CHAPTER 16

CONFIDENTIALITY

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16.1. CONFIDENTIALITY AND PRIVILEGED COMMUNICATION: AN OVERVIEW

Patients and clients whom we serve share personal, even intimate, information about themselves and their families. Clients expect that such information will be used only to further professional services in their behalf. They expect that our use of the information will be consistent with their legitimate expectations of personal privacy. A professional relationship with such clients often rests on their trust that what they reveal will not be shared with others.

Personal privacy is recognized as a right under our law. The right to privacy has its foundation in our common law, in statutes, and in the federal and State constitutions. One body of law intended to safeguard the individual's right to privacy is the law of privileged communication and confidentiality. Privacy, in this context, includes not merely secrecy, but also the right to control how much information about oneself is disseminated and the scope and circumstances of its communication.

Professionals in the human services wish to be sensitive to client's rights of privacy and strive mightily to preserve confidentiality. However, proper service to a client often requires sharing confidential information among several agencies and professionals. The discussion that follows will explore the legal obligations of professionals to preserve the confidences and privacy of their clients. How far do the obligations of privilege and confidentiality extend? How can the obligation be voluntarily waived by the client? What is required for legally valid and fair release of information? Under what legal circumstances is the legal duty to preserve confidentiality involuntarily abrogated?

Suspicion of child abuse and neglect abrogates nearly all privileges that might otherwise exist. Professionals are required to report suspected child abuse and neglect and holders of records and reports are largely obliged to make those records available to child protective services and courts investigating and responding to suspected child abuse and neglect.

The professional's legal duty to respect and preserve the personal privacy of his client rests on two distinct but related legal concepts -- *privileged communication* and *confidentiality. Privileged communication* refers to communication made to a professional by a patient or client, which may not be disclosed in a court of law *if* the patient or client objects to its disclosure unless the privilege has been waived by the client or is abrogated by other rule of law.

The law of privileged communication governs what information can be revealed in a court of law. It is a courtroom privilege, a testimonial privilege, which belongs to the patient or client and not to the professional. It must therefore be asserted by the patient or client.[1]

Confidentiality refers to the relationship between a professional and his client in which the client may assume that his disclosures will not be passed on to others except under certain circumstances, and then only for the specific purpose of lending necessary services.[2]

Confidentiality originated as an ethical obligation.[3] Nearly all the helping professionals recognize the necessity of preserving the privacy of their clients. The need for respect of privacy rests on two major grounds: First, that efficacious and effective professional intervention requires full disclosure of all relevant information by the client to the professional, and that full disclosure requires the confidence and trust of the patient that what is revealed will not be communicated to others. Second, those clients deserve the respect and personal autonomy fostered by preserving confidence and personal privacy.[4] The ethical obligation to preserve client confidences, once established, generally extends to oral as well as to written communications.

The personal values and good manners of many professionals require restrictions on sharing information. Nearly all the helping professions, irrespective of rules of law, expect that the confidence of patients and clients be preserved.[5] Those expectations are codified in the codes of ethics of psychologists, psychiatrists, social workers, lawyers, nurses, physicians, and other professions. In addition to being an ethical obligation, confidentiality may be a legal obligation as well. Statutes and other rules of law require that certain records and information be kept confidential.[6] The professional bears an affirmative legal duty not to disclose confidential information unless the duty is waived by client consent or by other rule of law.

The rules of confidentiality and privileged communication have common purposes and often are discussed as a single topic. Both legal principles govern the way information about a client is to be used, even though the historical origins and legal bases of these principles differ. The common purposes include: (1) to preserve the privacy of the individual; (2) to foster relationships of trust between

