

Social Workers in North Carolina Public Defender Offices

Ethical and Legal Issues Involving Mandatory Reporting Laws

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CONTENTS

Introduction ... 2

**Common Roles of Social Workers in
Public Defender Offices** ... 2

Case Manager ... 3

Mitigation Specialist ... 3

Communicator ... 4

Counselor ... 4

Basics of Mandatory Reporting ... 4

1. Mandatory Reporting of Abuse, Neglect,
or Dependency Involving a Juvenile ... 4

2. Mandatory Reporting of a Violent
Offense, Sexual Offense, or Misdemeanor
Child Abuse Involving a Juvenile Victim ... 5

3. Other ... 5

Fundamentals of Privilege and Confidentiality ... 5

What Is the Dilemma? ... 7

**What Legal and Ethical Authority Exists
for Answering These Questions?** ... 9

**Does the Fact That North Carolina Is a “Universal
Mandatory Reporting” State Affect the Analysis?** ... 11

**What Is a Practitioner to Do? Potential
Protective Measures** ... 12

Informed Consent ... 12

Hiring People Who Are Not Licensed Social Workers ... 13

“Walling Off” ... 13

Avoiding In-House Therapeutic Practice ... 14

**Can an Attorney Advise a Social Worker
on What to Do?** ... 15

Conclusion ... 15

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Introduction

Increasingly, public defender offices are bringing social workers in-house. Seeking to adopt a “holistic” approach to defense work, these offices rely on social workers (and others providing social work services) to help their clients in a variety of ways.¹ Social workers can locate housing, find appropriate treatment for substance use disorder or mental illness, and improve client communication by building trust and sensitivity to clients’ needs. They address causes and consequences of a client’s involvement with the criminal justice system, attempting to break cycles of recidivism. Social workers may also bolster the argument for a mitigated sentence by gathering biographical information or providing opportunities for clients to improve their lives. In offices where social workers have worked alongside public defenders for decades, attorneys point to the benefits of inter-professional collaboration. The ultimate goal is for the client to receive effective legal representation complemented by social work support that goes beyond simply handling the pending case.

North Carolina is in the midst of a major expansion of its public defender system.² As new public defender offices open throughout the state, chief public defenders are making decisions about how to staff their offices, and many are choosing to hire social workers.

Yet a common question arises when social workers are embedded in public defender offices: how should the inter-professional defense team navigate a situation, such as learning of child abuse, where mandatory reporting laws require notification to the local department of social services (DSS) or law enforcement? Should social workers comply with state statutes and follow their own ethical code by making a report? Or does the attorney’s obligation to keep client confidences and provide effective assistance of counsel “trump” the social worker’s duty to report? This dilemma is the subject of this bulletin.

Before delving into this issue, it is important to understand (1) the roles of social workers in public defender offices, (2) the basics of mandatory reporting, and (3) the fundamental concepts of privilege and confidentiality. The sections below will cover these concepts. The next sections further explore the dilemma and the available authority. The bulletin concludes by discussing potential steps that defenders can take to resolve the dilemma or avoid it in the first place.

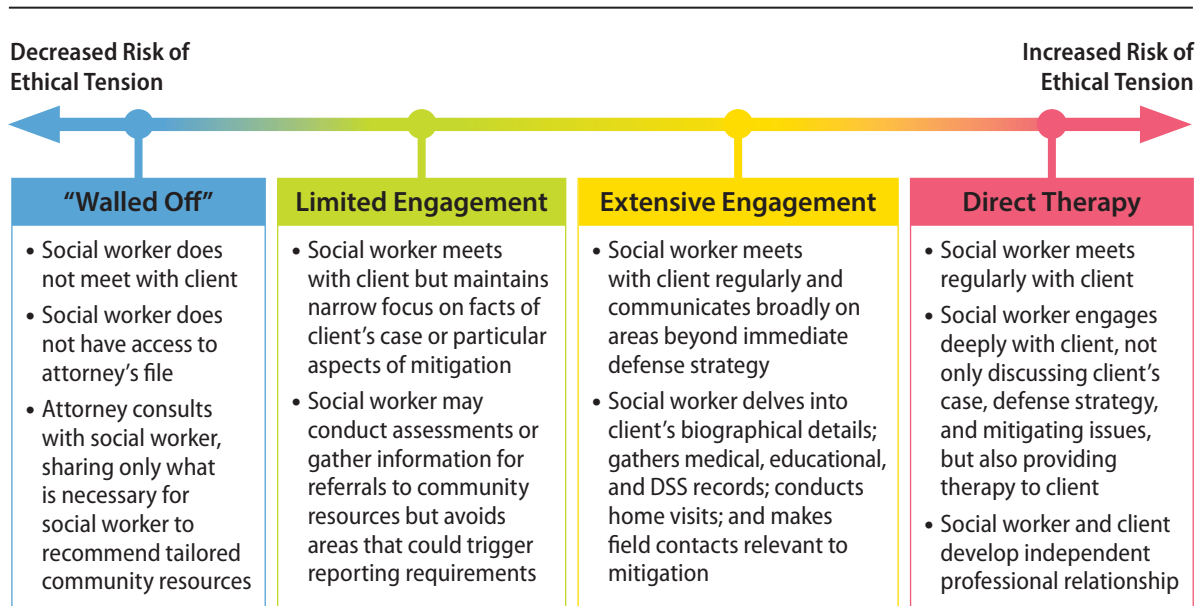
Common Roles of Social Workers in Public Defender Offices

Social workers and others providing social work services assist public defenders in a variety of ways. The following role descriptions are generalizations, but they are useful reference points for our analysis.

