

LEGAL ASSISTANCE

Confidentiality and Duty to Report Potential Sexual Abuse of Minors

Occasionally we are asked to reconcile the Air Force Rules of Professional Conduct (AFRPC) with state bar rules that have different provisions. The following scenario is provided to assist in this regard. The question presented is whether under the applicable rules of professional conduct and federal law applicable to a Special Assistant U.S. Attorney (SAUSA), a JAGC attorney has a duty to report potential sexual abuse of a minor by a non-client, which was disclosed during legal assistance. We conclude that the attorney does not have a duty to report the potential child abuse under the AFRPC or due to the attorney's status as a SAUSA. However, the attorney may disclose the suspected abuse, provided the attorney consults with Illinois State Bar officials¹ and they may determine that such reporting is required under Illinois Rule of Professional Conduct (IRPC) 1.6.

Facts

An Air Force attorney assigned to Base X is a SAUSA and is also assigned legal assistance duties. The attorney is a member of the Illinois bar. During a legal assistance visit concerning divorce, the client complained about her husband, citing numerous infidelities. The client then provided the attorney with emails in which the husband appeared to be soliciting sex from certain children while he was travelling abroad on business. Several potential meetings between the husband and different children were scheduled to occur in the coming months. The client expresses reluctance to report the matter because the husband is her sole source of financial support. The attorney requests guidance regarding the duty to report under the IRPC and a federal statute that mandates reporting of child abuse.

Rule

Several rules apply to this analysis.

AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, paragraph 1.6.2, indicates that "information received from a client during legal assistance, attorney work-product, and documents relating to the client are confidential. Release them only with the client's express permission, pursuant to a court order, or as otherwise permitted by the *Air Force Rules of Professional Conduct* and the *Air Force Standards for Civility in Professional Conduct* and other Air Force rules pertaining to ethical conduct and professional responsibility." Additionally, such a release should only be done after contacting AFLOA/JACA.

¹ This scenario considers an attorney licensed in Illinois. Accordingly, the analysis focuses on the difference between the Air Force Rule of Professional Conduct, Rule 1.6, *Confidentiality of Information*, and the equivalent Illinois rule. It is important to note that the confidentiality rule varies from jurisdiction-to-jurisdiction. States differ on the circumstances under which disclosures are authorized and whether they are permissive or required.

AFRPC 1.6, *Confidentiality of Information*. AFRPC 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) [Modified] to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . .

IRPC 1.6, *Confidentiality of Information*. IRPC 1.6 states:

(a) A lawyer shall not reveal information relating to 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 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 reasonable certain death or substantial bodily harm.

18 U.S.C. § 2423(c) prohibits an American citizen or alien admitted for permanent residence who travels in foreign commerce from engaging in any illicit sexual conduct. The maximum punishment includes imprisonment for 30 years.

42 U.S.C. § 13031, *Child Abuse Reporting*, states:

(a) In general. A person who, while engaged in a professional capacity or activity described in subsection (b) of this section on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency under subsection (d) of this section.

(b) Covered professionals. Persons engaged in the following professions and activities are subject to the requirements of subsection (a) of this section: ...

(6) Law enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees...

18 U.S.C. § 2258 makes a failure to report child abuse under 42 U.S.C. § 13031 punishable by up to 1 year in prison.

Analysis

The following analysis considers the interplay of various rules cited above.

Historical Context of Rule 1.6. Both the AFRPC and IRPC are modeled after version of the ABA Model Rules. As such, a brief discussion of the pertinent history is important to facilitate this analysis. In 2002, the ABA amended the Model Rules, broadening the exception related to death and substantial bodily harm.² Additionally, in 2002 the ABA added an exception related to disclosures in order to comply with other law or court order.³ The ABA drafters did not view this change as substantive as the previous comments to the Rule indicated that disclosure was prohibited except as authorized by other law.⁴ The AFRPC reflect the ABA Rules as they existed before 2002 while the IRPC largely reflect the ABA Rules as amended in 2002.

AFRPC 1.6 provides a narrow exception. AFRPC 1.6 provides that an attorney *may* reveal client confidences to prevent the *client* from committing a *criminal* act the lawyer believes is likely to result in *imminent* death or substantial bodily harm. In this case, the client is not discussing her own future criminal conduct, but that of her husband. As such, the rule does not authorize a disclosure of the husband's potential crime.

² ABA/BNA Lawyer's Manual on Professional Conduct § 55:1001, 1004 (2006).

³ ABA/BNA Lawyer's Manual on Professional Conduct § 55:1203 (2006).

⁴ *Id.* At 1204.

(1) The introduction to the AFRPC indicates that while the comments to the ABA Model Rules were not incorporated, “counsel are encouraged to consult them for guidance and Model Rule 1.6 indicated that another law may authorize disclosure of confidential information, stating that “[a] lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”⁵ Given that the AFRPC states the ABA Model Rules’ commentary is a useful source of guidance, it is reasonable to conclude that the AFRPC permit disclosures required by other law. Whether another law requires such disclosure is discussed below.