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1. McCormick, EVIDENCE §102 (2d Ed. 1972) In Michigan privileges are created by statute for physician-patient, MCL 600. 2157; psychologist-patient, MCL 330.1750; priest-penitent, MCL 600.2156; teacher-student MCL 600.2165
2. McCormick, *op. cit*.
3. *Id.*
4. Waltz & Inbau, MEDICAL JURISPRUDENCE, 234 (1971); S. Wilson, CONFIDENTIALITY IN SOCIAL WORK, 1-7 (1978)
5. Wilson, *op cit.*
6. *See*, for example, MCL 400.64 (social services records); MCL 600.2165 (school records); MCL 330.1748 (mental health department records); MCL 722.625 and 722.627 (child protection records)

individuals and professionals who may provide necessary and needed assistance; (3) to guarantee the confidence between the individual and the professional and thus foster that relationship; and (4) to prevent injury to individuals which might result from disclosures.[7]

The usual expectation in relationships with a psychiatrist, psychologists, social worker, marriage counselor, etc. is that communications made to such professionals will remain private and confidential. When actual or suspected child abuse or neglect or the courts are involved, however, the exceptions to that general rule are many indeed. Each of the exceptions has its own requirements and conditions so that the subject of confidentiality and privilege becomes very complex. The Michigan Rules of Evidence, which codified and clarified much of the laws of evidence, left privilege to be governed by the common law, except as modified by statute or court rule."[8] The following is an attempt to organize and discuss the major confidentiality and privilege issues related to suspected child abuse and neglect and child welfare legal proceedings in Michigan.

16.2. CONFIDENTIALITY AND PRIVILEGE IS ABROGATED FOR REPORTING SUSPECTED CHILD ABUSE AND NEGLECT

16.2.1. *Who Must Report; What Must be Reported?*

The list of professionals who *must* report suspected child abuse or neglect is lengthy. Failure to report suspected child abuse or neglect as required by statute may result in a misdemeanor penalty and/or civil liability for damages proximately caused by the failure to report.[9]

> A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker, registered social service technician, social service technician, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of suspected child abuse or neglect… .[10]

The level of suspicion required before the listed professionals must report to the Department of Human Services (DHS) is very low. Mandated reporters are asked to report when there is a *reasonable cause* to suspect

7. McCormick, *supra*.
8. MRE 501
9. MCL 722.633
10. MCL 722.623(1)

child abuse or neglect. They are not asked to determine whether there is child abuse or neglect nor even to report cases of *suspected* child abuse or neglect, but to report when there is *reasonable* cause to suspect child abuse or neglect. The Legislature has established a very low threshold for reporting and asks the class of mandated reporters to err, if they must, on the side of over-reporting, that is, to resolve any doubts in favor of reporting.

Any existing legal duty of confidentiality or privilege is set aside for purposes of reporting suspected child abuse and for providing evidence in family court child protection proceedings.

MCL 722.631 reads:

> Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication, is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act.

The written report shall contain the name of the child and a description of the abuse or neglect. If possible, the report shall contain the names and addresses of the child's parents, the child's guardian, the persons with whom the child resides, and the child's age.

The report shall contain other information available to the reporting person that might establish the cause of the abuse or neglect and the manner in which the abuse or neglect occurred.[11] (Emphasis added.) Information regarding specific instances of suspected child abuse, child neglect, or allowing a child to be exposed to or to have contact with methamphetamine production should be reported and fully described to protective services with confidentiality and privilege being no bar.[12] Thus, if an incident of child abuse were admitted in the course of therapy (e.g., "I lost my temper with my baby and hit her very hard"), the therapist has a responsibility to report the admission to the Department.[13]

Once the report is made to the DHS, background information, which "might establish the cause of the abuse or neglect and the manner in which the abuse or neglect occurred," should be shared with the DHS.

