WILLAMETTE VALLEY AMERICAN INN OF COURT

OREGON CHILD ABUSE REPORTING

THE DUTY AND SOME EXCEPTIONS

TEAM CAMPBELL

PRESENTATION

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PRESENTATION EXECUTIVE SUMMARY

Oregon Child Abuse Reporting—The Duty and Some Exceptions.

This presentation explores the duty placed on officials to report child abuse from an historical basis and an analysis some of the exceptions found in ORS 419B.010 that officers of the court must consider when faced with disclosures which may indicate potential child abuse.

Setting: A court annexed mediation session by a senior judge serving as a mediator in a pending motion to modify child support proceeding in which the sole issue is the amount of child support obligation to be paid by and to the mother, by an ex-husband and father, to a 19 year old daughter who is attending community college half time in Oregon while living with her mother and the mother's boyfriend in an apartment.

Actors: Senior Judge Williamson, Justine, Wilhelmina, Francois and Wilhelmina's lawyer.

Background facts: Senior Judge Williamson is in a conference room with 19 year old Justine who wants to be paid child support of $5,000 per month from her mother, Wilhelmina, and her father, Wilson. She is not represented by a lawyer. This is a session with Justine, then a separate session with Wilhelmina and her lawyer with Francois present. The current support order is $1,500 per month paid by Wilson to Wilhelmina since his release from a 5 year hitch in the federal correctional institute at Sheridan for manufacture of methamphetamine. Wilson and Wilhelmina dissolved their marriage just after he was arrested at the family compound, while cooking a batch of methamphetamine with 10 year old Justine, who earned her allowance by cleaning the still and making sure the batch cooled slow enough to allow small crystals to form. After the divorce, Wilhelmina took up with Francois, an amorous 27 year old French Canadian, some fifteen years younger than her, and lives in an apartment with Francois and Justine. Wilson is out of prison and off parole, working as a fertilizer chemist for Marion Feed and Fertilizer.

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QUESTIONS AND (Some) ANSWERS
ABOUT MANDATORY CHILD ABUSE REPORTING

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Question 1: What is Mandatory Child Abuse Reporting?

The Oregon Child Abuse Reporting Law is found at ORS 419B.005 to 419B.050. It imposes a legal obligation on certain "public and private officials" to report child abuse. The statute also expresses the state's policy that all citizens have a responsibility to prevent abuse and protect children, and the statute encourages voluntary reporting in situations in which reporting is not required. Mandatory reporters are a critical link in the state's system of child protection and account for approximately 75% of reports received.

Question 2: What Are Lawyers Required To Do?

Lawyers are included in the definition of "public or private officials" who have a duty to report child abuse. ORS 419B.005(3)(m). Physicians, school employees, social workers, police, firefighters, clergy, psychologists, day care workers and members of the Legislative Assembly are among the other mandatory reporters. Reporting is required when a lawyer has "reasonable cause to believe that any child with whom the [lawyer] comes in contact has suffered abuse or that any person with whom the [lawyer] comes in contact has abused a child. . . ." ORS 419B.010(1).

Child abuse reporting is a 24-hour-a-day, 7-day-a-week responsibility. Originally, the statute required public and private officials to report only information they learned in the performance of official duties. In 1991, however, the statute was amended to eliminate that language, with the result that mandatory reporters are never "off-duty" for purposes of child abuse reporting.

Failure to report as required by the statute is a Class A violation. ORS 419B.010(3). The penalty for a Class A violation is a maximum fine of $720, according to ORS 153.018(2)(a).

Oregon Rule of Professional Conduct 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client.[2] Oregon RPC 1.6(b)(5) *permits*, but does not require,

a lawyer to disclose information relating to the representation of a client when required by law. A lawyer may thus report child abuse as required by law without violating the lawyer's ethical duty of confidentiality to a client. Note that when one of the exceptions to reporting applies (discussed in Question 6, *infra*), the law does *not* require reporting, and therefore would *not* permit a lawyer to disclose information protected by Oregon RPC 1.6. In addition, Oregon RPC 1.6(b)(5) permits disclosure to the extent that is required by law; it does not give a lawyer permission to reveal information about child abuse that the law does not require be reported. In other words, a lawyer cannot use the permission in the disciplinary rule to justify disclosing information about child abuse that is not required to be reported by the exceptions in ORS 419B.010.

Question 3: What Is "Reasonable Cause?"

There are no reported cases applying or interpreting this phrase specifically in connection with ORS 419B.010(1). One case interprets "reasonable cause" in connection with ORS 419B.020, a provision that requires the Department of Human Services to investigate a report of child abuse and make a determination of whether the allegations of abuse are "founded," that is, whether there is "reasonable cause to believe that abuse has occurred." ORS 419B.020(2). In *Berger v. State Office for Services to Children and Families*, 195 Or App 587, 98 P3d 1127 (2004), the court noted that the agency's determination of whether charges are founded is limited only to "whether there is evidence that creates a reasonable suspicion of child abuse; [the agency] does not decide whether child abuse in fact occurred or even probably occurred." *Id.* at 590.

Child Protective Services investigators who have *reasonable suspicion* that a suspicious physical injury is or may be the result of abuse are required to immediately photograph the injury and ensure that a medical assessment is conducted within 48 hours. ORS 419B.023(2). "Reasonable suspicion" in this context means "a reasonable belief given all of the circumstances, based upon specific and describable facts, that the suspicious physical injury

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[1] Grateful acknowledgement goes to Sylvia E. Stevens, who prepared the original version of these materials, which have been revised and updated over the years to reflect changes and developments in the law.

[2] Lawyers are required by ORS 9.460 to "maintain the confidences and secrets of…clients consistent with the rules of professional conduct…" ORS 9.460 uses the terminology of *former* DR 4-101, which has been replaced by Oregon RPC 1.6.

may be the result of abuse." OAR 413-015-0115. The administrative rule further explains that "the belief must be subjectively and objectively reasonable. In other words, the person subjectively believes that the injury may be the result of abuse, and the belief is objectively reasonable considering all of the circumstances. The circumstances that may give rise to a reasonable belief may include, but not be limited to, observations, interviews, experience, and training. The fact that there are possible non-abuse explanations for the injury does not negate reasonable suspicion."

Similarly, "reasonable suspicion" for an officer to stop an individual in the criminal law context is defined as "a belief that is reasonable under the totality of the circumstances existing at the time and place the peace officer acts." ORS 131.605(5). The standard is an "objective test of observable facts" and requires the officer "to point to specific articulable facts that give rise to a reasonable inference that a person has committed a crime." *State v. Ehly*, 317 Or 66, 80, 854 P2d 421 (1993).

By contrast, the standard of "probable cause" for arrest in the criminal law context is generally thought of as a higher standard than that of "reasonable suspicion." "Probable cause" is defined by ORS 131.005(11) as a "substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it."

"Reasonable cause," has also been defined in a variety of criminal and civil cases and sometimes has been equated with "probable cause." In *State v. Childers,* 13 Or App 622, 511 P2d 447 (1973), the court held that a police officer did not have probable cause to make a warrantless search for marijuana since he was uncertain whether he had smelled it. The court cited the probable cause standard as the existence of circumstances that would lead a reasonably prudent person to believe that an event has occurred, and it is distinguishable from "mere suspicion or belief, unsupported by facts of circumstances." *Id.* at 629. This articulation of probable cause sounds more like the reasonable suspicion standard.

Interpreting "reasonable cause" in the context of obtaining a subpoena for bank records under ORS 192.565(6), the court in *State v. McKee,* 89 Or App 94, 99, 747 P3d 395 (1987) found that a showing of reasonable cause requires a recital of known facts, not merely conclusory statements. By contrast, a merchant was found to have reasonable cause to detain a suspected shoplifter when the merchant saw the person leaving the store with unpaid-for merchandise partially concealed in a pocket. *Delp v. Zapp's Drug & Variety Stores,* 238 Or 538, 395 P2d 137

(1964). The statute cited in *Delp*, which allows merchants to detain suspected shoplifters, has since been amended to require "probable cause" as opposed to "reasonable cause." *See* ORS 131.655(1).

As used in ORS 419B.010(1) and in order to qualify for immunity, "reasonable cause" is a good faith determination that child abuse has occurred based on facts reasonably believed by the reporter to be true. *See* ORS 419B.025.

Question 4: What Is "Comes In Contact?"

"Comes in contact" is a more nebulous phrase that is also not defined in the statute or case law. A dictionary definition of "contact" includes "coming together…," "not being separated by space . . . ," and "being in communication." Webster's *Illustrated Encyclopedic Dictionary,* Tormont Publications (Montreal: 1990). That definition and common usage suggest that a lawyer is required to report child abuse only when the lawyer has had some kind of physical contact with a person who has abused a child or with a child who has been abused. This does not necessarily mean "in person" contact; telephone or even email or written contact would likely suffice.

The "comes in contact" requirement does not appear to modify the "reasonable cause" requirement. In other words, the statute does not appear to require reporting only when the lawyer learns of the abuse directly from the child or abuser. Reliable second- or third-hand information may provide the reasonable cause to believe that abuse has occurred; reporting would then be required if the lawyer had come in contact with the abuser or the child. For example, if a neighbor tells a lawyer that she heard from another neighbor that a child living down the street (with whom the lawyer has occasional contact) appears to have been abused, the lawyer may have reasonable cause to believe that abuse occurred if the lawyer believes the neighbors are reliable sources of information.

It is sometimes suggested that, under a broad reading of the statute and its purpose, that contact includes knowledge of child abuse even without any physical contact with the victim or abuse. The Oregon Attorney General does not interpret the statute so broadly, opining that "physicians, psychologists and social workers who serve as members of the board of directors of a self-help child abuse prevention organization, but who do not provide direct services, are not required to report suspected child abuse…when they acquire that information indirectly in their official capacities as board members." Oregon AG Opinion No. OP-5543 (1984). The basis

for the opinion lies primarily in the fact that the list of mandatory reporters in Oregon consists of professionals and service providers who are most likely to come into direct contact with victims or perpetrators of child abuse. "We believe that if the drafter of [the statute] had intended to impose a mandatory reporting duty, violation of which is punishable by a substantial fine…, upon persons who merely have knowledge about child abuse, from whatever source, they would have said so clearly." *Id.*

Question 5: How Is A Lawyer Expected To Identify Child Abuse?

The child abuse reporting statute identifies various types of conduct that constitute child abuse. ORS 419B.005(1)(a). Lawyers, like many mandatory reporters, may not be experts in identifying child abuse and are not expected to be. The intent of the statute is to get at-risk children into a system where the circumstances will be evaluated and, as necessary, addressed by qualified professionals. Hence, the standard for reporting is only "reasonable cause," not "certainty."

Abuse that leaves physical marks is relatively easy to recognize. Some forms of neglect are also visible, such as malnutrition or young children left unattended. Criminal assault and certain sex crimes constitute child abuse, as does allowing a child to be in a place where methamphetamines are manufactured. Other kinds of child abuse, such as mental injury, may be more difficult to detect, particularly where contact with the child is limited. The mandatory reporting law does not require lawyers to conduct investigations into suspected child abuse, but lawyers should make reasonable inquiry where possible to follow up on initial observations or information that appears to involve child abuse to ensure that they have "reasonable cause" to believe that abuse has occurred.

The Oregon Department of Human Services publishes a booklet entitled "What You Can Do About Child Abuse--A Guide for Mandatory Reporters" that lawyers may find helpful. It is available on-line at http://dhsforms.hr.state.or.us/Forms/Served/DE9061.pdf. DHS will also answer questions and consult about whether a situation should be reported.

Question 6: Are There Any Exceptions To The Reporting Requirement?

There are three exceptions to the statutory reporting requirement:

A Lawyers, together with clergy, psychiatrists, psychologists and guardian ad litems appointed under ORS 419B.231 are not required to report information "communicated

by a person if the communication is privileged under ORS 40.225 to 40.295 or 419B.234(6)."

B A lawyer is also not required to report child abuse based on information communicated to the lawyer "in the course of representing a client, if disclosure of the information would be detrimental to the client."

C No official is required to report if the information about child abuse is acquired "by reason of a report" or "by reason of a proceeding arising out of a report" made under ORS 419B.010, provided the official "reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services." ORS 419B.010(2).

A. Privileged Communications

The first exception relates to statutory privileges. Lawyers are not required to report information that is *"privileged under ORS 40.225 to 40.295."* ORS 40.225 is the lawyer-client privilege.[3] The reference, however, encompasses thirteen other privileges: psychotherapist-patient (40.230), physician-patient (40.235), nurse-patient (40.240), school employee-student (40.245), clinical social worker-client (40.250), husband-wife (40.255), clergy-penitent (40.260), counselor-client (40.262), stenographer-employer (40.265), public officer (40.270), disabled person-sign language interpreter (40.272), non-English speaking person-interpreter (40.273), and informer (40.275).

Clearly, if a lawyer learns in a privileged communication with a client that the client has abused a child, the lawyer is not required to report. What, however, of information protected by one of the other privileges contained in ORS 40.225 to 40.295? Can ORS 419B.010(1) be read

[3] A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. A "confidential communication" is one that is "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Confidential communications include those (1) between the client or the client's representative and the client's lawyer or a representative of the lawyer, (2) between the client's lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between

to also exempt a lawyer from reporting information that is protected by any one of the other thirteen privileges even if it was not, for some reason, covered by the attorney-client privilege? For instance, what if the lawyer receives a report containing the client's disclosure to a psychotherapist that the client committed child abuse, but the client has never made the disclosure directly to the lawyer. Is the lawyer exempted from reporting the information because it is protected by the psychotherapist-patient privilege? Or is the psychotherapist-patient privilege lost when the report is delivered to the lawyer? The first question to ask in a situation such as the foregoing is whether the information continues to be privileged; if so, there remains the unanswered question of whether a lawyer is excepted from reporting the information protected by the other privileges.

Although the plain language of the statute suggests that lawyers, psychiatrists, psychologists and clergy are excused from reporting information protected by all the statutory privileges, there is no authority interpreting the scope of the privilege exception. Given that absence of authority and the broad protective purpose behind the statute, prudence may dictate a less expansive reading.

B. Information Detrimental to Client if Disclosed

The second exception to mandatory reporting applies only to lawyers, and tracks to some extent a lawyer's ethical obligation to protect confidential client information. Lawyers are prohibited by Oregon RPC 1.6(a) from revealing "information relating to the representation of a client." "Information relating to the representation of a client" is defined in Oregon RPC 1.0(f) as both "information protected by the lawyer-client privilege under applicable law" and "other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[4]

Clearly then, "information relating to the representation" is not limited to information that is privileged because communicated by the client. Information protected under Oregon RPC 1.6 includes information learned from witnesses and other third parties as well as information imparted by the client that is, for some reason, not covered by the privilege. All that is required

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representatives of the client or between the client and a representative of a client, or (5) between lawyers representing the client. OEC 503 (ORS 40.225).

[4] These are the definitions, respectively, of "confidences" and "secrets" from *former* DR 4-101.

is that it be gained during the course of the professional relationship between the lawyer and the client, and either that the client has requested it be "held inviolate" or that it would be embarrassing or detrimental to the client if revealed.

In creating the statutory exception for some of the information that would be protected by Oregon RPC 1.6,[5] the legislature limited it to information that would be detrimental (not merely embarrassing) if disclosed. This appears to be the legislature's way of reconciling the sanctity of the lawyer-client relationship with the interest of protecting children. The legislature appears to have concluded that mere embarrassment to a client is not sufficient justification for the lawyer to ignore child abuse.

