

Mandated Reporter Commission
July 28, 2020
10:00am-12:00pm

Protocols of Notification/Institutional Reporting

The Massachusetts statute permits some mandated reporters to transfer their responsibility to report in an agency or institutional setting:

“If a mandated reporter is a member of the staff of a medical or other public or private institution, school or facility, the mandated reporter may instead notify the person or designated agent in charge of such institution, school or facility who shall become responsible for notifying the department in the manner required by this section.” MGL. c. 119 § 51A(a).

Models from Other States

- Arkansas permits employers to require notification that a mandated reporter has made a report but prohibits any institutional process like the one described above. Arkansas includes in its penalties unlawful restriction of child abuse reporting as a Class A misdemeanor, specifically noting (in part), that employers cannot prohibit a mandated reporter from reporting and employers cannot require that a mandated reporter receive permission to report prior to reporting.
- Georgia hospitals, schools, social agencies, or other facilities to require their employees and volunteers to notify the institution of the need to report and the person in charge or designee must make the report and cannot change or restrain any of the information presented to them in the report.
- Maine requires institutional staff to notify the person in charge or designated agent who will then make the report, though staff may also make a report. The notifying staff person must acknowledge in writing that the institution has provided confirmation that a report was made (name of individual who made report, the date and time the report was made, summary of the information conveyed). If the notifying staff does not receive confirmation within 24 hours, they are required to report themselves.
- South Dakota: “Any person who has contact with a child through the performance of services as a member of a staff of a hospital or similar institution shall immediately notify the person in charge of the institution or his designee of suspected abuse or neglect. The person in charge shall report the information in accordance with the provisions...Any person required by this section to report shall also promptly submit to the state’s attorney complete copies of all medical examination, treatment, and hospital records regarding the child. Any person who knowingly and intentionally fails to make a required report and to submit copies of records is guilty of a Class 1 misdemeanor. Each hospital or similar

institution shall have a written policy on reporting of child abuse and neglect and submission of copies of medical examination, treatment, and hospital records to the state's attorney.”

- Tennessee: “Nothing in this section shall be construed to prohibit any hospital, clinic, school or other organization responsible for the care of children, from developing a specific procedure for internal tracking, reporting, or otherwise monitoring a report made by a member of the organization’s staff pursuant to this section, including requiring a member of the organization’s staff who makes a report to provide a copy or notice concerning the report to the organization, so long as the procedure does not inhibit, interfere with, or otherwise affect the duty of a person to make a report as required by subsection (a).”
- Wyoming: Institutional staff shall notify the person in charge or designated agent as soon as possible then both staff member and PIC/agent become responsible for filing a report or causing the report to be made. “Nothing in this subsection is intended to relieve individuals of their obligation to report on their own behalf unless a report has already been made or will be made.”
- **New York:** The mandated reporter makes the report individually, then immediately notifies the person in charge or designated agent that a report has been made. The person in charge or designated agent is then responsible for the subsequent administration of the process necessitated by the report.
- **Pennsylvania:** The mandated reporter must immediately report individually and then notify the person in charge of the institution or their designee that a report has been made. The person in charge or their designee shall facilitate the cooperation of the institution with the investigation.

Other relevant MA provisions:

MGL 119 § 51B(1) *in part*: If the department substantiates a report alleging that abuse or neglect occurred at a facility approved, owned, operated or funded, in whole or in part, or was committed by an individual the department has reason to believe was licensed by the department of elementary and secondary education, the department of early education and care, the department of mental health, the department of developmental services, the department of public health or the department of youth services, the department shall notify the office of the child advocate and the affected department, in writing, by transmitting a copy of the report filed under section 51A and the department's written evaluation and written determination...

Question: Should mandated reporters in institutional settings be required to follow the institutional reporting protocol if one exists?

Pros:

- Use of the institutional protocol would ensure that the institution is informed of concerning situations that arise within the institutional setting that are screened-out by DCF. It is expected that the institution would become aware of any 51A that was screened-in through the resulting DCF investigation.
- Mandatory use of the institutional protocol would provide clarity to both mandated reporters and to institutions regarding reporting and division of obligations.

Con:

- Mandated reporters may be discouraged from reporting concerning situations in an institutional setting if they did not have the option of shielding their identity (fear of retaliation, fear of reputational damage, fear of internal pressure not to report, and so on).
- There will likely be irremediable concerns regarding the quality of institutional reporting procedures, especially if the practice differs from the written procedure, and sole reliance on the reporting procedure could create a culture of non-reporting.
- Institutions who do not create an institutional reporting protocol would not be alerted of any screened-out 51A reports.

