

Mandatory Child Abuse Reporting for Judges

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“organizational and systemic
collaborations”



Featuring...

“The Goose”

It's not Daddy's fault that



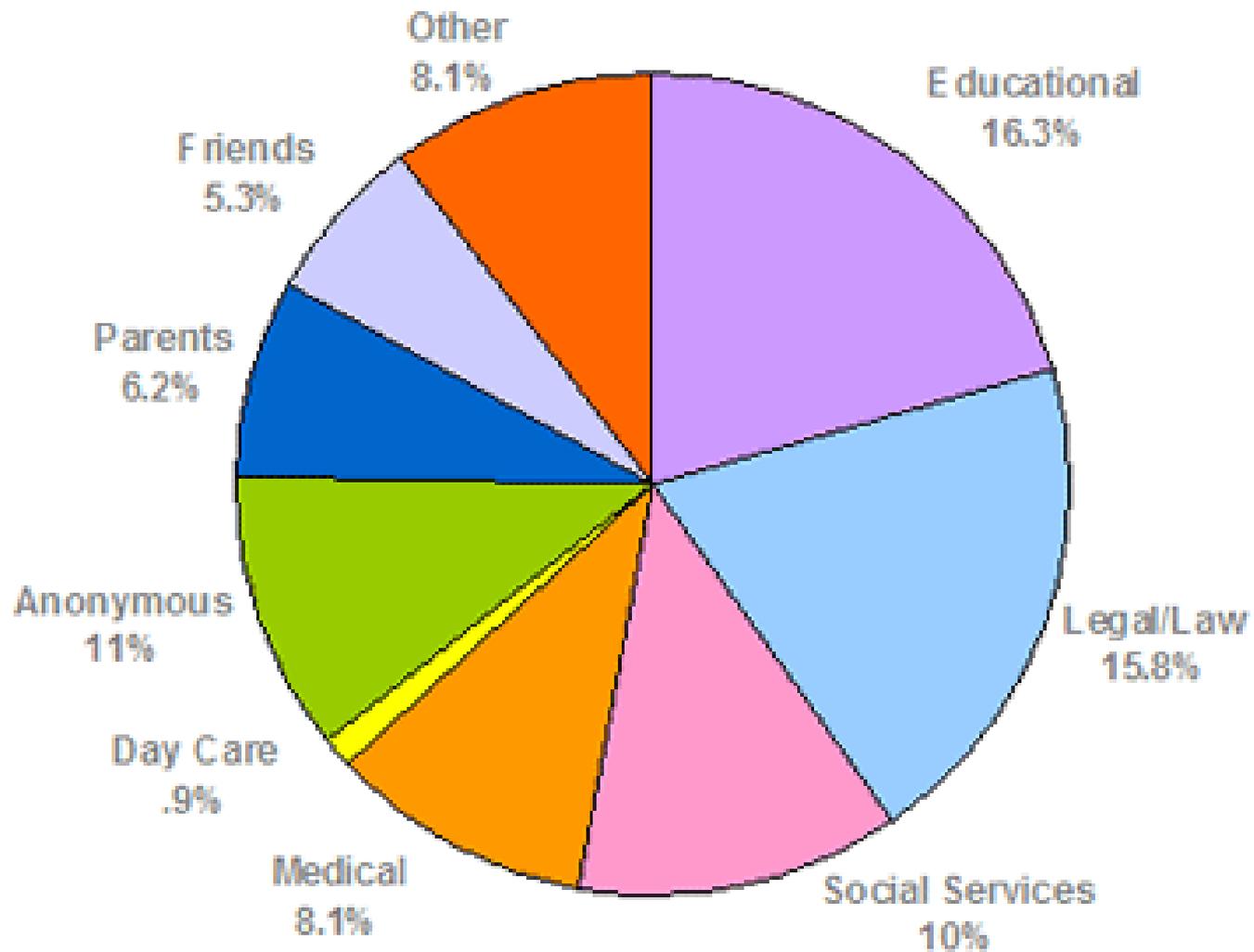
1. You have to do this
2. There is little new about this subject

so be nice to him

75% of child abuse reports in Oregon come from mandatory reporters



Reports of Child Abuse by Source, 2005



15.8%

Second only to “educational



Where did duty to report come from?