C. Information Learned from an Official Report

The final exception to the reporting requirement applies to all mandatory reporters. Reporting is not required of information learned "by reason of a report" or "by reason of a proceeding arising out of a report" made under the mandatory reporting statute. The exception applies if the reporter "reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services." This relatively new exception[6] appears to be the legislature's attempt to clarify that mandatory reporters do not need to report when the only information they have comes from an existing report. The language is not crystal clear, however, as it suggests that reports may be made and proceedings may arise therefrom, yet the information might not be known to DHS. Although it is difficult to image a situation where that could actually be the case, a lawyer who learns about abuse (involving a person with whom the lawyer has had contact) from another reporter's report would be prudent to confirm that DHS is aware of the situation. If DHS cannot confirm its existing knowledge of the abuse, the lawyer should report.

The effect of these statutory exceptions to the duty to report is that most of the information a lawyer will be required to report will be that learned outside the lawyer's "official capacity." For instance, witnessing an act of child abuse in a public place will trigger the reporting obligation, despite the fact that the lawyer may not have a lot of information to

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[5] This exception was added by the 2001 Legislature in response to suggestions by lawyers that the exception for privileged communications could easily put lawyers in the difficult situation of having to violate their ethical duties to clients in order to comply with the statute.

[6] This exception was also added by the 2001 Legislature.

report. Similarly, information that a non-client friend or neighbor is abusing a child or is a victim of abuse must be reported.

Question 7: What If Someone Expresses The Intent To Commit An Act Of Child Abuse?

ORS 419B.010(1) mandates reporting only when there is reasonable cause to believe that a child "*has suffered* abuse" or that a person "*has abused* a child." It does not require advance reporting of possible future child abuse, except where the future abuse constitutes a "threatened harm" under ORS 419B.005(G). Threatened harm is defined broadly to include any situation that subjects a child to a substantial risk of harm to the child's health or welfare.

If the situation does not involve "threatened harm" within the meaning of ORS 419B.005(G), reporting may still be possible. Oregon RPC 1.6(b)(1) permits a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary "to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." There is also no lawyer-client privilege under ORS 40.225(4)(a) "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." Oregon RPC 1.6(b)(2) permits a lawyer to reveal information otherwise protected to the extent the lawyer reasonably believes necessary "to prevent reasonably certain death or substantial bodily harm," whether or not a crime is involved. When used in reference to degree or extent, "substantial" denotes "a material matter of clear and weighty importance." Oregon RPC 1.0(o).

It is not clear that all incidents of child abuse identified in the statute constitute crimes. A lawyer whose client has expressed a clear intention to commit child abuse in the future should ascertain first whether the intended conduct is a crime or if it puts a person at risk of reasonably certain death or substantial bodily harm. If so, the lawyer may disclose information necessary to prevent the commission of the crime.

A voluntary report of suspected future abuse that is not required under ORS 419B.010 would nevertheless be subject to the same statutory confidentiality and immunity as a mandatory report.

Question 8: Are Lawyers Obligated to Report Child Abuse Occurring Outside Of Oregon?

While all states have adopted mandatory child abuse reporting laws, the laws are not uniform and lawyers are not mandatory reporters in all jurisdictions. Lawyers who are licensed

in multiple jurisdictions should be attentive to the statutory requirements of each jurisdiction as well as to the interplay between those statutory requirements and the disciplinary rules to which the lawyer is subject.

Additionally, the scope of Oregon's mandatory child abuse reporting law is not clear with respect to incidents occurring outside of Oregon or involving abusers and victims who are not residents of Oregon. Nothing in ORS 419B.010 can be read to limit reporting only to incidents occurring within the state. The language of the statute sweeps broadly to include "any child" who has been abused and "any person" who has abused on child. On the other hand, if a lawyer fails to report an incident of child abuse involving non-Oregonians and learned about while visiting another state, it may be difficult for Oregon to assert jurisdiction over the lawyer for purposes of citing a violation pursuant to ORS 419B.010(3).

A lawyer who wishes to act most cautiously should make a report to DHS of the out-of-state incident and allow DHS to determine whether and how to deal with the information. Reporting in that circumstance does not violate any ethical responsibility of the lawyer or violate any right of the persons involved; moreover, it is consistent with the policy behind the child abuse reporting statute to protect children not only by requiring reports, but also "to encourage voluntary reports." ORS 419B.007.

Question 9: What Type Of Report Is Required And To Whom Must It Be Made?

The statute requires that reports be made "immediately," ORS 419B.010(1), and the report must be "an oral report by telephone or otherwise." ORS 419B.015. That combined language suggests that a letter will not suffice. (It has been suggested to the author that a fax, if sent during office hours, meets the requirement at least in part because it is transmitted by telephone.) In-person or telephone reports are obviously preferred. Reports must be made to the local office of the Department of Human Services, its designee, or a law enforcement agency within the county where the person making the report is located at the time of the contact. In SB 234(2011), the Legislature defined law enforcement agency to mean:

- A city or municipal police department.
- A county sheriff's office.
- The Oregon State Police.
- A police department established by a university.
- A county juvenile department.

The report must contain, if known:

- the names and addressees of the child and the parents of the child or other persons responsible for care of the child,
- the child's age,
- the nature and extent of the abuse, including any evidence of previous abuse,
- the explanation given for the abuse, and
- any other information that might be helpful in establishing the cause of the abuse and the identity of the abuser.

Question 10: Are Child Abuse Reports Confidential?

Notwithstanding Oregon's public records law, "reports and records compiled under [the mandatory child abuse reporting law] are confidential and are not accessible for public inspection." ORS 419B.035. DHS is required to make the reports available in some circumstances and permitted to do so in other circumstances. In either case, however, the name, address or other identifying information about the reporter cannot be disclosed except on court order. Recipients of records under DHS's mandatory or permissive disclosure authority are also required to maintain the confidentiality of the records and commit a Class A violation for failure to do so.

The confidentiality is not absolute, as a reporter may be required to testify in juvenile or criminal court proceedings relating to the report. In criminal proceedings, the alleged abuser's constitutional right to confront witnesses would override the statutory confidentiality.

Confidentiality may be enhanced by reporting anonymously. While there is no requirement in the statute that the reporter identify him- or herself, it is also clear that the statute does not contemplate anonymous reporting and it is likely not preferred by DHS. Police and DHS will accept anonymous reports, however. Because of the liability that can result from not reporting, lawyers should weigh the desire for confidentiality with the possible need for proof that a report was in fact made as required.

Question 11: What If I Am Wrong, And There Really Was No Abuse?

A person who acts in good faith in making a report of child abuse and who has reasonable grounds for doing so, is immune from civil or criminal liability for making the report and for the content of the report. Reporters have the same immunity with respect to their participation in any judicial proceeding resulting from the report. ORS 419B.025. *See McDonald v. State of*

Oregon, 71 Or App 751, 694 P2d 569 (1984)(negligence claim against teacher dismissed because plaintiffs failed to assert any facts to negate teacher's good faith and reasonable grounds to report child abuse, notwithstanding the fact that the report was later determined to be unfounded).

The efficacy of the foregoing immunity provision may be open to question, based on the Oregon Supreme Court's decision in *Smothers v. Gresham Transfer, Inc.,* 332 Or 83, 23 P3d 333 (2001). That case held that the exclusive remedy of the Workers' Compensation statutes violated Article I, Section 10 of the Oregon Constitution to the extent it left the plaintiff without a remedy for an injury not compensable under the workers' compensation system. Similarly, the immunity granted by ORS 419B.025 may conflict with the arguable common-law right of an alleged abuser to sue a reporter for defamation.

This immunity provision would not shield an attorney from civil or criminal liability if he or she knowingly made a false report. In 2011, the Legislature enacted HB 2183, which provides it is a Class A violation to *knowingly* make a false child abuse report in order to influence a custody, parenting time, visitation or child support decision.

Question 12: Are Lawyers Liable For *Not* Reporting Child Abuse?

As mentioned above, failure to report child abuse when required under the statute is a Class A violation punishable by a fine. The bar is aware of at least one case in which a mandatory reporter (not a lawyer) was prosecuted for failing to report. In that case, the official informed the parents of the victim, who took immediate and apparently successful steps to protect her. The official also informed her supervisor. She was prosecuted for not reporting to DHS exactly as the statute required; she was eventually acquitted.

Civil liability is also a possibility. There are no reported cases in Oregon imposing liability on mandatory reporters for failure to report child abuse, but at least one jury has rendered a verdict in favor of a plaintiff based in part on the defendant's failure to report child abuse. *See Shin v. Sunriver Prep. School*, 199 Or App 352, 111 P3d 352 (2005). A statutory tort theory may provide the basis for liability because the mandatory reporting statute "imposes a duty to protect a specified group of persons." *Scovill v. City of Astoria*, 324 Or 159, 172, 921 P2d 1312 (1996)(setting forth statutory tort analysis in context of protective custody statute, ORS 430.399). In addition, the court of appeals has held that a child who had been sexually abused could state a claim for negligence against the Children's Services Division (CSD) by alleging that

CSD breached its statutory duty to investigate abuse allegations. *Blachly v. Portland Police Dept.,* 135 Or App 109, 898 P2d 784 (1995).

Legislation that would have eliminated any private right of action under the mandatory child abuse reporting law was vetoed by the governor during the 1999 legislative session. Other jurisdictions have imposed liability on mandatory reporters for failure to report suspected abuse. *See* Singley, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J Juv L 236 (1998).

The Professional Liability Fund also has defended and settled two claims arising out of a lawyer's failure to report when there was no privilege or other exception to the duty to report. If you are an attorney in private practice, a claim for failure to report child abuse will be covered under the Professional Liability Fund Coverage Plan only if the claim falls within the definition of a "Covered Activity," that is, it arises from an act, error, or omission by a lawyer in rendering professional services in his or her capacity as a lawyer. In short, the lawyer must have obtained the information about child abuse while on the job, in the context of rendering professional legal services. *See* PLF Plan, Section V—*Exclusions from Coverage*, Comments to Exclusion 16. Claims not covered by the PLF may also be covered under a lawyer's commercial general liability policy or homeowner's policy.

Question 13: What Does The Law Require The Oregon State Bar To Do In Connection With Child Abuse Reporting?

The Oregon State Bar is required to identify those persons regulated by the bar (Oregon lawyers) "who in their official capacity have regular and ongoing contact with children" and to notify them every two years of their duty to report child abuse. ORS 418.702(2). The notice must also advise them of the symptoms to look for and provide a contact number for further information. The bar meets this statutory obligation by publishing notice regularly in the *Oregon State Bar Bulletin*.

The Bar is also required to ensure that attorneys complete one hour of training every three years on the duties of attorneys under the mandatory child abuse reporting law. ORS 9.114. The legislature enacted this educational requirement in 1999, in the apparent belief that lawyers were not sufficiently aware of their duties as mandatory child abuse reporters.

Question 14: Are Lawyers Also Mandatory Reporters Under The Elderly And Disabled Person Abuse Prevention Act, ORS 124.050, Et Seq.?

Generally, no. ORS 124.060 requires reporting of elder abuse by "any public or private official" who comes in contact with the abused elder or with the abuser while the reporter is "acting in an official capacity." The definition of "public or private official" in ORS 124.050(5) does *not* specifically include lawyers. *Cf.* ORS 419B.005(m). However, "public or private official" does include "any public official who comes in contact with elderly persons in the performance of the official's duties." ORS 124.050(5)(k). Thus, although lawyers generally are not covered by the Act, lawyers who are public officials and who come in contact with elderly persons in the performance of their official duties must comply with the Elderly Abuse Reporting Act.

In addition, ORS 441.640 requires any public or private official to report abuse of a resident of a long-term care facility. The definition of "public or private official" in this section includes legal counsel for the resident, guardian or family member of the resident. ORS 441.630(6)(h). Long-term care facility means "a facility with permanent facilities that include inpatient beds, providing medical services, including nursing services but excluding surgical procedures except as may be permitted by the rules of the director, to provide treatment for two or more unrelated patients." ORS 442.015(2)

APPENDIX A
OREGON REVISED STATUTES 2009**
REPORTING OF CHILD ABUSE—ORS 419B.005 et seq.

419B.005 Definitions. As used in ORS 419B.005 to 419B.050, unless the context requires otherwise:

(1)(a) "Abuse" means:

(A) Any assault, as defined in ORS chapter 163, of a child and any physical injury to a child which has been caused by other than accidental means, including any injury which appears to be at variance with the explanation given of the injury.

(B) Any mental injury to a child, which shall include only observable and substantial impairment of the child's mental or psychological ability to function caused by cruelty to the child, with due regard to the culture of the child.

(C) Rape of a child, which includes but is not limited to rape, sodomy, unlawful sexual penetration and incest, as those acts are described in ORS chapter 163.

(D) Sexual abuse, as described in ORS chapter 163.

(E) Sexual exploitation, including but not limited to:

(i) Contributing to the sexual delinquency of a minor, as defined in ORS chapter 163, and any other conduct which allows, employs, authorizes, permits, induces or encourages a child to engage in the performing for people to observe or the photographing, filming, tape recording or other exhibition which, in whole or in part, depicts sexual conduct or contact, as defined in ORS 167.002 or described in ORS 163.665 and 163.670, sexual abuse involving a child or rape of a child, but not including any conduct which is part of any investigation conducted pursuant to ORS 419B.020 or which is designed to serve educational or other legitimate purposes; and

(ii) Allowing, permitting, encouraging or hiring a child to engage in prostitution ***or to patronize a prostitute***, as defined in ORS chapter 167.

(F) Negligent treatment or maltreatment of a child, including but not limited to the failure to provide adequate food, clothing, shelter or medical care that is likely to endanger the health or welfare of the child.

(G) Threatened harm to a child, which means subjecting a child to a substantial risk of harm to the child's health or welfare.

(H) Buying or selling a person under 18 years of age as described in ORS 163.537.

(I) Permitting a person under 18 years of age to enter or remain in or upon premises where methamphetamines are being manufactured.

(J) Unlawful exposure to a controlled substance, as defined in ORS 475.005, that subjects a child to a substantial risk of harm to the child's health or safety.

(b) "Abuse" does not include reasonable discipline unless the discipline results in one of the conditions described in paragraph (a) of this subsection.

(2) "Child" means an unmarried person who is under 18 years of age.

(3) "Law enforcement agency" means:

(a) A city or municipal police department.

(b) A county sheriff's office.

(c) The Oregon State Police.

(d) A police department established by a university under section 1 of this 2011 Act.

(e) A county juvenile department.

(4) "Public or private official" means:

**Statutes incorporate changes from the 2011 Regular Session, which are identified in bold italics. *See* SB 405(2011); HB 2714 (2011); HB 2183 (2011).

(a) Physician, osteopathic physician, physician assistant, naturopathic physician, podiatric physician and surgeon, including any intern or resident.

(b) Dentist.

(c) School employee.

(d) Licensed practical nurse, registered nurse, nurse practitioner, nurse's aide, home health aide or employee of an in-home health service.

(e) Employee of the Department of Human Services, Oregon Health Authority, State Commission on Children and Families, Child Care Division of the Employment Department, the Oregon Youth Authority, a county health department, a community mental health program, a community developmental disabilities program, a county juvenile department, a licensed child-caring agency or an alcohol and drug treatment program.

(f) Peace officer.

(g) Psychologist.

(h) Member of the clergy.

(i) Regulated social worker.

(j) Optometrist.

(k) Chiropractor.

(L) Certified provider of foster care, or an employee thereof.

(m) Attorney.

(n) Licensed professional counselor.

(o) Licensed marriage and family therapist.

(p) Firefighter or emergency medical technician.

(q) A court appointed special advocate, as defined in ORS 419A.004.

(r) A child care provider registered or certified under ORS 657A.030 and 657A.250 to 657A.450.

(s) Member of the Legislative Assembly.

(t) Physical, speech or occupational therapist.

(u) Audiologist.