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11. MCL 722. 623(2)
12. MCL 722.623, MCL 722.631
13. *Id.*

16.3. ACCESS TO CONFIDENTIAL RECORDS

16.3.1. *Access to Public Health and Medical Records of Child*

There is no violation of the physician-patient privilege or any other privilege or duty of confidentiality when a hospital provides medical information about a child suspected of being abused or neglected to the department staff conducting a protective services investigation. All legally recognized privileges (except attorney-client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication) are abrogated for purposes of reporting and providing evidence in civil proceedings.[14] MCL 722.631 does not relieve a member of the clergy from reporting suspected child abuse or child neglect under MCL 722.623 if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity. In addition, all mandated reporters, including health care professionals, are required to provide the information that formed the basis of a report of suspected child abuse or neglect to the department.[15] The hospital is also obliged to provide the department information obtained as part of a medical evaluation of a child suspected of being abused or neglected even without parental authorization[16]:

> The physician's written report to the department shall contain summaries of the evaluation, including medical test results.

Similarly, a hospital is required to allow access to the medical records of a child under protective services investigation to the attorney appointed to represent the child.[17]

Licensees and registrants of the Michigan Department of Community Health are required to release records to the DHS when such records are pertinent to a child abuse or neglect investigation as follows[18]:

> If there is a compelling need for records or information to determine whether child abuse or neglect has occurred or to take action to protect a child where there may be a substantial risk of harm, a Department of Human Services caseworker or administrator directly involved in the child abuse or neglect investigation shall notify a licensee or registrant that a child abuse or neglect investigation has been initiated regarding a child who has received services from the licensee or registrant and shall request in writing the child's medical records and information that are pertinent to that investigation. Upon receipt of this notification

14. MCL 722.631
15. MCL 722.623(2)
16. MCL 722.626(2); *See also*, Op Atty Gen 1978, No 5406, p. 724
17. Op.Atty.Gen. 1979, No 5446, p. 59; MCL 712A.17d(1)(b)&(c)
18. MCL 333.16281(1)

> and request, the licensee or registrant shall review all of the child's medical records and information in the licensee's or registrant's possession to determine if there are medical records or information that is pertinent to that investigation. Within 14 days after receipt of a request made under this subsection, the licensee or registrant shall release those pertinent medical records and information to the caseworker or administrator directly involved in the child abuse or neglect investigation.

This section of the law provides again that the privileges of physician-patient, dentist-patient, licensed professional counselor-client, limited license counselor-client, psychologist-patient privilege, and any other health care professional-patient privilege created or recognized by law do not apply to medical records or information released by the above section.[19] The statute also extends immunity to an individual complying in good faith with the law, unless the conduct was grossly negligent.[20]

Under a similar procedure, the Michigan Department of Community Health itself is required to make medical records or information available to the DHS if there is a compelling need for the information to determine whether child abuse or neglect has occurred or to take action to protect a child where there may be a substantial risk of harm.[21]

16.3.2. *Mental Health Records*

There is a companion statute to the public health codes section quoted directly above that covers mental health records or information. The language is parallel to MCL 333.16281(1) quoted extensively above. Because the statute may be centrally important to DHS child protection responsibilities, the mental health code provisions are set out here.[22]

> If there is a compelling need for mental health records or information to determine whether child abuse or child neglect has occurred or to take action to protect a minor where there may be a substantial risk of harm, a family independence agency caseworker or administrator directly involved in the child abuse or neglect investigation shall notify a mental health professional that a child abuse or neglect investigation has been initiated involving a person who has received services from the mental health professional and shall request in writing mental health records and information that are pertinent to that investigation. Upon receipt of this notification

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19. MCL 333.16281(2)
20. MCL 333.16281(3)
21. MCL 333.2640
22. MCL 330.1748a(1)

> and request, the mental health professional shall review all mental health records and information in the mental health professional's possession to determine if there are mental health records or information that is pertinent to that investigation. Within 14 days after receipt of a request made under this subsection, the mental health professional shall release those pertinent mental health records and information to the caseworker or administrator directly involved in the child abuse or neglect investigation.