“If a mandated reporter is a member of the staff of a public or private institution, facility, or organization, such institution, facility, or organization may establish a written protocol by which the mandated reporter **shall be required to** notify the person or designated agent in charge of such institution, facility, or organization, of the information that that mandated reporter believes requires reporting under this section. The person or designated agent in charge shall then become responsible for notifying the department in the manner required by this section. **The written protocol must specify that the person or designated agent in charge has no discretion to refuse filing a report or alter the information provided by the notifying mandated reporter. The notifying mandated reporter shall be provided confirmation in writing within 24 hours of the notification that the report was filed pursuant to the institutional protocol.** A minimal facts inquiry may be necessary prior to making a report under this section, but under no circumstances can any institution, facility, or organization delay the filing of a report under this section for purposes of conducting an internal investigation. **Nothing in this subsection would prevent a person or designated agent in charge from adding supplemental information to the report filed under this section, so long as that information is clearly identified as supplemental.**

“If a mandated reporter is a member of the staff of a public or private institution, facility, or organization, such institution, facility, or organization may establish a written protocol by which the mandated reporter **may, but cannot be required to,** notify the person or designated agent in charge of such institution, facility, or organization, of the information that that mandated reporter believes requires reporting under this section **prior to making a report as required in this section.** The person or designated agent in charge shall then become responsible for notifying the department in the manner required by this section. **The written protocol must specify that the person or designated agent in charge has no discretion to refuse filing a report or alter the information provided by the notifying mandated reporter. The notifying mandated reporter shall be provided confirmation in writing within 24 hours of the notification that the report was filed pursuant to the institutional protocol.**

The written protocol may also require that a mandated reporter must notify the institution after individually filing a report under this section regarding any situation occurring at the institution.

A minimal facts inquiry may be necessary prior to making a report under this section, but under no circumstances can any institution, facility, or organization delay the filing of a report under this section for purposes of conducting an internal

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investigation. Nothing in this subsection would prevent a person or designated agent in charge from adding supplemental information to the report filed under this section, so long as that information is clearly identified as supplemental.

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51B(l): If the department receives a report under 51A alleging that abuse or neglect occurred at a facility approved, owned, operated or funded, in whole or in part, or was committed by an individual the department has reason to believe was licensed by the department of elementary and secondary education, the department of early education and care, the department of mental health, the department of developmental services, the department of public health or the department of youth services, the department shall notify the office of the child advocate and the affected department, in writing, by transmitting a copy of the report filed under section 51A and the department's written evaluation and written determination.

(Language is meant to require the transmission of screened-in and screened-out 51As and supported and unsupported investigations.)

Alternatively- Pennsylvania has a provision stating that if the alleged perpetrator is a school or childcare employee, the school administrator/child care employer shall receiving notice of any pending allegation and final status of the report following the investigation.

The written protocol under this subsection must specify where documentation of notification by mandated reporters to persons in charge or designated agents and documentation of reports filed under this section shall be maintained, and the protocol must specify the confidentiality procedures applicable to such documentation.

A mandated reporter who follows the protocol created by the institution, facility, or organization under this subsection and believes a report to have been dutifully made under this section as a result of their notification to the person in charge or designated agent, shall be held harmless against any claims of failure to file unless and until the mandated reporter is provided factual information to indicate that a report has not been made under this section.

Any report made by a person in charge or their designated agent based under this subsection must identify whether the report was made pursuant to a protocol under this subsection in the report.

The written protocol under this subsection must not in any way discourage reporting by mandated reporters or persons in charge or their designated agents under this section.”

Possible groups identified as not Mandated Reporters

Social workers and other practitioners assisting or employed by attorneys

California: “A district attorney investigator, inspector, or local child support agency caseworker, unless the investigator, inspector, or caseworker is working with an attorney appointed pursuant to Section 317 of the Welfare and Institutions Code to represent a minor.”

Washington D.C.: “...social service worker...domestic violence counselor...and mental health professional...Such persons are not required to report when 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.”