(v) Speech-language pathologist.

(w) Employee of the Teacher Standards and Practices Commission directly involved in investigations or discipline by the commission.

(x) Pharmacist.

(y) An operator of a preschool recorded program under ORS 657A.255.

(z) An operator of a school-age recorded program under ORS 657A.257.

[1993 c.546 §12; 1993 c.622 §1a; 1995 c.278 §50; 1995 c.766 §1; 1997 c.127 §1; 1997 c.561 §3; 1997 c.703 §3; 1997 c.873 §30; 1999 c.743 §22; 1999 c.954 §4; 2001 c.104 §148; 2003 c.191 §1; 2005 c.562 §26; 2005 c.708 §4; 2009 c.199 §1; 2009 c.442 §36; 2009 c.518 §1; 2009 c.570 §6; 2009 c.595 §364; 2009 c.633 §10; 2009 c.708 §3]

419B.007 Policy. The Legislative Assembly finds that for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports. [1993 c.546 §13]

419B.010 Duty of officials to report child abuse; exceptions; penalty. (1) Any public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child shall immediately report or cause a report to be made in the manner required in ORS 419B.015. Nothing contained in ORS 40.225 to 40.295 or 419B.234 (6) affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of

the clergy, attorney or guardian ad litem appointed under ORS 419B.231 is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295 or 419B.234 (6). An attorney is not required to make a report under this section by reason of information communicated to the attorney in the course of representing a client if disclosure of the information would be detrimental to the client.

(2) Notwithstanding subsection (1) of this section, a report need not be made under this section if the public or private official acquires information relating to abuse by reason of a report made under this section, or by reason of a proceeding arising out of a report made under this section, and the public or private official reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services.

(3) A person who violates subsection (1) of this section commits a Class A violation. Prosecution under this subsection shall be commenced at any time within 18 months after commission of the offense. [1993 c.546 §14; 1999 c.1051 §180; 2001 c.104 §149; 2001 c.904 §15; 2005 c.450 §7]

419B.015 Report form and content; notice. (1)(a) A person making a report of child abuse, whether the report is made voluntarily or is required by ORS 419B.010, shall make an oral report by telephone or otherwise to the local office of the Department of Human Services, to the designee of the department or to a law enforcement agency within the county where the person making the report is located at the time of the contact. The report shall contain, if known, the names and addresses of the child and the parents of the child or other persons responsible for care of the child, the child's age, the nature and extent of the abuse, including any evidence of previous abuse, the explanation given for the abuse and any other information that the person making the report believes might be helpful in establishing the cause of the abuse and the identity of the perpetrator.

(b) When a report of child abuse is received by the department, the department shall notify a law enforcement agency within the county where the report was made. When a report of child abuse is received by a designee of the department, the designee shall notify, according to the contract, either the department or a law enforcement agency within the county where the report was made. When a report of child abuse is received by a law enforcement agency, the agency shall notify the local office of the department within the county where the report was made.

(2) When a report of child abuse is received under subsection (1)(a) of this section, the entity receiving the report shall make the notification required by subsection (1)(b) of this section according to rules adopted by the department under ORS 419B.017.

(3)(a) When a report alleging that a child or ward in substitute care may have been subjected to abuse is received by the department, the department shall notify the attorney for the child or ward, the child's or ward's court appointed special advocate, the parents of the child or ward and any attorney representing a parent of the child or ward that a report has been received.

(b) The name and address of and other identifying information about the person who made the report may not be disclosed under this subsection. Any person or entity to whom notification is made under this

subsection may not release any information not authorized by this subsection.

(c) The department shall make the notification required by this subsection within three business days of receiving the report of abuse.

(d) Notwithstanding the obligation imposed by this subsection, the department is not required under this subsection to notify the parent or parent's attorney that a report of abuse has been received if the notification may interfere with an investigation or assessment or jeopardize the child's or ward's safety. [1993 c.546 §15; 1993 c.734 §1a; 2005 c.250 §1; 2007 c.237 §1]

419B.017 Time limits for notification between law enforcement agencies and Department of Human Services; rules. (1) The Department of Human Services shall adopt rules establishing:

(a) The time within which the notification required by ORS 419B.015 (1)(a) must be made. At a minimum, the rules shall:

(A) Establish which reports of child abuse require notification within 24 hours after receipt;

(B) Provide that all other reports of child abuse require notification within 10 days after receipt; and

(C) Establish criteria that enable the department, the designee of the department or a law enforcement agency to quickly and easily identify reports that require notification within 24 hours after receipt.

(b) How the notification is to be made.

(2) The department shall appoint an advisory committee to advise the department in adopting rules required by this section. The department shall include as members of the advisory committee representatives of law enforcement agencies and multidisciplinary teams formed pursuant to ORS 418.747 and other interested parties.

(3) In adopting rules required by this section, the department shall balance the need for providing other entities with the information contained in a report received under ORS 419B.015 with the resources required to make the notification.

(4) The department may recommend practices and procedures to local law enforcement agencies to meet the requirements of rules adopted under this section. [2005 c.250 §3]

Note: 419B.017 was added to and made a part of 419B.005 to 419B.050 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

419B.020 Duty of department or law enforcement agency receiving report; investigation; notice to parents; physical examination; child's consent; notice at conclusion of investigation. (1) If the Department of Human Services or a law enforcement agency receives a report of child abuse, the department or the agency shall immediately:

(a) Cause an investigation to be made to determine the nature and cause of the abuse of the child; and

(b) Notify the Child Care Division if the alleged child abuse occurred in a child care facility as defined in ORS 657A.250.

(2) If the abuse reported in subsection (1) of this section is alleged to have occurred at a child care facility:

(a) The department and the law enforcement agency shall jointly determine the roles and responsibilities of the department and the agency in their respective investigations; and

(b) The department and the agency shall each report the outcomes of their investigations to the Child Care Division.

(3) If the law enforcement agency conducting the investigation finds reasonable cause to believe that abuse has occurred, the law enforcement agency shall notify by oral report followed by written report the local office of the department. The department shall provide protective social services of its own or of other available social agencies if necessary to prevent further abuses to the child or to safeguard the child's welfare.

(4) If a child is taken into protective custody by the department, the department shall promptly make reasonable efforts to ascertain the name and address of the child's parents or guardian.

(5)(a) If a child is taken into protective custody by the department or a law enforcement official, the department or law enforcement official shall, if possible, make reasonable efforts to advise the parents or guardian immediately, regardless of the time of day, that the child has been taken into custody, the reasons the child has been taken into custody and general information about the child's placement, and the telephone number of the local office of the department and any after-hours telephone numbers.

(b) Notice may be given by any means reasonably certain of notifying the parents or guardian, including but not limited to written, telephonic or in-person oral notification. If the initial notification is not in writing, the information required by paragraph (a) of this subsection also shall be provided to the parents or guardian in writing as soon as possible.

(c) The department also shall make a reasonable effort to notify the noncustodial parent of the information required by paragraph (a) of this subsection in a timely manner.

(d) If a child is taken into custody while under the care and supervision of a person or organization other than the parent, the department, if possible, shall immediately notify the person or organization that the child has been taken into protective custody.

(6) If a law enforcement officer or the department, when taking a child into protective custody, has reasonable cause to believe that the child has been affected by sexual abuse and rape of a child as defined in ORS 419B.005 (1)(a)(C) and that physical evidence of the abuse exists and is likely to disappear, the court may authorize a physical examination for the purposes of preserving evidence if the court finds that it is in the best interest of the child to have such an examination. Nothing in this section affects the authority of the department to consent to physical examinations of the child at other times.

(7) A minor child of 12 years of age or older may refuse to consent to the examination described in subsection (6) of this section. The examination shall be conducted by or under the supervision of a physician licensed under ORS chapter 677 or a nurse practitioner licensed under ORS chapter 678 and, whenever practicable, trained in conducting such examinations.

(8) When the department completes an investigation under this section, if the person who made the report of child abuse provided contact information to the department, the department shall notify the person about whether contact with the child was made, whether the department determined that child abuse occurred and whether services will be provided. The department is not required to disclose information under this subsection if the department determines that disclosure is

not permitted under ORS 419B.035. [1993 c.546 §16; 1993 c.622 §7a; 1997 c.130 §13; 1997 c.703 §1; 1997 c.873 §33; 2007 c.501 §4; 2007 c.781 §1]

419B.022 Short title. ORS 419B.023 and 419B.024 shall be known and may be cited as "Karly's Law." [2007 c.674 §1]

Note: 419B.022 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 419B or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

419B.023 Duties of person conducting investigation under ORS 419B.020. (1) As used in this section:

(a) "Designated medical professional" means the person described in ORS 418.747 (9) or the person's designee.

(b) "Suspicious physical injury" includes, but is not limited to:

(A) Burns or scalds;

(B) Extensive bruising or abrasions on any part of the body;

(C) Bruising, swelling or abrasions on the head, neck or face;

(D) Fractures of any bone in a child under the age of three;

(E) Multiple fractures in a child of any age;

(F) Dislocations, soft tissue swelling or moderate to severe cuts;

(G) Loss of the ability to walk or move normally according to the child's developmental ability;

(H) Unconsciousness or difficulty maintaining consciousness;

(I) Multiple injuries of different types;

(J) Injuries causing serious or protracted disfigurement or loss or impairment of the function of any bodily organ; or

(K) Any other injury that threatens the physical well-being of the child.

(2) If a person conducting an investigation under ORS 419B.020 observes a child who has suffered suspicious physical injury and the person is certain or has a reasonable suspicion that the injury is or may be the result of abuse, the person shall, in accordance with the protocols and procedures of the county multidisciplinary child abuse team described in ORS 418.747:

(a) Immediately photograph or cause to have photographed the suspicious physical injuries in accordance with ORS 419B.028; and

(b) Ensure that a designated medical professional conducts a medical assessment within 48 hours, or sooner if dictated by the child's medical needs.

(3) The requirement of subsection (2) of this section shall apply:

(a) Each time suspicious physical injury is observed by Department of Human Services or law enforcement personnel:

(A) During the investigation of a new allegation of abuse; or

(B) If the injury was not previously observed by a person conducting an investigation under ORS 419B.020; and

(b) Regardless of whether the child has previously been photographed or assessed during an investigation of an allegation of abuse.

(4)(a) Department or law enforcement personnel shall make a reasonable effort to locate a designated medical professional. If after reasonable efforts a designated medical professional is not available to conduct a medical assessment within 48 hours, the child shall be evaluated by an available physician.

(b) If the child is evaluated by a health care provider as defined in ORS 127.505 other than a designated medical professional, the health care provider shall

make photographs, clinical notes, diagnostic and testing results and any other relevant materials available to the designated medical professional for consultation within 72 hours following evaluation of the child.

(c) The person conducting the medical assessment may consult with and obtain records from the child's regular pediatrician or family physician under ORS 419B.050.

(5) Nothing in this section prevents a person conducting a child abuse investigation from seeking immediate medical treatment from a hospital emergency room or other medical provider for a child who is physically injured or otherwise in need of immediate medical care.

(6) If the child described in subsection (2) of this section is less than five years of age, the designated medical professional may, within 14 days, refer the child for a screening for early intervention services or early childhood special education, as those terms are defined in ORS 343.035. The referral may not indicate the child is subject to a child abuse investigation unless written consent is obtained from the child's parent authorizing such disclosure. If the child is already receiving those services, or is enrolled in the Head Start program, a person involved in the delivery of those services to the child shall be invited to participate in the county multidisciplinary child abuse team's review of the case and shall be provided with paid time to do so by the person's employer.

(7) Nothing in this section limits the rights provided to minors in ORS chapter 109 or the ability of a minor to refuse to consent to the medical assessment described in this section. [2007 c.674 §3; 2009 c.296 §1]

Note: 419B.023 was added to and made a part of 419B.005 to 419B.050 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

419B.024 Critical Incident Response Team for child fatality; rules. (1) The Department of Human Services shall assign a Critical Incident Response Team within 24 hours after the department determines that a child fatality was likely the result of child abuse or neglect if:

(a) The child was in the custody of the department at the time of death; or

(b) The child was the subject of a child protective services assessment by the department within the 12 months preceding the fatality.

(2) During the course of its review of the case, the Critical Incident Response Team may include or consult with the district attorney from the county in which the incident resulting in the fatality occurred.

(3) The department shall adopt rules necessary to carry out the provisions of this section. The rules adopted by the department shall substantially conform with the department's child welfare protocol regarding Notification and Review of Critical Incidents. [2007 c.674 §4]

Note: 419B.024 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 419B or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

419B.025 Immunity of person making report in good faith. Anyone participating in good faith in the making of a report of child abuse and who has reasonable grounds for the making thereof shall have immunity from any liability, civil or criminal, that might otherwise be incurred or

imposed with respect to the making or content of such report. Any such participant shall have the same immunity with respect to participating in any judicial proceeding resulting from such report. [1993 c.546 §17]

419B.028 Photographing child during investigation; photographs as records. (1) In carrying out its duties under ORS 419B.020, any law enforcement agency or the Department of Human Services may photograph or cause to have photographed any child subject of the investigation for purposes of preserving evidence of the child's condition at the time of the investigation. Photographs of the anal or genital region may be taken only by medical personnel.

(2) When a child is photographed pursuant to ORS 419B.023, the person taking the photographs or causing to have the photographs taken shall, within 48 hours or by the end of the next regular business day, whichever occurs later:

(a) Provide hard copies or prints of the photographs and, if available, copies of the photographs in an electronic format to the designated medical professional described in ORS 418.747 (9); and

(b) Place hard copies or prints of the photographs and, if available, copies of the photographs in an electronic format in any relevant files pertaining to the child maintained by the law enforcement agency or the department.

(3) For purposes of ORS 419B.035, photographs taken under authority of this section shall be considered records. [1993 c.546 §18; 2007 c.674 §5]

419B.030 Central registry of reports. (1) A central state registry shall be established and maintained by the Department of Human Services. The local offices of the department shall report to the state registry in writing when an investigation has shown reasonable cause to believe that a child's condition was the result of abuse even if the cause remains unknown. Each registry shall contain current information from reports cataloged both as to the name of the child and the name of the family.

(2) When the department provides specific case information from the central state registry, the department shall include a notice that the information does not necessarily reflect any subsequent proceedings that are not within the jurisdiction of the department. [1993 c.546 §19]

419B.035 Confidentiality of records; when available to others. (1) Notwithstanding the provisions of ORS 192.001 to 192.170, 192.210 to 192.505 and 192.610 to 192.990 relating to confidentiality and accessibility for public inspection of public records and public documents, reports and records compiled under the provisions of ORS 419B.010 to 419B.050 are confidential and may not be disclosed except as provided in this section. The Department of Human Services shall make the records available to:

(a) Any law enforcement agency or a child abuse registry in any other state for the purpose of subsequent investigation of child abuse;

(b) Any physician, at the request of the physician, regarding any child brought to the physician or coming before the physician for examination, care or treatment;

(c) Attorneys of record for the child or child's parent or guardian in any juvenile court proceeding;

(d) Citizen review boards established by the Judicial Department for the purpose of periodically reviewing the status of children, youths and youth offenders under the

jurisdiction of the juvenile court under ORS 419B.100 and 419C.005. Citizen review boards may make such records available to participants in case reviews;

(e) A court appointed special advocate in any juvenile court proceeding in which it is alleged that a child has been subjected to child abuse or neglect;

(f) The Child Care Division for certifying, registering or otherwise regulating child care facilities;

(g) The Office of Children's Advocate;

(h) The Teacher Standards and Practices Commission for investigations conducted under ORS 342.176 involving any child or any student in grade 12 or below;

(i) Any person, upon request to the Department of Human Services, if the reports or records requested regard an incident in which a child, as the result of abuse, died or suffered serious physical injury as defined in ORS 161.015. Reports or records disclosed under this paragraph must be disclosed in accordance with ORS 192.410 to 192.505; and

(j) The Child Care Division of the Employment Department for purposes of ORS 657A.030 (8)(g).