An Attorney General opinion holds that child protection workers are entitled to access to community mental health records of children under investigation and the relevant records of other recipients of community mental health services.[23] The rationale for accessing mental health records of adults, as well as children, during a child protection investigation is set out in this excerpt[24]:

> None of the foregoing authorities distinguishes between accessing records of children versus records of adults. Access to community mental health records of an adult, particularly where the adult is suspected of abusing or neglecting the child who is the subject of a protective services investigation, may be necessary to enable the protective services worker to determine whether child abuse or neglect has occurred, or to take necessary action to prevent further abuse or neglect, or otherwise safeguard the welfare of the child. Moreover, section 748(7)(c) of the Mental Health Code, [MCL 330.1748(7)(c)] which authorizes disclosure of mental health recipient records to a public agency to prevent harm to the recipient or other individuals, would include the situation where an adult mental health recipient's clinical records may contain important information relevant to establishing the suspected child abuse or neglect. "[A] remedial statute, such as the Child Protection Law, that attempts to protect the public health and general welfare should be liberally construed." *Williams v. Coleman*, 194 Mich. App. 606, 612; 488 N.W.2d 464 (1992).
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> It is my opinion, therefore, in answer to your second question, that Family Independence Agency child protective services workers, while in the course of investigating suspected child abuse or neglect, are entitled to access relevant community mental health agency clinical records of other recipients of community mental health services.

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23. Op.Atty.Gen. 1998, No. 6976 (March 26, 1998)
24. *Id.*

16.3.3. *Records of Drug Treatment*

A special problem is presented by patients in a federally supported substance abuse program. Federal confidentiality laws and regulations prohibit release of information about current or former clients without written consent in a form consistent with federal regulations.[25] Federal laws and regulations prohibited a program from disclosing information in response to a subpoena unless the court also issued an order in compliance with the procedures and standards set forth in the regulations.[26] Before the court could issue such an order, both the program and the alleged client needed to be notified of the proceedings and given an opportunity to appear in person or file a responsive statement and the court must find that "good cause" exists to issue the order. [27] Any order must limit disclosure to those parts of the patient's record, which are essential to fulfill the objectives of the order.[28]

A request for the court order, which is required to permit a disclosure under the confidentiality regulations, may be made concurrently with the petition for an order authorizing action for protection of the child. The conflict between federal law which protects patients from disclosure of their drug addiction records and State law which mandates disclosures of suspected child abuse and neglect was also addressed by the Michigan Court of Appeals in *In the Matter of Baby X*.[29] The Court of Appeals held that in neglect proceedings confidentiality must give way to the best interests of the child. Further urging that in future neglect cases any conflict between federal and State law be avoided by filing a John or Jane Doe Petition for Disclosure.

16.3.4. *School Records*

School authorities are required to report instances of suspected child abuse and neglect and to cooperate with DHS in investigation of such cases.[30] *See* Chapter 2, **INVESTIGATION**. School records pertinent to an investigation of suspected child abuse or neglect would seem to fall under the Child Protection Law duty to report where it provides that the written report required of the reporting person "shall contain other information available to the reporting person which might establish the cause of the

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25. 42 CFR 2.31

26. 42 CFR 2.61. Note that 42 USC 290dd-3 and 42 USC 290ee-3 have been omitted in the general amendment of Part D of Act July 1, 1944, ch 373, Title V, by Act July 10, 1992

27. 42 CFR 2.64(d)

28. *Id.*

29. *In the Matter of Baby X*, 97 Mich.App. 111 (1980)

30. MCL 722.628(8)&(9)

abuse or neglect and the manner in which the abuse or neglect occurred."[31]

School records are otherwise protected by the federal Family Educational and Privacy Rights Act that generally require parent's consent to release the records.[32] Schools are also permitted to release records pursuant to a court subpoena.[33] State statute also prohibits school employees from disclosing records or confidences without the consent of a parent or legal guardian if the child is under 18.[34] That duty of confidence is also abrogated under the child protection law where the school employee has reason to suspect child abuse and neglect.