1. The Bronx Defenders, a public defender nonprofit and innovator in the area, defines holistic defense in terms of “four pillars”: (1) seamless access to services that meet legal and social support needs; (2) dynamic, interdisciplinary communication; (3) advocates with an interdisciplinary skillset; and (4) a robust understanding of, and connection to, the community served. See Bronx Defenders, [Holistic Defense, Defined](https://www.bronxdefenders.org/holistic-defense/), <https://www.bronxdefenders.org/holistic-defense/> (last visited Jan. 8, 2025).

2. See Hannah Turner, [North Carolina 2024 Public Defender Expansion](https://nccriminallaw.sog.unc.edu/north-carolina-2024-public-defender-expansion/), N.C. CRIM. L.: A UNC SCH. OF GOV’T BLOG (Apr. 3, 2024), <https://nccriminallaw.sog.unc.edu/north-carolina-2024-public-defender-expansion/>.

Figure 1. Spectrum of Social Worker Involvement with Defense Team, Degree of Ethical Risk Involved



Case Manager

A social worker in a public defender office may serve as a case manager for clients. In this role, the social worker identifies community resources to assist clients in addressing root causes of the behavior that led to contact with the criminal justice system. For example, the social worker may locate inpatient or outpatient substance use disorder treatment and assist a client with enrollment. The social worker may help navigate issues pertaining to medical costs, as well as insurance coverage and eligibility. A social worker acting in a case manager role also frequently assists defenders in locating mental health services, housing, employment options, anger management and parenting classes, and other possible sources of support for a client.

The goal of referring a client to community resources may be to demonstrate to the state or the court that the client has the potential for rehabilitation. Or the goal may be to help a client find improved health and economic stability, avoiding future encounters with the criminal justice system. A referral to treatment or any other service may or may not require a face-to-face assessment, where a client provides information so that the social worker can more appropriately tailor recommendations.

Mitigation Specialist

A social worker may also serve as a mitigation specialist, identifying factors in a client’s upbringing or life experience, such as early childhood trauma or prior victimization, that reduce the client’s culpability. These factors may be considered by the state, the sentencing judge, or even the jury (in a capital case) in determining the appropriate punishment for a given crime.

The work of a mitigation specialist may involve extensive inquiry into a client's background and relationships. The mitigation specialist may conduct home visits, travel outside the jurisdiction to interview family members and others, or delve into the client's educational and mental health records. Thus, the chance of uncovering information subject to mandatory reporting requirements is higher in this context.

Communicator

Some social workers assist a client's defense team by meeting with the client and relaying developments in the criminal case. The social worker may be particularly skilled in communicating difficult news and listening to the client with empathy. The social worker can bring the client's concerns back to attorneys and generally enhances communication. This can be helpful for attorneys with heavy caseloads, who lack the time to meet with clients as much as they would like.

Counselor

Although less common than the roles discussed above, a social worker may provide direct counseling services to a client. This could involve an array of therapeutic practices geared toward addressing issues related to the client's general life circumstances or specific aspects of the client's encounter with the criminal justice system. As discussed below, where social workers build a one-on-one relationship with a client involving the delivery of therapeutic services, it may be difficult to argue that the social worker's mandatory reporting obligations are superseded by the attorney's determination that effective assistance requires maintaining confidentiality. This is because the independent nature of the relationship between the social worker and the client that develops through the direct delivery of therapeutic services means that the social worker's involvement is not purely derivative of the attorney-client relationship.

Basics of Mandatory Reporting

The following is a synopsis of North Carolina mandatory reporting laws. Readers interested in a more detailed discussion should refer to School of Government faculty member Jill Moore's publication, [North Carolina Laws Mandatory Reporting Laws](#).³

1. Mandatory Reporting of Abuse, Neglect, or Dependency Involving a Juvenile

The most common type of information that triggers North Carolina mandatory reporting laws is information pertaining to the abuse of a minor. North Carolina is a "universal mandatory reporting" state, meaning that all persons, regardless of their profession, have a statutory obligation to make a report to their local department of social services (DSS) when they have cause to suspect that a juvenile under 18 is abused, neglected, or dependent.⁴ The only statutory exception to this rule is for attorneys representing clients in abuse, neglect, or dependency cases

3. Jill Moore, [North Carolina Laws Mandatory Reporting Laws](#) (UNC Sch. of Gov't, July 8, 2022), <https://wicws.dph.ncdhhs.gov/provPart/docs/7-2022-Handout-MR-Laws-Jill.pdf>.