CAPTA Overview

- Definitions of abuse
- Require certain professionals report
- Some states: everyone must report
- Some extent of required knowledge
- Failure can result in “criminal” and/or civil liability
- Immunity
- Confidentiality for reporters
- hotline

CAPTA (1974)

- “You will report...”
- Federal money tied to having a mandatory reporting law

Confidentiality of reports...

ORS 419B.035

Reports...are not accessible for public
inspection...

But testimony may become necessary

Immunity

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. (ORS 419B.025)

Zamstein v. Marvasti, 240 Conn. 549, 692 A.2d 781 (1997)

Divorce

Mom accuses Dad of sexually abusing children

Dr. Marvasti evaluates children

Mom gets custody

Dad prosecuted...acquitted

Dad sues Dr. Marvasti...*but for* evaluation no prosecution, no alienation of children's affections

Dad loses

By the way...

CAPTA, ICWA and PL 96-272 are the
watershed of the national consensus on child
welfare policy

—

ASFA, DRA and Foster Connections (and
everything else since) all elaborate on these
three statutes

Duty to Report

ORS 419B.010(1) – Handout p 3 of Statutes

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.

Duty to report arises when

1. Mandatory reporter
2. With reasonable belief
3. That abuse has occurred
4. Comes into contact
5. With victim or perpetrator



Complicated judgment calls...



It's not all so clear...

POLICY

Policy

- **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.

Duty to Report

ORS 419B.010(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



My Mommy says
that last slide shows
That my Daddy
has too much time on his hands

Duty to report arises when

1. Mandatory reporter
2. With reasonable belief
3. That abuse has occurred
4. Comes into contact
5. With victim or perpetrator



Analysis of Duty

“Public Officials”

419B.005(3)

- Attorney (m)

Why these people?

- All people in some states
- Most likely to come into contact with abuse situations (practical)
- Reasonable to “deputize” those upon whom benefit/license is conferred (theoretical)

- The list expands....
- The list does not contract...
- Legislators on the List...

Welcome Aboard!

- 2009 Legislative Session adds:

Pharmacist

Physician, **osteopathic physician, physician assistant, naturopathic physician, podiatric physician and surgeon**, including any intern or resident

Licensed practical nurse [*or*], registered nurse, **nurse practitioner, nurse's aide, home health aide or employee of an in-home health service.**

Welcome Aboard!

- 2009 Legislature adds:

Physical, speech or occupational therapist.

Audiologist

Speech language pathologist

Why compulsory training only for
lawyers?

We will come back
to this

Duty to report arises when

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Analysis of Duty

reasonable cause to believe

419B.005(3) -- Page 2 of Statutes, Page 3 of FAQ

- No definition of reasonable cause.
- Beyond mere suspicion—based on facts
- “good faith determination that abuse has occurred based on facts reasonably believed”

Oregon Rules of Professional Conduct (advisory?)

Rule 1.0(m)

“Reasonable Belief”...denotes that
the lawyer believes...and that the
circumstances are such that the belief
is reasonable.”

Aunt Tillie?

A bus load of sisters?

“...seems reasonable to
me...”

Lawyer may not, however, be the final arbiter
of whether his/her conclusion as to
“reasonable” really was reasonable.

Duty to report arises when

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CAPTA: minimum definition of abuse is any recent failure to act:

- Resulting in imminent risk of serious harm, death, serious physical or emotional harm, sex abuse or exploitation.
- Of a child
- By parent or caretaker responsible for child's welfare

Analysis of Duty

“suffered abuse”

- Definition of Abuse -- ORS 419B.005(1)(a)

What is child abuse, anyway?

ORS 419B.005

(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.

“...as defined by (criminal statute)”

- Does not mean that perpetrator is charged with crime
- Does not mean that that the criminal law standard (beyond reasonable doubt) applies *unless there is a criminal prosecution*

What is child abuse, anyway?

ORS 419B.005

(1)(a) “Abuse” means: (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.

*Intentional act is abuse
even if the intent was
not to cause harm...*

What is child abuse, anyway?

ORS 419B.005

(1)(a) “Abuse” means:

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

Require report of all pregnancies of women under 18?

“...turned out to be an honest but misguided interpretation by a particular state agency... discouraging access to vital prenatal care which ran the risk of making a bad situation worse.”

What is child abuse, anyway?