16.3.5. *Friend of the Court Records*

Protective services personnel from DHS must be given access to Friend of the Court records related to the investigation of alleged child abuse and neglect.[35]

16.3.6. *Law Enforcement Information Network (LEIN)*

DHS children's services workers are also entitled to access to information on the Law Enforcement Information Network concerning any individual being investigated in the enforcement of child protection laws.[36]

16.4. ABROGATION OF TESTIMONIAL PRIVILEGE

16.4.1. *Privilege shall not excuse a report or evidence*

The Child Protection Law not only requires certain professionals to report information regarding suspected child abuse and neglect to child protective services and to testify in court as necessary in civil child protection proceedings, but the law also provides that privileged communication shall not exclude "evidence in a civil child protection proceeding resulting from a report made pursuant to this act."[37]

For example, Dr. Brown suspected that Larry's fractures were not accidental. Even though his relationship with Larry and his parents was privileged, the privilege was waived under the Child Protection Law and

31. MCL 722.623(2)
32. 20 USC 1232g *et seq.*
33. 20 USC 1232g(b)(2)(B)
34. MCL 600.2165
35. MCR 3.218(D)
36. MCL 28.214(1)(a)(ii)
37. MCL 722.631

Dr. Brown reported his suspicions and his reasons to Protective Services. Protective Services subsequently filed a petition with Juvenile Court and asked Dr. Brown to testify at the hearing. The testimonial privilege that would ordinarily apply to a doctor-patient relationship is set aside and the doctor may testify.[38]

Considering the Department's duty to initiate court action on behalf of suspected abused and neglected children, there is no testimonial privilege between the department social worker and the client in cases of suspected child abuse and neglect.

16.4.2. *Broad Abrogation of Privilege in Civil Child Protection Proceedings*

In *In re Brock*, the Michigan Supreme Court interpreted the Child Protection Law to extend a broad abrogation of testimonial privilege in civil child protection cases so that all privilege is set-aside in such cases when brought as a result of a report made pursuant to the child protection law.[39] In so doing the Supreme Court overruled several earlier Court of Appeals cases.[40]

In *Brock* a report of suspected child abuse or neglect was made by a neighbor. Child protective services brought a civil child protection case before Marquette County Juvenile Court in which the mother's treating psychologist and physician were allowed to testify about her history of emotional difficulties. Even though the report of suspected child abuse or neglect had not originated with her treating psychologist or physician and the court had not ordered an evaluation for court purposes, their testimony was upheld as consistent with the Child Protection Law. "It is in the best interests of all parties for the factfinder to be in possession of all relevant information regarding the welfare of the child."[41] The Court held[42]:

> Furthermore, the probate court did not err in allowing Mrs. Brock's physician and psychologist to testify regarding her history of emotional difficulties. The present proceeding was initiated by a report to DSS by respondent's neighbor. The testimony is therefore evidence in a civil child protective proceeding resulting from a report made pursuant to the Child Protection Law, and admissible pursuant to §11 of the Child Protection Law if determined to be relevant to the proceeding.

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38. *Id*.

39. *In re Brock*, 442 Mich. 101 (1993)

40. *In re Atkins*, 112 Mich.App. 528 (1982); *In re Tedder*, 150 Mich.App. 688 (1986); *In re McCombs*, 160 Mich. App. 621 (1987)

41. *In re Brock* at 119

42. *Id*. at 120

16.4.3. *Abrogation implications for criminal proceedings*

In *People v. Wood*, the Michigan Supreme Court held that the statutory confidentiality duty of a social worker employed by the DSS was abrogated where it was necessary to cooperate with law enforcement officials in order to protect a child.[43] In *Wood*, the eleven-year-old child confided in the child protection worker that her parents used and distributed cocaine and marijuana.[44]

> She stated that her father made four or five trips per evening to sell cocaine, and that she and her younger brother sometimes accompanied him and that her parents were usually "high." She said she was fearful about this situation.

The social worker communicated this otherwise confidential information to the Michigan State Police. The social worker, John Lomiewski, acted as affiant to obtain a search warrant which, in turn, resulted in a criminal action, not for crimes against the children, but for violation of the narcotics laws. The Supreme Court said that Mr. Lomiewski's duty of confidentiality was abrogated because his report to the police was statutorily required under the circumstances of this case. Section 8 of the Child Protection Law, MCL 722.628 (3), required the department to cooperate with law enforcement officials.

