Chapter 18  CONFIDENTIALITY*

by Ann M. Haralambie**

§ 18.1 Introduction

Confidentiality in child welfare practice involves both state and federal laws. Not only does the law determine what matters are deemed confidential, but also who is entitled to assert or waive confidentiality and what formalities are required to obtain confidential records. Ordinarily, people have an evidentiary privilege protecting their communications with medical and mental health professionals as provided by state law. In order for the privilege to arise, it is generally required that the communication be made with the intention that it remain confidential, that the confidentiality be essential to the relationship, that the relationship be one that society wishes to foster, and that the injury of disclosure be greater than the benefit to be gained for the correct disposition of the litigation.1 Wigmore took the position that privileges, being in derogation of common law, are disfavored and to be strictly construed or eliminated altogether.2 However, many courts are loath to lightly set aside privileges, and in some states, some privileges are constitutionally protected privacy interests3. Exercise or waiver of privileges involves balancing the holder’s privacy rights, the public policy benefits of extending privilege to encourage full disclosure in confidential settings, and the need for the court to have complete information. Where the safety of a child is concerned, the public policy scale may tip towards disclosure.

In general, adults control release of their own confidential records, and the parents or legal guardians generally control release of children’s records. But when families are involved in child welfare proceedings, parents may lose the right to control access to their children’s records, and it is not always clear who then steps into the parent’s position: the agency, the child’s attorney, or the court itself? Further, when the records were produced through the court process itself, such as in court-ordered evaluations, examinations, and therapy, there is a question about whether or not confidentiality ever attached to the professional relationships and records. The records of child protective services and of the dependency court proceedings themselves may be covered by confidentiality laws. Finally, child welfare court proceedings may be deemed confidential, and not only the public in general, but non-party friends and relatives of the parents and children may be

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1  This chapter is based in part on portions of several chapters in the first edition of this book.

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4  See, e.g., EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES §3.2.2 (2002).

5  See, e.g., People v. Hammon, People v. Hammon, 15 Cal.4th 1117, 938 P.2d 986 (1997) (defendant in child sexual abuse prosecution denied access to his victim’s foster daughter’s therapy records; therapist-patient privilege is an aspect of the constitutional right of privacy).
barred from attending the proceedings.

While the federal law has generally tightened confidentiality of the records it governs, states have been experimenting with loosening the restrictions on access to child welfare court proceedings.4

This chapter will deal briefly with the major ways in which confidentiality, other than confidentiality in the attorney-client relationship, is involved in the practice of child welfare law.

§ 18.2 When Confidentiality Generally Does Not Apply

§ 18.2.1 Court-ordered Evaluations and Examinations

Court-ordered examinations and evaluations generally do not create confidential professional relationships which would shield the patient from disclosure of information to the court.5 This is because the reason for the professional examination or evaluation is explicitly to provide information to the court and parties for use in the legal proceeding. Nevertheless, the health care professional, as part of the standard informed consent procedure, should specifically inform the patient that nothing said or discovered during the examination or evaluation is confidential and that the results will be disclosed to the court, child welfare agency, and/or the other parties to the legal proceeding. The therapist-patient privilege might apply to communications made during court-ordered therapy.6 The fact that a parent did or did not attend court-ordered therapy would not be deemed privileged. It would be helpful for the court ordering therapy to specify whether or not the sessions will be covered by privilege.

§ 18.2.2 Child Abuse and Neglect Reporting

All states have mandatory reporting statutes, but there are some differences among the various states concerning who must report and the circumstances under which reports must be made.7 Typically, professionals who deal with children are required to report suspicion of abuse. If they fail to do so, they may suffer criminal or civil penalties. Under some statutes, professionals are required to report suspicion of abuse if the

4 See §18.5 infra for a discussion of public access to child welfare proceedings.

5 See Fed R Evid 706, and the state rules patterned after it. See also, In re Jones, 99 Ohio St. 3d 203, 790 N.E.2d 321 (2003) (statements made by mother to a licensed psychologist or licensed social worker in the course of forensic examinations ordered for child dependency proceeding were not privileged)

6 See, e.g., In re Jones, 99 Ohio St. 3d 203, 790 N.E.2d 321 (2003) (privilege applies for statements mother made to licensed independent social worker during therapy in child dependency proceeding, even though the therapist was working primarily with the children because the participation was treatment-focused, with the goal being to get the mother to change her own behavior and to develop a healthy and constructive relationship with her children)

suspicion originates from the professional’s observation or examination of the child (as opposed to merely hearing about the abuse from a person other than the child). Doctors, nurses, teachers, psychologists, and daycare workers who have a reasonable suspicion of abuse generally must make a report, even if they would not be in a position to testify that they held a professional opinion that abuse had occurred. In other words, it is the duty of child protective services or law enforcement to investigate suspected abuse. It is not the reporter’s obligation to conduct an investigation.