4. See Chapter 7B, Section 301 of the North Carolina General Statutes (hereinafter G.S.). Also see Moore, *supra* note 3.

who learn of the information through privileged communication with a client.⁵ This type of mandatory reporting is triggered when an individual has cause to suspect that (1) a juvenile's abuse, neglect, or dependency is created or caused by a parent, guardian, custodian, or caretaker or (2) any minor is a victim of human trafficking (sex or labor trafficking) regardless of who created the juvenile's victimization.⁶ Knowingly and wantonly failing to make a report is a Class 1 misdemeanor.⁷

2. Mandatory Reporting of a Violent Offense, Sexual Offense, or Misdemeanor Child Abuse Involving a Juvenile Victim

A second type of mandatory reporting arises when an adult knows or reasonably should have known that a juvenile under 18 has been or is the victim of a violent offense, sexual offense, or misdemeanor child abuse.⁸ This type of mandatory reporting is triggered by the child's victimization; it does not consider the relationship between the juvenile and alleged perpetrator, unlike the reporting of abuse, neglect, or dependency. The report must be made to local law enforcement. For this second type of reporting obligation, the exception is broader, as all attorneys who acquire the information through privileged communication with a client are exempted. Also, private social workers who learn of the reportable conduct through privileged communications are also exempted from reporting.⁹ Social workers in public defender offices are not covered by this private social worker exemption, although the exemption may arise when clients are referred to social workers outside the office. Knowingly and wantonly failing to make a report is a Class 1 misdemeanor.¹⁰

3. Other

Other types of information are subject to mandatory reporting beyond the above two, such as information relating to the disappearance of a child under 16 and situations involving health care providers, but they are less relevant to the issues described below and will not be discussed further here.¹¹

Under the above mandated reporting laws, depending on the circumstances, a report may need to be made to DSS, law enforcement, or both.¹²

Fundamentals of Privilege and Confidentiality

This section sets out the fundamentals of privilege and confidentiality, and their grounding in various sources of authority.

Attorney-client privilege protects any communication from being admitted into evidence if (1) the relationship of attorney and client existed when the communication was made;

5. G.S. 7B-310.

6. See *id.* § 101(1) (definition of "abused juveniles"); (9) (definition of "dependent juvenile"); (15) (definition of "neglected juvenile").

7. *Id.* § 301(b).

8. See G.S. 14-318.6.

9. Social workers are exempted from this duty only when licensed or certified under G.S. 90B and engaged in the delivery of private social work services. See G.S. 14-318.6(h); 8-53.7.

10. G.S. 14-318.6(c).

11. See Moore, *supra* note 3, for more information.

12. See G.S. 14-318.6(d).

(2) the communication was made in confidence; (3) the communication concerns a matter about which the attorney is being professionally consulted; (4) the communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated; and (5) the client has not waived the privilege.¹³ Stated more concisely, the attorney-client privilege “excludes from evidence statements made by an individual in confidence to an attorney for the purpose of obtaining legal advice.”¹⁴ Notably, the attorney-client privilege is not codified in the North Carolina statutes recognizing various privileges, such as doctor-patient.¹⁵ Rather, it is grounded in case law and has constitutional underpinnings in the right against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as the right to effective assistance of counsel guaranteed by the Sixth Amendment.¹⁶

In comparison, the duty of confidentiality is significantly broader in scope than attorney-client privilege and encompasses “all information acquired during the representation, whatever its source.”¹⁷ This includes not just statements made by a client to an attorney in confidence, but, for example, observations an attorney may make in visiting a crime scene or conversations a social worker may have with a client’s family member during a home visit.¹⁸ Rule 1.6 of the North Carolina Rules of Professional Conduct prohibits attorneys from revealing confidential information. However, the rule contains certain exceptions allowing for disclosures. These include complying with another law, such as a mandatory reporting statute, preventing the client from committing a future crime, or preventing reasonably certain death or bodily harm to any individual.¹⁹

Without delving deeply into the constitutional underpinnings of privilege and confidentiality, it is worth noting that there are layers of information that implicate constitutional rights to varying degrees. Statements made by a client to an attorney in confidence have heightened protection, as our courts have found the attorney-client privilege to be “critical to the effective assistance of counsel” right under the Sixth Amendment.²⁰ There may also be due process implications under the Fifth Amendment where a client has good reason to believe that information shared with a lawyer is protected by privilege, and yet the information is subsequently revealed when the attorney is compelled to give testimony.²¹

Information learned during investigation or mitigation-gathering, on the other hand, may not be as core to the constitutional guarantees. Confidentiality is still rooted in the Sixth Amendment, as effective assistance of counsel requires that an attorney be free to gather information through

13. See *In re Investigation of Death of Miller*, 357 N.C. 316, 335 (2003).

14. See Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L. J. 203, 208 (1992), citing 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292, at 554 (rev. ed. 1961).

15. See G.S. 8-53 to -53.14.

16. See *State v. Ballard*, 333 N.C. 515 (1993) (right to proceed *ex parte* in applying to court for expert to protect attorney-client privilege and right to effective assistance of counsel under Sixth Amendment; also right against self-incrimination under Fifth Amendment).

17. N.C. RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (N.C. STATE BAR 2022).

18. See *id.* r. 1.6; N.C. RULES OF PRO. CONDUCT r. 5.3 (N.C. STATE BAR 2016).

19. See N.C. RULES OF PRO. CONDUCT, *supra* note 17, r. 1.6(b).

20. See *Ballard*, 333 N.C. at 521–22.

21. See Mosteller, *supra* note 14, at 269–72, for a more in-depth discussion of the extent to which the attorney-client privilege is protected by the Fifth and Sixth Amendments.

investigation and consult with experts without risking disclosure of information damaging to a client.²² However, the protection may not be as strong, or at least as deeply rooted, as the protection for client communications covered by the attorney-client privilege.²³

What Is the Dilemma?

