

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 97-12

Approved January 23, 1998

Issue: Utah Code Ann. § 62A-4a-403 obligates any person who suspects a child has been subjected to abuse to report such conduct to the nearest law enforcement officer. Is it a violation of the Rules of Professional Conduct if the attorney does not report a client's conduct that falls under this provision when the attorney learns of such conduct from the client and the client refuses to consent to such disclosure?

Opinion: It is not a violation of the Rules of Professional Conduct if the attorney does not disclose such information, but the attorney may, to the extent the attorney believes necessary, disclose attorney-client information as provided in Rule 1.6(b).

Facts: The Committee has been asked to assume that an attorney, in the course of attorney-client consultations, learns from a client that the client has subjected a child to abuse. The client does not consent to disclosure by the attorney of the abuse to law enforcement authorities. (fn1)

Utah Code Ann. § 62A-4a-403(1) provides, in pertinent parts, as follows:

Except as provided in Subsection (2), when any person, including persons licensed under Title 58, Chapter 12, Part 5, Utah Medical Practice Act, or Title 58, Chapter 31, Nurse Practice Act, has reason to believe that a child has been subjected to incest, molestation, sexual exploitation, sexual abuse, physical abuse or neglect, or who observes a child being subjected to conditions or circumstances which would reasonably result in sexual abuse, physical abuse or neglect, he shall immediately notify the nearest peace officer, law enforcement agency or office of the division.

Section 62A-4a-403(2) provides an exception for clergy, who are not required to notify law enforcement authorities under certain circumstances. The statute does not address the duty of confidentiality regarding the attorney-client communications contained Utah Rules of Professional Conduct 1.6 and the attorney-client privilege in Utah Rules

of Evidence 504, nor the privilege against self-incrimination contained in the Utah Constitution, Article I, § 12.

Analysis: Rule 1.6(a) of the Rules of Professional Conduct prohibits an attorney from revealing information relating to the representation of a client unless that client consents after disclosure. Rule 1.6(b) provides some exceptions to this prohibition:

A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

(4) to comply with the Rules of Professional Conduct or other law. (fn2)

The confidentiality of communications between attorney and client is further recognized in Utah Rules of Evidence 504(b), (fn3) which provides in pertinent part:

General Rule of Privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's representatives, lawyers, lawyer's representatives and lawyers representing others in matters of common interest, and among the client's representatives, lawyers, lawyer's representatives and lawyers representing others in matters of common interest, in any combination.

Certainly, to prevent that client from committing a criminal act the attorney believes is likely to result in death or substantial bodily harm to the child, an attorney who is informed by a client that he *intends* to commit child abuse could reveal this intent to the appropriate authorities if the attorney reasonably believes disclosure is necessary under Rule 1.6(b)(1). However, Utah Code Ann. § 62A-4a-403 is not aimed at future conduct. It purports to require an attorney to disclose past conduct of a client that would

otherwise be privileged. Consequently, the issue before this Committee is whether an attorney violates the Rules of Professional Conduct by failing to disclose the client's past conduct under § 62A-4a-403. (fn4)

The requirements of Utah Code Ann. § 62A-4a-403, as applied to attorneys, appear to be in conflict with the Utah Constitution and the Utah Rules of Evidence. However, it is not within the jurisdiction of this Committee to determine which of these authorities governs the situation. Deciding which of these provisions controls an attorney's behavior is a legal question, not an ethical one. We are constrained, if for no other reason, by our rules, as approved by the Board of Bar Commissions of the Utah State Bar: "The Committee shall not respond to requests . . . [f]or a legal opinion, rather than an ethics opinion." (fn5) Hence, we are limited to addressing the question of whether an attorney who does not report behavior covered by § 62A-4a-403 has committed an ethical violation.

There also appears to be a conflict between § 62A-4a-403 and Rules of Professional Conduct 1.6 to the extent the statute requires the attorney to disclose information that Rule 1.6 requires the attorney to preserve as confidential. The commentary to Rule 1.6 acknowledges that the Rules in various circumstances authorize a lawyer to disclose information relating to the representation, specifically noting disclosures under Rules 1.13 (Organization as Client), 2.2 (Lawyer as Intermediary), 2.3 (Lawyer's Evaluation for Use by Third Parties), 3.3 (Candor Toward Tribunal) and 4.1 (Truthfulness in Statements to Others). The Rule 1.6 comment goes on to state:

In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such supersession.

The Committee believes the presumption against supersession is a proper one, particularly in light of what appears to be a conflict between § 62A-4a-403, on the one hand, and, on the other, the attorney-client privilege in Rules of Evidence 504 and the privilege against self-incrimination in the Utah Constitution. However, as stated in our Advisory Opinion No. 95-06, (fn6) whether an attorney can be compelled to disclose such information in the face of these privileges is a legal question beyond the jurisdiction of the Committee to answer.

In light of the Committee's limitation to decide only ethical issues, we can conclude only that an attorney who fails to report information obtained from the client that falls under Utah Code Ann. § 62A-4a-403 does not violate the Rules of Professional Conduct. Nevertheless, the attorney does have

the *discretion* to disclose such information with client consent under Rule 1.6(a) or to the extent the attorney believes it is necessary under Rule 1.6(b).

Footnotes

1. Utah Rules of Professional Conduct 1.6(a) permits the attorney to report the incident if the client consents.

2. Utah Rules of Professional Conduct 1.6(b).

3. A related protection is found in Utah Const., art. I, § 12, which provides that a person accused of a criminal offense shall not be compelled to give evidence against himself. Arguably, this extends through the attorney-client relationship to mean the client's attorney cannot be compelled to give such evidence.

4. Note that Rule 1.6(b)(4), which states that "A lawyer may reveal such [attorney-client] information to the extent the lawyer believes necessary . . . [t]o comply with . . . other law" (emphasis added), does not itself require the lawyer to reveal the information.

5. Ethics Adv. Op. Comm. Rules of Proc. § III(b)(3).

6. Utah Ethics Advisory Op. No. 95-06, 1995 WL 464483 (July 28, 1995), states an attorney may, under Rule 1.6(b), disclose information leading the attorney to believe a person who is not his client has subjected a child to abuse, even if such information is obtained during the course of representing the attorney's client and even if the client objects to the disclosure. Opinion No. 95-06 did not address whether the attorney was compelled to disclose such information, stating only that this issue required determination of a legal, as opposed to an ethical, duty that is beyond the purview of the Committee.

Rule Cited:

1.6(b)