Louisiana: “Notwithstanding any other provision of law to the contrary, when representing a child in this Code, in a case arising out of this Code, a mental health/social service practitioner shall not be considered a mandatory reporter under the following limited circumstances: (i) when the practitioner is engaged by an attorney to assist in the rendition of professional legal services to that child, (ii) when the information that would serve as the basis for reporting arises in furtherance of facilitating the rendition of those professional legal services to that child, and (iii) when the information that would serve as the basis for reporting is documented by the mental health/social service practitioner. The documentation shall be retained by the mental health/social service practitioner until one year after the child has reached the age of majority.”

Massachusetts specific arguments are paraphrased and written by the OCA for purposes of this discussion below. *None of the statements as written, besides those in quotes, were said or communicated in this wording or format by any person from CPCS or NASW.*

- CPCS employs a holistic approach to client representation which often includes a social worker on a defense team.
 - o Civil and criminal “defense” is broader than the nuances of a particular case and requires addressing the underlying reasons and patterns of experience and behavior that bring persons into contact with the justice system, especially those persons who have multiple contacts with the justice system.
 - o Lawyers are not typically trained or equipped to address or unpack the possibility of underlying mental health issues and trauma that clients may experience and employ social workers in part to gain a deeper understanding of their clients, and a stronger relationship with their clients, that will ultimately aide the lawyer in their client’s defense.
 - o Social workers may not be able to fully engage in a zealous defense through a holistic approach if they are required to report information learned through their work with the client.

- Trusting relationship is broken, clients will withhold valuable information (example: relapse information), social worker will not be a safety resource, etc.
- Clients may be unwilling or unable to fully engage with their own defense through a holistic approach if they cannot depend on the confidentiality of their communications.
- There will be practical implications for defense work as it is currently done by CPCS.
- Excerpts from CPCS proposed language: “SECTION 5. Section 21 of chapter 119 of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by inserting after the word “advocate.”, in line 74, the following:-

A “mandated reporter” shall not include a person who is retained by an attorney to assist the attorney in his or her representation of an individual client or employed by a legal service provider to assist its attorneys in their representation of individual clients if the facts that provide reasonable cause for the person to believe that a child is suffering physical or emotional injury under the circumstances described in section 51A(a) became known to the person in connection with his or her retention by the attorney or his or her employment by a legal service provider.

SECTION 6. Section 51A of chapter 119 of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by adding at the end thereof the following subsection:-

(1) This section shall not apply to a person who is retained by an attorney to assist the attorney in his or her representation of an individual client or employed by a legal service provider to assist its attorneys in their representation of individual clients if the information that provides reasonable cause for the person to believe that a child is suffering or has suffered physical or emotional injury under the circumstances described in subsection (a) became known to the person in connection with his or her retention by the attorney or his or her employment by a legal service provider. No board of registration created under chapter 13 may require such a person with such knowledge to make a report of the type described in subsection (a) as a condition of registration or impose discipline on such a person under section 61 of chapter 112 for failing to make such a report.”

- National Association of Social Workers- Massachusetts Chapter:

- NASW has a code of ethics that states in part “Social workers’ primary responsibility is to promote the well-being of clients. In general, clients’ interests are primary. However, social workers’ responsibility to the larger society or specific legal obligations may on limited occasions supersede the loyalty owed clients, and clients should be so advised. (Examples include when a social worker is required by law to report that a client has abused a child or has threatened to harm self or others.)”
 - NASW believes that the duty to warn is a core principle of social work ethics and is similar to the attorney ethical requirements.
 - Social workers should have the same ethical and moral obligations across all settings as these obligations are at the core of their work but also to standardize the profession.
 - Social workers advise their clients at the beginning of the relationship about the role and obligations of social workers and the duty to report has not been a barrier in establishing a client relationship.
 - Social workers are secondary to the core of a legal defense (which is the attorney and the arguments in court) and if an attorney does not believe that a social worker can provide services to a particular client without triggering the 51A requirement to report that lawyer should not employ the social worker in that case.
 - Social workers have made 51A reports in the course of their work with attorneys and it has not resulted in significant damage to the legal case.
 - When balancing the harms of damaging a holistic approach to a legal defense and protecting children from abuse and neglect, we should err on the side of child protection.
 - NASW notes that the language proposed by CPCS is broader than social workers and includes any person, including doctors, psychologists, and so on.
- Massachusetts Rules of Professional Conduct- Attorneys
- Attorneys *may* reveal confidential information relating to the representation of a client “to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;...to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another...” (Excerpted from Rules of Professional Conduct Rule 1.6)

- “Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions... Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities, even if the information is confidential information, if there is a substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.” (Excerpted from Comments to Rules of Professional Conduct Rule 1.6: Confidentiality of information)

Healthcare Professionals and others:

Florida: “If the report is of an instance of known or suspect child abuse solely under s. 827.04(3) [impregnation of a child under 16 years of age by a person 21 years of age or older], the reporting provisions of this subsection do not apply to health care professionals or other persons who provide medical or counseling services to pregnant children when such reporting would interfere with the provision of medical services.”

