Legal Letters by Andrew Agatston Legal List 10/22/12

"Legal Eagle's Guide to Understanding the Public Policies of Statutes"

Legal Eagles – I was interviewed by the Atlanta NPR station this week regarding mandated reporting, probably because they couldn't find another lawyer nerdy enough to have read the Georgia mandated reporting statute and its new amendments from top to bottom.

In Georgia, and in other states in the U.S., mandated reporting statutes were amended in the last legislative session in the wake of the Sandusky case and the outrage in that case over the more than one-decade failure to report suspicions of alleged child sexual abuse by mandated reporters.

The reporter asked me about the most important points of Georgia's mandated reporting statute that the public needed to know about. I expect that she was waiting for me to recite the technical requirements of reporting; to talk about which professionals were required to report; and to talk about the new requirements just passed by the Georgia General Assembly.

But that's not where I went, because that, to me, is not the launching off point for what is most import. Where I launch, and where I urge mandated reporters to launch, is to first understand the public policy of the mandated reporting statute.

Once mandated reporters understand the public policy, then they are better equipped -- not to mention more inclined -- to follow the law and report their reasonable suspicions of alleged child abuse to their county's CPS office or law enforcement.

And CAC Legal Eagles, it's the same with you. When reviewing any statute that has direct application to your professional responsibilities, the first thing to do is figure out your state legislature's intent in passing the statute in the first place. What is the public policy? What safety values was this law designed to uphold and protect?

With mandated reporting, that answer is probably very clear in the first line or two of your state's mandated reporting statute. Here are the first two lines of Georgia's:

"The purpose of this Code section is to provide for the protection of children whose health and welfare are adversely affected and further threatened by the conduct of those responsible for their care and protection. It is intended that the mandatory reporting of such cases will cause the protective services of the state to be brought to bear on the situation in an effort to prevent further abuses, to protect and enhance the welfare of these children, and to preserve family life wherever possible." (Emphasis added.)

And if that doesn't scream from the rooftops to mandated reporters, there are certain "incentives" dropped like lead balloons to reinforce the public policy. ***Incentive #1:*** In Georgia, it is a crime for mandated reporters not to report their reasonable suspicions of child abuse. ***Incentive #2:*** In Georgia, it is nearly certain -- as in 99.99% -- that mandated reporters cannot be successfully sued for reporting their reasonable suspicions of child abuse. ***Incentive #3:*** In Georgia, the mandated reporters reasonable suspicion is based on ***his or her*** subjective belief that child abuse occurred. Subjective is not objective. Subjective is what I believe. Objective is what the reasonable person believes, the proverbial "what the reasonable man or reasonable woman would do under the same or similar circumstances" standard.

Therefore, if I am a mandated reporter in Georgia and I have a ***subjective belief*** that child abuse has occurred -- even if my ***subjective belief*** is ***objectively unreasonable***, then I report! There will be no second-guessing mandated reporters reporting. Once it is reported, it is up to CPS and/or law enforcement to take it from there to determine whether to precede any further or not.

Public policy. It is very important.

When Legal Eagles understand the public policies of the statutes that impact their professional roles, a couple of things happen.

First, the thought process moves from inward-centered thinking to something else. Taking the mandated reporting statute as an illustration, we know and have heard the myriad reasons why mandated reporters don't report. And most of those reasons are inward-centered, or self-centered:

I am not 100% certain that child abuse occurred, so I am not going to report.

I don't want the alleged perpetrator to find out that I was the reporter.

I don't want to get involved.

I am going to leave it up to someone else to report.

I don't really understand what my mandated reporting duties really are.

I am not sure whom I am supposed to report this to.

You will note the inwardness of these rationales for not reporting. You will also note that none of them have any support in the law itself.

And most importantly, none of them have any relationship to the ***public policy***. You can see that none of these excuses support safety for children, or as the first line says: "***provide for the protection of children whose health and welfare are adversely affected and further threatened by the conduct of those responsible for their care and protection."***

Now let's move on from mandated reporting to another statute that has direct application to what CACs do -- a child hearsay statute. In one of the previous Legal Letters, we highlighted a child hearsay case, but I left a review of the public policy for this week.

So let's look at the public policy of child hearsay, and then see how our understanding of the public policy can help us perform our professional roles in a superior manner.

Why would a state legislature let the hearsay statements of children who allegedly have been sexually abused come into evidence, when it might not allow hearsay statements of the same-aged child who was, for example, injured in an automobile accident into evidence?

This question has been reviewed and answered, and we need to understand the answer. First, state legislatures passing such child hearsay statutes, want to spare children who are abused from further trauma in the courtroom. Next, state legislatures believe it is important for juries to hear the statements of children who have been traumatized by abuse and might be psychologically unable to recount the incident while testifying. Also, state legislatures have found that the rights of victimized children who cannot defend those rights should be protected.

Those are some of the public policies that fall squarely into the wheelhouse of all of your CAC Legal Eagles, because that is what ***you*** are concerned about too. As such, when you interact with a child alleging abuse, you have in mind these public policies that might impact a judge's ruling in allowing a child hearsay statement into evidence.

But there is another point that needs to be understood, and that is that there are other procedural and substantive concerns that must be addressed before a court will allow child hearsay into evidence. These, too, can be viewed as public policies, but these are the public policies placed on the child hearsay statute by trial and appellate judges.

So let's get to them now. Putting aside the *Crawford v. Washington* issues (covered in prior Legal Letters), one of the major concerns before a judge will allow a child hearsay statement into evidence is ensuring that these child hearsay statements are ***reliable.*** That is, judges are not going to allow child hearsay statements into evidence even in the face of the public policies set forth by the legislature, i.e., sparing children from trauma of courtroom, etc.

Judges understand the potential harm of hearsay.

Hearsay cannot be cross-examined because the person who made the statement is not in the courtroom testifying about it. Cross-examination, the law believes, is the ultimate test of the veracity of a witness's statement. Without the child in the courtroom to be cross-examined, something else must substitute for the cross-examination.

That "something else" is ***reliability.*** The child hearsay statement must be reliable. For CAC professionals, they must (1) know this and (2) ensure the reliability when they speak to the child alleging abuse.

In my review of the cases, the following points are important to trial judges when gauging reliability. Know these, and the child's statement is more likely to be allowed to be introduced under a child hearsay statute:

(1) A calm atmosphere and calm circumstances under which the statement is made (2) the spontaneity of the child's statement (3) the child's general demeanor; (4) the presence or absence of threats or promise of benefits; (5) the child's general credibility; (6) the presence or absence of any coaching by parents or other third parties before or at the time of the child's statement; and (7) the nature of the child's statement and type of language used, among others.

Anyone can hear about or know of "child hearsay" or other statutes.

But Legal Eagles understand the underlying public policies!

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