Professional privileges for confidential communications are generally abrogated by the mandatory reporting laws. However, in some states a few privileges remain and excuse an otherwise mandated reporter from making a report if the source of the suspicion is a privileged communication. In Nevada and Ohio, for example, attorneys and clergy are mandated reporters. Both states, however, have exceptions for privileged communications between attorney and client, and between clergy and penitent. If the abuse is disclosed during a privileged conversation, these specific mandated reporters are not required to report it.

§ 18.3 Confidentiality of Records

§ 18.3.2 Confidentiality of Records Generally

Child welfare attorneys often deal with records of parents and children which are confidential under the law and therefore entitled to an evidentiary privilege. If there is a non-privileged option through which the relevant information may be obtained, privileges are generally upheld, even in child welfare cases. Therefore, for example, courts may order parents to undergo evaluations or examinations, in which case there is no expectation of confidentiality, and no evidentiary privilege attaches to the communications. The results of the evaluation may obviate the need for obtaining the parent’s private therapy records.

The most direct way to obtain such records is with the informed, written consent of the person about whom the records pertain or, if the person is a minor, the consent of the parent or legal guardian. However, for medical and psychotherapy records, the consent now required under federal law is something more than the typical authorization for release of information routinely used by attorneys, and specific information must be included. For example, where subpoenas are administratively issued, instead of being issued by a judge, a health care provider might not release the records or might send them to the court under seal for in camera inspection. The court can refuse to disclose the

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8 See generally J.E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES §§ 1.12 to 1.19 (2d ed 1992); ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES 3D § 12:23 (West 2009).

records or can disclose only a redacted copy containing only what is necessary, maintaining as much confidentiality as possible.

Release of substance abuse treatment records are covered by a separate federal law which requires a specific release or court order with specific findings. Therefore, even subpoenas and court orders may not be sufficient to obtain covered records unless they specifically comply with federal law.

In addition to the federal confidentiality laws discussed in this chapter, attorneys should be aware of their own state laws regarding confidentiality. The U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention (OJJDP) maintains a web site collecting current state laws on juvenile justice and child welfare record privacy, particularly with respect to interagency information sharing.

§ 18.3.2 Child Abuse and Neglect Records

Pursuant to CAPTA states must keep child abuse and neglect reports confidential except as explicitly provided by federal law. Where certain disclosure is permitted, CAPTA prohibits re-disclosure of that confidential information without consent. Once the information is released to these authorized recipients, they become subject to the same confidentiality rules as the releasing agency. More than half the states permit public disclosure in the case of child fatalities or near fatalities, which is explicitly permitted by CAPTA. A few states permit disclosure if the abuser has been arrested or criminally charged. Some states allow limited information to be provided to reporting sources summarizing the outcome of the investigation conducted pursuant to the report. The records, usually with the reporting source redacted, are generally

10 See §18.3.4 below.
13 Exceptions exist, inter alia for disclosure to individuals who are the subject of the report, government entities that have a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect, child abuse citizen review panels, child fatality review panels, a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury, and other entities or classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate State purpose.  Id.
17 Arkansas, California, Connecticut, Georgia, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode
available to the parties in the child welfare case and their attorneys. Some states also permit certain information to be shared with the child’s foster parents.18

Courts may preclude parties from otherwise disclosing records they have received through the child welfare proceeding. Further confidential child welfare records disclosed pursuant to Title IV-B of the Social Security Act or CAPTA may not be redisclosed by the recipients unless the redisclosure also complies with Title IV-B of the Social Security Act or CAPTA.19 In other words, the recipient is governed by the same legal rules as the agency which initially released the information, and there are penalties for unauthorized redisclosure. It is prudent for attorneys to obtain an order allowing disclosure to independent consultants or experts as part of trial preparation; although, it can be argued that there is implied authorization for such further disclosure. Any secondary disclosure, however, should be made with written restrictions on further disclosure by the third party.