Wisconsin:

- “The purpose of this subsection is to allow children to obtain confidential health care services.”
- A health care provider who provides any services to a child or a person who obtains information about a child who is receiving or has received health care services from a health care provider does not have to report sexual intercourse or sexual contact unless
 - The sexual intercourse or sexual contact occurred or is likely to occur with a caregiver
 - The child suffers from a mental illness or “mental deficiency” that renders the child incapable of understanding or evaluating the consequences of their actions
 - The child, because of their age, was incapable of understanding the nature or consequences of sexual intercourse or contact
 - The child was unconscious at the time of the act or for any reason unable to communicate unwillingness to engage
 - Another participant in the act was or is exploiting the child
 - If the provider has any reason to doubt the child’s voluntariness in the contact or intercourse

Arizona: *Alternative phrasing of similar idea- linked to definition of abuse and neglect*

- A report is not required: “For conduct prescribed by sections...if the conduct involves only minors who are fourteen, fifteen, sixteen or seventeen years of age and there is nothing to indicate that the conduct is other than consensual.”

Arizona: “If a physician, psychologist or behavioral health professional receives a statement from a person other than a parent, stepparent, guardian or custodian of the minor during the course of providing sex offender treatment that is not court ordered or that does not occur while the offender is incarcerated...the physician, psychologist or behavioral health professional may withhold the reporting of that statement if the physician, psychologist or behavioral health professional determines it is reasonable and necessary to accomplish the purposes of the treatment.”

Maine: “The intent of this subsection is to encourage offenders to seek and effectively utilize treatment and, at the same time, provide any necessary protection and treatment for the child and other family members.”

- When licensed mental health professionals are required to report information that they learn during the course of their treatment of the perpetrator, the department shall consult with the mental health professional in an attempt to reach an agreement about how the report should be pursued. If no agreement is reached, then the mental health professional can call for a meeting with at least one member of the department and one mental health professional with expertise in child abuse and neglect and a representative from the DA’s office if prosecution is likely. The purpose of the meeting is to make recommendations regarding treatment and prosecution.

Current legislation pending:

SB2789- An Act making appropriations for the fiscal year 2020 to authorize certain Covid-19 spending in anticipation of federal reimbursement

In relevant part: extends the Mandated Reporter Commission Deadline to December 31, 2020

HB4852 – An Act relative to accountability for vulnerable children and families

In part:

- c) The commission shall review: (i) the agencies and employers responsible for training mandated reporters; (ii) the frequency, scope and effectiveness of mandated reporter training and continuing education including, but not limited to, whether such training and continuing education covers retaliation protections for filing a report as a mandated reporter and the fines and penalties for failure to report under section 51A of chapter 119 of the General Laws; (iii)

whether agencies and employers follow best practices for mandated reporter training, including profession-specific training for recognizing the signs of child sexual abuse and physical and emotional abuse and neglect; (iv) the process for notifying mandated reporters of changes to mandated reporter laws and regulations; (v) the department of children and families' responses to written reports filed under said section 51A of said chapter 119, including offenses that require a referral to the district attorney; (vi) the feasibility of developing an automated, unified and confidential tracking system for all reports filed under said section 51A of said chapter 119; (vii) protocols related to filing a report under said section 51A of said chapter 119, including the notification of the person or designated agent in charge and the submission of required documentation; (viii) the availability of information at schools regarding the protocols for filing a report under said section 51A of said chapter 119; (ix) options for the development of public service announcements to ensure the safety and well-being of children; (x) proposals to revise the definition of child abuse and neglect to ensure a standard definition among state agencies; (xi) proposals to expand mandated reporting requirements under sections 51A to 51F, inclusive, of said chapter 119; (xii) proposals to allow law enforcement to report to the department of children and families on incidents of suspected child abuse and neglect in domestic violence cases, and (xiii) options for designating an agency responsible for overseeing the mandated reporter system or aspects thereof, including developing and monitoring training requirements for employees on mandated reporter laws and regulations and responding to reports of intimidation and retaliation.