Dear Members of the Attorney Ethics Advisory Committee:

seeks the Committee's guidance on the application of attorney-client confidentiality obligations when a social worker, employed by , learns of suspected offenses committed against children that would otherwise be required to be reported by the social worker. Because the Committee, the Arizona Attorney General, and the Arizona courts have not addressed this issue, requests an ethics opinion.

I. Background

is a non-profit agency that provides legal and social services to victims of crime. represents crime victims during all phases of the criminal justice process and ensures that victims are able to exercise their state constitutional and state and federal statutory rights. employs five lawyers, two social workers, and two office staff members. The social workers and lawyers work closely together to provide holistic services to victims. The duties of social worker focus primarily on enhancing 's representation of victims. Among other things, the social workers provide emotional and crisis support to victims, keep victims informed of court dates, and accompany victims to court. They do not provide formal counseling or therapeutic services to victims.

The lawyers appear at hearings on behalf of victims, file motions, and work with prosecutors, law enforcement, defense lawyers, and other criminal justice personnel to ensure lawyers also file petitions for special action, that the rights of the victim are enforced. petitions for review, petitions for certiorari, and amicus briefs with appellate courts to develop victims' rights case law in Arizona and the United States.

II. social worker break confidentiality and report suspected physical injury, abuse, child abuse, a reportable offense or neglect?

In Arizona, a social worker must report suspected physical injury, abuse, child abuse, a reportable offense, or neglect to a law enforcement agency, tribal social services agency, or the Department of Child Safety. Lawyers, on the other hand, generally cannot reveal such information unless the client consents or an exception to the duty of confidentiality applies.³ One such exception requires a lawyer to reveal otherwise protected information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial

³ ER 1.6(a).

1

¹ These duties fall under the statutory definition of the "practice of social work." See A.R.S. § 32-3251(11)(b) (stating that the "'[p]ractice of social work' means the professional application of social work theories, principles, methods and techniques to... assist individuals, families, groups ² A.R.S. § 13-3620(A) (stating that "[a]ny person who reasonably believes that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect . . . shall

immediately report or cause reports to be made of this information[.]"); see also id. at 13-3620(A)(1) (including "social worker" in the definition of "person").

bodily harm."⁴ Another exception gives a lawyer the discretion to reveal protected information "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."⁵

's lawyers and social workers, however, anticipate situations where clients disclose cases of physical injury, abuse, child abuse, reportable offenses, or neglect that may not lead to "death or substantial bodily harm." Clients may also disclose *past* abuse by *non*-clients. In these cases, 's lawyers cannot break confidentiality. This leaves the social workers in a bind.

On the one hand, 's social workers must follow the lawyers' ethical obligation to maintain confidentiality. If they do not, they place the lawyers at risk for sanctions. On the other hand, the social workers must follow their own obligation to report even if the injury is not serious or life threatening. If they do not, they may face criminal prosecution and professional sanctions. In short, 's lawyers are unclear on how to advise the social workers when a client discloses past abuse or abuse that may not lead to death or substantial bodily harm.

⁴ ER 1.6(b).

⁵ ER 1.6(d)(6).

⁶ Examples include minor physical injury—such as bruising—and surreptitious photographing. *See* A.R.S. § 13-3623(F)(4) (including "skin bruising" under the definition of "physical injury"); A.R.S. § 13-3620(P)(4) (including surreptitious photographing as a "reportable offense").

⁷ No other exception to confidentiality seems to apply. ER 1.6(c) typically does not apply because either the crime has already occurred or the person that committed the crime is not AVCV's client. ER 1.6(d)(5) does not apply because lawyers are exempt from Arizona's mandatory reporting law and do not need to "comply with other law."

⁸ A non-lawyer, such as a social worker, employed by a law office is bound by a lawyer's ethical obligations. *See* ER 5.3.

⁹ Lawyers must give non-lawyer employees "appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client[.]" ER 5.3. This duty "clearly encompasses the protection of client confidences communicated to a nonlawyer assistant[.]" *Smart Industries Corp.*, *Mfg. v. Superior Court*, 179 Ariz. 141, 146 (App. 1994).

¹⁰ "An injury need not be serious or life threatening to trigger the reporting obligation. All that is necessary is that the injury meet the statutory definition and that [the] person...have a reasonable belief that the infliction of the injury was non-accidental." Ariz. Att'y Gen. Op. No. I07-006 at 2 (2007); see also L.A.R. v. Ludwig, 170 Ariz. 24, 27 (App. 1991) (stating that the threshold for reporting is "low").

¹¹ A.R.S. § 13-3620(O) ("A person who violates this section is guilty of a class 1 misdemeanor, except if the failure to report involves a reportable offense, the person is guilty of a class 6 felony.").

¹² Among other things, AVCV's social workers can face sanctions for "[v]iolating any federal or state law, rule or regulation applicable to the practice of behavioral health." A.R.S. § 32-3251(16)(ii).

III. The Committee should issue an opinion because this question has not been directly addressed by an ethics opinion, Attorney General opinion, or case law and is of statewide importance.

The Committee, the Attorney General, and the courts have not answered the question that poses. The (former) Committee on the Rules of Professional Conduct has issued opinions on related issues, such as a lawyer's duty to report elder abuse and a lawyer's duty to supervise non-lawyers. It has not, however, directly addressed squestion. The Attorney General has also issued opinions on related issues, but has not squarely addressed squestion. Arizona's courts have not offered any guidance either.

Furthermore, this issue may affect many other organizations in Arizona. ¹⁸ This is an ethical issue that lawyers and mandatory reporters working all over Arizona may encounter.

IV. Conclusion

respectfully requests that the Committee accept this request for an ethics opinion and offer guidance on this important issue.

Sincerely,

¹³ Other jurisdictions have addressed similar issues. *E.g.*, State Bar of Nevada, *Standing Comm. on Ethics and Professional Responsibility Op. 30* (2005); District of Columbia Bar, *Legal Ethics Comm. Op. 282* (1998); Maryland Att'y Gen. Op. No. 90-007 (1990).

¹⁴ Ariz. Op. 01-02 (2001).

¹⁵ Ariz. Op. 98-08 (1998); Ariz. Op. 01-11 (2001).

¹⁶ The Committee on the Rules of Professional Conduct referred to the issue in a footnote, but did not give an opinion. *See* Ariz. Op. 01-02, fn. 4 (2001) ("In the somewhat analogous context of mandatory child abuse reporting statutes, ethics committees in other jurisdictions have concluded that an attorney may ethically disclose confidential information when disclosure is required by statute.").

¹⁷ See Ariz. Att'y Gen. Op. I05-007 (2005) (discussing the reporting responsibilities of teachers and school volunteers under A.R.S. § 13-3620); Ariz. Att'y Gen. Op. I07-006 (2007) (discussing reporting responsibilities under A.R.S. § 13-3620 generally).

¹⁸ For example, physicians, physician's assistants, and nurses working in a medical-legal partnership may face this issue. *See* A.R.S. § 13-3620(A)(1) (including physicians, physician's assistants, and nurses in the mandatory reporting statute).