



# ISBA Professional Conduct Advisory Opinion

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**Opinion No. 12-08**  
**March 2012**

**Subject:** Confidentiality; Government Attorneys

**Digest:** Child sex abuse is “substantial bodily injury” for purposes of the Illinois Rules of Professional Conduct, so an Illinois lawyer must reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain child sex abuse. Whether an Illinois lawyer has a duty to report suspected child sex abuse under a federal statute is a question of law beyond the competence of the Committee.

**References:** Illinois Rule of Professional Conduct 1.6

ISBA Opinion 12-03 (January 2012)

*Restatement Third, The Law Governing Lawyers* § 66 (2000)

*Balla v. Gambro, Inc.*, 145 Ill.2d 492, 584 N.E.2d 104 (1991)

42 U.S.C. § 13031

## **FACTS**

The inquiring lawyer, admitted in Illinois, works as a civilian lawyer providing legal assistance to military personnel and their families at a federal military facility. A divorce client has disclosed to the lawyer that the client’s spouse had committed various infidelities, including soliciting sex from minors. When the lawyer advised the client to report the matter to law enforcement authorities, the client expressed a strong reluctance to do so. The client also claimed to lack proof of any actual sexual assault of minors although some of the spouse’s emails that the client claimed to have seen, which the lawyer has not seen, indicated that the spouse was interested in meeting children for sex.

The lawyer asks whether there is a duty under the Illinois Rules of Professional Conduct or federal law to report this situation to the appropriate law enforcement authorities.

### OPINION

This inquiry raises issues of a lawyer's duty to reveal information to prevent abuse of a minor. The general rule governing client confidentiality is Illinois Rule 1.6, which provides in relevant part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

...

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

As explained in Comment [3] to Rule 1.6, the rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." See, e.g., ISBA Opinion 12-03 (January 2012) (identity of lawyer's client protected). Comment [3] also explains that a lawyer may not disclose protected information except as authorized by the Rules or other law. Paragraph (b) of the rule lists six situations where disclosure of client information by the lawyer may be permitted, but is not required. Paragraph (b)(1) permits disclosure to the extent the lawyer reasonably believes necessary to prevent the lawyer's client from committing certain crimes. Because paragraph (b)(1) applies only to situations where the lawyer's client is the potential perpetrator, it would not appear relevant to the situation presented, where the client's spouse is the person who may intend a criminal act.

Paragraph (b)(6) permits disclosure to the extent the lawyer reasonably believes necessary to comply with "other law" or a court order. Comment [12] to Rule 1.6 explains that whether such other law supersedes Rule 1.6 is a question of law beyond the scope of the rules. The Comment further explains that when disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4 (lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). If, however, the other law requires disclosure, then paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

There is a federal statute, 42 U.S.C. § 13031, concerning child abuse reporting. Paragraph (a) of § 13031 requires a person engaged in a professional capacity on federal land or in a federal facility who “learns of facts that give reason to suspect that a child has suffered an incident of child abuse” to report promptly to designated authorities. Whether this statute applies to the Illinois lawyer in the situation presented is a question of law beyond the competence of this Committee. However, if § 13031 applies and requires a report, then the inquiring lawyer would be permitted by Rule 1.6(b)(6) to make the disclosures required to comply with the statute.

The other potentially relevant provision of Rule 1.6 is paragraph (c), which directs that a lawyer “shall” reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm. In contrast to the permissive disclosures under paragraph (b), the duty to disclose under paragraph (c) to prevent reasonably certain death or substantial bodily injury is mandatory. And this duty is neither excused nor negated by the client’s wishes or instructions. See *Balla v. Gambro, Inc.*, 145 Ill.2d 492, 502, 584 N.E.2d 104, 109 (1991) (in-house lawyer “had no choice but to report to the FDA” employer’s plan to distribute defective dialysis machines). At least twelve other states have a similar mandatory disclosure rule. See Arizona Rule 1.6(b); Connecticut Rule 1.6(b); Florida Rule 4-1.6(b)(2); Iowa Rule 32:1.6(c); Nevada Rule 1.6(c); New Jersey Rule 1.6(b)(1); North Dakota Rule 1.6(b); Tennessee Rule 1.6(c)(1); Texas Rule 1.05(e); Vermont Rule 1.6(b)(1); Washington Rule 1.6(b)(1); and Wisconsin Rule 20:1.6(b).

Also in contrast to paragraph (b)(1), paragraph (c) does not limit disclosure to acts of the lawyer’s client. Thus, in the situation presented, the fact that the potential perpetrator is the client’s spouse rather than the client would not relieve the lawyer of the duty to disclose an otherwise reportable threat of death or substantial bodily harm. Whether there is a reportable threat will usually depend upon the specific circumstances because paragraph (c) requires that the lawyer “reasonably believes” that the disclosure is “necessary” to prevent “reasonably certain” death or substantial bodily injury. In the situation presented, it is not clear whether the spouse’s alleged interest in meeting children for sex is a realistic threat to any particular child or merely a prurient fantasy. For there to be a mandatory duty to disclose, the threat must meet the tests of paragraph (c). It should also be noted that paragraph (c) applies only to future harm rather than past conduct.

Finally, it seems clear that child sex abuse should be regarded as “substantial bodily harm” for purposes of Rule 1.6(c). By definition, sex acts with minors are nonconsensual; and such activity likely involves violence and intimidation. Comment c to § 66 of *Restatement Third, The Law Governing Lawyers* (2000), includes “child sexual abuse” in the definition of “serious bodily harm” for purposes of § 66, which permits a lawyer to use or disclose confidential client information when the lawyer reasonably believes necessary to prevent reasonably certain death or serious bodily harm to a person.

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