ORS 419B.005

(1)(a) “Abuse” means:

Sexual exploitation, including but not
limited to:

non educational use of children
to depict sexual conduct

Non educational Use?

What is child abuse, anyway?

ORS 419B.005

(1)(a) “Abuse” means:

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

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

What is child abuse, anyway?

ORS 419B.005

(1)(a) “Abuse” means:

(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.



Ms. Travis contemplates duty upon seeing child eating trans-fatty burger

What is child abuse, anyway?

ORS 419B.005

(1)(a) “Abuse” means:

(G) Threatened harm (*of type listed herein*) to a child, which means subjecting a child to a substantial risk of harm to the child’s health or welfare.

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Ⓞ BABY Ⓞ

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What is child abuse, anyway?

ORS 419B.005

(1)(a) “Abuse” means:

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

What is child abuse, anyway?

ORS 419B.005

(1)(a) “Abuse” means:

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

What is child abuse, anyway?

ORS 419B.005



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



Reasonable *what?*

Duty to report arises when

1. Mandatory reporter
2. With reasonable belief
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5. With victim or perpetrator



Analysis of duty

”come into contact with...”



Personally? Phone? Letter? Drive by?

Analysis of Duty

“come into contact with”

Not reasonable cause based on contact...second hand information can create the duty to report if it creates reasonable cause to believe and report has contact...

Duty to report arises when

1. Mandatory reporter
2. With reasonable belief
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5. With victim or perpetrator



Analysis of Duty

“any child”

- Unmarried person under the age of 18
- Adults? (abused as a child?)
 - No duty
 - Moral obligation?
 - Advise victim to report?

Analysis of Duty

“perpetrator”



not necessarily an adult...

Duty to report arises when

1. Mandatory reporter
2. With reasonable belief
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4. Comes into contact
5. With victim or perpetrator



Duty exists 24/7...

...not just while doing legal
things

...since 1991

Query:

Who defends an “out of the line of duty” claim...

Not the PLF...

Homeowners policy?

“sounds in tort”

Exceptions



Duty to Report First Exception Privilege

ORS 419B.010(1)

...Nothing contained in ORS 40.225 to 40.295 shall affect the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy or attorney shall not be required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295.

Analysis of Duty

first exception

Attorney-client Privilege

ORS 40.225 Rule 503. Lawyer-client privilege

(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

Privileges...

- A privilege excuses the duty to report...
- ...but (except for lawyer client privilege) is not a ground to exclude evidence
 - See ORS 419B.040

Duty To Report

Second Exception

learned of abuse from a report

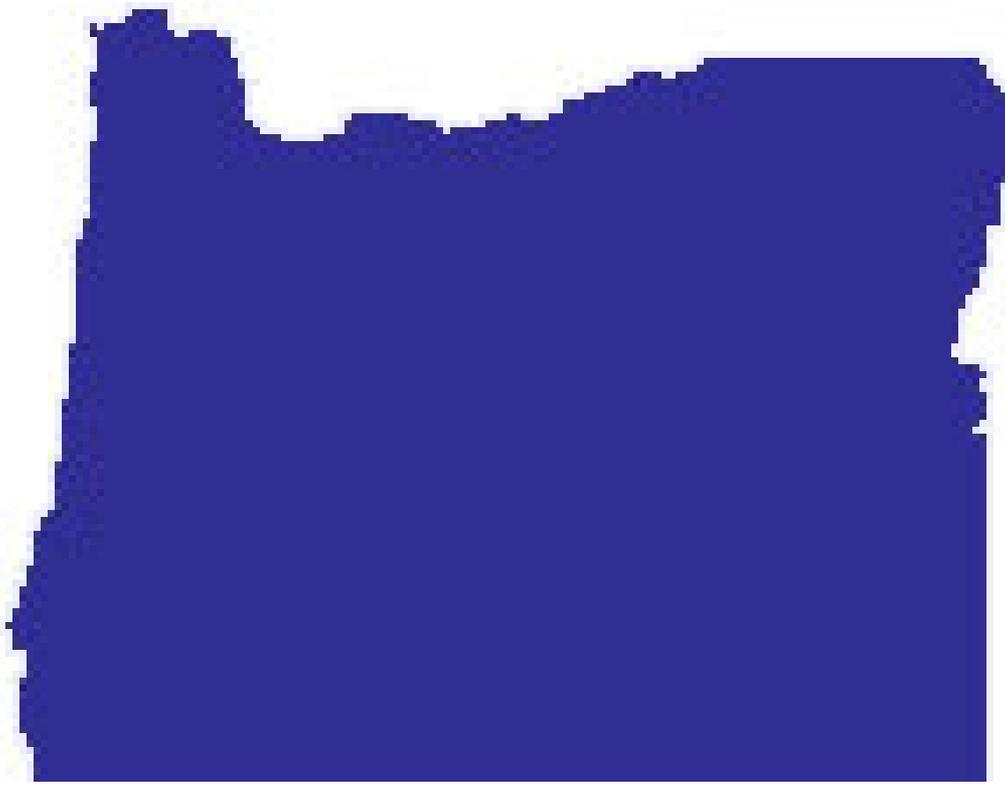
ORS 419B.010(2)

