not put these clients in contact with social workers. A combination of these latter strategies is known as a "screen and inform" approach.

CONCLUSION

This report seeks to empower defenders with knowledge of the foundational legal principles protecting their use of experts and with practical guidance for navigating this fraught area of law. The value of social workers to the representation of indigent defendants is clear, as is apparent from the ever increasing inclusion of social workers on defense teams by staff defender agencies and private assigned counsel alike. State statutes on mandated reporting must not deprive indigent defendants of the fully effective defense representation which is their fundamental Constitutional right.

Through participation in the work of NLADA's membership committees, virtual discussions, and in-person conferences — and in criminal justice system reform efforts more broadly — defenders can engage in an ongoing conversation about how to bring down all barriers to quality, community-oriented indigent defense advocacy.

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National Alliance of Sentencing Advocates & Mitigation Specialists (NASAMS)

[Code of Ethics and Professional Standards](#)

National Association for Public Defense

[Formal Ethics Opinion 14–1](#)

National Association of Social Workers

[Code of Ethics](#)

APPENDIX II: 50-STATE SURVEY OF CHILD ABUSE MANDATORY REPORTING LAWS (2015)

The following table describes the mandatory reporting statute for child abuse in each state, the District of Columbia, and in the federal system. The left column indicates where to find the statute in each state code. The middle columns indicate who is *explicitly* listed as mandatory reporters in each statute: either “any person” who suspects abuse, or social workers and/or attorneys in particular. The rightmost columns indicate whether the statute *explicitly* recognizes attorney-client privilege as an exception, or abrogates it (or all privileges) as to mandated reports. This table, therefore, does not capture which persons or information may be implicitly covered by the mandatory reporting statutes, nor does it capture how case law may have expanded on their meaning, especially where they conflict with separate laws of professional conduct or evidence.

An expanded version of this table, with more detailed analysis of each statute, is available from NLADA upon request.

	Statute	Mandated Reporters			Attorney-Client Privilege		
		Any Person	Social Workers	Attorneys	Recognized	Abrogated	
AL	Ala. Code §26-14-3		X		X		AL
AK	Alaska Stat. Ann. §47.17.020		X				AK
AZ	A.R.S. §13-3620		X				AZ
AR	A.C.A. §12-18-402		X			X	AR
CA	Cal Pen Code §11165.7		X				CA
CO	C.R.S. §19-3-304		X				CO
CT	Conn. Gen. Stat. §17a-101		X				CT
DE	16 Del. C. §903	X	X		X		DE
DC	D.C. Code §4-1321.02		X		X		DC
FL	Fla. Stat. §39.201	X	X		X		FL

	Statute	Mandated Reporters			Attorney-Client Privilege		
		Any Person	Social Workers	Attorneys	Recognized	Abrogated	
GA	O.C.G.A. §19-7-5		X				GA
HI	HRS §350-1.1		X				HI
ID	Idaho Code Ann. §16-1605		X				ID
IL	325 ILCS 5/4		X		X		IL
IN	IC §31-33-5-1	X					IN
IA	Iowa Code §232.69		X				IA
KS	K.S.A. §38-2223		X				KS
KY	KRS §620.030	X	X		X		KY
LA	La. Child. Code Ann. Art. 603(17)(a-k), 609		X		X		LA
ME	22 M.R.S. §4011-A		X				ME
MD	Md. Family Law Code Ann. §5-704	X	X		X		MD
MA	ALM GL ch. 119, §51A		X				MA
MI	MCLS §722.623		X				MI
MN	Minn. Stat. §626.556		X				MN
MS	MS Code. §43-21-353	X	X	X			MS
MO	§210.115 R.S.Mo		X				MO
MT	§41-3-201, MCA		X				MT
NE	R.R.S. Neb. §28-711	X	X			X	NE
NV	Nev. Rev. Stat. Ann. §202.882, §432B.220.4	X	X		X		NV
NH	N.H. Rev. Stat. Ann. §169-C:29	X	X		X		NH

	Statute	Mandated Reporters			Attorney-Client Privilege		
		Any Person	Social Workers	Attorneys	Recognized	Abrogated	
NJ	N.J. Stat. Ann. §9:6-8.10	X					NJ
NM	NMSA §32A-4-3	X	X			X	NM
NY	NY CLS Soc Serv §413		X				NY
NC	G.S. §7B-301	X			X		NC
ND	N.D. Cent. Code 50-25.1-03		X		X		ND
OH	ORC §2151.421		X	X	X		OH
OK	10A O.S. §1-2-101	X				X	OK
OR	ORS 419B.010		X	X	X		OR
PA	23 Pa.C.S. §6311		X	X	X		PA
RI	R.I. Gen. Laws §40-11-3	X			X		RI
SC	S.C. Code Ann. §63-7-310		X		X		SC
SD	S.D. Codified Laws §26-8A-3		X				SD
TN	Tenn. Code Ann. §37-1-403	X					TN
TX	Tex. Fam. Code §261.101	X	X			X	TX
UT	Utah Code Ann. §62A-4a-403	X					UT
VT	33 V.S.A. §4913		X			X	VT
VA	Va. Code Ann. §63.2-1509		X				VA
WA	RCW §26.44.030		X		X		WA
WV	WV Code §49-2-803		X				WV
WI	Wis. Stat. §48.981		X				WI
WY	Wyo. Stat. §14-3-205	X			X		WY



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