

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-360
Issued: July 1993

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 1.6 and the Comments, which were substantially amended and renumbered. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: Under the Rules of Professional Conduct, is it mandatory that an attorney report dependency, neglect or abuse of a child which the attorney learns of in the process of representing a client?

Answer: No. However, in some circumstances reporting is permitted.

References: Rules of Professional Conduct 1.6(b)(2) and (3); KRS 620.030-50; Cleveland Op. 92-2; Indianapolis Op. 1-1986; Wisconsin Op. E-88-11 (1988); American Academy of Matrimonial Lawyers, Standards of Conduct (1991).

OPINION

The privileged nature of attorney-client communications is well established in Kentucky law. Insofar as the Rules of Professional Conduct are concerned, the general rule is that a lawyer "shall not reveal information relating to the representation of a client unless the client consents after consultation." Rule 1.6(a). Yet, there are exceptions to this rule which permit, but do not require disclosure.

Insofar as future conduct is concerned, a lawyer is permitted, but is not required, by the rules of ethics to reveal otherwise protected information "to the extent the lawyer reasonably believes necessary ... to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Rule 1.6(b)(1). This exception may apply to child abuse, and justify disclosure, whether the abuser is the client or someone else. Compare Wisconsin Op. E-88-11 (1988) (permissive disclosure if the lawyer reasonably believes that the abuse will continue and result in substantial bodily or emotional harm); American Academy of Matrimonial Lawyers, Standards of Conduct, Sec. 2.26 (1991) ("An attorney should disclose evidence of a substantial risk of physical or sexual abuse of a child by the attorney's client.").

Insofar as past conduct is concerned, the privilege must be invoked where applicable, but a lawyer may reveal otherwise protected information to the extent the lawyer reasonably believes necessary ... to comply with other law or a court order. Rule 1.6(b)(3).

Allegations of abuse often surface in the context of disputes over custody or visitation. Such allegations are troublesome enough when the attorney's client is making allegations of abuse or neglect by another party; and they are even more problematic when the attorney receives information that suggests that his or her own client may be guilty of abuse or neglect. Reports of child abuse or neglect commonly result in civil or criminal proceedings, and it would greatly hamper attorneys acting as counsel for accused if all client communications were subject to a superior obligation to disclose. See Indianapolis Op. 1-1986 (the legislature surely would have explicitly addressed the attorney-client privilege if it had intended to abrogate it). Compare Cleveland Op. 92-2.

KRS 620.030 provides for "mandatory reporting" of child abuse and neglect, but KRS 620.050(2) states in part:

Neither the husband-wife nor any professional-client/patient privilege, except the attorney-client and clergy-penitent privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding a dependent, neglected or abused child or the cause thereof... .

It is not the Committee's mandate to make a determination of the meaning of a particular statute - the attorney must ascertain his or her obligations under the statute. Accord Cleveland Op. 92-2. The Attorney General can provide an advisory opinion construing this statute. However, it would appear that 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.

Nevertheless, the question remains as to whether the privilege alluded to in the statute is the more narrow evidentiary privilege, or the broader ethical requirement that the lawyer not disclose "information relating to the representation of the client." Whether KRS 620.030 is in conflict with or supersedes Rule 1.6 is a matter of interpretation that cannot be resolved by this Committee. See Comment [21] to Rule 1.6. That Comment also proposes that "a presumption should exist against such a supersession." We also note in passing that an attorney might very well argue that the Court, in Rule 1.6, has given lawyers discretion in these scenarios [even the 1.6(b)(3) exception is permissive and not mandatory], and that a holding that the statute overrides this grant of discretion would violate the separation of powers. Indianapolis Op. 1-1986.

The Committee can only construe the Rules of Professional Conduct and cannot advise the lawyer on questions of law. However, in light of the Comments to the Rules, which are more specific than the general statute, and were adopted later in time, we conclude that the Rules and KRS 620.030 are not in conflict.

For the foregoing reasons, we answer the question with a No.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.