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February 3, 1987

INDEXED LETTER 87-202

TO: ALL INTERESTED PARTIES

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SUBJECT: ADULT CHILD ABUSE VICTIM

The Department of Justice, Division of Law Enforcement, has requested an informal opinion concerning the child abuse reporting law. The question is as follows:

Are mandated reporters required to report past incidents of child abuse of persons who are now adults?

ADULT CHILD ABUSE VICTIM

The troublesome question of whether to report past incidents of child abuse generally arises when an adult seeks therapy. In the course of therapy, the counselor/therapist learns that the adult patient was abused as a child. Does the therapist, under these circumstances, have a mandatory duty to report child abuse under Penal Code section 11166? The answer to this question is unclear and requires legislative clarification.

The duty to report instances of child abuse is imposed by statute. The answer to the proposed question is therefore a matter of statutory construction and must be analyzed in light of the legislative intent and the words of the statute. The fundamental rule of statutory construction is to ascertain the intent of the Legislature so as to give effect to the purpose for which the law was enacted. (Cossack v. City of Los Angeles (1974) 11 Cal.3d 726, 732.) When establishing legislative intent, the courts will consider the evils to be remedied, the history of legislation upon the same subject, and public policy. (Id., p. 733.) However, the courts will first turn to the words of the statute and if they are clear, the courts will not add to or alter them. (California Teacher's Association v. San Diego Community College Dist. (1981) 28 Cal.3d 698.)

We therefore begin by examining the language of the reporting laws. The law imposes a mandatory duty to report child abuse on a mandated reporter "who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she reasonably suspects has been



the victim of child abuse . . . ." (Pen. Code, § 11166(a); emphasis added.) The report must be made "to a child protective agency immediately or as soon as practically possible by telephone . . . ." (Id.; emphasis added.) A mandated reporter is "any child care custodian, medical practitioner, non-medical practitioner, or employee of a child protective agency." (Id.; emphasis added.) The report "shall include the name of the person making the report, the name of the child, the present location of the child, the nature and extent of injury . . . ." (Pen. Code, § 11167(a); emphasis added.)

The express legislative purpose and intent of the reporting act is "to protect children from abuse. In any investigation of suspected child abuse, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim." (Emphasis added; Pen. Code, § 11174.5.)

The California Supreme Court has held that the purpose of the reporting law is the detection and prevention of child abuse "so that incidents of child abuse may be promptly investigated and prosecuted." (People v. Stritzinger (1983) 34 Cal.3d 505, 512.) As Justice Kaus stated in his concurring opinion in Stritzinger, "The law presumably has three objectives: to punish the abuser, to identify and protect the victims, and to cure [the abuser] in order to protect future potential victims."

Failure to report child abuse by a person required by law to report is a misdemeanor punishable by six months in jail or a \$1,000 fine. (Pen. Code, § 11172 (e).) Consequently, because failure to report is a crime, the question of the duty to report an instance of child abuse, where the victim is now an adult, may arise during a criminal prosecution. In this context, any ambiguity in the reporting law must be construed in favor of the defendant, the mandated reporter. (Landeros v. Flood (1976) 17 Cal.3d 399, 415; Keeler v. Superior Court (1970) 2 Cal.3d 619, 631; Reyes v. Superior Court (1977) 75 Cal.App.3d 214, 218.)

In addition, the information of child abuse is often revealed within the psychotherapist-patient relationship. Communications which fall within the psychotherapist-patient privilege have been recognized as an aspect of the patient's constitutional right to privacy. (Cal. Const., art. 1, § 1; In re Lifschutz (1970) 2 Cal.3d 415, 431-432; People v. Stritzinger (1983) 34 Cal.3d 505, 511.) Consequently, any exception to this privilege must be narrowly construed, and the exception is only applied "when the patient's case falls squarely within its ambit." (Id. p. 513.)