(2)(a) When disclosing reports and records pursuant to subsection (1)(i) of this section, the Department of Human Services may exempt from disclosure the names, addresses and other identifying information about other children, witnesses, victims or other persons named in the report or record if the department determines, in written findings, that the safety or well-being of a person named in the report or record may be jeopardized by disclosure of the names, addresses or other identifying information, and if that concern outweighs the public's interest in the disclosure of that information.

(b) If the Department of Human Services does not have a report or record of abuse regarding a child who, as the result of abuse, died or suffered serious physical injury as defined in ORS 161.015, the department may disclose that information.

(3) The Department of Human Services may make reports and records compiled under the provisions of ORS 419B.010 to 419B.050 available to any person, administrative hearings officer, court, agency, organization or other entity when the department determines that such disclosure is necessary to administer its child welfare services and is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect, to protect children from abuse and neglect or for research when the Director of Human Services gives prior written approval. The Department of Human Services shall adopt rules setting forth the procedures by which it will make the disclosures authorized under this subsection or subsection (1) or (2) of this section. The name, address and other identifying information about the person who made the report may not be disclosed pursuant to this subsection and subsection (1) of this section.

(4) A law enforcement agency may make reports and records compiled under the provisions of ORS 419B.010 to 419B.050 available to other law enforcement agencies, district attorneys, city attorneys with criminal prosecutorial functions and the Attorney General when the law enforcement agency determines that disclosure is necessary for the investigation or enforcement of laws relating to child abuse and neglect.

(5) A law enforcement agency, upon completing an investigation and closing the file in a specific case relating to child abuse or neglect, shall make reports and records in the case available upon request to any law enforcement agency or community

corrections agency in this state, to the Department of Corrections or to the State Board of Parole and Post-Prison Supervision for the purpose of managing and supervising offenders in custody or on probation, parole, post-prison supervision or other form of conditional or supervised release. A law enforcement agency may make reports and records compiled under the provisions of ORS 419B.010 to 419B.050 available to law enforcement, community corrections, corrections or parole agencies in an open case when the law enforcement agency determines that the disclosure will not interfere with an ongoing investigation in the case. The name, address and other identifying information about the person who made the report may not be disclosed under this subsection or subsection (6)(b) of this section.

(6)(a) Any record made available to a law enforcement agency or community corrections agency in this state, to the Department of Corrections or the State Board of Parole and Post-Prison Supervision or to a physician in this state, as authorized by subsections (1) to (5) of this section, shall be kept confidential by the agency, department, board or physician. Any record or report disclosed by the Department of Human Services to other persons or entities pursuant to subsections (1) and (3) of this section shall be kept confidential.

(b) Notwithstanding paragraph (a) of this subsection:

(A) A law enforcement agency, a community corrections agency, the Department of Corrections and the State Board of Parole and Post-Prison Supervision may disclose records made available to them under subsection (5) of this section to each other, to law enforcement, community corrections, corrections and parole agencies of other states and to authorized treatment providers for the purpose of managing and supervising offenders in custody or on probation, parole, post-prison supervision or other form of conditional or supervised release.

(B) A person may disclose records made available to the person under subsection (1)(i) of this section if the records are disclosed for the purpose of advancing the public interest.

(7) An officer or employee of the Department of Human Services or of a law enforcement agency or any person or entity to whom disclosure is made pursuant to subsections (1) to (6) of this section may not release any information not authorized by subsections (1) to (6) of this section.

(8) As used in this section, "law enforcement agency" has the meaning given that term in ORS 181.010.

(9) A person who violates subsection (6)(a) or (7) of this section commits a Class A violation. [1993 c.546 §§20,20a; 1995 c.278 §51; 1997 c.328 §8; 1999 c.1051 §181; 2003 c.14 §224; 2003 c.412 §1; 2003 c.591 §8; 2005 c.317 §1; 2005 c.659 §2; 2009 c.348 §3; 2009 c.393 §1]

419B.040 Certain privileges not grounds for excluding evidence in court proceedings on child abuse. (1) In the case of abuse of a child, the privileges created in ORS 40.230 to 40.255, including the psychotherapist-patient privilege, the physician-patient privilege, the privileges extended to nurses, to staff members of schools and to regulated social workers and the husband-wife privilege, shall not be a ground for excluding evidence regarding a child's abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 419B.010 to 419B.050.

(2) In any judicial proceedings resulting from a report made pursuant to ORS 419B.010 to 419B.050, either spouse shall

be a competent and compellable witness against the other. [1993 c.546 §21; 2009 c.442 §37]

419B.045 Investigation conducted on public school premises; notification; role of school personnel. If an investigation of a report of child abuse is conducted on public school premises, the school administrator shall first be notified that the investigation is to take place, unless the school administrator is a subject of the investigation. The school administrator or a school staff member designated by the administrator may, at the investigator's discretion, be present to facilitate the investigation. The Department of Human Services or the law enforcement agency making the investigation shall be advised of the child's disabling conditions, if any, prior to any interview with the affected child. A school administrator or staff member is not authorized to reveal anything that transpires during an investigation in which the administrator or staff member participates nor shall the information become part of the child's school records. The school administrator or staff member may testify at any subsequent trial resulting from the investigation and may be interviewed by the respective litigants prior to any such trial. [1993 c.546 §22; 2003 c.14 §225]

419B.050 Authority of health care provider to disclose information; immunity from liability. (1) Upon notice by a law enforcement agency, the Department of Human Services, a member agency of a county multidisciplinary child abuse team or a member of a county multidisciplinary child abuse team that a child abuse investigation is being conducted under ORS 419B.020, a health care provider must permit the law enforcement agency, the department, the member agency of the county multidisciplinary child abuse team or the member of the county multidisciplinary child abuse team to inspect and copy medical records, including, but not limited to, prenatal and birth records, of the child involved in the investigation without the consent of the child, or the parent or guardian of the child. A health care provider who in good faith disclosed medical records under this section is not civilly or criminally liable for the disclosure.

(2) As used in this section, "health care provider" has the meaning given that term in ORS 192.519. [1997 c.873 §27; 1999 c.537 §3; 2001 c.104 §150; 2005 c.562 §27]

HB 2183 (2011) amends ORS Chapter 419B to provide:

(1) A person commits the offense of making a false report of child abuse if, with the intent to influence a custody, parenting time, visitation or child support decision, the person:

(a) Makes a false report of child abuse tot eh Department of Human Services or a law enforcement agency, knowing that report is false; or

(b) With the intent that a public or private official make a report of child abuse tot eh Department of Human Services or a law enforcement agency, makes a false report of child abuse to the public or private official, knowing that the report is false.

(2) Making a false report of child abuse is a Class A violation.

APPENDIX B
OREGON REVISED STATUTES 2009
PRIVILEGES—ORS 40.225 & 40.252

40.225 Rule 503. Lawyer-client privilege.
(1) As used in this section, unless the context requires otherwise:

(a) "Client" means a person, public officer, corporation, association or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(b) "Confidential communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(d) "Representative of the client" means:

(A) A principal, an officer or a director of the client; or

(B) A person who has authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client, or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the person's scope of employment for the client.

(e) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of professional legal services, but does not include a physician making a physical or mental examination under ORCP 44.

(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;

(b) Between the client's lawyer and the lawyer's representative;

(c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(d) Between representatives of the client or between the client and a representative of the client; or

(e) Between lawyers representing the client.

(3) The privilege created by this section may be claimed by the client, a guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(4) There is no privilege under this section:

(a) If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(b) As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(c) As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

(5) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communication made to the office of public defense services established under ORS 151.216 for the purpose of seeking preauthorization for or payment of nonroutine fees or expenses under ORS 135.055.

(6) Notwithstanding subsection (4)(c) of this section and ORS 40.280, a privilege is maintained under this section for a communication that is made to the office of public defense services established under ORS 151.216 for the purpose of making, or providing information regarding, a complaint against a lawyer providing public defense services.

(7) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communication ordered to be disclosed under ORS 192.410 to 192.505. [1981 c.892 §32; 1987 c.680 §1; 2005 c.356 §1; 2005 c.358 §1; 2007 c.513 §3; 2009 c.516 §1]

40.252 Rule 504-5. Communications revealing intent to commit certain crimes. (1) In addition to any other limitations on privilege that may be imposed by law, there is no privilege under ORS 40.225, 40.230 or 40.250 for communications if:

(a) In the professional judgment of the person receiving the communications, the communications reveal that the declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse or death or involving an act described in ORS 167.322;

(b) In the professional judgment of the person receiving the communications, the declarant poses a danger of committing the crime; and

(c) The person receiving the communications makes a report to another person based on the communications.

(2) The provisions of this section do not create a duty to report any communication to any person.

(3) A person who discloses a communication described in subsection (1) of this section, or fails to disclose a communication described in subsection (1) of this section, is not liable to any other person in a civil action for any damage or injury arising out of the disclosure or failure to disclose. [2001 c.640 §2; 2007 c.731 §4]

APPENDIX C
OREGON REVISED STATUTES 2009
TRAINING--ORS 418.702 & 9.114

418.702 Training and continuing education for mandatory reporters; notice to persons required to report child abuse. (1) The Department of Human Services shall implement a training and continuing education curriculum for persons other than law enforcement officers required by law to investigate allegations of child abuse. The curriculum shall address the areas of training and education necessary to facilitate the skills necessary to investigate reports of child abuse and shall include but not be limited to:

(a) Assessment of risk to the child;

(b) Dynamics of child abuse, child sexual abuse and rape of children; and

(c) Legally sound and age appropriate interview and investigatory techniques.

(2) The Oregon State Bar and each board that licenses, certifies or registers public and private officials required to report child abuse under ORS 419B.010 shall identify those persons regulated by the board who in their official capacity have regular and on-going contact with children and shall notify those persons every two years of their duty to report child abuse. Such notice shall contain what the person is required to report and where such report shall be made and also advise of the symptoms to look for and provide a contact number for further information.

(3) The department shall develop content of the notice for such a mailing. The cost of distribution shall be paid by the board.

(4) The department shall develop and make available, at cost, training materials that may be used at training conferences and other similar events involving such public and private officials, as defined in ORS 419B.005. [Formerly 418.749]

ORS 9.114 Mandatory training on duties relating to reporting child abuse. The Oregon State Bar shall require that attorneys complete one hour of training every three years designed to provide education on the duties of attorneys under ORS 419B.010. All training under this section shall be applied by the bar against the hours of continuing legal education required of attorneys as a condition of membership in the bar or as a condition to the practice of law in this state. Credit acquired under this section shall be applied first against any requirement of continuing legal education relating to ethics. [1999 c.953 §2]

APPENDIX D
Selected Oregon Rules of Professional Conduct

Rule 1.0 Definitions

* * *

(f) "Information relating to the representation of a client" denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;

(2) to prevent reasonably certain death or substantial bodily harm;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules;

(6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties; the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the selling lawyer to preserve information relating to the representation of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer; or

(7) to comply with the terms of a diversion agreement, probation, conditional reinstatement or conditional admission pursuant to BR 2.10, BR 6.2, BR 8.7or Rule for Admission Rule 6.15. A lawyer serving as a monitor of another lawyer on diversion, probation, conditional reinstatement or conditional admission shall have the same responsibilities as the monitored lawyer to preserve information relating to the representation of the monitored lawyer's clients, except to the extent reasonably necessary to carry out the monitoring lawyer's responsibilities under the terms of the diversion, probation, conditional reinstatement or conditional admission and in any proceeding relating thereto.

107.755 Court-ordered mediation; rules. (1) Each judicial district shall:

(a) Provide a mediation orientation session for all parties in cases in which child custody, parenting time or visitation is in dispute, and in any other domestic relations case in which mediation has been ordered. The orientation session may be structured in any way the circuit court determines best meets the needs of the parties. The orientation session should be designed to make the parties aware of:

(A) What mediation is;

(B) Mediation options available to them; and

(C) The advantages and disadvantages of each method of dispute resolution.

(b) Except in matters tried under ORS 107.097 and 107.138 or upon a finding of good cause, require parties in all cases described in paragraph (a) of this subsection to attend a mediation orientation session prior to any judicial determination of the issues.

(c) Provide mediation under ORS 107.755 to 107.795 in any case in which child custody, parenting time and visitation are in dispute.

(d) Have developed a plan that addresses domestic violence issues and other power imbalance issues in the context of mediation orientation sessions and mediation of any issue in accordance with the following guidelines:

(A) All mediation programs and mediators must recognize that mediation is not an appropriate process for all cases and that agreement is not necessarily the appropriate outcome of all mediation;

(B) Neither the existence of nor the provisions of a restraining order issued under ORS 107.718 may be mediated;

(C) All mediation programs and mediators must develop and implement:

(i) A screening and ongoing evaluation process of domestic violence issues for all mediation cases;

(ii) A provision for opting out of mediation that allows a party to decline mediation after the party has been informed of the advantages and disadvantages of mediation or at any time during the mediation; and

(iii) A set of safety procedures intended to minimize the likelihood of intimidation or violence in the orientation session, during mediation or on the way in or out of the building in which the orientation or mediation occurs;

(D) When a mediator explains the process to the parties, the mediator shall include in the explanation the disadvantages of mediation and the alternatives to mediation;

(E) All mediators shall obtain continuing education regarding domestic violence and related issues; and

(F) Mediation programs shall collect appropriate data. Mediation programs shall be sensitive to domestic violence issues when determining what data to collect.

(e) In developing the plan required by paragraph (d) of this subsection, consult with one or more of the following:

(A) A statewide or local multidisciplinary domestic violence coordinating council.

(B) A nonprofit private organization funded under ORS 409.292.

(2) Notwithstanding any other provision of law, mediation under ORS 107.755 to 107.795, including the mediation orientation session described in subsection (1)(a) of this

section, may not be encouraged or provided in proceedings under ORS 30.866, 107.700 to 107.735, 124.005 to 124.040 or 163.738.

(3) The court, as provided in ORS 3.220, may make rules consistent with ORS 107.755 to 107.795 to govern the operation and procedure of mediation provided under this section.

(4) If a court provides mediation of financial issues, it shall develop a list of mediators who meet the minimum education and experience qualifications established by rules adopted under ORS 1.002. The rules must require demonstrated proficiency in mediation of financial issues. Once the list is developed, the judicial district shall maintain the list. Mediation of financial issues is subject to the plan developed under subsection (1)(d) of this section and to the limitations imposed by subsection (2) of this section.

(5) A circuit court may provide mediation in connection with its exercise of conciliation jurisdiction under ORS 107.510 to 107.610, but a circuit court need not provide conciliation services in order to provide mediation under ORS 107.755 to 107.795. [1983 c.671 §2; 1993 c.138 §4; 1995 c.273 §10; 1995 c.666 §21a; 1997 c.475 §1; 1997 c.707 §18a; 2001 c.394 §2; 2003 c.791 §24; 2005 c.22 §82]

107.765 When referral to mediation permitted; scope of mediation; report to court of outcome of mediation. (1) In a domestic relations suit, where it appears on the face of one or more pleadings, appearances, petitions or motions, including any form of application for the setting aside, alteration or modification of an order or judgment, that custody, parenting time or visitation of a child is contested, the court may, when appropriate, refer the matter for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of the mediation is to assist the parties in reaching a workable settlement of the contested issues instead of litigating those issues before the court. Unless the court provides for the mediation of financial issues under ORS 107.755 (4), the mediator shall not consider issues of property division or spousal or child support, in connection with the mediation of a dispute concerning child custody, parenting time or visitation, or otherwise, without the written approval of both parties or their counsel.

