

Ethics Opinion 19-0003

When a lawyer engages a social worker to provide services in connection with a representation, and when such services are or may be subject to the mandatory reporting requirement of Arizona Revised Statute 13-3620, the lawyer must advise the client that the social worker may be obligated by law to report physical injury, abuse, or neglect of a minor when the lawyer is not otherwise required to do so. It is the decision of the client whether to utilize the services of the social worker.

Issue Presented:

What are the ethical duties of a lawyer supervising a non-lawyer professional who may have a statutory obligation to report offenses against minors?

Factual Background:

An agency provides legal and social services to victims of crime. The agency employs lawyers and social workers who work closely together to provide holistic services to victims. The duties of the social worker focus primarily on enhancing the agency's representation. They provide emotional and crisis support to victims, inform victims of court dates, explain steps, and accompany victims to court. They do not provide formal counseling services to clients.

The lawyers represent victims at hearings. The lawyers work with prosecutors, law enforcement, defense counsel, and others involved in criminal justice to ensure the rights of victims are upheld.

In Arizona, under Arizona Revised Statutes Section 13-3620, a social worker must report suspected physical injury, abuse, child abuse, a reportable offense, or neglect to a law enforcement agency, tribal social services, or the Department of Child Safety. There are certain exceptions.

In working with a social worker, a client may disclose an instance of physical injury, abuse, child abuse, a reportable offense, or neglect that does not lead to death or substantial bodily injury. A client may reveal past abuse by a non-client.

Applicable Arizona Rules of Professional Conduct

ER 1.0 Terminology

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

ER 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) [A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued.

ER 1.4 Communication

(a) A lawyer shall:

- (2) Reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
- (3) Keep the client reasonably informed about the status of the matter;

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ER 1.6 Confidentiality of Information

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 of the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

ER 5.3 Responsibilities Regarding Nonlawyer Assistants

- (a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

- (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

- (c) A lawyer shall be responsible for conduct of such a person that would be a violation of the rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or,

 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Relevant Ethics Opinions

District of Columbia Bar, Legal Ethics Committee Opinion 282 (June 1998)

OPINION

The Committee was presented with the question of whether a social worker, in connection with a lawyer's representation of a client, can break confidentiality and report the suspected physical injury, abuse, child abuse, reportable offense, or neglect pursuant to Arizona's mandatory reporting statutes.¹ The Rules of Professional Conduct apply to a lawyer, not to a nonlawyer individual, and therefore, the Committee is constrained to addressing questions of lawyer ethics and cannot decide the extent of a social worker's obligations under the mandatory reporting statute.

Every lawyer owes his or her client a duty of confidentiality under ER 1.6. A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by the Rules.²

In many instances, a lawyer works in connection with nonlawyer assistants, who provide support to the lawyer in his or her practice. When a nonlawyer is employed, retained by, or associated with a lawyer, ER 5.3 requires the lawyer to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations including the lawyer's responsibility to maintain the confidentiality of information relating to the client representation.

According to the Rules of Professional Conduct, a lawyer has supervisory obligations and responsibilities when associating with nonlawyers. ER 5.3(a) requires a lawyer with managerial authority to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a nonlawyer's conduct is compatible with the professional obligations of the lawyer. Likewise, a lawyer having direct supervisory authority over a nonlawyer must make a reasonable

¹ The statutory requirement in question is A.R.S. §13-3620(A), stating that "[a]ny person who reasonably believes that a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect . . . shall immediately report or cause reports to be made of this information . . ." A.R.S. §13-3620(A)(1) further defines "person" as "[a]ny physician, physician's assistant, optometrist, dentist osteopathic physician, chiropractor, podiatrist, behavioral health professional, nurse, psychologist counselor or social worker who develops the reasonable belief in the course of treating a patient."

² For purposes of addressing the requestor's question, the Committee assumed that no exception in ER 1.6 applied to the lawyer and therefore, the lawyer was not required to report suspected abuse or neglect.

effort to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations. ER 5.3(b). Comment [2] to ER 5.3 provides further guidance. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. . . . The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline." Comment [3] to ER 5.3 recognizes that these obligations extend to a nonlawyer outside of the firm as well.

Given these obligations, the lawyer has an affirmative duty to make a reasonable effort and reasonably assure that a nonlawyer assisting the lawyer is aware of the lawyer's duty of confidentiality regarding the matter, and that the duty of confidentiality extends to the nonlawyer as well. Not ensuring that such measures are in place, or allowing the nonlawyer to violate the Rules, could result in the lawyer being disciplined for the failure to supervise the nonlawyer if the "lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or . . . knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." ER 5.3(c), *see also In re Phillips*, 226 Ariz. 112, 244 P.3d 549 (2010) (reasonable efforts to ensure that the firm has in effect measures giving reasonable assurances that a nonlawyer employed by the firm or associated with the lawyer comply with the professional obligations of the lawyer requires not only supervision but also that the supervising lawyer establishes internal policies and procedures).

In situations where a lawyer employs, retains, or is associated with a nonlawyer individual who is subject to a mandatory reporting statute, the lawyer remains obligated by ER 1.6 to maintain client confidentiality. Likewise, the nonlawyer involved is also generally obligated to maintain ER 1.6 confidentiality by operation of ER 5.3. However, the nonlawyer may be required to breach confidentiality to comply with the mandatory reporting obligation.