§ 18.3.3 Health Records and HIPAA20

Congress enacted the Health Insurance Portability and Accountability Act of 199621 (HIPAA), in relevant part, to establish national standards for electronic health care transactions that ensure the security and privacy of patient information and to provide for patient access to their own health records. In addition to medical and dental records, psychotherapy notes are covered under HIPAA.22 Because violation of HIPAA can involve both civil and criminal penalties to a health care provider who releases records, most health care providers err on the side on nondisclosure to third parties when there is any question about authorization.

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19  See, e.g., 45 CFR §205.50.

20  This section was co-authored by Andrea Khoury, J.D. She is an Assistant Staff Director at the American Bar Association Center on Children and the Law. She has represented children in abuse and neglect proceedings for over twelve years.


22  “‘Psychotherapy notes’ means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record. Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.” United States Department of Health and Human Services, OCR Privacy Brief, Summary of the HIPAA Privacy Rule, page 21, n. 47 (2003), available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html.
The Standards for Privacy of Individually Identifiable Health Information (“Privacy Rule”), enacted by the U.S. Department of Health and Human Services, incorporated federal privacy protection for individually identifiable health information held or transmitted by a covered entity or its business associate in any form or media, whether electronic, paper or oral. A covered entity (including health care providers) may not use or disclose protected health information (PHI) without authorization from the individual who is the subject of the PHI or for other permissible uses allowed under the Privacy Rule. “All authorizations must be in plain language, and contain specific information regarding the information to be disclosed or used, the person(s) disclosing and receiving the information, expiration, right to revoke in writing, and other data.”

Relevant exceptions to this rule are:

- HIPAA rules do not apply where the “provision of state law provides for the reporting of disease or injury, child abuse…or public health investigation”.
- A covered entity may use or disclose PHI for treatment, payment, or health care operations.
- PHI can be disclosed in response to “court or administrative orders or by subpoena, discovery request, or other lawful process”.
- A covered entity can disclose PHI to a “public health authority…authorized by law to receive reports of child abuse or neglect”.

The Privacy Rule does not prevent reports of suspected abuse to the proper authorities when state law provides for reporting. In most states, the child welfare agency is the public health authority that receives the abuse and neglect reports.

Child welfare professionals should seek an individual’s authorization when attempting to receive protected health information. Many health care providers have their own authorization forms which comply with HIPAA and will be readily recognized by the records clerk responding to a request for confidential records. The authorization must describe the type of information which must be disclosed, the name of the person or agency to whom disclosure should be made, the purpose of the disclosure, and the date.

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25 45 CFR 160.203(c).

26 45 CFR 164.506(a).

27 45 CFR 164.512(e) and (f).

28 45 CFR 164.512 (b).

on which the authorization will expire. If the need for access to records extends beyond the expiration date, a new authorization must be obtained.

If the authorization is not forthcoming, access to a child’s or parent(s)’ PHI may be obtained through a judge-issued subpoena or court order. An administratively issued subpoena which was not signed by a judge is insufficient under HIPAA. Before obtaining a subpoena or court order, the Privacy Rule requires that the party seeking the information has made reasonable efforts to ensure that the individual who is the subject of the PHI has been given notice of the request and the opportunity to object30 or that the individual seeking the information has sought a qualified protective order prohibiting the parties from using or disclosing the PHI for any purpose other than the proceeding for which the information was requested and requiring the destruction of the PHI (or return to the covered entity) at the end of the proceeding.31 The child welfare professional should then retain a copy of the subpoena and document the information provided.

When a covered entity discloses PHI in compliance with a court order or subpoena issued by a judicial officer, the covered entity must ensure that the information sought is relevant and is limited in scope to satisfy the purpose for the information.32 Therefore, the subpoena or court order must be specific about the scope of records sought in order to ensure that all relevant records are produced.

§ 18.3.4 Substance Abuse Treatment Records

Federal law, 42 CFR Part 2, provides strengthened confidentiality protections specifically for records concerning substance abuse diagnosis or treatment, over and above the HIPAA protections for health care records in general.33 “Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States Substance abuse treatment records from facilities which receive federal funding, directly or indirectly,”34 are confidential and may not be disclosed without the patient’s specific written consent or a court order based upon a specific showing of good cause.35 The court may order disclosure of the patient’s confidential communications only if the disclosure “is necessary to protect against an existing threat to life or of serious bodily

30 45 CFR 164.512(e).
31 45 CFR 164.512(e).
32 45 CFR 164.512(f).
35 42 U.S.C. §290ee–3(b) (there are also exceptions for medical emergencies and for disclosure of non-identifying information for scientific research, audits, or evaluations). See also 42 U.S.C. §290dd-2(b)(2)(C); 42 U.S.C. §290dd–3(b)(2)(C); 42 CFR §§ 2.1, 2.2.
injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties.”