The central dilemma discussed in this bulletin is that situations can arise where an attorney, in deference to a client's constitutional rights and other ethical considerations, determines that information subject to mandatory reporting statutes should not be disclosed, while a social worker's independent ethical strictures, concerns about licensing, and fear of being criminally prosecuted leave the social worker inclined to report.

Although these situations are rare, the consequences are serious for the client, the attorney, and the social worker, and thus it is important to consider the various sources of legal and ethical authority that apply, understand how to navigate the issue when it arises, and explore ways to avoid the issue in the first place.

In North Carolina, as in nine other states²⁴ with "universal mandated reporting" statutes, social workers and lawyers are *both* mandatory reporters of abuse, neglect, and dependency under G.S. 7B-301 with narrow exceptions, discussed above.²⁵ However, a lawyer may reasonably claim that breaching confidentiality to make a report to DSS would deprive the client of the right to effective assistance of counsel in a criminal case by causing harm or undermining the trust necessary for effective representation. The North Carolina Bar has provided support for this view in Rules of Professional Conduct opinion 175.²⁶ This ethics opinion states that an attorney has discretion to decide whether or not to report. The choice not to report "should not be exercised lightly," given the mandatory nature of the statute, but the attorney can "in good faith conclude that he or she should not reveal confidential information where to do so would substantially undermine

22. See, e.g., *State v. Dunn*, 154 N.C. App. 1 (2002) (right not to turn over nontestifying expert information to State in discovery to protect client confidentiality under Sixth Amendment). See also *State v. Pratt*, 398 A.2d 421 (Md. 1979) (defendant's statements to psychiatrist as part of insanity evaluation were covered by attorney-client privilege and Sixth Amendment protections). *Pratt* is cited in the Maryland Attorney General opinion discussed in the text below.

23. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law").

24. Idaho, Indiana, Mississippi, Nebraska, New Jersey, New Mexico, Oklahoma, Tennessee, Utah, as well as Puerto Rico.

25. See Moore, *supra* note 3; also see Sara DePasquale, [Mandated Reporting of Child Abuse, Neglect, or Dependency: What's an Attorney to Do?](https://civil.sog.unc.edu/mandated-reporting-of-child-abuse-neglect-or-dependency-whats-an-attorney-to-do/) ON THE CIVIL SIDE: A UNC SCH. OF GOV'T BLOG (Aug. 7, 2015), <https://civil.sog.unc.edu/mandated-reporting-of-child-abuse-neglect-or-dependency-whats-an-attorney-to-do/>.

26. N.C. State Bar Council on Rules of Pro. Conduct, Op., [RPC 175, Reporting Child Abuse](https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-175/) (Jan. 13, 1995), <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-175/>. Another opinion from the N.C. Bar, RPC 120, initially concluded that the mandatory reporting laws did not abrogate the attorney-client confidentiality or privilege, meaning that an attorney was not ethically required to report child abuse where the information was acquired during the course of the professional relationship. RPC 175 was adopted after a 1993 change in the statute making it explicit that an attorney could not rely on the privilege in deciding not to report, except where the attorney acquired the information from the client in the course of representing the client in an abuse, neglect, or dependency matter. See G.S. 7A-551 (1993) (this language is now contained in G.S. 7B-310).

the purpose of the representation or substantially damage the interest of his or her client.”²⁷ The ethics opinion cites to Rule 4 of the North Carolina Rules of Professional Conduct (now Rule 1.6), prohibiting attorneys from revealing information learned during the professional relationship, as well as to Rule 7.1, prohibiting attorneys from taking action that will intentionally “prejudice” or “damage” a client.²⁸

In short, the ethical opinion concludes that lawyers may choose not to report conduct covered by the mandatory reporting statutes, at least in certain circumstances. Attorneys may conclude that the constitutional right of a client supersedes the statutory mandatory reporting requirement. However, the State Bar recognized the limits of its authority in noting that a lawyer could still be criminally prosecuted for taking this otherwise “ethical” path.²⁹

The question of when an attorney should make a report is thus a dilemma in its own right.³⁰ However, the dilemma that this bulletin is primarily concerned with is whether a social worker should be viewed as essentially part of a client’s legal team and bound by the attorney’s ethical code³¹ or whether the social worker has an independent duty to report that cannot be circumvented by becoming part of

A Social Worker’s Observation

“In terms of my work as a mitigation investigator, where I have felt [the reporting dilemma] come into play is when I am interviewing people in their homes. I see a lot of questionable parenting techniques and living situations doing this work. I remember going to a trailer one time where the front door was wide open and there was a baby in a car seat on the sofa. I called out multiple times and no one came. I was getting ready to leave and call the police, when a woman finally came out of the back of the trailer. This was my client’s sister. It would have been terrible if I had . . . to report her.”

27. Note that RPC 175 predated the enactment of an explicit criminal sanction for noncompliance, but it is unclear whether this changes the analysis.

28. See N.C. RULES OF PRO. CONDUCT, *supra* note 17, r. 1.6. Note that language contained in former Rule 7.1 is now contained in Rule 8.4 (N.C. STATE BAR, last amended 2017).