IRPC 1.6 provides a broader exception. IRPC 1.6(b)(1) states that a lawyer *may* reveal information to prevent the client from committing a crime in circumstances other than those involving death or substantial bodily harm. However, this provision is specifically limited to crimes committed by the client, which is not involved in the present case. IRPC 1.6(b)(6) indicates a lawyer may reveal confidential information to comply with other law. Whether another law requires such disclosure will be discussed below. IRPC 1.6(c) indicates “A lawyer *shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonable certain death or substantial bodily harm.” This provision reflects the broader exception adopted by the ABA in 2002. The rule focuses on preventing death or bodily harm, regardless of whether or not a crime is involved, whether it involves the client or whether it is imminent.⁶ Additionally, the IRPC makes the obligation mandatory. Arguably, IRPC 1.6(c) requires disclosure to law enforcement in this case to prevent substantial bodily harm to minors based on the apparent threat posed by the husband.

42 U.S.C. § 13031 does not mandate disclosure in this context. The attorney that provided the legal assistance also serves as a SAUSA. As such, the attorney seeks guidance regarding reporting obligations under 42 U.S.C. § 13031 to report the suspected child abuse to appropriate authorities. The statute indicates that a person, who is engaged in the professional capacity or activity of a criminal prosecutor, who learns of facts indicating suspected child abuse, must report such abuse. Because the attorney was acting as a legal assistance attorney and not as a SAUSA at the time the information was obtained, the attorney cannot be said to have been engaged in the professional capacity or activity of a criminal prosecutor within the meaning of the statute. Additionally, the statute describes a duty to report information that a child has suffered abuse. The facts presented discuss future potential abuse, not abuse that a child has already occurred. For these

⁵ See Ethics 2000 Commission Report on the Model Rules of Professional Conduct, available at: http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html.

⁶ ABA/BNA Lawyer’s Manual on Professional Conduct § 55:1004 (2006).

reasons, we conclude the attorney does not have a duty to report under 42 U.S.C. § 13031.⁷ If such a duty is inapplicable, then the provisions of the ethics rules that pertain to disclosures based on requirements from “other law” are not met at least as they rely on 42 U.S.C. § 13031.

IRPC 1.6’s mandatory disclosure requirement can be honored consistent with the AFRPC. When there is a difference between state rules and the AFRPC, the Air Force provisions control.⁸ Having said that, the intent of the AFRPC is not to place an Air Force attorney in violation of a state bar *mandatory* reporting requirement. In this instance, the IRPC provision can be reconciled by considering it as “other law” that permits disclosure under the AFRPC. “Other law” is not defined in the commentary to the ABA Model Rules. The *Black’s Law Dictionary* definition of law includes “[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action...”⁹ The IRPC is a Supreme Court of Illinois Rule. We conclude that it falls within the definition of “other law,” as that term is used in the ABA Model Rule. The AFRPC do not have an explicit “other law” provision. However, as previously stated, when the ABA added that provision in 2002, the drafters indicated it did not represent a substantive change. In essence, it added what the comments already made clear, that an attorney may be required by other law to release information protected by Rule 1.6.¹⁰ We conclude that the IRPC provision can be considered an “other law” that permits disclosure under the AFRPC, provided that the attorney consults with the Illinois State Bar and the Illinois authorities conclude that the facts presented trigger mandatory reporting under IRPC 1.6. If a disclosure is required, the attorney should first seek to persuade the client to report the matter or get consent from the client to make the report.¹¹ In any event, the attorney should disclose only that minimally necessary to satisfy the reporting requirement.¹²

⁷ 42 U.S.C. § 13031 limits reporting under the law to explicitly designated agencies and, when done in good faith, provides immunity to the person making the report. 42 U.S.C. § 13031, paragraphs (a), (d), and (f).

⁸ TJAG Policy Memorandum: TJAG Standards-2, *Air Force Rules of Professional Conduct and Standards*, paragraph 2a.

⁹ *Black’s Law Dictionary* (9th ed. 2009). Virginia ethics officials used a previous definition in *Black’s Law Dictionary* when considering the “other law” provision. See Virginia Ethics Opinion 1811, ABA/BNA Lawyer’s Manual on Professional Conduct § 21:257 (2005).

¹⁰ This position is consistent with the 30 Aug 11 JAA Advisory Opinion on the Duty of Confidentiality and Legal Assistance Matters which states that, “Absent consent or express exception, a lawyer *may* disclose information relating to the representation when doing so is “impliedly authorized in order to carry out the representation’ or when required by a legal duty or court order.”

¹¹ ABA/BNA Lawyer’s Manual on Professional Conduct § 55:101, 110 (2006).

¹² *Id.*

Conclusion

An Air Force attorney who receives the subject information from a client while providing legal assistance does not have a duty to report the potential child abuse under either the AFRPC or 42 U.S.C. § 13031. In fact, AFRPC 1.6 prohibits disclosure of the confidential information except to the extent other law is determined to require disclosure. In this case, the attorney may have a duty to disclose the potential child abuse under Illinois law in accordance with IRPC 1.6. To ascertain whether such a duty exists, the attorney must consult with Illinois State Bar officials. If Illinois State Bar officials conclude that reporting is not required, that ends the matter as to the professional responsibility duties. However, the attorney should encourage the client to report or release information to law enforcement authorities or permit the attorney to do so. If Illinois State Bar officials conclude that reporting is required, the attorney must request they issue a written opinion/decision, which must be provided to AF/JAA-PR, who will consult in turn with AFLOA/JACA prior to the disclosure.

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