> The fact that this cooperation produced evidence supporting felony charges in addition to abuse and neglect proceedings undermines neither Lomiewski's authority to cooperate with law enforcement [and] or the legality of the seizure and use of the evidence. We find nothing in the statute that is inconsistent with the conclusion that the privilege is abrogated when a social worker employed by the department finds it necessary to cooperate with law enforcement officials in order to protect a child. The question is not whether Lomiewski was obligated "to serve as affiant on the search warrant," but whether he was prevented from doing so. We find he was not.[45]

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43. *People v. Wood*, 447 Mich. 80 (1994)

44. *Id.*, at 82

45. *Id.* Slip opinion, p. 9

16.5. DHS DUTIES IN SHARING CONFIDENTIAL INFORMATION

16.5.1. *The Duty to Preserve Confidentiality is Altered in the Context of Child Protection*

The Department and its employees are bound to preserve the confidences of their clients.[46] In the DHS' role as recipient of reports of suspected child abuse or neglect, however, the legal obligations of confidentiality are altered considerably. The Child Protection Law sets aside all privileges except that between attorney and client or that made to a member of the clergy (in his or her professional character in a confession or similarly confidential communication), as grounds to excuse a report or for excluding evidence in a civil child protective proceeding.[47]

The Child Protection Law, however, specifically permits the DHS to share confidential information on the central registry to those listed in Section 7 (MCL 722.627). *See* Chapter 1.9, **REPORTING**. The legislature is entitled to receive certain confidential information under conditions set out in the Child Protection Law as are child fatality review teams.[48] DHS is required to share information with law enforcement, and the DHS director may release otherwise confidential material under certain circumstances.[49]

The DHS' obligation to take actions on behalf of suspected abused and neglected children further justifies sharing confidential information. By statute, the Michigan State Department of Human Services has a duty to take action to protect children, to investigate allegations of child abuse and neglect and allegations of a child being exposed to or had contact with methamphetamine production, to initiate action in an appropriate court, and to provide multidisciplinary services.[50]

The requirements in Section 9(1) of the Child Protection Law, require multidisciplinary teamwork, and influence the Department's duty of confidentiality in cases of suspected child abuse and neglect. This section was adopted because the legislature recognized that a diagnosis of child neglect is often very difficult to make.

The assessment of a family and the development of a treatment approach to a family are complex responsibilities. To aid the DHS with these responsibilities, the Child Protection Law requires that the Department utilize whatever community agencies, professionals, and other resources

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46. *See* the CHILD PROTECTION LAW, §§7(1) and 13(3)
47. MCL 722.631
48. MCL 722.627a; MCL 722.627(2)(o)
49. MCL 722.627(2)(b); MCL 722.627(2)(i); MCL 722.623(6); MCL 722.628(3)
50. MCL 722.628(1); MCL 722.628(2); MCL 722.629(1)

are available. The requirements of Section 8(2) and 9(1) are mandatory. That is, they read that the department: "*shall* provide, enlist, and coordinate the necessary services ... from other agencies and professions." Similarly, in Section 9(1): "The department *shall* provide, directly and through purchase of services from other agencies and professions, multidisciplinary services. . . ." (Emphasis added.)

16.5.2. *Sharing Information with Case Consultants*

The strong inference from the Social Welfare Act and the Child Protection Law cited above is that *the circle of confidence* is widened to allow the department to consult with other agencies and/or other professionals in fulfilling their responsibilities toward suspected abused and neglected children and their families. The DHS typically contracts with a variety of service providers in the interests of the child and family. Sharing information among this team is appropriate. Foster parents are entitled by law to certain confidential information. Persons and agencies with which confidential information is shared are bound by the same duty to preserve privacy as the DHS.