29. See RPC 175, *supra* note 26.

30. Although it may be tempting for an attorney to treat any breach of confidentiality as an impermissible undermining of the trust necessary for effective representation, RPC 175 clearly contemplates that protecting a client’s Sixth Amendment right to effective assistance of counsel does not mean that the attorney should place confidentiality above mandatory reporting duties in every situation.

One can imagine information learned during the course of representation that is relatively tangential to a client and the client’s case. For example, in gathering mitigation for a serious case, an attorney may learn of abuse of a family member that does not implicate a client. The client may be ambivalent about whether the attorney reports. In such a situation, the attorney may reasonably conclude that the attorney is able to comply with the mandatory reporting statute without compromising the representation of the client.

The question is abstract and the line difficult to draw. Should an attorney simply consider whether information would be damaging to a client? Or is the question whether the duty to report interferes with specific aspects of the defense in a criminal case? Some argue more generally that the fundamental nature of the relationship between an attorney and client is compromised where the attorney may turn into an informant, and thus the Sixth Amendment requires that confidentiality only be breached where absolutely necessary. The United States Supreme Court wrote in *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), that the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law and its purpose is to “encourage full and frank communication between attorneys and clients, and thereby promote broader public interests in the observance of law and administration of justice.” Nevertheless, the ethical rule contemplates that an attorney will exercise discretion and consider various sources of legal and ethical authority in determining whether to make a report.

31. See N.C. RULES OF PRO. CONDUCT, *supra* note 18, r. 5.3.

the defense team. This tension has been referred to as a “clash” by some commentators.³² Social workers have their own professional orientation and norms, and they tend to be more reluctant to elevate the objectives of an individual client over other compelling interests. The first rule of the Social Workers’ Code of Ethics, promulgated by the National Association of Social Workers, states that clients’ interests generally come first, but the “responsibility to the larger society or specific legal obligations may, on limited occasions, supersede the loyalty owed clients . . .”³³ Of course, lawyers may also on rare occasions breach confidentiality to address concerns for third parties, as when a lawyer believes there is an imminent risk of serious bodily harm to another,³⁴ but the profession tends to jealously guard confidentiality as a fundamental principle.

The professional norms and practices of social workers are different from those of legal assistants and paralegals, and their ethical principles are integrated into their training and licensing requirements. Must social workers check their own professional code of ethics at the door when they join a public defender office? Should a social worker be prepared to risk loss of licensure, in addition to facing potential criminal and civil liability for not reporting?

What Legal and Ethical Authority Exists for Answering These Questions?

The ethical tension between a lawyer and a social worker that may arise in relation to mandatory reporting has been the subject of ethics opinions, state attorney general opinions, law review articles, and professional publications. However, it is not easily resolved. There is a scarcity of appellate law on the question (no case law exists in North Carolina), and opinions from other jurisdictions that do exist are generally advisory and non-binding.

Those writing from the point of view of the public defender tend to espouse the view that a lawyer’s discretion must control when deciding when to report. Public defender organizations are understandably reluctant to compromise fundamental principles of confidentiality and zealous advocacy. The National Association for Public Defense (NAPD), for example, has promulgated a Formal Ethics Opinion concluding that social workers (and health care professionals) “may not” report the abuse of a client without the permission of the client’s lawyer.³⁵ The NAPD ethics attorneys find a “reasonably bright line” rule. The opinion goes as far as to advise a defender to seek a court order preventing a social worker from disclosing information where the attorney determines that confidentiality should be protected. However, the NAPD opinion acknowledges that social workers may see it differently. Notably, the opinion cites to a Kentucky law stating that social workers employed by public defender offices must “practice under attorney-client privilege, irrespective of other obligations or duties arising with their independent licenses or certifications.”³⁶ This is certainly authority that social workers in Kentucky may rely on, but the dilemma persists for those in states without such a statute.

32. See Alexis Anderson, Lynn Barenberg, & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659 (2007).

33. See [CODE OF ETHICS OF THE NAT’L ASS’N OF SOC. WORKERS](https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English/Social-Workers-Ethical-Responsibilities-to-Clients) r. 1.01 (NAT’L ASS’N OF SOC. WORKERS, 2021 update), <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English/Social-Workers-Ethical-Responsibilities-to-Clients>.

34. See N.C. RULES OF PRO. CONDUCT, *supra* note 17, r. 1.6(b)(3).

35. See Nat’l Ass’n for Pub. Def. Ethics Counselors, [Formal Ethics Op. 14-1](https://publicdefenders.us/app/uploads/2023/08/NAPD_Forma l_Ethics_Opinion_14-1-1.pdf), https://publicdefenders.us/app/uploads/2023/08/NAPD_Forma l_Ethics_Opinion_14-1-1.pdf.

36. See KY. REV. STAT. ANN. § 31.100(6).

The view that social workers should deprioritize their professional norms and ethics in favor of those of legal defense teams makes sense from the perspective of an attorney. Under this view, the relationship between a social worker and a client is derivative of, and dependent on, the fundamental attorney-client relationship. Rule 5.3 of the North Carolina Rules of Professional Conduct dictates that a lawyer take “reasonable efforts” to ensure that nonlawyers employed or retained by the attorney comply with the professional obligations of the lawyer. As the predominant relationship is that of a lawyer and a client, and a social worker would not have contact with the client but for the criminal case, the view is that the lawyer’s ethical obligations must supersede those of the social worker.