Any order permitting disclosure of protected records must also include appropriate safeguards against unauthorized disclosure.

The federal regulations specify the procedure to be followed if the patient has not consented to disclosure:

(a) **Application.** An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of these regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) **Notice.** The patient and the person holding the records from whom disclosure is sought must be given:

(1) Adequate notice in a manner which will not disclose patient identifying information to other persons; and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.

(c) **Review of evidence: Conduct of hearing.** Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record, unless the patient requests an open hearing in a manner which meets the written consent requirements of these regulations. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) **Criteria for entry of order:** An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

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36 42 CFR § 2.63(a)(1).

(e) **Content of order.** An order authorizing a disclosure must:

1. Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;
2. Limit disclosure to those persons whose need for information is the basis for the order; and
3. Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.38

State law cannot authorize disclosure of the protected records other than as provided by the federal regulations. Therefore, for example, a general statutory authorization or court order providing that a child’s attorney or guardian *ad litem* shall have access to all records would not by itself permit disclosure of protected records even to the child patient’s own attorney.

Substance abuse records are not subject to a subpoena unless the subpoena is accompanied by an order meeting the criteria listed above. Further, a provider is not required to, but may, disclose the confidential records based solely on an order which meets the criteria, unless the order is accompanied by a subpoena or other compulsory process.39

Disclosure or use of the confidential records in violation of the federal law or violation of any part of the relevant regulations subjects the violator to criminal penalties and fines. Therefore, an attorney seeking access to substance abuse records must be very careful to comply in all respects with 42 C.F.R. § 2.64. Because the records of most child welfare proceedings are sealed, a fictitious name will not ordinarily be necessary. However, as some states are opening their child welfare proceedings to the public,40 attorneys should be aware that under such circumstances, they will be subject to criminal sanction if they do not use a fictitious name in their applications for substance abuse diagnostic or treatment records.

**§ 18.3.5 School Records-FERPA**

Confidentiality of school records is governed by the Family Education Rights and Privacy Act41 (FERPA), as amended by the Improving America's School Act (IASA).42 Generally, FERPA provides that parents have a right to access to their children’s school records and that third parties do not have access to such records without proper

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38 42 CFR § 2.64.
39 42 CFR § 2.61.
40 See §18.5 *infra* for a discussion of public access to child welfare proceedings.
41 20 U.S.C. §§ 1232g and 1232h
authorization. When the child becomes an “eligible student,” the parent’s rights are transferred to the student, and subject to some exceptions, the parent becomes a third party with respect to the need for authorization in order to access the student’s records. Where certain disclosure is permitted without consent, such as pursuant to a court order, FERPA prohibits re-disclosure of that confidential information unless consent is obtained. There is no prohibition to redisclosure for persons who have obtained school records with consent. There is also an exception to the general prohibition of redisclosure when the prior consent of the parent or “eligible student” is not required under 34 CFR §99.31, and the party complies with the reporting requirements found at 34 CFR §99.32(b).

FERPA defines a parent as “a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian.” Even if the child is in the legal custody of the child welfare agency, that fact alone does not suspend the child’s parent from also having access to school records unless parental rights have been terminated or the parent’s right to access has been restricted by court order.

§ 18.3.6 School Records-IDEA

Records concerning services received under the Individuals with Disabilities Education Act (IDEA), are "education records" under FERPA and are therefore subject to the confidentiality provisions of FERPA. In addition, IDEA provides its own confidentiality requirements. In the process of determining whether or not a student is eligible for services under IDEA the school may compile many records concerning the child and family which go beyond the normal school records. An agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of IDEA is also a "participating agency" subject to

