

Opinion No. 2 of 2015

This formal opinion is disseminated in accordance with the charge of the ISBA Legal Ethics Committee and is advisory in nature. It is intended to guide the membership of the Indiana State Bar Association and does not have the force of law.

Issue

If a lawyer learns, while representing a client, that a child is a victim of abuse or neglect, must the lawyer make a report to the Indiana Department of Child Services or local law enforcement?

Brief answer

Lawyers *must* report information relating to child abuse or neglect if they believe it necessary “to prevent reasonably certain death or substantial bodily harm,” regardless of the client’s wishes. However, a lawyer *may not* report

Lawyer’s duty to report child abuse and Rule 1.6 duty of confidentiality

information of lesser harm absent the client’s consent.

Analysis

The conflict between Indiana’s mandatory reporting statute and the duty of confidentiality

Lawyers, particularly those who practice in the family law arena, may encounter information relating to child abuse and neglect, from the trivial to the horrifying, and allegedly perpetrated both by their clients and others. In ordinary circumstances, of course, a lawyer generally may not “reveal information relating to representation of a client”¹

But the Indiana Code broadly requires any “individual who has reason to believe that a child is a

victim of child abuse or neglect” to “immediately make an oral report to (1) the department [of Child Services] or (2) the local law enforcement agency.”² Failure to do so is a Class B misdemeanor.³

The statute is broad and, unlike some other states, does not except lawyers from the reporting requirement.⁴

At least some aspects of this broad command seem intentional. The General Assembly could reasonably conclude that the costs of over-reporting child abuse and neglect are less than those of under-reporting, particularly given the nightmare scenario – a child suffering harm merely because someone “didn’t want to get involved.” But for the vast majority of allegations of untoward parenting that become known to a lawyer, the reporting statute conflicts with a lawyer’s duty of confidentiality.

It is no answer to say that a lawyer should prevail on her client to report the abuse or neglect. First, the mandatory reporting statute requires the report to occur “immediately,” and the Supreme Court has held that a four-hour delay in reporting, for purposes of conducting an “investigation” into an allegation’s veracity, violated the statute.⁵ Second, as is discussed more fully below, a client’s reluctance to report abuse, even that apparently perpetrated by others, might be legitimate.

It is likewise no answer to say that the lawyer is not subject to the mandatory reporting statute because the lawyer has no direct or firsthand knowledge of the abuse or neglect, so that even if the client has an obligation to report, the lawyer does not. A “reason to believe” abuse or neglect has occurred

is defined only as “evidence that, if presented to individuals of similar background and training, would cause the individuals to believe that a child was abused or neglected.”⁶ Indeed, in *Gilliand v. State*,⁷ female high school volleyball players told their parents that an older male coach had given them “foot rubs” and also reported instances of “lotion being rubbed on backs; some textings; [and] hanging out with the girls.”⁸ The parents in turn reported the allegations to the athletic director, who did not make a report to the Department of Child Services or local law enforcement. The Court of Appeals affirmed the trial court’s denial of the athletic director’s Motion to Dismiss the criminal failure to report charge against him. *Gilliand* seems to make clear, therefore, that there is no “hearsay” exception to the mandatory reporting law.

There is, then, a conflict between the lawyer’s ethical duty to keep silent and the apparent statutory duty to speak,⁹ one the Committee, consistent with its mission, addresses here. However, despite its substantial agreement with every other state bar ethics committee facing this topic, the ISBA Legal Ethics Committee notes, as have others,¹⁰ that the question is a difficult one on which reasonable, conscientious lawyers can disagree. The Committee cautions the reader that the Indiana Supreme Court is the final authority on both Indiana law and the professional conduct of Indiana lawyers.

For the following constitutional, pragmatic and statutory reasons, the Committee believes the lawyer’s duty of confidentiality is generally paramount over the general duty to report.

Initially, the Committee notes that, given the Supreme Court’s authority over the legal profession,

its Rules of Professional Conduct control over conflicting legislation.

Article III of the Indiana Constitution provides that “[t]he powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another.” The Constitution further provides that the Indiana Supreme Court has jurisdiction over attorney “discipline or disbarment.”¹¹ It is this authority that gives the Supreme Court the power to regulate the attorney-client relationship through its Rules of Professional Conduct.¹²

As above, those Rules delineate both a general principle of confidentiality, with an exception when necessary “to prevent reasonably

certain death or substantial bodily harm.” The Committee agrees with the Kentucky Bar Association’s similar constitutional analysis: “... the Court, in Rule 1.6, has given lawyers discretion in these scenarios ... a holding that the [mandatory reporting] statute overrides this grant of discretion would violate the separation of powers.”¹³

Indeed, requiring lawyers to protect their client’s confidences likewise protects the attorney-client relationship – at a time when it is most needed. Comment [2] to Rule 1.6 broadly states:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation. ... This contributes to the trust that is the hallmark of the client-lawyer relationship. The client

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is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. ...