Some opinions from other states’ ethics committees and attorneys general support this view. For example, the Maryland Attorney General opined on the question in the context of mental health providers outside an attorney’s office receiving referrals from the attorney.³⁷ Thus, the tension addressed was at least as strong as that which would exist within a lawyer’s office, as the more distance between a lawyer and a social worker, the weaker the argument that the social worker’s relationship with the client is derivative of the attorney-client relationship. The attorney general concluded that where a mental health professional learns of the information triggering reporting duties before initiation of a criminal proceeding, the mandatory reporting duty trumps, but once a criminal case is pending, the discretion of the lawyer handling that case trumps.³⁸ As public defenders almost always become involved in a case after a client is charged, this opinion appears to support the view that a lawyer’s discretion supersedes a social worker’s duty to report.

The ethics committee for the State Bar of Nevada considered the general question in the context of a legal aid organization with teams of lawyers, law students, and social work students.³⁹ The committee reasoned that a social work student was the equivalent of a legal assistant and thus an attorney’s discretion as to whether to report should control.⁴⁰ However, the relevance of the opinion may be somewhat lessened given the relatively circumscribed role of the social worker students. Pursuant to internal policy, the students were required to “limit their participation” on the legal team. The social work students participated in interviewing clients and offered insights into the clients’ backgrounds and social contexts but did not directly provide other services to clients such as assessments or referrals to treatment.⁴¹ If the social worker students’ participation were broader,

37. See 75 Md. Op. Att’y Gen. 76, 1990 WL 595302 (1990).

38. Note that this distinction is grounded in the Sixth Amendment, as courts have determined that the right to effective assistance of counsel attaches when formal charges have been initiated. See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *State v. Tucker*, 331 N.C. 12, 33 (1992).

39. See State Bar of Nev., Standing Comm. on Ethics & Pro. Resp., [Op. 30](https://nvbar.org/wp-content/uploads/opinion_30.pdf) (2005), https://nvbar.org/wp-content/uploads/opinion_30.pdf.

40. See also L.A. Cnty. Pub. Def., Policies & Procs. Op. E-2 (2000) (“Social Workers’ Obligations When Confronted with Observations or Evidence of Reportable Child Abuse”). The L.A. County Public Defender opinion concluded that social workers were not acting in the capacity of health care practitioners when serving on a client’s defense team and thus were not subject to California’s mandatory reporting statute. However, the statutory duty in California was only triggered when information came to light while a health care practitioner was working in a professional capacity. In North Carolina, the duty is triggered regardless of how an individual learns of the information.

41. See State Bar of Nev., *supra* note 39.

the reasoning of the opinion may not hold. Nevertheless, the Nevada ethics committee concluded that the Nevada Supreme Court would “place the duty of confidentiality ahead of the statutory reporting obligation” if the question were to present itself.⁴²

However, not all ethics committees and attorneys general come to the same conclusion. One of the most widely cited opinions on point is that of the District of Columbia Bar Ethics Committee.⁴³ The D.C. ethics committee looked at the question of whether a social worker employed by a law firm should be treated as the equivalent of a lawyer for the purposes of interpreting and applying Rule 1.6 of the D.C. Rules of Professional Conduct (“Confidentiality of Information”). The D.C. committee answered in the affirmative but hedged, stopping short of a conclusive opinion that a social worker need not comply with mandatory reporting obligations where a lawyer determines that confidentiality must be maintained. Recognizing the advisory nature of its authority, the committee left the door open to the possibility that a social worker may still have a statutory duty to report. Describing the situation as a “quandary,” the D.C. ethics committee advised lawyers to consider warning clients that the involvement of social workers in the legal representation could trigger mandatory reporting duties. The Kansas Attorney General quoted the D.C. opinion “at length” in coming to a similar conclusion.⁴⁴

On the other end of the spectrum, the Louisiana Attorney General issued an opinion explicitly concluding that a social worker’s mandatory reporting duties persist despite the conflict with a lawyer’s ethical strictures.⁴⁵ The opinion advises that “arrangements be made” to “accommodate” a social worker’s needs. The opinion includes an article outlining various “models” and protective measures to avoid the dilemma by warning clients of the issue or “walling off” a social worker from situations in which the social worker may learn of reportable information.⁴⁶

Does the Fact That North Carolina Is a “Universal Mandatory Reporting” State Affect the Analysis?

In North Carolina, attorneys are not exempted from mandatory reporting of abuse, neglect, and dependency under G.S. 7B-301. In this context, some commentators do not perceive a “clash” or role tension because the reporting obligations of attorneys and social workers are equivalent as defined by statute.⁴⁷

42. *Id.* at 9. Relevant to the analysis of the issue in North Carolina, attorneys were not exempted from mandatory reporting of child abuse in Nevada at the time the Nevada ethics committee published this opinion. However, in 2013, the Nevada legislature passed a law carving out significant exceptions to an attorney’s duty. Pursuant to the change in law, an attorney shall not report abuse by a client when the attorney learns of the information during a privileged client communication and the client has been or could be accused of the abuse. *See* NEV. REV. STAT. § 432B.225 (2013).