43 “Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education.” 34 C.F.R Part 99, § 99.3
44 34 C.F.R Part 99, § 99.5. Therefore, a child who has reached the age of 18 or is in college has a right to access all of his school records and must consent to a third party’s access.
45 “The most relevant exceptions to child welfare professionals that permit disclosure without prior consent are to: other school officials, including teachers, with legitimate educational interest in the child; appropriate persons in connection with an emergency, when the information is needed to protect the health and safety of the student or other persons (Note: used for health and safety emergencies where immediate release of the information is necessary to control a serious situation); officials of other schools when a student is transferring schools; state and local authorities within the department of juvenile justice, if your state statute permits disclosure (Note: currently only Florida and Illinois have such statutes); and appropriate persons when the release of information is needed to comply with a judicial order or subpoena.” See Kathleen McNaught, Mythbusting: Breaking Down Confidentiality and Decision-Making Barriers to Meet the Education Needs of Children in Foster Care (2005) [end notes omitted], available at http://www.abanet.org/child/education/mythbusting2.pdf.
46 34 CFR §99.3.
the Part B Confidentiality of Information requirements codified at 34 CFR § 300.560 -
300.577. The school “must protect the confidentiality of personally identifiable
information at collection, storage, disclosure, and destruction stages.” The Secretary of
Education is required “to ensure the protection of the confidentiality of any personally
identifiable data, information, and records collected or maintained by the Secretary and
by State educational agencies and local educational agencies.”

The child’s parents have a right to inspect and review the IDEA records and to
consent to the release of the records to third parties. However, IDEA’s definition of a
parent is more specific and narrow than the definition of a parent in FERPA and includes:

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is
prohibited by State law from serving as a parent);

(B) a guardian (but not the State if the child is a ward of the State);

(C) an individual acting in the place of a natural or adoptive parent (including
a grandparent, stepparent, or other relative) with whom the child lives,
or an individual who is legally responsible for the child’s welfare; or

(D)… an individual assigned … to be a surrogate parent.

Notably, IDEA specifically excludes the child welfare agency (“the State”) from the
definition of “guardian” for purposes of the Act, even if the agency is the child’s legal
guardian.

§ 18.4 Who May Assert or Waive Confidential Privileges

The Federal Rules of Evidence rejected a proposed rule which would have
detailed various privileges and waiver of those privileges, instead deferring to common
law and state law. States which have adopted rules patterned after the Federal Rules of
Evidence have generally added rules after Rule 501 relating to what matters are
privileged and, sometimes, who may assert or waive them.

Generally, privileges may be asserted or waived by the holder of the privilege or
that person’s legal representative. Competent adults may assert or waive the professional
privilege related to their own confidential communications and records. Children are
generally also entitled to the evidentiary benefits of professional privileges. Children

48 See 34 CFR § 300.560(c).
49 34 C.F.R. § 300.623(a).
50 20 U.S.C. § 1417(c).
52 FED. R. EVID. 501 (and Advisory Committee Notes).
53 See, e.g., Cal.Welf. & Inst.Code § 317(f) (child is the holder of the privilege, or child’s attorney is the
who have been victimized by their parents may be especially harmed by the casual breach of their confidential relationships.54

Who has the authority to exercise or waive such privileges on behalf of children? In a few states it is provided for by statute, case law, or court order. The professional may always assert the privilege on behalf of the patient or client (and may have a duty to do so) but may not waive the privilege. In some cases, both the children and their parents or guardians have an ability to assert or waive the child’s privileges. Generally, parents who have custodial rights can assert or waive these privileges; although, where the parents are in a legally adverse posture with the child, it is generally held that the parent should not be permitted to assert or waive the objection on behalf of the child over the child’s objection or in order to protect the parent from evidence of the child’s injuries.55 Where the child has an attorney or guardian ad litem, that person may be deemed the proper person to exercise the privilege on the child’s behalf, but the child may have an independent right to notice and a hearing if he or she objects to a proposed waiver.56 Courts may even appoint a guardian ad litem for the purpose of deciding whether to assert or waive the child’s privilege.57

54 A Florida appellate court has expressed this persuasively: “Many children involved with service agencies have suffered repeated violations of their sense of personal privacy. They have been abused by parents or relatives, or transferred from one foster care placement to another, or treated like commodities on an assembly line by harried or overworked agency staff. Respect for confidentiality rights is particularly crucial for such children. It allows them to exert some measure of control over their world, and to develop a degree of trust in those around them. . . . We recognize that a guardian ad litem has an interest in inquiring into the child's progress in therapy. Nevertheless, we conclude that [the child] has a right to assert the therapist/patient privilege.” See S.C. v. Guardian ad Litem, 845 So.2d 953, 960 (Fla. App. 4 Dist.,2003).