The express language of the reporting law strongly suggests that the Legislature contemplated that a report is required only if the victim of the abuse is still a child. The duty to report is imposed only when the reporter "has knowledge of or observes a child in his or her professional capacity who has been the victim of child abuse" (Pen. Code, § 11166(a)). This language refers to two time periods: (1) the time of the actual abuse,



and (2) the time when the reporter has knowledge or observes. In both periods, the statute refers to the victim as a child, thereby indicating that the duty to report exists only if the child abuse victim is still a child. Moreover, the requirements of Penal Code section 11167 also suggest that the victim is still a child. This section sets forth the information required to be related in the report, namely, "the name of the child" and "the present location of the child" (Pen. Code, § 11167(a)). The reporting law also requires that the telephonic report be made "immediately or as soon as practically possible" (Pen. Code, § 11166(a)). This requirement serves to bring cases of suspected child abuse to the attention of police authorities as early as possible to avoid the potential danger to the child when he or she remains with the abusing parent. (People v. Salinas (1982) 131 Cal.App.3d 925, 941-943.) These sections of the reporting law clearly indicate that the Legislature took certain precautions which are necessary to protect the victim because the victim still is a child, unable to protect himself or herself from further abuse.

The reporting law imposes the affirmative duty to report all known and suspected instances of child abuse to a child protective agency. (People v. Stritzinger, supra, 34 Cal.3d 505, 512.) Nevertheless, rules of statutory construction require that penal laws be construed as favorably to the defendant "as its language and the circumstances of its application may reasonably permit." (Keeler v. Superior Court, supra, 2 Cal.3d 619, 631). Here, the express language of the law refers to a victim who is presently a child. It would therefore appear that a therapist could not be criminally convicted for failing to report child abuse when the victim is no longer a child.

However, this conclusion does not end the inquiry. As stated, the purpose of the reporting law is to protect the welfare of both the abused child and other children who are at risk for future abuse, as well as to identify and punish the abuser. (People v. Stritzinger, supra, 34 Cal.3d 505; People v. Battaglia (1984) 156 Cal.App.3d 1058.) Failure to report, where the victim is no longer a child, may often frustrate the intent of the law. For example, where the victim is 19 or 20 years old, and the statute of limitations has not run, failure to report clearly defeats the legislative intent to prosecute the abuser. Moreover, other children may be in the home or in the child care or school setting where they are still very much at risk. If the therapist has reasonable suspicion to believe other children are abused, there is a clear duty to report. (Pen. Code, § 11166(a).) However, the law does not impose investigative duties on the reporter. (People v. Younghanz (1984) 156 Cal.App.3d 811, 818.) As a result, the reporter's relationship with the patient-victim may not lead him or her to inquire about other potential victims who may still be at risk. As a result, failure to report abuse of the patient defeats the legislative purpose of protecting other potential victims. On the other hand, if the victim is 40 years old, or the abuser is dead, reporting would serve no purpose because punishment is no longer possible and the risk of abuse of other children no longer exists.



It therefore appears that the duty to report may be better analyzed in terms of the purpose of the law; i.e., if reporting will serve any one of the purposes of the law, a report must be made. However, this approach gives the reporter a great deal of discretion. Where this discretion is abused and the reporter fails to report, as discussed above, criminal sanctions are probably not available. As a practical matter, the decision to report may hinge on the reporter's own personal sympathies. However, the commitment to therapy at the expense of punishment of the abuser and/or protection of future victims is a policy decision which should be made by the Legislature, not by an individual therapist. (People v. Stritzinger, supra, 34 Cal.3d 505, 523.)

Therefore, it appears that the express language of the statute is unclear and does not fully serve the intent of the statute. This ambiguity has caused a great deal of confusion and is more appropriately resolved by the Legislature. Until it does, we believe the literal wording of the statute should prevail--there is no mandatory duty to report unless the victim, in the terms of section 11166(a), is still a child.

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