(2) The mediator shall report to the court and to counsel for the parties the outcome of the mediation at the conclusion of the mediation proceeding. The mediator shall report in writing to the court and to counsel for the parties any agreement reached by the parties as a result of the mediation, and the agreement shall be incorporated in a proposed order or judgment provision prepared for the court. If the parties do not reach an agreement, the mediator shall report only that fact to the court and to counsel for the parties, but shall not make a recommendation to the court without the written consent of the parties or their counsel. [1983 c.671 §3; 1995 c.273 §18; 1997 c.475 §2; 1997 c.707 §19; 1999 c.59 §24; 2003 c.576 §130]

107.775 Methods of providing mediation services; qualifications; costs. (1) A circuit court may obtain mediation services, with the prior approval of the governing body of each county involved, by:

(a) Using personnel performing conciliation services for the court under ORS 107.510 to 107.610;

(b) Contracting or entering into agreements with public or private agencies to provide mediation services to the court; or

(c) Employing or contracting for mediators directly.

(2) Personnel performing mediation services for the circuit court shall have the minimum educational and experience qualifications established by rules adopted under ORS 1.002.

(3) Subject to the provisions of the Local Budget Law, the compensation and expenses of personnel performing mediation services for the circuit court and other expenses of mediation services provided by the court shall be paid by the county or as may be agreed upon by the counties involved. Personnel performing mediation services are not state employees, and their compensation and expenses shall not be paid by the state.

(4) The parties to a child custody, parenting time or visitation dispute that is referred by the circuit court to mediation may use, at their option and expense, mediation services other than those provided by the court.

(5) Two or more counties may join together to provide services under ORS 107.510 to 107.610 and 107.755 to 107.795. [1983 c.671 §4; 1989 c.718 §25; 1997 c.475 §3; 1997 c.707 §20; 2003 c.791 §25]

107.785 Privacy of proceedings; confidentiality of communications; records. (1) All mediation proceedings under ORS 107.755 to 107.795 shall be held in private, and all persons other than mediation services personnel, the parties, their counsel and children of the parties shall be excluded.

(2) All communications, verbal or written, made in mediation proceedings shall be confidential. A party or any other individual engaged in mediation proceedings shall not be examined in any civil or criminal action as to such communications and such communications shall not be used in any civil or criminal action without the consent of the parties to the mediation. Exceptions to testimonial privilege otherwise applicable under ORS 40.225 to 40.295 do not apply to communications made confidential under this subsection.

(3) All records of the court with respect to mediation proceedings shall be closed except for:

(a) Records reflecting which cases have been referred for mediation under ORS 107.765 (1);

(b) The mediator’s report to the court made under the provisions of ORS 107.765 (2); and

(c) Information used to compile statistical data. [1983 c.671 §5; 1995 c.273 §19]

107.795 Availability of other remedies. Nothing in ORS 21.112, 107.615 and 107.755 to 107.795 shall preclude a party from obtaining any orders available under ORS 107.700 to 107.735 or ORS 124.005 to 124.040 before or during mediation. [1983 c.671 §8; 1995 c.666 §22]

36.185 Referral of civil dispute to mediation; objection; information to parties. After the appearance by all parties in any civil action, except proceedings under ORS 107.700 to 107.735 or 124.005 to 124.040, a judge of any circuit court may refer a civil dispute to mediation under the terms and conditions set forth in ORS 36.185 to 36.210. When a party to a case files a written objection to mediation with the court, the action shall be removed from mediation and proceed in a normal fashion. All civil disputants shall be provided with written information describing the mediation process, as provided or approved by the State Court Administrator, along with information on established court mediation opportunities. Filing parties shall be provided with this information at the time of filing a civil action. Responding parties shall be provided with this information by the filing party along with the initial service of filing documents upon the responding party. [1989 c.718 §19; 1993 c.327 §1; 1995 c.666 §13; 2003 c.791 §20]

36.190 Stipulation to mediation; selection of mediator; stay of proceedings. (1) On written stipulation of all parties at any time prior to trial, the parties may elect to mediate their civil dispute under the terms and conditions of ORS 36.185 to 36.210.

(2) Upon referral or election to mediate, the parties shall select a mediator by written stipulation or shall follow procedures for assignment of a mediator from the court's panel of mediators.

(3) During the period of any referred or elected mediation under ORS 36.185 to 36.210, all trial and discovery timelines and requirements shall be tolled and stayed as to the participants. Such tolling shall commence on the date of the referral or election to mediate and shall end on the date the court is notified in writing of the termination of the mediation by the mediator or one party requests the case be put back on the docket. All time limits and schedules shall be tolled, except that a judge shall have discretion to adhere to preexisting pretrial order dates, trial dates or dates relating to temporary relief. [1989 c.718 §20]

36.195 Presence of attorney; authority and duties of mediator; notice to court at completion of mediation. (1) Unless otherwise agreed to in writing by the parties, the parties' legal counsel shall not be present at any scheduled mediation sessions conducted under the provisions of ORS 36.100 to 36.175.

(2) Attorneys and other persons who are not parties to a mediation may be included in mediation discussions at the mediator's discretion, with the consent of the parties, for mediation held under the provisions of ORS 36.185 to 36.210.

(3) The mediator, with the consent of the parties, may adopt appropriate rules to facilitate the resolution of the dispute and shall have discretion, with the consent of the parties, to suspend or continue mediation. The mediator may propose settlement terms either orally or in writing.

(4) All court mediators shall encourage disputing parties to obtain individual legal advice and individual legal review of any mediated agreement prior to signing the agreement.

(5) Within 10 judicial days of the completion of the mediation, the mediator shall notify the court whether an agreement has been reached by the parties. If the parties do

not reach agreement, the mediator shall report that fact only to the court, but shall not make a recommendation as to resolution of the dispute without written consent of all parties or their legal counsel. The action shall then proceed in the normal fashion on either an expedited or regular pretrial list.

(6) The court shall retain jurisdiction over a case selected for mediation and shall issue orders as it deems appropriate. [1989 c.718 §21]

36.200 Mediation panels; qualification; procedure for selecting mediator. (1) A circuit court providing mediation referral under ORS 36.185 to 36.210 shall establish mediation panels. The mediators on such panels shall have such qualifications as established by rules adopted under ORS 1.002. Formal education in any particular field shall not be a prerequisite to serving as a mediator.

(2) Unless instructed otherwise by the court, upon referral by the court to mediation, the clerk of the court shall select at least three individuals from the court's panel of mediators and shall send their names to legal counsel for the parties, or to a party directly if not represented, with a request that each party state preferences within five judicial days. If timely objection is made to all of the individuals named, the court shall select some other individual from the mediator panel. Otherwise, the clerk, under the direction of the court, shall select as mediator one of the three individuals about whom no timely objection was made.

(3) Upon the court's or the parties' own selection of a mediator, the clerk shall:

(a) Notify the designated person of the assignment as mediator.

(b) Provide the mediator with the names and addresses of the parties and their representatives and with copies of the order of assignment.

(4) The parties to a dispute that is referred by the court to mediation may choose, at their option and expense, mediation services other than those suggested by the court, and entering into such private mediation services shall be subject to the same provisions of ORS 36.185 to 36.210.

(5) Disputing parties in mediation shall be free, at their own expense, to retain jointly or individually, experts, attorneys, fact finders, arbitrators and other persons to assist the mediation, and all such dispute resolution efforts shall be subject to the protection of ORS 36.185 to 36.210. [1989 c.718 §22; 1993 c.327 §2; 2003 c.791 §21]

(Liability of Mediators and Programs)

36.210 Liability of mediators and programs. (1) Mediators, mediation programs and dispute resolution programs are not civilly liable for any act or omission done or made while engaged in efforts to assist or facilitate a mediation or in providing other dispute resolution services, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

(2) Mediators, mediation programs and dispute resolution programs are not civilly liable for the disclosure of a confidential mediation communication unless the disclosure was made in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.

(3) The limitations on liability provided by this section apply to the officers, directors, employees and agents of mediation programs and dispute resolution programs. [1989 c.718 §24; 1995 c.678 §2; 1997 c.670 §12; 2001 c.72 §1; 2003 c.791 §§22,22a]

(Confidentiality of Mediation Communications and Agreements)

36.220 Confidentiality of mediation communications and agreements; exceptions. (1) Except as provided in ORS 36.220 to 36.238:

(a) Mediation communications are confidential and may not be disclosed to any other person.

(b) The parties to a mediation may agree in writing that all or part of the mediation communications are not confidential.

(2) Except as provided in ORS 36.220 to 36.238:

(a) The terms of any mediation agreement are not confidential.

(b) The parties to a mediation may agree that all or part of the terms of a mediation agreement are confidential.

(3) Statements, memoranda, work products, documents and other materials, otherwise subject to discovery, that were not prepared specifically for use in a mediation, are not confidential.

(4) Any document that, before its use in a mediation, was a public record as defined in ORS 192.410 remains subject to disclosure to the extent provided by ORS 192.410 to 192.505.

(5) Any mediation communication relating to child abuse that is made to a person who is required to report child abuse under the provisions of ORS 419B.010 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 419B.010. Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under the provisions of ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under the provisions of ORS 124.050 to 124.095.

(6) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.

(7) A party to a mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS 40.010 to 40.585 or other provision of law. A party may disclose confidential mediation communications to any other person for the purpose of obtaining advice concerning the subject matter of the mediation, if all parties to the mediation so agree.

(8) The confidentiality of mediation communications and agreements in a mediation in which a public body is a party, or in which a state agency is mediating a dispute as to which the state agency has regulatory authority, is subject to ORS 36.224, 36.226 and 36.230. [1997 c.670 §1]

36.222 Admissibility and disclosure of mediation communications and agreements in subsequent adjudicatory proceedings. (1) Except as provided in ORS 36.220 to 36.238, mediation communications and mediation agreements that are confidential under ORS 36.220 to 36.238 are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding.

(2) A party may disclose confidential mediation communications or agreements in any subsequent adjudicative proceeding if all parties to the mediation agree in writing to the disclosure.

(3) A mediator may disclose confidential mediation communications or confidential mediation agreements in a subsequent adjudicatory proceeding if all parties to the mediation, the mediator, and the mediation program, if any, agree in writing to the disclosure.

(4) In any proceeding to enforce, modify or set aside a mediation agreement, confidential mediation communications and confidential mediation agreements may be disclosed to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(5) In an action for damages or other relief between a party to a mediation and a mediator or mediation program, confidential mediation communications or confidential mediation agreements may be disclosed to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(6) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(7) The limitations on admissibility and disclosure in subsequent adjudicatory proceedings imposed by this section apply to any subsequent judicial proceeding, administrative proceeding or arbitration proceeding. The limitations on disclosure imposed by this section include disclosure during any discovery conducted as part of a subsequent adjudicatory proceeding, and no person who is prohibited from disclosing information under the provisions of this section may be compelled to reveal confidential communications or agreements in any discovery proceeding conducted as part of a subsequent adjudicatory proceeding. Any confidential mediation communication or agreement that may be disclosed in a subsequent adjudicatory proceeding under the provisions of this section may be introduced into evidence in the subsequent adjudicatory proceeding. [1997 c.670 §2]

36.224 State agencies; confidentiality of mediation communications; rules. (1) Except as provided in this section, mediation communications in mediations in which a state agency is a party, or in which a state agency is mediating a dispute as to which the state agency has regulatory authority, are not confidential and may be disclosed or admitted as evidence in subsequent adjudicatory proceedings, as described in ORS 36.222 (7).

(2) The Attorney General shall develop rules that provide for the confidentiality of mediation communications in mediations described in subsection (1) of this section. The rules shall also provide for limitations on admissibility and disclosure in subsequent adjudicatory proceedings, as described in ORS 36.222 (7). The rules shall contain provisions governing mediations of workplace interpersonal disputes.

(3) Rules developed by the Attorney General under this section must include a provision for notice to the parties to a mediation regarding the extent to which the mediation communications are confidential or subject to disclosure or introduction as evidence in subsequent adjudicatory proceedings.

(4) A state agency may adopt any or all of the rules developed by the Attorney General under this section. The agency shall provide the Governor with a copy of the rules that the agency proposes to adopt at the time that the agency gives notice of intended action under ORS 183.335. The Governor may notify the agency that the Governor disapproves of the proposed rules at any time before the agency files the rules with the Secretary of State under ORS 183.355.

(5) Except as provided in ORS 36.222, mediation communications in any mediation regarding a claim for workers' compensation benefits conducted pursuant to rules adopted by the Workers' Compensation Board are confidential, are not subject to disclosure under ORS 192.410 to 192.505 and may not be disclosed or admitted as evidence in subsequent adjudicatory proceedings, as described in ORS 36.222 (7), without regard to whether a state agency or other public body is a party to the mediation or is the mediator in the mediation.

(6) Mediation communications made confidential by a rule adopted by a state agency under this section are not subject to disclosure under ORS 192.410 to 192.505. [1997 c.670 §3; 2003 c.791 §23; 2005 c.333 §1]

36.226 Public bodies other than state agencies; confidentiality of mediation communications. (1) Except as provided in subsection (2) of this section, mediation communications in mediations in which a public body other than a state agency is a party are confidential and may not be disclosed or admitted as evidence in subsequent adjudicatory proceedings, as described in ORS 36.222 (7).

(2) A public body other than a state agency may adopt a policy that provides that all or part of mediation communications in mediations in which the public body is a party will not be confidential. If a public body adopts a policy under this subsection, notice of the policy must be provided to all other parties in mediations that are subject to the policy. [1997 c.670 §4]

36.228 Mediations in which two or more public bodies are parties. (1) Notwithstanding any other provision of ORS 36.220 to 36.238, if the only parties to a mediation are public bodies, mediation communications and mediation agreements in the mediation are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505. Mediation of workplace interpersonal disputes between employees of a public body is not subject to this subsection.

(2) Notwithstanding any other provision of ORS 36.220 to 36.238, if two or more public bodies are parties to a mediation in which a private person is also a party,

mediation communications in the mediation are not confidential if the laws, rules or policies governing confidentiality of mediation communications for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(3) Notwithstanding any other provision of ORS 36.220 to 36.238, if two or more public bodies are parties to a mediation in which a private person is also a party, mediation agreements in the mediation are not confidential if the laws, rules or policies governing confidentiality of mediation agreements for at least one of the public bodies provide that mediation agreements in the mediation are not confidential. [1997 c.670 §4a; 2007 c.12 §1]

36.230 Public bodies; confidentiality of mediation agreements. (1) Except as provided in this section, mediation agreements are not confidential if a public body is a party to the mediation or if the mediation is one in which a state agency is mediating a dispute as to which the state agency has regulatory authority.

(2) If a public body is a party to a mediation agreement, any provisions of the agreement that are exempt from disclosure as a public record under ORS 192.410 to 192.505 are confidential.

(3) If a public body is a party to a mediation agreement, and the agreement is subject to the provisions of ORS 17.095, the terms of the agreement are confidential to the extent that those terms are confidential under ORS 17.095 (2).

(4) If a public body is a party to a mediation agreement arising out of a workplace interpersonal dispute:

(a) The agreement is confidential if the public body is not a state agency, unless the public body adopts a policy that provides otherwise;

(b) The agreement is confidential if the public body is a state agency only to the extent that the state agency has adopted a rule under ORS 36.224 that so provides; and

(c) Any term of an agreement that requires an expenditure of public funds, other than expenditures of $1,000 or less for employee training, employee counseling or purchases of equipment that remain the property of the public body, may not be made confidential by a rule or policy of a public body. [1997 c.670 §5; 2005 c.352 §2]

36.232 Disclosures allowed for reporting, research, training and educational purposes. (1) If a public body conducts or makes available a mediation, ORS 36.220 to 36.238 do not limit the ability of the mediator to report the disposition of the mediation to that public body at the conclusion of the mediation proceeding. The report made by a mediator to a public body under this subsection may not disclose specific confidential mediation communications made in the mediation.