43. *See* D.C. Bar, [Ethics Op. 282](https://dcb.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-282) (1998), <https://dcb.org/for-lawyers/legal-ethics/ethics-opinions-210-present/ethics-opinion-282>.

44. *See* Kan. Att’y Gen. Op. No. 01-28, 2001 WL 930603 (2001).

45. *See* La. Att’y Gen. Op. No. 10-0195 (2011).

46. For an in-depth discussion of the process of “walling off” a social worker from aspects of the representation, albeit in the context of a domestic violence clinic, *see* Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2001).

47. *See* Anderson et al., *supra* note 32, at 697.

However, this view appears to overlook that lawyers may not always comply with the statute. When situations arise where a lawyer determines that the Sixth Amendment rights of a client require that confidentiality be maintained, the lawyer may risk prosecution and choose not to report, a view supported by the N.C. State Bar as discussed above. A social worker employee of a public defender office, having a distinct ethical code and independent professional priorities, may still be at odds with a lawyer from the office, even in a state such as North Carolina where the statutory obligations of the respective professionals appear to be congruent on the face of the law. In other words, it is not at all clear that the clash disappears in a universal mandatory reporting state. Arguably, the tension is even worse in universal reporting states, as the legislature's choice not to exempt attorneys from reporting duties in many instances may mean that the legislature chose to prioritize reporting over confidentiality.

What Is a Practitioner to Do? Potential Protective Measures

Although several ethics committees, attorneys general, and commentators have concluded that it is appropriate for social workers to defer to attorneys as to when to report, some disagree, and there is not a clear source of authority in North Carolina.

Given this, defenders may wish to explore options that fully or partially address the issue. Below are some possibilities.

Informed Consent

As suggested by the D.C. Bar Ethics Committee and others, a defender may consider obtaining informed consent by advising a client of the requirements of mandatory reporting before involving a social worker in the representation. This solution enables the client to decide whether they want to bring the social worker on, and if so, what they will share with a social worker member of the defense team.⁴⁸ Defenders regularly seek consent from clients in making referrals to treatment or requesting medical records. However, seeking consent in this context may undermine trust and raise the possibility that the lawyer may not be prioritizing the client's best interests. Commentators have also questioned the ethics of requesting consent from a vulnerable client.⁴⁹ As demonstrated by the discussion above, it may not be straightforward for a client to assess the risk that might arise from involving a social worker in the representation. Nonetheless, this course of action may be attractive in that the client maintains some control over the composition of the defense team and is on notice that certain types of information must be reported.

Informed Consent

Attorney explains reporting obligations and risks of including social worker on team; attorney obtains consent from client prior to involving social worker

Benefits: Client better understands consequences of sharing information; prevents potential harm to client

Drawbacks: May undermine trust between attorney and client; may be difficult for client to make truly informed decision given complexities

48. See N.C. RULES OF PRO. CONDUCT r. 1.4 (N.C. STATE BAR 2014).

49. See St. Joan, *supra* note 46, at 434.

Hiring People Who Are Not Licensed Social Workers

Another option for defender offices is to hire individuals who are not licensed social workers (or not social workers at all). Some of the roles discussed above, such as case manager, mitigation specialist, or communicator, may be suitable for those without social work credentials if such individuals have the aptitude and proper training. Hiring non-licensed social workers avoids one potential source of tension that can arise when social workers are concerned about the impact that not reporting may have on their state licenses. However, ethical tension may remain due to an individual's orientation to social work and previous training, as well as fear about violating the statute. For tasks with heightened risk of encountering information subject to mandatory reporting, such as home visits or fact-intensive mitigation gathering, defenders may consider assigning people other than licensed social workers. For enhanced communication with clients and assistance navigating community resources, peer support specialists may also be helpful.⁵⁰

“Walling Off”

A more conservative approach involves preventing a social worker from encountering information that might be subject to mandatory reporting. In this approach, a social worker is “walled off” or “shielded” from a client, meaning that the social worker is generally prevented from learning directly about the client's circumstances, thus avoiding the dilemma entirely. Lawyers can consider meeting with the client without the social worker present, conducting home visits with the aid of an investigator rather than a social worker, or generally filtering the information provided to the social worker. This approach has the benefit of avoiding the tensions that arise upon discovering information subject to mandatory reporting.

However, this approach prevents a social worker from being a full and effective member of a client's team. The classic benefits of improved communication with clients, as well as enhanced ability to identify and address root causes,⁵¹ are undermined. Although a client might still derive substantial benefit from a social worker's case management skills, as the social worker

Hiring Individuals Who Are Not Social Workers

Non-licensed social workers or individuals who are not social workers at all assist defense team with identifying community resources, developing mitigation material, and communicating with client

Benefits: Decreased risk of ethical tension arising from differences between attorney's and social worker's ethical principles

Drawbacks: Lose benefits of social worker's expertise and training

“Walling Off”

Only attorney communicates with client; attorney consults with social worker to identify community resources

Benefits: Decreased risk of ethical tension arising in first place

Drawbacks: Social worker is unable to fully and effectively participate in defense team; does not take advantage of social worker's strengths, such as enhanced communication and understanding of root causes

50. For more information about peer support specialists, see the website of the North Carolina Certified Peer Support Specialist Program at <https://pss.unc.edu/>.