55 See, e.g., In re Berg, 152 N.H. 658, 886 A.2d 980 (2005) (denying parent an automatic right to access to child’s therapy records over child’s objection in a custody proceeding, holding that the court must engage in fact-finding to determine whether waiver or assertion of the privilege is in the best interests of the child); McCormack v. Board of Educ. of Baltimore County, 158 Md.App. 292, 857 A.2d 159 (2004) (the test for determining whether the appointment of a guardian is necessary is whether there is a conflict of interest between parent and child so substantial that it imperils a significant interest of the child); In re Daniel C.H., 220 Cal.App.3d 814, 269 Cal.Rptr. 624 (1990) (in a dependency proceeding, except in very special circumstances, if disclosure would have a detrimental effect on the child, a parent may not waive the child’s therapist-patient privilege); In re Adoption of Diane, 400 Mass. 196, 508 N.E.2d 837, 840 (1987) (in adoption proceeding, where the parent and child may well have conflicting interests the mother could not assert the child’s therapist-patient privilege, especially where neither the child's attorney nor the guardian ad litem chose to exercise the privilege); In re M----P----S----, 342 S.W.2d 277 (Mo.App. 1961) (in neglect proceeding, mother could not invoke the child’s privilege to bar the attending physician from testifying).

56 See, e.g., S.C. v. Guardian ad Litem, 845 So.2d 953 (Fla. App. 4 Dist.,2003) (a 14-year-old dependent child may assert a psychotherapist/patient privilege to deny guardian ad litem access to therapeutic records; to the extent the court may have authority to invoked the minor’s privilege, its exercise must, at a minimum, include notice to the minor and an opportunity to be heard).

57 See, e.g., MD Code, Courts and Judicial Proceedings, § 9-109(c) (if a patient is incompetent to assert or waive the therapist-patient privilege, a guardian shall be appointed and shall act for the patient).
Where the child is a ward of the court—that is, where the court already has formal authority over the child—the court itself may have the power to assert or waive privileges, or the agency having legal guardianship may have that power. In some jurisdictions, a judge other than the judge hearing the case will consider and rule on whether the privilege should be waived. Since state laws on these issues are generally not well-developed, perhaps no one clearly possesses the legal authority to enter a waiver on behalf of a child.

Where local law permits children to waive confidentiality, or where the law is not clear, the attorney must determine whether the child has the capacity to make an informed waiver. Functional capacity exists on a continuum, even for adults. Many factors contribute to whether a child has sufficient capacity to make a waiver with respect to a particular issue at a particular time, and there is no bright line test for determining capacity.

Children’s capacity to waive rights has been considered most often in the context of juvenile delinquency cases. The United States Supreme Court has held that juveniles may have the capacity to waive their constitutional rights. In that context, mental health professionals and some courts have found that children’s actual capacity to waive rights has been overestimated. In assessing whether a child has capacity to waive constitutional rights, a crucial issue is the child’s ability to appreciate the consequences of the waiver. It is at the developmental stage of formal operations, which begins around age 12, when the child develops the ability to appreciate consequences of decisions. However, the protections offered by assertion of constitutional rights in a delinquency setting raise different concerns than the protections provided by ethical rules about conflict of interest or assertion of testimonial privileges. Further, the goals of juvenile justice and the child welfare system are different, and statutory rights of confidentiality may not be the equivalent of constitutional rights.

Children’s capacity to give informed consent has also been considered in the context of medical or mental health treatment. The United States Supreme Court, as well as lower courts, has adopted the doctrine of the “mature minor,” who is permitted to make certain medical decisions without parental involvement. In obtaining informed consent on a child-friendly level, the medical or mental health professional will explain the consequences to the child. Similarly, the child’s attorney must explain the likely or possible short- and long-term consequences of the child’s direction. However, before the child has reached the stage of formal operations (and children in child welfare proceedings are often developmentally delayed or impaired), the child is not likely to have the capacity to appreciate the impact on his or her life of the consequences, even when the consequences have been explained.

58 See, e.g., In re D.K., 245 N.W.2d 644 (S.D.1976) (it is within the power of the court to waive the privilege on behalf of the neglected or dependent child to permit the physician to testify when the mother’s treatment of the child was the critical question).