(2) If a public body conducts or makes available a mediation, ORS 36.220 to 36.238 do not limit the ability of the public body to compile and disclose general statistical information concerning matters that have gone to mediation if the information does not identify specific cases.

(3) In any mediation in a case that has been filed in court, ORS 36.220 to 36.238 do not limit the ability of the court to:

(a) Require the parties or the mediator to report to the court the disposition of the mediation at the conclusion of the mediation proceeding;

(b) Disclose records reflecting which matters have been referred for mediation; or

(c) Disclose the disposition of the matter as reported to the court.

(4) ORS 36.220 to 36.238 do not limit the ability of a mediator or mediation program to use or disclose confidential mediation communications, the disposition of matters referred for mediation and the terms of mediation agreements to another person for use in research, training or educational purposes, subject to the following:

(a) A mediator or mediation program may only use or disclose confidential mediation communications if the communications are used or disclosed in a manner that does not identify individual mediations or parties.

(b) A mediator or mediation program may use or disclose confidential mediation communications that identify individual mediations or parties only if and to the extent allowed by a written agreement with, or written waiver of confidentiality by, the parties. [1997 c.670 §6]

36.234 Parties to mediation. For the purposes of ORS 36.220 to 36.238, a person, state agency or other public body is a party to a mediation if the person or public body participates in a mediation and has a direct interest in the controversy that is the subject of the mediation. A person or public body is not a party to a mediation solely because the person or public body is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation. [1997 c.670 §7]

36.236 Effect on other laws. (1) Nothing in ORS 36.220 to 36.238 affects any confidentiality created by other law, including but not limited to confidentiality created by ORS 107.755 to 107.795.

(2) Nothing in ORS 36.220 to 36.238 relieves a public body from complying with ORS 192.610 to 192.690. [1997 c.670 §9]

36.238 Application of ORS 36.210 and 36.220 to 36.238. The provisions of ORS 36.210 and 36.220 to 36.238 apply to all mediations, whether conducted by a publicly funded program or by a private mediation provider. [1997 c.670 §8]

ADVANCE SHEET HEADNOTE
October 24, 2011

No. 08SC945 – People v. Gabriesheski: attorney-client privilege as set out in § 13-90-107(1)(b), C.R.S. (2010), does not strictly apply to communications by a child to a guardian ad litem. Social workers are not barred from testifying under § 19-3-207, C.R.S. (2010), unless the statements at issue are made in compliance with a court order or made by a client in the course of professional employment or psychotherapy.

The People sought review of the court of appeals' judgment affirming two in limine evidentiary rulings of the district court in a prosecution for sexual assault on a child by one in a position of trust in People v. Gabriesheski, 205 P.3d 441 (Colo. App. 2008). Following the district court's exclusion of testimony concerning the recantation of the defendant's step-daughter, the alleged child-sexual-assault victim, the prosecutor conceded her inability to go forward, and the case was dismissed. The court of appeals concluded that section 16-12-102(1), C.R.S. (2010), gave it jurisdiction to entertain the People's appeal, but it affirmed both of the trial court's evidentiary rulings.

With regard to the exclusion of testimony by the guardian ad litem appointed in a parallel dependency and neglect

proceeding, the court of appeals held that the child's communications with the guardian fell within the attorney-client privilege, as set out at section 13-90-107(1)(b), C.R.S. (2010). With regard to the exclusion of testimony by a social worker also involved in the dependency and neglect proceeding, the court found her to be both a professional who could not be examined in a criminal case without the consent of the parent-respondent, as dictated by section 19-3-207, C.R.S. (2010), and a licensed professional who could not be examined without the consent of her client, according to section 13-90-107(1)(g), C.R.S. (2010).

The Colorado Supreme Court affirms in part and reverses in part, holding that the court of appeals did have jurisdiction to entertain the People's appeal, but disapproved of its conclusions with regard to both of the trial court's evidentiary rulings. The supreme court finds that because a child who is the subject of a dependency and neglect proceeding is not the client of a court-appointed guardian ad litem, neither the statutory attorney-client privilege nor ethical rules governing an attorney's obligations of confidentiality to a client strictly apply to communications by the child. Further, the supreme court finds that because the trial court apparently understood section 19-3-207 to bar the examination of the social

worker in the defendant's criminal case as long as she qualified as a professional involved in the dependency and neglect proceeding, it failed to make sufficient findings to satisfy the additional statutory requirement that the statements at issue be ones made in compliance with court treatment orders, or to demonstrate the applicability of section 13-90-107, which is limited by its own terms to communications made by a client in the course of professional employment or psychotherapy.

SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202 Certiorari to the Court of Appeals Court of Appeals Case No. 07CA1016	Case No. 08SC945
Petitioner: The People of the State of Colorado, v. **Respondent:** Mark Joseph Gabriesheski.	
JUDGMENT AFFIRMED IN PART AND REVERSED IN PART EN BANC October 24, 2011	

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JUSTICE COATS delivered the Opinion of the Court.
JUSTICE MARTINEZ dissents, and CHIEF JUSTICE BENDER joins in the dissent.

The People sought review of the court of appeals' judgment affirming two in limine evidentiary rulings of the district court in a prosecution for sexual assault on a child by one in a position of trust. See People v. Gabriesheski, 205 P.3d 441 (Colo. App. 2008). Following the district court's exclusion of testimony concerning the recantation of the defendant's step-daughter, the alleged child-sexual-assault victim, the prosecutor conceded her inability to go forward, and the case was dismissed. The court of appeals concluded that section 16-12-102(1), C.R.S. (2010), gave it jurisdiction to entertain the People's appeal, but it affirmed both of the trial court's evidentiary rulings.

With regard to the exclusion of testimony by the guardian ad litem appointed in a parallel dependency and neglect proceeding, the court of appeals held that the child's communications with the guardian fell within the attorney-client privilege, as set out at section 13-90-107(1)(b), C.R.S. (2010). With regard to the exclusion of testimony by a social worker also involved in the dependency and neglect proceeding, the court found her to be both a professional who could not be examined in a criminal case without the consent of the parent-respondent, as dictated by section 19-3-207, C.R.S. (2010), and a licensed professional who could not be examined without the

consent of her client, according to section 13-90-107(1)(g), C.R.S. (2010).

We conclude that the court of appeals did have jurisdiction to entertain the People's appeal, but we disapprove of its conclusions with regard to both of the trial court's evidentiary rulings. Because a child who is the subject of a dependency and neglect proceeding is not the client of a court-appointed guardian ad litem, neither the statutory attorney-client privilege nor ethical rules governing an attorney's obligations of confidentiality to a client strictly apply to communications by the child. Because the trial court apparently understood section 19-3-207 to bar the examination of the social worker in the defendant's criminal case as long as she qualified as a professional involved in the dependency and neglect proceeding, it failed to make sufficient findings to satisfy the additional statutory requirement that the statements at issue be ones made in compliance with court treatment orders, or to demonstrate the applicability of section 13-90-107, which is limited by its own terms to communications made by a client in the course of professional employment or psychotherapy.

The judgment of the court of appeals is therefore affirmed in part and reversed in part.

I.

Mark Gabriesheski was charged with two counts of sexual assault on a child by one in a position of trust. The charges arose from allegations by the defendant's sixteen-year-old step-daughter to the effect that he had fondled her breasts and digitally penetrated her vagina on approximately fifteen occasions. A Petition in Dependency and Neglect was then filed in the juvenile court, designating the child's mother as the Respondent and the defendant as a Special Respondent. A guardian ad litem was appointed by the juvenile court, as required by statute.

Prior to trial the child recanted her accusations, and the prosecution gave notice of its intention to call as witnesses the guardian ad litem and a social worker who had apparently been assigned to act as caseworker in the juvenile proceeding. According to the prosecution's offer of proof, the guardian ad litem and social worker were crucial witnesses because they had knowledge of attempts by the mother to pressure her daughter to recant. The prosecutor indicated that the guardian would testify concerning a discussion with the child during which the child said it would make things easier for her if she admitted to lying about the sexual abuse and that it would make her mother happy if she simply said the abuse never occurred. The

prosecutor represented that the social worker would testify regarding her own conversation with the mother, in which the mother asserted that the child made up the allegations in order to get back at her and the child's step-father, and that the mother had a long talk with the child, in which she became angry and called the child a liar, and based on that discussion the child admitted to her, the mother, that she had fabricated the allegations.

The defense objected on the grounds that all communications between the child and guardian ad litem and all communications between the child and social worker were confidential and inadmissible in the absence of appropriate consent or waiver. The defense specifically argued that communications between the child and guardian ad litem were protected by the statutory attorney-client privilege and duty of confidentiality imposed on attorneys by rule 1.6(a) of the Colorado Rules of Professional Conduct. It asserted that communications between the social worker and mother were privileged under subsections 13-90-107(1)(g), which prohibits the examination of certain enumerated treatment professionals concerning communications or advice given to clients in the course of professional employment, and were further made inadmissible by section 19-3-207(2), which prohibits the examination in a criminal case of professionals as

to certain statements made by respondents in dependency and neglect proceedings.

The trial court ruled that neither the guardian ad litem nor the social worker would be permitted to testify at trial. It concluded that Colo. R.P.C. 1.6, in conjunction with Chief Justice Directive 04-06, imposed a duty of confidentiality on the guardian ad litem, which could only be waived by the child. Although it did not address Gabriesheski's assertion of a social worker-client privilege, the trial court also concluded that the social worker could not be examined in the criminal case without the consent of the child's mother for the separate reason that the social worker was a qualifying professional within the prohibition of subsection 19-3-207(2). In light of the trial court's rulings, the prosecution conceded its inability to go forward, and the court dismissed the charges, without prejudice. Following the dismissal of all charges, the prosecution filed a notice of appeal in the court of appeals, challenging the validity of both of the trial court's evidentiary rulings.

After rejecting the defendant's contention that it lacked jurisdiction to entertain the People's appeal, the appellate court affirmed both of the trial court's evidentiary rulings. With regard to the guardian ad litem, it upheld the trial court's ruling that communications by the child fell within the

statutory attorney-client privilege. It reasoned that because Chief Justice Directive 04-06 subjects guardians ad litem to "all of the rules and standards of the legal profession," it necessarily establishes an attorney-client relationship between the guardian and the minor child. With regard to the social worker, the appellate court upheld the trial court's finding that section 19-3-207 barred any examination of her in the criminal case but also found, despite the issue not having been addressed by the trial court, that the social worker-client privilege of section 13-90-107(1)(g), supported the conclusion that she could not testify without the consent of the child or her mother.

The People petitioned for a writ of certiorari, challenging the appellate court's conclusion concerning both evidentiary rulings. Although the defendant did not cross-petition with regard to the question of jurisdiction, in conjunction with granting the People's petition, we ordered the parties to brief the question whether the People's direct appeal following dismissal was authorized as the appeal of a question of law pursuant to section 16-12-102(1).

II.

Public prosecutors in this jurisdiction are granted uncommonly broad authority to appeal decisions of trial courts

in criminal cases upon questions of law. § 16-12-102(1), C.R.S. (2010)[1]; People v. Guatney, 214 P.3d 1049, 1050 (Colo. 2009). Because this statutory authority, however, expressly requires that appeals under section 16-12-102(1) be filed and prosecuted as provided by the applicable rules of this court, we have previously made clear that appeals by the prosecution pursuant to this subsection are nevertheless subject to the final judgment requirement of C.A.R. 1. See Guatney, 214 P.3d at 1050; Ellsworth v. People, 987 P.2d 264, 266 (Colo. 1999); People v. Gallegos, 946 P.2d 946, 950 (Colo. 1997). Although the statute expressly permits an immediate appeal of an order declaring a death penalty inoperative, regardless of any statute or court rule to the contrary, and specifically designates as sufficiently final for immediate appeal certain kinds of court orders, including orders dismissing a charge or granting a new trial, the finality requirement of C.A.R. 1 is satisfied with regard to any ruling or order of a district court once the action in which it was entered has produced a final judgment.

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[1] As relevant here, subsection 16-12-102(1) provides:

> The prosecution may appeal any decision of a court in a criminal case upon any question of law. . . . The procedure to be followed in filing and prosecuting appeals under this section shall be as provided by applicable rule of the supreme court of Colorado.

Although C.A.R. 1 makes no attempt to comprehensively describe what would constitute a final judgment for every kind of action, we have construed the term generally to refer to a judgment that ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceeding. See Bye v. Dist. Court, 701 P.2d 56, 61 (Colo. 1985) (citing D.H. v. People, 192 Colo. 542, 544, 561 P.2d 5, 6 (1977); People v. Cochran, 176 Colo. 364, 490 P.2d 684 (1971)). For criminal cases, we have consistently held that a judgment comes when "the defendant is acquitted, the charges are dismissed, or the defendant is convicted and sentence is imposed." Guatney, 214 P.3d at 1051; accord Sanoff v. People, 187 P.3d 576, 577 (Colo. 2008); Gallegos, 946 P.2d at 950. The dismissal of all charges in a criminal prosecution clearly ends the particular action in which the order of dismissal is entered and therefore constitutes a final judgment for purposes of the appellate review of any ruling in the case.

In People v. Frye, -- P.3d --, No. 08CA2321, 2010 WL 2521741 (Colo. App. June 24, 2010), a different division of the court of appeals reached the opposite conclusion with regard to dismissals resulting from the failure of the prosecution to proceed. Largely by conflating finality for purposes of

appellate review with limitations on any future prosecution of the defendant for the same conduct, the Frye division held that even a complete dismissal, as long as it results from either the unwillingness or inability of the prosecution to proceed to trial, does not constitute a final judgment from which an appeal of a question of law could be taken pursuant to section 16-12-102(1). Id. at *5. Relying largely on isolated language from an ancient treatise concerning the dismissal of charges at common law by a course of action formerly referred to as nolle prosequi, the division misinterpreted a statement of this court that a nolle prosequi was not a final disposition of the case, in the sense that it would not bar future prosecution for the same offense, to mean that because the dismissal of charges at the request of the prosecution does not bar reinstatement of charges at some future date, it cannot produce a final judgment for purposes of appellate review. Id. at *3; see Lawson v. People, 63 Colo. 270, 274-75, 165 P. 771, 772-73 (1917) (quoting 10 Encyclopedia of Pleading and Practice 558 (1898)).

In fact, a careful reading of our reasoning in Lawson reveals that it is to precisely the opposite effect. There we held that a criminal defendant in a reinstituted prosecution had not already used up his limited statutory right to move for disqualification of the judge because "(w)hen the nolle prosequi

was entered (initially dismissing all charges), that case was at an end," and upon refiling, a new case, in which the defendant had not yet exercised his right to seek disqualification, had begun. Id., 63 Colo. at 275, 165 P. at 773. While we were not there concerned with the finality of a judgment for purposes of appellate review, we clearly held that refiled charges did not constitute a continuation of the earlier action against the defendant – an action which came to an end upon the dismissal of all charges in that case. Id. Similarly, in People v. Small, also relied on by the Frye division, we quoted the same passage to the effect that the "original indictment became a nullity upon its dismissal without prejudice," and at least where the prosecution acted in keeping with its duty to avoid putting the defendant in jeopardy on the basis of insufficient evidence, the reinstitution of identical criminal charges after acquiring new evidence did not amount to a continuation of the same action and therefore did not violate the defendant's constitutional right to a speedy trial. 631 P.2d 148, 154-55 (Colo. 1981).