If attorneys are mandatory reporters, this “fundamental principle” is undermined regardless of when the lawyer discloses the potential for reporting. If the lawyer informs the client that reports of abuse or neglect are subject to disclosure, the client will likely withhold such information, to the detriment of everyone involved. If the lawyer waits for such a disclosure, then reports it over the client’s objection, that betrayal, in the client’s eyes, will likely result in irreversible harm to the client’s relationship with any attorney – to the client’s, and potentially the children’s, detriment.¹⁴ As before, the Committee agrees with the reasoning of the Kentucky Bar Association in reaching a similar conclusion: “... it would greatly hamper attorneys acting as counsel for accused if all client communications were subject to a superior obligation to disclose.”¹⁵

The harm of disclosure can best be understood by a commonly occurring example: A domestic violence victim with children consults a legal services attorney, detailing the abuse she has endured, in the course of seeking advice on obtaining a protective order.

Instead, the legal services attorney, based on the mandatory reporting statute, immediately notifies the Department of Child Services of Mother’s disclosures. As subjecting children to domestic violence indubitably subjects them to harm,¹⁶ DCS would be fully justified, if they questioned Mother’s commitment to leaving

her batterer, in placing the children in foster care; Mother might even be subject to criminal prosecution for “subjecting” her children to the harm.¹⁷ Such an outcome would certainly discourage future domestic violence victims from seeking protection.

The Rules’ approach, on the other hand, would allow the attorney to make a commonsense, reasonable determination of whether the children will be subject to “reasonably certain death or substantial bodily harm,” and only disclose to prevent that harm.

As the above scenario suggests, a lawyer’s duty to keep confidential information relating to the representation extends not only to information about the client’s conduct, but other information relating to the representation, including the conduct of others. The lawyer’s duty of confidentiality is much broader than the attorney-client privilege and can even extend to

matters that are part of the public record in a case.¹⁸

Lawyers, of course, are not alone in reconciling their traditional duty of confidentiality with the duty to report child abuse.¹⁹ In the only reported case involving such a scenario, a religious institution terminated a rabbi for disclosing a congregation member’s confidences. Unfortunately, the rabbi proceeded *pro se*, and the Court of Appeals, in a decision in which all three judges wrote opinions, did not reach the issue directly.²⁰ Judge Vaidik, however, in a concurring opinion, noted that “[f]ailure to report child abuse is a criminal offense. ... This law does not exempt spiritual leaders from reporting. ...”²¹

Indeed, it does not; in fact, the General Assembly specifically purported to abrogate numerous common-law privileges as part of the

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mandatory reporting statute.²² Significantly, however, the lawyer-client privilege is not among them. The Committee again agrees with Kentucky Bar Opinion E-360; noting the attorney-client privilege's similar absence from that state's abrogation statute, the Kentucky Bar Association concluded: "... it would appear the above quoted language was intended to inform us, in a roundabout way, that lawyers are not required to report abuse or neglect if reporting would violate the attorney-client privilege."²³

Mandatory duty to report in serious cases

Notwithstanding the above, the Committee believes a lawyer *must* report that a child is a victim of abuse or neglect "to prevent reasonably certain death or substantial bodily harm."

Initially, the constitutional conflict mentioned above is no longer present, as the Supreme Court, through the Rules of Professional Conduct, specifically authorizes lawyers to disclose client information in such situations.²⁴ More significantly, while the prudential concerns (harm to the attorney-client relationship chief among them) remain, Rule 1.6 "recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm."²⁵ The reasons for "exempting" attorneys from the general reporting rule being, in such situations, either nullified or substantially negated, the general reporting requirement applies, and lawyers must report.

Conclusion

Concurring in *Ballaban v. Bloomington Jewish Community*, Chief Judge Vaidik wrote:

Children are notoriously reticent to report abuse. When the victims and their loved ones do confide in relatives, teachers, ministers, counselors, medical doctors, or other adults, the legislature has determined that it is a crime for those adults to fail to report the abuse to the authorities. ... This reporting law is designed to, and does, protect children from future abuse.²⁶

The Committee agrees; and if disclosure is reasonably necessary "to prevent reasonably certain death or substantial bodily harm," lawyers must comply with the mandatory reporting statute to prevent the overriding harm to children. But in any other situation, the Committee agrees with Prof. Robert P. Mosteller:

Lawyers are rarely among the first to learn of abuse, and the net loss of information occasioned by the privilege is relatively minimal as it is the privilege's very promise of confidentiality that encourages the initial candid and damaging revelation. Overall, the precedent set for lawyers as reporters of crime and as informants on their clients, although capable of being limited to the child abuse area, will likely have far-reaching, unfortunate consequences that outweigh the beneficial effects of potentially increased reporting in combating the horror of child abuse.²⁷

The Committee concludes that, absent taking action "to prevent reasonably certain death or substantial bodily harm," lawyers must maintain their longstanding duty of confidentiality. ⚖️

1. Indiana Rule of Professional Conduct 1.6(a).
2. Indiana Code §§ 31-33-5-1 and 5.
3. Ind. Code §31-33-22-1(a).
4. See U.S. Dept. of Health & Human Svcs., Child Welfare Information Gateway, "Mandatory Reporters of Child Abuse and Neglect" 3, ("Most states expressly require reporting despite a claim of privilege,

- but “[t]he attorney-client privilege is most commonly affirmed.”) Accessible at https://www.childwelfare.gov/systemwide/laws_policies/statutes/mandata.cfm.
5. *Smith v. State*, 8 N.E.3d 668 (Ind. 2014).
 6. Ind. Code §31-9-2-101.
 7. 979 N.E.2d 1049 (Ind. Ct. App. 2012).
 8. *Id.* at 1052.
 9. *See also Daymude v. State*, 540 N.E.2d 1263, 1265 (Ind. Ct. App. 1989) (“[I]n Indiana ‘any individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report’ as required by statute [emphasis added]. Thus, this language and the physician-patient privilege place conflicting duties upon a physician who learns of child abuse during the course of a physician-patient relationship.”) (citation omitted) (emphasis, as noted, in original).
 10. Donald R. Lundberg, “Mandatory Child Abuse Reporting by Lawyers,” *Res Gestae*, Dec. 2011 at 31.
 11. Ind. Const. Art. VII, sec. 4 (“The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. . . .”)
 12. *See, e.g., Order Amending Indiana Rules for Professional Conduct*, 92S00-1401-MS-57 (Sep. 2, 2014).
 13. Kentucky Bar Ass’n Ethics Opinion KBA E-360 at 2 (1993) (citing Indianapolis Op. 1-1986). *See also Williams v. State*, 681 N.E.2d 195, 200 n. 6 (Ind. 1997) (citation omitted) (“To the extent there are any differences” between evidentiary statutes and the Indiana Rules of Evidence, the Rules of Evidence control); Nebraska Attorney General Op. No. 207 at 5 (1982), child abuse statute’s “curtailment of the common law attorney/client privilege . . . would be difficult to defend as to constitutionality.” For this reason, the Committee does not believe that the exception to confidentiality “to comply with other law,” Ind. R. Prof. Cond. 1.6(b)(6), resolves the issue, nor does it believe that Ind. Code §31-33-6-1, which provides that reporters are “immune from any civil or criminal liability that might otherwise be imposed” because of their reporting, would not in and of itself preclude a disciplinary action for violating confidentiality by reporting.
 14. Megan M. Smith, “Causing Conflict: Indiana’s Mandatory Reporting Laws in the Context of Juvenile Defense,” 11 *Ind. Health L. Rev.* 439 (2014).
 15. KBA E-360 at 2 (citing Indianapolis Op. 1-1986).
 16. *See In re E.M.*, 4 N.E.3d 636 (Ind. 2014).
 17. *See* Ind. Code §35-46-1-4(a)(1) (defining criminal Neglect of a Dependent as placing “the dependent in a situation that endangers the dependent’s life or health”); *but see Patterson v. State*, 979 N.E.2d 1066 (Ind. Ct. App. 2012) (holding that a protected person cannot be held criminally liable for “aiding” violation of a protective order).
 18. *In re Anonymous*, 932 N.E.2d 671, 674 (Ind. 2010).
 19. *E.g., State v. I.T.*, 4 N.E.2d 1139 (Ind. Ct. App. 2014) (therapists), *Devore v. State*, 658 N.E.2d 657, 658 (Ind. Ct. App. 1995), *reh’g denied, trans. denied* (health care workers).
 20. *Ballaban v. Bloomington Jewish Community*, 982 N.E.2d 329 (Ind. Ct. App. 2013).
 21. *Id.* at 341-342 (concurring opinion).
 22. Ind. Code §31-32-11-1.
 23. KBA E-360 at p. 2.
 24. Ind. R. Prof. Cond. 1.6(b)(1).
 25. Comment [6] to Ind. R. Prof. Cond. 1.6.
 26. *Ballaban*, 982 N.E.3d 329, 341-42 (concurring opinion) (citations omitted).
 27. “Child Abuse Reporting Law and Attorney-Client Confidences: The Reality and Specter of Lawyer as Informant,” 42 *Duke L. J.* 203, 207 (1992).