51. See Premela Deck, *Law and Social Work: Reconciling Conflicting Ethical Obligations between Two Seemingly Opposing Disciplines to Create a Collaborative Law Practice*, 38 W. NEW ENG. L. REV. 261, 268 (issue 2, 2016). Deck describes social workers' specialized training in “systems theory,” which applies a broad lens to consider and address the environmental factors that led to a client's contact with the criminal justice system.

can still recommend appropriate resources in the community, help navigate administrative and logistical hurdles, and add perspective and general support to the defense team, the “walled off” arrangement may be less than ideal.

In some defender offices, social workers gather mitigation material, such as family history, educational background, and medical and mental health history. Extensive mitigation gathering is especially common in serious matters such as capital murder cases. As noted by the NAPD ethics opinion discussed in the text above,⁵² this type of work carries a heightened risk of discovering information subject to mandatory reporting. Conducting a formal or informal assessment, as a precondition to referring a client to various services in the community, may also result in delving into the client’s past or present and lead to the discovery of reportable conduct. Having in-house social workers avoid certain tasks with heightened risk may be an effective strategy to mitigate the issue.

However, given that social workers might be obligated to report information gleaned from any source, be it additional investigation, written materials, or an attorney’s statements,⁵³ the dilemma may still arise even where attempts are made to put up protective “walls.”

North Carolina’s Office of Indigent Defense Services, in the context of interdisciplinary parent representation teams, requires attorneys and social workers to use a combination of the informed consent (or “notice”) approach and the confidentiality wall approach.⁵⁴ Note though that the analysis in abuse, neglect, and dependency cases differs from the analysis in criminal cases given, among other differences, the application of the Sixth Amendment to the latter.

Avoiding In-House Therapeutic Practice

Public defenders should consider avoiding the arrangement where an in-house social worker provides direct therapeutic services to clients. Nearly all who have reflected on this arrangement conclude that the social worker is bound by mandatory reporting laws where they are providing therapy to the client.⁵⁵ This is because the social worker–client relationship is no longer derivative of the attorney’s relationship with the client. The therapeutic relationship is likely to develop its own contours and independent goals. Furthermore, the social worker’s ethical code comes to the forefront when a social worker is engaged in this core clinical social worker function separate and apart from the pending criminal case.

Avoiding In-House Therapeutic Practice

Social workers do not engage in formal therapy with client

Benefits: Prevents formation of independent professional relationship and maintains role of social worker as part of defense team; legal ethics and constitutional considerations are prioritized

Drawbacks: Although the arrangement is rare given serious ethical risks, direct therapy may benefit client; presence of in-house social worker may enhance accessibility of treatment

52. See Nat’l Ass’n for Pub. Def. Ethics Counselors, *supra* note 35.

53. See Anderson et al., *supra* note 32, at 712–13.

54. See OFF. OF THE PARENT DEF., [IPR \[INTERDISCIPLINARY PARENT REPRESENTATION\] 2024](https://ncparentdefender.org/resources/ipr-program-guide-2024/) (Jan. 2025), <https://ncparentdefender.org/resources/ipr-program-guide-2024/>.

55. See, e.g., Anderson et al., *supra* note 32, at 710–11.

Can an Attorney Advise a Social Worker on What to Do?

After information subject to mandatory reporting is discovered, may an attorney advise a social worker as to how to proceed? Some have suggested that an attorney in these circumstances cannot provide independent advice out of concern for the client in a criminal case.⁵⁶ Indeed, the D.C. Bar Ethics Committee directly states that an attorney should not provide advice to a social worker given this conflict between the needs of the client in the criminal case and the needs of the social worker (not to mention the additional compounding factor of the attorney's concerns about the attorney's own potential professional consequences).⁵⁷

However, others disagree, concluding that the conflict, if it exists, should be deemed waivable by the social worker. This means that the attorney can advise the social worker as to the nature of the conflict and potential risks, and the social worker can then decide whether to consent to the conflict and rely on the attorney for advice or to seek advice elsewhere. These commentators point to the attorney's legitimate interest in coming to a lawful and ethical decision about how the social worker should proceed.⁵⁸

Conclusion

The ethical "clash" that may arise when attorneys collaborate with social workers and encounter information subject to mandatory reporting duties raises challenging and nuanced questions. Although many of the opinions addressing the dilemma favor the lawyer's determination of what the constitution requires and deprioritize the social worker's duty, the issue has not been clearly resolved in North Carolina.

Some practitioners may wish to take measures such as obtaining client consent before involving a social worker or shielding a social worker from certain aspects of the representation. In this way, collaborating professionals may avoid the dilemma, or better manage it when it arises.

Others may find the opinions out of Maryland and Nevada (and various public defender organizations) convincing and adopt the view that a social worker's ethics and duties should cede to a lawyer's discretion.

As other states have done, the North Carolina legislature could pass a law to change the mandatory reporting duties of defenders and social workers in defender offices or amend the existing laws to clarify their respective duties. Until then, the issue remains an open question in North Carolina.

56. See N.C. RULES OF PRO. CONDUCT r. 1.7 (N.C. STATE BAR 2003) (addressing conflicts of interest).

57. See D.C. Bar, *supra* note 43.

58. See Anderson et al., *supra* note 32, at n.150.