Professionals typically consult with one another regarding their clients for purposes of improving services to those clients. A common example is provided by medical practice where a surgeon may consult with another surgeon or with a psychiatrist regarding a patient. Some consultations are done with the patient's knowledge and consent; others are not. The consulted physician is bound by the same legal duty of confidentiality and privilege, as is the treating physician. The circle of confidence is not broken it is widened.[51]

> In the few cases wherein the question has been raised or discussed, it has been recognized that a communication from one physician to another regarding a patient is absolutely privileged, at least if it is necessary and pertinent to the treatment being rendered.

McCormick notes: "When the patient's doctor calls in a consulting physician to aid in diagnosis or treatment, the disclosures are privileged."[52] In cases reported on the issue of communication between one physician and another for purposes of consultation, the permitted communication seems to be limited to that necessary for rendering the professional service. That is, communicating confidential information for purposes of consultation is permissible if the consultation is for the benefit of the patient and if the communication is limited to what is necessary for professional services to be rendered.[53]

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51. Annot. 73 ALR2d 336
52. McCormick, *supra* note 2, at 103
53. *See Parsons v. Henry*, 177 Mo.App. 329 (1941); and *Thornburg v. Long*, 178 N.C. 589 (1919)

16.6. COURT ORDERED EVALUATION OR TREATMENT IS NOT PRIVILEGED

16.6.1. *Court-ordered Evaluations*

When a court orders that an individual undergo a physical or mental examination for purposes of court action, the resulting evaluation is not privileged and may be revealed by the professional as required by the court. Likewise a court-ordered course of treatment, such as what is typically done as part of a dispositional hearing, is not privileged. Michigan Court Rules specifically provide for abrogation of privileges[54]:

> [N]o assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at the dispositional phase, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment.

The Michigan Court Rules extend judicial immunity for providing information to the court upon order of the court[55]:

> Persons or agencies providing testimony, reports, or other information relevant at the request of the court, including otherwise confidential information, records, or reports that are relevant and material to the proceedings following authorization of a petition, are immune from any subsequent legal action with respect to furnishing the information to the court.

Although not expressly required by the Court Rules, the professional providing a court-ordered exam or any other exam which is not privileged, should inform the client that any communications will not be privileged but may be shared with other named persons, agencies, or courts.

The Michigan Mental Health Code is more specific when it provides[56]:

> (2) Privileged communication shall be disclosed upon request:
> (e) If the privileged communications were made during an examination ordered by a court, prior to which the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered.

The better practice is for notice to the client of the nonprivileged nature of the relationship to be documented by the evaluator by asking that the client sign a form acknowledging that he or she has been informed that any communication would not be privileged or by making a

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54. MCR 3.973(E)(1)
55. MCR 3.924
56. MCL 330.1750

contemporaneous memorandum that the full notice and disclosure has been made to the client.

Fig. 16.1.

Acknowledgment

I understand that Dr. _____ is conducting an evaluation of myself (and my children) pursuant to a court order and that the evaluator will share information learned in the course of the evaluation and his/her opinions with the court and whomever else the court authorizes.

Dated: _____ _____

Client's Signature

Fig. 16.2.

CHECKLIST FOR EXPERT DOING COURT-ORDERED EVALUATION

[ ] Court Orders evaluation
[ ] Necessary background material is made available
[ ] Notice is given to client that any communication would *not* be privileged
[ ] Notice to client is documented
[ ] Evaluation conducted; report submitted as directed by the court

16.5.2. *Evaluations and Treatment Not Court-ordered*

Occasionally an evaluation of a parent or the parent(s) and child together is arranged by the Department or another social agency for purposes of assessing the family situation and developing a treatment plan. The family members may willingly participate in the evaluation. At the time the evaluation is arranged court action may not be contemplated or expected. However, it is usually prudent and wise to arrange such evaluations so that they may be used in court should court action become necessary. A clear waiver of privilege should be obtained from the client before the evaluation is conducted. The clients should be told the nature of the evaluation and with whom the results will be shared and for what purpose. A signed waiver makes it clear that the client understands the nature of the assessment and the waiver.