59 See Chapter 29, Representing Children and Youth, §29.5, Determining Decision-Making Capacity
Attorneys, by training, rarely have any specialized skills in judging a person’s legal capacity. When undertaking such a task, it is easy to confuse capacity and wisdom. The fact that the child—or even an adult client—may make choices that the attorney disagrees with or that are foolish is not necessarily an indication that the child lacks capacity to make the choice. Further, the attorney may have a great deal of influence over how the child chooses to address waiver issues, with many children merely following the advice of the attorney. It is tempting to assume that because the child is following the attorney’s advice, the child must possess adequate capacity to make the decision. Therefore, the determination of capacity should be made thoughtfully, based on consideration of many factors, perhaps with the input of other adults who know the child well or have specialized training in the field, such as teachers or mental health professionals. Comment 6 to revised Model Rule 1.14\(^{60}\) provides:

In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as: the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostian.

Most mental health professionals do not have adequate training to determine whether the child has adequate capacity to waive conflicts and privileges. That determination is very specialized. Child development experts may be aware of some means to assess the child’s capacity, but as of the writing of this edition, there are no tests or batteries of tests that will provide a definitive answer. Whether or not a particular child can give informed consent to waive a particular right will remain a problem for future resolution.

Even in situations where a child does not have the legal right to consent to disclosure of his own records, the child’s attorney or guardian ad litem should consider obtaining the child’s written consent in addition to the consent of the legal guardian or court order. For a child old enough to appreciate the concept of confidentiality, it is a matter of respect to allow the child to consent. Of course, if the child withholds consent, the attorney must explain that other parties may be able to obtain the records without his consent. In appropriate circumstances, the attorney may want to interpose an objection to disclosure on the child’s behalf.

\(^{60}\) American Bar Association, Model Rules of Professional Responsibility (2002).
§ 18.5 Confidentiality of Juvenile Court Proceedings

§ 18.5.1 Introduction

Confidentiality of juvenile court proceedings and records has long been an element of the juvenile dependency court process. The longstanding assumption has been that maintaining the confidentiality of juvenile court proceedings, as well as maintaining confidentiality of juvenile court records, protects the children involved. More recently, critics have suggested that the secrecy created by closed courts is not healthy and is not the most conducive to good outcomes. Many states are debating the potential benefits of opening juvenile court proceedings and records. In the Child Abuse Prevention and Treatment Act (CAPTA) amendments of 2003, Congress provided states with the flexibility to allow public access to court proceedings that determine child abuse and neglect, so long as policies ensure the safety and well-being of the child, parents, and families.

Historically, the Supreme Court has enforced the public’s First Amendment right to access, requiring open court proceedings unless a court orders otherwise. The Court has applied a two-prong analysis to determine whether criminal proceedings should be open, considering the history of access to a proceeding and the function of the proceeding. The rationale behind the Court’s decision to open proceedings included the importance of increased public understanding and confidence in the judicial process. In *Globe Newspaper Co. v. Superior Court*, the Supreme Court rejected the Massachusetts Supreme Court’s decision to close a sex offense trial during the testimony of minor victims. The court ruled that closing a criminal proceeding, even for a limited amount of time, violated the First Amendment.

Family law matters have traditionally been viewed as private proceedings. Confidentiality restrictions in child welfare proceedings exist to protect children and families from public exposure of the intimate details of their lives. Even states with open courtrooms generally permit closure of the court during sensitive portions of proceedings, for instance, when a child is testifying. Many states, however, are questioning the value of closed child welfare proceedings and considering the potential benefits of open proceedings.

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61 This section is updated from Chapter 13 of the first edition of this book, co-authored with Amanda George Donnelly.


63 See Richmond Newspaper, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion) (recognizing right of access to criminal trials through the First and Fourteenth Amendments).


§ 18.5.2 Pros and Cons of Open Court Proceedings

In the mid-1960’s, in the juvenile delinquency context, the United States Supreme Court put constraints on the informality of juvenile courts and proceedings done in the name of not stigmatizing children. As the public has clamored for delinquents to be treated more harshly for their crimes, there has been a parallel call to open delinquency hearings to the public, removing the perceived ability of the juvenile to “hide” in juvenile court. The proponents of open dependency courts approach the issue from another side. They question whether the confidentiality of juvenile court has in fact protected its most vulnerable subjects.