The requirement of the appellate rules for a final judgment is applicable to prosecutor appeals only to the same extent that it applies to all other appeals not expressly singled out by statute or rule. To conclude that the "finality" of a particular action turns on the moving party's motives or ability

to initiate some further action against the nonmoving party would not only significantly depart from the accepted meaning of the term itself but would thwart the legislature's clear purpose in expressly permitting prosecutors to seek the judicial resolution of legal questions, without regard to the continued jeopardy of the defendant. Under such a regime, evidentiary rulings so injurious as to bar further ethical prosecution would not simply become immediately unreviewable. They would become unreviewable at any time.

Nor does our failure to read greater limitations into the final judgment requirement empower prosecutors to dangerously manipulate the courts and seek interlocutory appellate review at will, as feared by the Frye court. Quite apart from the ethical considerations involved in arguing for dismissal without prejudice due to the prosecution's inability to proceed, moving to dismiss as the result of an adverse evidentiary ruling will virtually always entail substantial risk that the defendant may never be prosecuted for the offense. Unless a public prosecutor feels that he can no longer prove the case against the defendant, and therefore can no longer ethically proceed, moving to dismiss a criminal prosecution is not an action to be taken lightly.

Although jeopardy will not yet have attached at the time of pre-trial rulings, the dismissal of all charges nevertheless precludes reliance on those charges for any continued infringement on the defendant's liberty. In addition to the practical problems associated with again acquiring jurisdiction over both the defendant and necessary witnesses within the applicable statutory limitations period, delay long enough for appellate review risks violating the defendant's constitutional right to a speedy trial by the loss of witnesses or other evidence important to his defense. See Small, 631 P.2d at 155-57. Depending upon the timing and actual impact of such an evidentiary ruling on the prosecutor's case, his bona fides in dismissing and refiling may well be challenged on due process grounds as an attempt to circumvent statutory speedy trial limitations or the trial court's refusal to grant a continuance. See People v. McClure, 756 P.2d 1008 (Colo. 1988)(and cases cited therein); see also People v. Allen, 885 P.2d 207 (Colo. 1994). In any event, however, the defendant's susceptibility to further prosecution can only be determined when, and if, the prosecutor succeeds in reacquiring a right to the disputed evidence or otherwise acquires sufficient evidence for, and actually attempts, a second prosecution.

In addition, finality is far from the only limitation imposed on appeals by a prosecutor. The appeals authorized by section 16-12-102(1) are limited to questions of law implicated by actual decisions of criminal courts. See People v. Ware, 528 P.2d 224 (Colo. 1974). While in limine evidentiary rulings may involve the construction of statutes or rules, or some similar question of law, a trial court's decision to admit or exclude evidence is not, in and of itself, an appealable question of law; and as this case demonstrates, resolution of even a properly postured question of law is unlikely to fully resolve the ultimate question of the admissibility of particular evidence.

Whether or not the issues presented by the prosecutor to the court of appeals below might also have been appealable according to different provisions of this statute, or according to different statutes or rules altogether, it is enough here that they posed questions of law and arose from decisions of a criminal court that had become final, within the contemplation of section 16-12-102(1) and C.A.R. 1.

III.

Although a lawyer's ethical obligations not to reveal information relating to the representation of a client are governed in this jurisdiction by the Colorado Rules of

Professional Conduct, see Colo. R.P.C. 1.6, the rules themselves expressly contemplate that external principles of substantive law must determine, in the first instance, whether an attorney-client relationship exists. See Colo. R.P.C., Preamble and Scope, para. 14. Similarly, while the evidentiary privilege protecting communications between attorney and client relating to legal advice is codified in this jurisdiction by statute rather than court rule, see § 13-90-107(1)(b), C.R.S. (2010); Wesp v. Everson, 33 P.3d 191, 196 (Colo. 2001); Gordon v. Boyles, 9 P.3d 1106, 1123 (Colo. 2000), that statute makes no attempt to define the attorney-client relationship itself. Instead, we have held generally that a client is a person who employs or retains an attorney for advice or assistance on a matter relating to legal business, People v. Morley, 725 P.2d 510, 517 (Colo. 1986), and an attorney-client relationship is established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions. People v. Bennett, 810 P.2d 661, 664 (Colo. 1991); Morley, 725 P.2d at 517.

With regard in particular to the guardian ad litem and child for whom his appointment is statutorily dictated in all dependency and neglect proceedings, the statutes are equally silent as to the existence of an attorney-client relationship.

See §§ 19-1-111 and 19-3-203, C.R.S. (2010). While all guardians ad litem appointed to serve in dependency and neglect proceedings must be credentialed as attorneys licensed to practice in the jurisdiction, § 19-1-103(59), and are statutorily assigned obligations usually associated with legal representation, like the examination of witnesses, they are ultimately tasked with acting on behalf of the child's health, safety, and welfare. See § 19-3-203. Rather than representing the interests of either the petitioner or respondents in the litigation, or even the demands or wishes of the child, the legal responsibility for whom is at issue in the proceedings, the guardian ad litem is statutorily tasked with assessing and making recommendations to the court concerning the best interests of the child. See id.

The Children's Code's general provision for the appointment of guardians ad litem delegates to the Chief Justice the authority to establish their duties and responsibilities in legal matters affecting children. See § 19-1-111(6). And while the applicable Chief Justice Directive clearly contemplates that such guardians ad litem may be performing functions touching on their professional obligations as lawyers, and therefore requiring their adherence to the Rules of Professional Conduct, see, e.g., CJD 04-06 V. F., no more than the statutes themselves

does it purport to designate an attorney-client relationship between a guardian ad litem in dependency and neglect proceedings and the child who is the subject of those proceedings. Even assuming that a directive of the Chief Justice, which is authorized under the Supreme Court's general superintending power over the state court system, see Office of the State Court Admin. v. Background Info. Servs., Inc., 994 P.2d 420, 430-31 (Colo. 1999); Bye v. Dist. Court, 701 P.2d 56, 59 (Colo. 1998), might under some circumstance be an appropriate vehicle for creating an evidentiary privilege, CJD 04-06 nowhere suggests any intent to do so.

Nothing in the term "guardian ad litem," which on its face indicates merely a guardian for purposes of specific proceedings or litigation, suggests an advocate to serve as counsel for the child as distinguished from a guardian, charged with representing the child's best interests. See generally Black's Law Dictionary (9th ed. 2009) (quoting from Homer H. Clark, Jr. & Ann Laquer Estin, Domestic Relations: Cases and Problems 1078 (6th ed. 2000)). From the distinction between the two flow a series of important consequences, id., implicating delicate policy choices potentially affecting, as this case clearly demonstrates, not only the best interests of the child but the criminal liability of others as well. In the absence of some

clearer expression of legislative intent to do so, we are unwilling to impute to the statutory guardian ad litem-child relationship the legislatively-imposed, evidentiary consequences of an attorney-client relationship.[2]

For similar reasons, a number of other jurisdictions following a best-interests-of-the-child model have likewise declined to extend the attorney-client privilege and duties of confidence to this unique guardian ad litem-child relationship. See, e.g., R.I. Gen. Laws § 15-5-16.2(c)(1)(iv)-(v) (2010) (communications between guardian ad litem and child not privileged, but still identifying child's best interests as focus of court's determination and guardian ad litem's duties); In re Guardianship of Mabry, 666 N.E.2d 16, 24 (Ill. App. Ct. 1996) (citing child representation statute and holding no attorney-client privilege exists between guardian ad litem and ward because guardian ad litem's duty it to serve ward's best interests); Ross v. Gadwah, 554 A.2d 1284, 1285 (N.H. 1988)

[2] Contrary to the assertion of amici, our holding in In re Marriage of Hartley, 886 P.2d 665 (Colo. 1994), implies nothing to the contrary. Although we used the term "guardian ad litem" in reference to an attorney and his ethical obligations under the Rules of Professional Conduct in that proceeding under the Uniform Dissolution of Marriage Act, we made clear that we did so only to avoid confusion, where the parties had referred to the attorney by that term in their briefing. See id. at 667 n.2. The attorney at issue in that case was clearly not a statutorily designated guardian ad litem under the Children's Code or any other statute of this jurisdiction.

(noting guardian ad litem represents child's interests and holding, "Communications between a guardian ad litem and a minor child are not privileged"); Alaska Bar Ass'n Ethics Comm., Ethics Op. 85-4 (1985) ("[T]he attorney is not bound by the normal duty of confidentiality, but rather should act within the context of the proceeding and be responsive to the reason for his appointment, namely the best interest of the child."); Ark. Sup. Ct. Admin. Order 15, Attorney Qualifications and Standards § 5(g) ("An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child."); Mass. Prob. & Family Ct. Standing Order 1-05, Standards for Guardians Ad Litem/Investigators §§ 1.3(c), 1.5 & cmt. (making clear child's best interests control and guardian ad litem should adhere to professional standards, but also that "[t]here is no attorney-client confidentiality").

Unlike the court of appeals, we therefore disapprove the trial court's ruling excluding the proffered testimony of the guardian ad litem as privileged pursuant to section 13-90-107(1)(b).

IV.

We also agreed to review that portion of the court of appeals judgment approving the trial court's exclusion of any

testimony by the social worker involved in parallel dependency and neglect proceedings. The trial court excluded the social worker's testimony solely for the reason that it understood section 19-3-207 to bar the examination, in any criminal case, of any professional involved in a dependency and neglect proceeding, unless the respondent in that proceeding consented.[3] Making clear that it considered a caseworker covered by the statute and that the respondent had not consented to the social worker's testimony, the court ruled that it would not permit the social worker to testify in the criminal case or permit any reference to her in the prosecutor's opening statement.

It appears that the trial court simply misread the applicable statute. On its face, section 19-3-207 bars no more than the examination of certain professionals without the consent of the respondent "as to statements made pursuant to compliance with court treatment orders . . . ." The trial court's understanding of the statute was clearly mistaken, and its evidentiary ruling was therefore not supported by its articulated rationale. Quite apart from questions about the credentials of the caseworker in this case, the trial court

[3] "And I think that is why 19-3-207 was enacted by the legislature and especially under subparagraph (2), it is pretty precise what it says: 'No professional shall be examined in any criminal case without the consent of the respondent.'" R. at 17.

failed to make any findings from which a reviewing court could determine whether the statements in question were made "pursuant to compliance with" treatment orders of the juvenile court.

By the same token, because the trial court did not rely on the licensed social worker-client privilege of section 13-90-107(1)(g) at all, it made no findings from which a social worker-client relationship between the social worker and the child, much less between the social worker and the declarant in this case, could be determined. In addition to addressing a question of law that was never the subject of a decision by the trial court, the court of appeals therefore presumed a factual predicate not established in the record.

Unlike the court of appeals, we therefore disapprove the trial court's reliance on section 19-3-207 as a basis for prohibiting examination of the social worker in the prosecution of the step-father. Should the mother's statements to the social worker become relevant in some future criminal prosecution, additional findings concerning their relation to the treatment orders of the juvenile court would be required to determine the applicability of section 19-3-207.

V.

The judgment of the court of appeals is therefore affirmed in part and reversed in part.

JUSTICE MARTINEZ, dissenting.

I respectfully dissent. Although I disagree with the majority's opinion in its entirety, I address the guardian ad litem issue first, because the majority's decision will have such a major negative impact on the juvenile justice system. As to the jurisdictional issue, I write separately in order to state my concern that the majority's decision will give the prosecution unlimited power to appeal any decision of a trial court simply by requesting a dismissal. Although I would hold that the court of appeals lacked jurisdiction to hear the appeal, I recognize that we can still address the guardian ad litem issue through our discretionary jurisdiction pursuant to Colorado Appellate Rule 21. Lastly, I address the majority's completely unnecessary decision to reverse the court of appeals on an aspect of an evidentiary question that was not even addressed by the parties.

I. The Role of the Guardian Ad Litem

The majority's decision deprives children of the right to legal representation. In addition, the impact of this decision will have devastating effects on the ability of guardians ad litem to fully represent the best interests of children in dependency and neglect proceedings. Because children will no longer have the protection of the attorney-client privilege,

guardians ad litem will be required to disclose information about their wards even when it is not in the child's best interests to do so. This outcome, which appears to be based on a generalization that a child is incapable of being involved in the legal process, is at odds with a child's fundamental right to be represented in court, and fails to protect the legal rights of children. The majority's opinion ignores both our statutory language and the growing trend recognizing that children should be represented by lawyers acting in full accordance with legal ethical rules. The better outcome, and the one intended by our statutory scheme, recognizes the attorney-client privilege, but permits the guardian ad litem to decide whether to assert the privilege on behalf of the child.

The majority claims that Colorado's statutory scheme is silent about whether an attorney-client relationship exists between a guardian ad litem and a child in a dependency and neglect proceeding. From this assertion, the majority presumes that the correct course of action is to eschew any duty of confidentiality in order to avoid "creating an evidentiary privilege." This assumption is incorrect for two reasons: (1) Colorado's statutory scheme is not silent, but instead uses language evoking a hybrid role for a guardian ad litem; and (2) because guardians ad litem are required to be attorneys, and are

explicitly required to comply with the rules of professional conduct, a standard that eschews attorney-client privilege and the duty of confidentiality is at odds with well-established principles.

In many jurisdictions, the laws governing guardians ad litem have been unclear about the role of confidentiality in the relationship between a guardian ad litem and a child. See Roy T. Stuckey, Guardians Ad Litem As Surrogate Parents: Implications for Role Definition and Confidentiality, 64 Fordham L. Rev. 1785, 1786, 1792 (1996). While some jurisdictions have required guardians ad litem to adhere to the traditional attorney-client privilege,[1] other jurisdictions have held that the privilege does not apply, liberally permitting disclosure of communications even without a waiver.[2] Other states fall somewhere on the spectrum between privilege and no privilege, emphasizing the importance of confidentiality, but permitting

[1] See, e.g., Mich. Comp. Laws § 712A.13a(1)(c) (2011)("An attorney defined under this subdivision owes the same duties of undivided loyalty, confidentiality, and zealous representation of the child's expressed wishes as the attorney would to an adult client.").

[2] See, e.g., Ark. Supreme Court Admin. Order No. 15.1: Qualifications and Standards for Attorneys Appointed to Represent Children and Parents, § 2(j) ("Attorney-client or any other privilege shall not prevent the ad litem from sharing all information relevant to the best interest of the child with the court.").

disclosure under certain circumstances.[3] The United States as a whole still reflects a lack of consensus as to the role of the guardian ad litem. In fact, a 2005 study found that the United States has fifty-six individual systems of representation in place for children. Jean Koh Peters, How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study, 6 Nev. L.J. 966, 968 (2006). The trend, however, has been a growing consensus among scholars and practitioners that children should be represented by lawyers acting in full accordance with legal ethical rules. Id. at 968-69.

a. Colorado's Statutory Language

Despite the majority's assertion that our laws are silent on the issue, Colorado's laws use language evincing adherence to both the traditional attorney-client privilege and a best-interests standard, under which the guardian ad litem would represent the best interests of the child. For example, the statutory definition of a guardian ad litem is both someone who is appointed "to act in the best interests" of another person

[3] See, e.g., Minn. Rules of Guardian Ad Litem Procedure in Juvenile and Family Court, R. 905.01(c) (the guardian ad litem shall "maintain the confidentiality of information related to a case, with the exception of sharing information as permitted by law to promote cooperative solutions that are in the best interests of the child . . .").

and an attorney who is "appointed to represent a person in a dependency and neglect proceeding." § 19-1-103(59), C.R.S. (2011) (emphasis added). The dichotomy within this definition suggests that the guardian ad litem's duty is both to the child and to the best interests of the child. The majority completely disregards Colorado's statutory definition of a guardian ad litem, and instead relies on a broad definition of a guardian ad litem extracted from Black's Law Dictionary. As discussed above, the definition of a guardian ad litem varies widely from state to state and therefore, Black's definition is not helpful in specifically ascertaining the intent of Colorado's legislature. The statutory definition controls, and that language indicates a hybrid role for guardians ad litem in Colorado.