...a report need not be made ... if the ... 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 ... official reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services.

Not in the line of duty...

NOT an exception

Out of Oregon?



Not an exception....

*But
really?*

While we're out of state all state laws are a little different

- Represent mandatory reporters who do business in other states? (make sure they know the law...)
- Represent clients in other states? (make sure you know the law...)

Violation Liability



*Violation
Liability?*

Duty to Report

Penalty for Not Reporting

ORS 419B.010(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

Prosecutions?

Really?

Class A violation

153.018 Schedule of penalties. (1) The penalty for committing a violation is a fine.

...

(2) Except as provided in this section, a sentence to pay a fine for a violation shall be a sentence to pay an amount not exceeding:

(a) \$720 for a Class A violation.

Civil Liability



Theory of recovery....

But for failure to make report...

Private Right of Action

PLF has defended...and paid...two claims arising out of a lawyer's failure to report when there was no privilege or other exception that excused the duty to report...

Repeal private right of action?

Governor vetoed a bill...

And so came mandatory training...

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.

only lawyers and
judges required to
get training

And so I became Mr. Popular

With at least 1/3 of the Bar -- especially from
October – December of every year

Schools required to provide training
to school personnel, but getting it
not a licensure requirement

Analysis of Duty

“immediately”

Analysis of Duty

“report or cause report to be made”

(ORS 419B.015)

Oral report allows for questioning to gather maximum information

Contents of report

What's *required by law*?

ORS 419B.015

...Such reports 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 which the person making the report believes might be helpful in establishing the cause of the abuse and the identity of the perpetrator...

Anonymous Reports

- Liability

- Criminal penalty

on the record report insulates reporter from liability or penalty as well as providing maximum information

Hypothetical #1

Almost every morning on your way to work (anytime between 6:45 and 8:15 am) you see a boy who looks to be about ten years old playing alone in the park. Rain or shine he's wearing a T shirt and blue jeans—nothing else.

Hypothetical #2

In the State of Montana on vacation you hear a waitress in the diner talking about her next door neighbor who makes her daughter kneel (bare kneed) on uncooked kernels of rice when she misbehaves. A twelve year old girl enters the diner and, in overhearing their conversation you become aware of the fact that this is the daughter.

Hypothetical #3

Your best friend and golfing partner, the Right Reverend Charles MacMillan, tells you that on the way to the course he saw a boy whose father was beating him with an orange stick. The boy had on red tennis shoes and blue jeans and a t-shirt that said “Ape Shirt” on the front of it. On the way home you see a boy wearing those clothes walking along the street limping.

Hypothetical #4

Two women are riding a motorcycle (one behind the other). Although they are wearing helmets a child who appears to be about three years old is seated between them with no helmet on. You see the license number of the motorcycle.

Last hypothetical...

You leave your office for the evening and stop to buy some groceries. At the check stand you see a young woman with a child. She becomes frustrated and slaps the child, leaving red mark on the child's cheek

Same but the woman loudly ridicules and chastises the child for no apparent reason. The child begins to shake and wets her pants.

Same except that the woman is standing with the child who has a black eye, finger shaped bruises on her arm and looks very dirty.

Resources

Questions and Answers about reporting abuse
in Oregon

- <http://www.oregon.gov/DHS/children/abuse/cps/report.shtml>

Hot lines...

503 494 7300

503 731 3100

503 670 0246