Advocates for opening child welfare proceedings argue that the secrecy actually protects the abusive parents, child welfare agencies, attorneys, and judges more than the children. They argue that an open system will increase public awareness and accountability. Others argue that open proceedings will motivate the public to improve the child welfare system. Additionally, some view open proceedings as an opportunity for the court to receive more accurate information in child protection proceedings by allowing families, friends, and neighbors to participate as witnesses.

The Minnesota Supreme Court Foster Care Task Force conducted a three-year pilot project mandating open proceedings and records for neglect and termination of parental rights proceedings. Minnesota’s pilot project permitted access to all documents, except those restricted by rules. Social Services and GAL files were not open, and judges could issue protective orders to keep any file closed. The National Center for State Courts evaluated Minnesota’s project and concluded that “no devastating downsides or remarkable benefits” resulted from open proceedings. In 2002, the Minnesota Supreme Court ordered dependency court proceedings presumptively open.

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See, e.g., In re Gault, 387 U.S. 1, 27-28 (1967) (“the condition of being a boy does not justify a kangaroo court”); Kent v. United States, 383 U.S. 541, 544 (1966) (“there is no place in our system of law for reaching a result of such tremendous consequences without ceremony-without hearing, without effective assistance of counsel, without a statement of reasons”).


State statutes or court rules dictate access to proceedings and records in most jurisdictions. As of 2004, 16 states had open or presumptively open child welfare proceedings, and 10 states had presumptively closed, but judicial discretion to open proceedings; 19 states had closed proceedings for all cases, and 8 states had closed proceedings with some exceptions. 75 Each state with presumptively open proceedings has a provision to close the courtroom when it is determined to be in the best interest of the child involved. 76 A court could also be open but place restrictions on what observers could disclose outside of the courtroom. Judge Leonard Edwards argues that this provision allows the individual juvenile judge to balance the benefits with the specific needs of the family, especially the children. 77 A number of states have statutory regulations providing for presumptively closed proceedings with judicial discretion to open them. 78 Many jurisdictions, however, have continued with all closed proceedings. 79

Opponents of open proceedings argue that open dependency proceedings could psychologically harm the children involved. A finding of the psychological analysis, developmental victimology, indicates that in sexual abuse cases a child’s psychological distress is increased by self-blame for the abuse. Public exposure and the public’s reaction to abuse appear to increase the child’s self-blame, which impacts the duration and severity of the child’s psychological trauma. 80

Additionally, opponents of open proceedings are concerned about the potential negative impact of open proceedings on the child welfare system. Advocates of closed proceedings note the risk for a decrease in admitting to allegations because the admissions would be made public. They are also concerned that open proceedings may cause more contested hearings and requests for closed hearings, resulting in increased costs and delayed placement of children. 81 The critics also point out that there are other mechanisms for overseeing the system, such as citizen review boards, which still maintain the family’s confidentiality.

Critics of open proceedings doubt the value of the media’s access to dependency proceedings. Many child advocates fear that the media will exploit children involved in

78 KAY FARLEY, PUBLIC ACCESS TO CHILD ABUSE AND NEGLECT PROCEEDINGS 3-4 (Nat’l Ctr. for State Courts Issue Brief No. 5, 2003).
79 See DIONNE MAXWELL ET AL., TO OPEN OR NOT TO OPEN: THE ISSUE OF PUBLIC ACCESS IN CHILD PROTECTION HEARINGS (NCJFCJ Technical Assistance Brief, 2004).
dependency proceedings.\textsuperscript{82} They argue that the media feeds on sensationalism and will likely expose identifying information of children involved. The media rarely report on dependency proceedings, and when they do they are under no ethical duty to withhold identifying information.\textsuperscript{83}

NACC has adopted the position that courts should be presumptively closed, with the exception that judges should be allowed to open them on a case-by-case basis. The NACC position on Open Courts in Child Welfare Proceedings can be accessed on the NACC website.\textsuperscript{84}

\textsuperscript{82} Informal survey conducted on the NACC Listserv March 2003.

\textsuperscript{83} See William Patton, \textit{An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement} (forthcoming Fall 2004).

\textsuperscript{84} See NAT’L ASS’N OF COUNSEL FOR CHILDREN, CONFIDENTIALITY OF JUVENILE COURT PROCEEDINGS AND RECORDS, (NACC Policy Papers, adopted April 25, 1998), \textit{available at} \url{http://www.naccchildlaw.org/?page=Policy_Papers}. 

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