Accordingly, given the mandatory reporting requirements some nonlawyers may have, the supervising or employing lawyer has an ethical obligation to the client whose matter is potentially impacted by a reporting requirement. More specifically, the lawyer is obligated to ensure Rule compliance to the extent permissible (including confidentiality) by the nonlawyer individual regarding information not subject to mandatory reporting, to inform any possibly affected client of the

confidentiality limits and risks created by the involved nonlawyer's statutory reporting obligations and to ascertain the client's informed consent as to whether to proceed with the use of such a nonlawyer given the risk it presents to some aspects of the confidentiality of the client's matter.

Because the possibility of disclosure by a nonlawyer statutory reporter poses a serious risk to the confidentiality of a client matter, it is imperative that the lawyer, at either the inception of representation or at the time of involving a nonlawyer subject to a mandatory reporting requirement, informs the client of the confidentiality duties of the lawyer and its extension to the nonlawyer, as well as the limitations on those duties and the risk posed by possible mandatory reporting. When discussing the risks associated with the use of a nonlawyer subject to a mandatory reporting statute, it is vital that the client receives adequate information that would allow the client to give informed consent. "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. ER 1.0(e).

In addition, the general client communication requirements of ER 1.4 requires a lawyer to advise a client, in advance, of the risk that information—that may otherwise be protected under ER 1.6—may have to be disclosed by a nonlawyer with a mandatory reporting obligation. Such information is necessary for a client to be reasonably informed about the status of his or her matter, such that the client can make an informed decision regarding the case. *See* ER 1.4(a), ER 1.4(b).

ER 1.4(a)(2) requires a lawyer to reasonably consult with the client about the means by which the client's objectives are to be accomplished, and ER 1.2(a) directs that a lawyer abide by a client's decisions concerning the objectives of representation and consult with the client as to the means by which the objectives of representation are to be pursued. The risk posed to client confidentiality by a mandatory reporter's potential obligation to reveal information is serious enough that a client should be fully informed of the potential risk and presented with the decision whether to proceed with taking that risk in furtherance of the representation. Once the client has been advised of the risks associated with involving a nonlawyer with a mandatory reporting obligation, the client should be permitted to make, and the lawyer should

confirm with the client, the decision whether to proceed with the utilization of such a nonlawyer.³

Neither informed consent nor ER 1.4 require a writing memorializing the discussion with the client. However, it is advisable that at or about the time of the communication, the lawyer create a writing that adequately describes the nature of the communication with the client, including the risk to the confidentiality of the client's matter. This document should be signed by the client and retained by the lawyer.

The District of Columbia Bar addressed a similar question from an association of social workers who sought guidance about the obligation of a social worker who is employed by or acting as a consultant to a lawyer in the course of representing a client. "Under D.C. Code §2-1352, social workers and certain other professionals who reasonably suspect that child abuse or neglect has taken place must 'immediately' report the suspected abuse to the Metropolitan Police department or to the Child Protective Services Division of the Department of Human Services."

The District of Columbia Bar concluded that a lawyer who engages a social worker to provide a service in connection with the representation of a client must inform the client that the social worker may be required under law to report suspected child abuse or neglect, and, although the lawyer must ensure that the persons employed by the lawyer preserve client confidences, other laws may require the social worker

³ If the client determines that the representation should not continue with the use of the social worker, the firm should take steps to eliminate access to the client's matter. The process to do so depends on the systems in place in the firm. For example, if the firm keeps paperless files, the social worker's permissions to that file should be revoked/restricted. If the firm keeps paper files, the file should have some advisory on it to denote restricted access and should not be kept in a central file location where the social worker may inadvertently come across the file. Additionally, proper instructions should be given to support staff that serve both the lawyer and the social worker that the social worker should have no access to the file. Given the physical set up of the workspace, consideration should be given to whether general discussions regarding the client may be heard by the social worker.

to report abuse or neglect.⁴ It is then the client's decision whether to proceed with the use of the social worker.⁵

In conclusion, the inquiring lawyer who employs a social worker in connection with the representation of a client must advise the client that the social worker may be required by law to report physical injury, abuse, child abuse, a reportable offense, or neglect of a minor when the lawyer is otherwise prohibited from disclosing the client's confidences. It is the client's decision whether to proceed with the use of the social worker.

Formal opinions of the Supreme Court Attorney Ethics Advisory Committee are binding, and reliance on the opinion may be raised as a defense in any disciplinary proceeding.

⁴ Following the issuance of District of Columbia Bar Legal Ethics Opinion 282 (1998) District of Columbia Code §4-1321.02 was enacted and addressed the issue that was the subject of the opinion. "Such persons are not required to report when employed by a lawyer who is providing representation in a criminal, civil, including family law, or delinquency matter and the basis for the suspicion arises solely in the course of that representation . . ." Other states have taken a converse position, specifically, Tennessee mandates, through Tennessee Code §37-1-403, that anyone with knowledge of child neglect or abuse is required to report the information and the lawyer shall reveal such information to "comply with other law" which is an exception to ER 1.6.

⁵ Also noted in the opinion is that the lawyer should not provide legal advice to the social worker regarding a reporting obligation under the statute because the lawyer's duty to the client to assure protection of confidences prevents giving any contrary opinion to the social worker. *See* ER 1.7(a) In addition, the lawyer should not request that the social worker ignore a provision of the law mandating the reporting of child abuse or neglect.