Fig. 16.3.

WAIVER OF CONFIDENTIALITY AND PRIVILEGE

I, _____, hereby authorize the release of information obtained by _____ in the course of an evaluation and/or treatment of myself, my children, and my relationship with the children. I freely and voluntarily waive any rights of confidentiality or testimonial privilege with respect to this evaluation or treatment. Such information may be shared with the Family Independence Agency for purposes of providing assistance to me and my children and securing proper care for my children.
Dated:_____

_____
(Client's signature)

Witness:_____

Michigan statues creating the duties of confidentiality and privilege for psychiatrists and psychologists provide that the client, if 18 or older, may waive the privilege.[57] The doctrine of informed consent is likely to be applied to such waivers. That is, the client must be competent and capable of knowingly and intelligently making such a release and it must be explained expressly and specifically to the client what information is to be disclosed, to whom and for what purpose. A written waiver (release) is the best documentation that the release was informed.

16.7. CLIENT ACCESS TO CASE RECORDS AND FILES

Clients are generally entitled to access to information about themselves. The policy of the Department of Human Services is that the client's access to their case record may be limited or restricted only by court order or law.[58] Among the applicable statutes is the Child Protection Law which provides that a "written report, document, or photograph filed with the department pursuant to this act shall be a confidential record available only to ... (f) A person named in the report or record as a perpetrator or alleged perpetrator of child abuse or neglect or a victim who is an adult at the time of the request, if the identity of the reporting person is protected pursuant to section 5."[59]

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57. MCL 330.1750(1), (psychiatrist and psychologist). But *see also Cartwright v. Maccabees Insurance Company*, 398 Mich. 238 (1976) which provides that a release of information from the physician for insurance eligibility purposes does not operate to waive privilege at trial. *See Gilchrist v. Mystic Workers*, 188 Mich. 466 (1915) and *Wohfeil v. Bankers Life Co.*, 296 Mich. 310, 320 (1941) in support of the proposition that anticipatory waivers of the testimonial privilege are void as against public policy in Michigan

58. MDHS CPS Manual Item 717-4

59. MCL 722.627(2)(f)

The Mental Health Code restricts client access to mental health records only if the mental health provider believes the information would be detrimental to the client and if the mental health provider who gave the record to the Department of Human Services or the court restricted access to the client for the same reason. Even in the case of this so-called "therapeutic privilege" a client's attorney always has access to the client's mental health record if the client consents.[60] If a record containing sensitive information about a client is to be released to him or her, good social work and mental health practice is not simply to mail the record to the individual or to make it available to the client alone in a room, but to have someone sit down with the client to review the record with them and interpret and explain the records as necessary.

16.8. FAMILY COURT PROCEDURES AND RECORDS OPEN TO PUBLIC

Family Court proceedings on the formal calendar and preliminary hearings, including child protection proceedings, are open to the public.[61] Upon motion of a party or a victim, the court may close the proceedings to the public during the testimony of a child or during the testimony of the victim to protect the welfare of either. In making such a determination, the court shall consider the nature of the proceedings; the age, maturity and preference of the witness; and if the witness is a child, the preference of a parent, guardian, or legal custodian, that the proceedings be open or closed. The court may not close the proceedings to the public during the testimony of the juvenile if jurisdiction is requested under MCL 712A.2(a)(1).[62]

Records of a case brought before the Family Court are open to the general public, although confidential files may be accessed only by persons found by the court to have a legitimate interest. [63] Recording or broadcasting court proceedings by news media is permitted in the court's discretion.[64]

16.9. CIVIL LIABILITY FOR UNAUTHORIZED DISCLOSURE OF CONFIDENCES

See Chapter 19, **LIABILITY.**

60. MCL 330.1748(5)(c); MDHS CPS Manual, Item 131, p. 2
61. MCR 3.925(A)(1)
62. MCR 3.925(A)(2)
63. MCL 3.925(D)(1); MCR 3.925(D)(2)
64. Supreme Court Administrative Order 1989-1