The statutory definition is not the only place in our law that acknowledges the unique role of the guardian ad litem. The duties of the guardian ad litem are further described in section 19-3-203(3), C.R.S. (2011), which states that the guardian ad litem "shall be charged in general with the representation of the child's interests." (emphasis added). The statute then enumerates the guardian ad litem's duties to investigate the facts, talk with the child, examine witnesses, make recommendations to the court concerning the child's welfare, and

participate in proceedings to the degree necessary "to adequately represent the child." Once again, within the same statute, the language suggests that a guardian ad litem represents both the child and the child's interests. Moreover, while many of these responsibilities are typical duties of an attorney, because of the emphasis on representing and acting in the child's best interests, it is clear that a guardian ad litem is a special kind of attorney.

b. The Effect of Chief Justice Directive 04-06

To clarify the duties of the guardian ad litem, the legislature has delegated the establishment of more specific practice standards to the chief justice. § 19-1-111(6), C.R.S. (2011). Chief Justice Directive 04-06 states, notably, that an attorney appointed as a guardian ad litem "shall be subject to all of the rules and standards of the legal profession . . . ." C.J.D. 04-06(V)(B). This directive also requires a guardian ad litem in a dependency and neglect case to provide accurate and current information directly to the court and to "[t]ake actions within the scope of his or her statuory authority and ethical obligations necessary to represent the best interests of the child." C.J.D. 04-06(V)(D)(1) & (3) (emphasis added). Therefore, this directive does not relieve a guardian ad litem from fulfilling his or her ethical obligations as an attorney.

The majority downplays the significance of this directive, emphasizing instead that the directive does not, and potentially cannot, create an evidentiary privilege. This argument is misleading, however, because it rests on the false assumption that C.J.D. 04-06 is the source of the evidentiary privilege. C.J.D. 04-06 simply clarifies that an attorney appointed as a guardian ad litem in a dependency and neglect proceeding is required to act in full accordance with the rules governing attorney conduct. Attorney-client privilege applies as the result of the relationship between the attorney-guardian ad litem and the child, created by statute.

c. The Attorney-Client Relationship

The majority concludes that a guardian ad litem represents the child's best interests, but not the child, because to hold otherwise would impose the evidentiary consequences of an attorney-client relationship onto the statutory guardian ad litem-child relationship. Thus, without discussion or analysis, the majority presumes that a child who is the subject of a dependency and neglect proceeding is not the client of a court-appointed guardian ad litem. I disagree, and would instead conclude that the child is the client of the guardian ad litem, and that, therefore, attorney-client privilege applies.

An attorney-client relationship "may be inferred from the conduct of the parties." People v. Bennett, 810 P.2d 661, 664 (Colo. 1991). In determining whether an attorney-client relationship exists, we apply a subjective test, of which an important factor is "whether the client believes that the relationship existed." Id. As the majority noted, we have held that a client is a person who employs or retains an attorney for advice or assistance on a matter relating to legal business. People v. Morley, 725 P.2d 510, 517 (Colo. 1986). Although we have not explicitly addressed the present situation, in other contexts, we have not made the existence of an attorney-client relationship contingent on whether counsel was retained by the defendant or the court. People v. Harlan, 54 P.3d 871, 878 (Colo. 2002) ("[O]nce counsel is appointed, the attorney-client relationship 'is no less inviolable than if the counsel had been retained by the defendant.'" (quoting People v. Isham, 923 P.2d 190, 193 (Colo. App. 1995))). Accordingly, the fact that a guardian ad litem is appointed by the court, rather than sought out by the child, is not a dispositive factor in determining whether the attorney-client relationship exists. Instead, we must look to statutes, the conduct of the parties, and the subjective belief of the child.

Although our statutory language requires the guardian ad litem to represent the best interests of the child, this does not necessitate a conclusion that there is no attorney-client relationship between a child and an appointed guardian ad litem. In other areas of Colorado's domestic relations law, the General Assembly has used similar "best-interests" language even when it is clear that an attorney is appointed to serve as the legal representative of the child. For example, in a custody proceeding, the court has the discretion to appoint a child's representative. § 14-10-116(1), C.R.S. (2011). The child's representative serves as the "legal representative of the child," but also represents the "best interests of the child." Like the guardian ad litem in a dependency and neglect case, the child's representative is required to be an attorney and to comply with all the provisions of the Colorado rules of professional conduct. This duty is described both in section 14-10-116 and in C.J.D. 04-06(V)(B). In contrast, a child and family investigator may be appointed in a custody proceeding to serve as the "investigative arm of the court." C.J.D. 04-08 (IV)(B)(3). While the investigator may be an attorney, he or she is not permitted to provide legal advice or act as a lawyer, and is not required to comply with the rules of professional conduct for attorneys. C.J.D. 04-08 (IV)(B)(4). The same

person may not serve as both the child's representative and the family investigator. § 14-10-116.5(1), C.R.S. (2011).

The contrast between the role of child's representative and investigator highlights the difficulty of rectifying a guardian ad litem's varying responsibilities with the obligation to adhere to legal ethical standards. The contrast also demonstrates, however, that the General Assembly may use the "best interests" language even when it intends for an attorney to represent a child in an attorney-client relationship. The language in the guardian ad litem statute more closely resembles the language describing the child's representative, particularly in light of the express requirement that the guardian ad litem adhere to the legal rules of professional conduct. Accordingly, I would hold that the statutory language requires a conclusion that an attorney-client relationship exists between a child and a guardian ad litem in a dependency and neglect proceeding, and that the guardian ad litem represents both the child and the child's best interests. [4]

The conduct of the parties further confirms my conclusion that the attorney-client relationship exists. When a dependency and neglect petition is filed, it means that there is reason to

[4] In lieu of this dual-role, children could be represented by both an attorney and a guardian ad litem in every dependency and neglect proceeding, but such an outcome strains scarce resources.

believe that the child's parents are not acting in the child's best interests. The guardian ad litem steps into the shoes of the parents, acting on behalf of the parents in pursuit of the best interests of the child. In Colorado, however, the guardian ad litem is also required to be an attorney and perform typical duties of an attorney in court. Both of these roles make it essential for the guardian ad litem to earn the child's trust. The consensus among academics and practitioners is that the duty of confidentiality enhances the representation because it encourages full disclosure from the child, which may lead to the discovery of information which would not otherwise come to light. See, e.g., Gail Chang Bohr, Ethics and the Standards of Practice for the Representation of Children in Abuse and Neglect Proceedings, 32 Wm. Mitchell L. Rev. 989, 1002-03 (2006). Furthermore, when a child confides in a guardian ad litem attorney, the child most likely expects confidentiality, because the child has no other legal representative.

I recognize that there may be times where it would be in the best interests of a child to reveal information to the court, but the child does not consent to disclosure. In my view, the guardian ad litem in a dependency and neglect proceeding is bound by the attorney-client privilege and the duty of confidentiality, but the guardian ad litem, acting in

the child's best interests, decides whether to invoke the privilege on behalf of the child. In this way, both the child's legal rights and best interests are represented by an attorney. In determining whether to reveal a communication without the child's consent, the guardian ad litem should, as a good parent would, speak with the child first and consider the child's wishes. Additionally, the guardian ad litem should take into account the age and maturity of the child in making its determination. While a guardian ad litem for a younger child will likely make most or all of the decisions, a guardian for an older mature child might function more like an attorney for an adult, allowing the child to play a larger role in the decision-making.

I would hold that the attorney-client privilege does apply to confidential communications made between a guardian ad litem and a child in a dependency and neglect proceeding, and that the responsibility to decide whether to assert the privilege on behalf of the child is placed with the guardian ad litem.

II. Jurisdiction

I also dissent from the majority's holding that a dismissal for failure to prosecute constitutes a final judgment for purposes of appeal. The majority's holding gives the prosecution unlimited power to appeal any decision of a trial

court simply by requesting a dismissal. The majority justifies this result by claiming that the prosecution will always make the correct ethical judgment about when to dismiss a case. In my view, the General Assembly did not intend to give the prosecution the unchecked right to appeal an otherwise unappealable interlocutory order. Instead, the General Assembly enacted the amendment to section 16-12-102(1), C.R.S. (2011), to prevent double jeopardy issues when the court dismissed or reduced a charge. Therefore, I would hold that, because a dismissal for failure to prosecute is not a final order, it cannot be the basis for an appeal under section 16-12-102(1).

The legislature has specified that a final order includes a pre-trial dismissal of at least one count of a charging document, but in order to serve as the sole basis for an appeal, the dismissal must also satisfy the final judgment rule. See People v. Guatney, 214 P.3d 1049, 1050 (Colo. 2009). Therefore, the dismissal must leave nothing further for the court to do in order to completely determine the rights of the parties with regard to the dismissed charges. Id. at 1051. Because a dismissal for failure to prosecute does not satisfy the definition of a final judgment, it cannot be considered the type of final order contemplated by the statute.

The distinction lies in the reason behind the dismissal. When a court dismisses a charge on its own cognizance, such as for a lack of probable cause, the dismissal is a final judgment because the dismissing court has nothing further to do regarding those charges. As a result, the prosecution is left with no other choice but to go forward on any remaining charges or appeal. If the prosecution does not appeal, the opportunity to prosecute the dismissed charge is lost completely due to double jeopardy concerns. In contrast, when a pre-trial dismissal is caused by a failure to prosecute, the prosecution may simply refile the charges at a later time. Consequently, there could be something further for the dismissing court to do, and so long as refiling is a possibility, the rights of the parties with regard to those charges cannot be said to have been completely determined. Therefore, a dismissal for failure to prosecute is distinct from a dismissal initiated by the court.

Although prosecutors in Colorado are granted uncommonly broad authority to appeal, this power is not supposed to be unlimited, as the majority's holding would make it. The legislative history is consistent with the notion that section 16-12-102(1) was not meant to provide appellate review of evidentiary rulings underlying a dismissal order for failure to prosecute. In 1998, section 16-12-102(1) was amended to add

that any order dismissing one or more counts of a charging document prior to trial shall constitute a final appealable order. Ch. 251, sec. 9, § 16-12-102, 1998 Colo. Sess. Laws 948. The amendment was proposed in response to the Gallegos case, in order to clear up confusion on the issue of whether an appeal would be allowed of an order that dismissed one or more, but not all charges at a preliminary hearing. Hearing on H.B. 1088 Before the S. Judiciary Comm., 1998 Leg., 2d Regular Sess., 61st Gen. Assemb. (Colo. 1998) (referring to People v. Gallegos, 946 P.2d 946 (Colo. 1997)). The hypothetical situation discussed during the committee hearings involved a first degree murder charge dismissed or reduced to second degree by the court at a preliminary hearing. Without the right to appeal at that stage, the case would go forward on the second degree charge and jeopardy would attach, making it impossible for the prosecution to ever appeal the reduction or dismissal of the original charge. Based on this example, it is clear that the General Assembly intended to make a dismissal of charges appealable when the court initiates the dismissal over the objection of the prosecution. Conversely, the amendment was not intended to give the prosecution the authority to dismiss charges and then challenge, not the order of dismissal, but any ruling made by the trial court, even those which would ordinarily be

unappealable. Therefore, I conclude that section 16-12-102(1) does not permit an appeal of a dismissal for failure to prosecute.

When a prosecutor requests a dismissal, the court's discretion to withhold consent and approval is extremely limited. For example, this court has held that "a trial court's refusal to grant a prosecutor's request to dismiss a charge was an abuse of discretion absent [clear and convincing] evidence that the prosecutor was attempting to harass the defendant or prejudice his defense." People v. Frye, No. 08CA2321, slip. op. at 3 (Colo. App. June 24, 2010) (selected for official publication) (citing People v. Lichtenstein, 630 P.2d 70, 73 (Colo. 1981)). Thus, when a court dismisses a case for failure to prosecute, it is essentially performing a ministerial function at the behest of the prosecution.

By allowing a dismissal for failure to prosecute to serve as the basis of an appeal, the majority is "transform[ing] the trial court's essentially ministerial role in approving a prosecution's request for dismissal into the means for gaining an appeal of right of what is, in essence, an interlocutory order of a kind not appealable under the interlocutory appeal provisions of section 16-12-102(2) . . . ." Id. at 5 (citing cf. People v. Donahue, 750 P.2d 921, 922-23 (Colo. 1988)

(suppression orders are appealable by interlocutory appeal, not by voluntarily dismissing the case and appealing on a "question of law")). In other words, it gives the prosecution a way to get around the limitations on interlocutory appeals by merely requesting that the charges be dismissed and then appealing.

The majority's mistaken approach makes the scope of appellate review entirely coterminous with the strategy and tactics of prosecutors. While the majority notes that the decision to request dismissal should not be taken lightly, appealability should not hinge on the majority's purported confidence that strategic and tactical decisions of each individual prosecutor will be properly constrained by their ethical standards. Accordingly, I would hold that section 16-12-102(1) may not be used as a basis for appellate jurisdiction when the only alleged final order is a dismissal for failure to prosecute.

III. Social Worker Testimony

Lastly, I dissent from the majority's conclusions regarding the testimony of the social worker. In disapproving of the trial court's reliance on section 19-3-207, C.R.S. (2011), as a basis for prohibiting examination of the social worker, the majority has gone out of its way to reverse the court of appeals on an issue that was never addressed by the parties or the trial

court. The majority dwells on the lack of findings regarding the existence of the social-worker-client relationship and the question of whether the statements were made pursuant to compliance with treatment orders. However, the parties did not even argue about these issues. Because the prosecution implicitly conceded that the relationship existed and that the statements were made pursuant to compliance with treatment orders, the parties and the court of appeals focused on whether the proposed statements fall under the exception to the privilege.

Section 19-3-207(2) prohibits the testimony of any treating professional involved in a dependency and neglect case, but makes an exception for discussions of future misconduct or past misconduct unrelated to the allegations involved in the treatment plan. The People sought to admit testimony of the social worker which would suggest that T.W.'s mother had pressured T.W. to recant the allegations of sexual abuse.

I agree with the court of appeals that the statements cannot be said to be "unrelated to the allegations" of sexual abuse, because the proposed testimony goes "directly to the veracity of the allegations," and would not fall under the exception to the privilege. People v. Gabriesheski, 205 P.3d 441, 444 (Colo. App. 2008). Therefore, although the exact

statements at issue were not in the record before us, the description of the proffered testimony provides sufficient information to determine that the trial court did not abuse its discretion in excluding the testimony.

Likewise, the court of appeals did not err when it concluded that section 13-90-107(1)(g), C.R.S. (2011), serves as an additional ground for precluding the testimony. Section 13-90-107(1)(g) prohibits a social worker from being examined without consent, as to any communication made by the client in the course of professional employment. The parties argued the applicability of this statute before the trial court, but because the trial court decided to exclude the social worker's testimony based on section 19-3-207, the trial court did not address section 13-90-107 in its ruling.

The majority complains that the court of appeals should not have addressed section 13-90-107 because the trial court did not make findings regarding the existence of the social-worker-client relationship. The court of appeals merely noted that section 13-90-107 further supports the conclusion that the social worker could not testify. Because neither the trial court nor the court of appeals relied on 13-90-107, and because the plain language of the statute supports the conclusion that the social worker's testimony was inadmissible,

the majority's decision to remand for additional findings on the existence of the social-worker-client relationship is completely unnecessary.

For the reasons described above, I respectfully dissent.

I am authorized to state that CHIEF JUSTICE BENDER joins in this dissent.