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Lawyers Must Report Child Abuse

Lawyers must comply with the statutory mandate like everyone else, and lawyers may do so without violating their professional duties of maintaining confidences related to the representation of a client.

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Many lawyers believe that only doctors, psychologists, teachers, social workers and other professionals who work with children have a duty to report child abuse. In New Jersey, however, "*[a]ny person* who knowingly fails to report an act of sexual abuse against a child and who has reasonable cause to believe that an act of sexual abuse has been committed is guilty of a crime of the fourth degree." N.J.S.A. 9:6-8.14(b) (emphasis added). Attorneys representing clients and attorney mediators are not exempted from these criminal statutes. Fourth-degree crimes carry a penalty of up to 18 months in prison. N.J.S.A. 2C:43-6(a)4. For other forms of child abuse, the failure to report is a disorderly persons offense, N.J.S.A. 9:6-8.14(a), carrying up to six months in jail, N.J.S.A. 2C:43-8.

The definition of an abused child, at N.J.S.A. 9:6-8.9, for purposes of the reporting statute is:

[A] child under the age of 18 years whose parent, guardian, or other person having his custody and control: a. Inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ; b. Creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ; or c. Commits or allows to be committed an act of sexual abuse against the child; d. Or a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, or such other person having his custody and control, to exercise a minimum degree of care (1) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so, or (2) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment or using excessive physical restraint under circumstances which do not indicate that the child's behavior is harmful to himself, others or property; or by any other act of a similarly serious nature requiring the aid of the court; e. Or a child who has been willfully abandoned ….

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Child Protection and Permanency, New Jersey's child protection and child welfare agency within the New Jersey Department of Children and Families, is responsible for investigating allegations of child abuse promptly, 3A:10-2.2(a), and has a 24-hour a day hotline, N.J.S.A. 9:6-8.12. Any person who, in good faith, makes a report of child abuse or neglect or testifies in a child abuse hearing resulting from such a report is immune from any criminal or civil liability as a result of such action. N.J.S.A. 9:6-8.13. Reports, which are kept confidential, N.J.S.A. 9:6-8.10a, may be made anonymously.

What is the definition of "reasonable cause to believe" that child abuse has occurred? Our Supreme Court has held that New Jersey imposes a "universal obligation to report child abuse" whenever a person holds a "reasonable belief" of abuse, which "requires an objective assessment of whether given all of the facts and circumstances known at the time a person similarly situated would have held a reasonable belief that child abuse had occurred." *L.A. v. New Jersey Div.*

of Youth & Fam. Servs., 217 N.J. 311, 316, 317 (2014) (upholding summary judgment when deciding that a doctor who treated a two-year-old child for the apparent accidental ingestion of cologne did not have the legal obligation to report abuse.) Given the broad statutory definition of child abuse, and the imperative to report it, attorneys should be vigilant to report such abuse, while at the same time not allowing clients to use an unfounded report as a weapon, as occasionally occurs in family matters.

Reasonable attorneys may pause before acting to report suspected child abuse when the information comes while representing a client. Generally, communications between an attorney and client are subject to evidentiary privilege and to the confidentiality provisions of the Rules of Professional Conduct. The attorney-client privilege imposed by the rules of evidence (NJRE 504) and the broader confidentiality obligations imposed by the Rules of Professional Conduct (RPC 1.6) establish limits to confidentiality and define when and how an attorney may disclose and, in some cases, must disclose otherwise protected information related to a client.

Unlike many other jurisdictions across the country, New Jersey ethics rules mandate certain types of disclosures despite confidentiality. RPC 1.6(b) requires a lawyer to reveal information to the proper authorities "as soon as, and to the extent the lawyer reasonably believes necessary" to prevent the client or another person from committing a criminal or illegal act that the lawyer reasonably believes is likely to result in substantial bodily harm. That requirement on its face covers the situation in which a lawyer reasonably believes a child is at risk of future substantial bodily harm.

Likewise, the New Jersey Rules of Evidence pertaining to the attorney-client privilege create an exception to confidentiality when legal services are in aid of the commission of a crime or fraud, including civil fraud. Fraud is given "the broadest interpretation." *In re Callan*, 122 N.J. Super. 479 (Ch. Div.) *aff'd* 126 N.J. Super. 103 (App. Div. 1972), *rev'd on other grounds*, 66 N.J. 401 (1975). Under the crime-fraud exception, the attorney-client privilege falls to the duty to report when the lawyer's services are used to conceal child abuse or to hide the propensity for future abuse.

The framework for complying with the mandatory child abuse reporting statute is contained in RPC 1.6(d)(4) which allows, but does not require, an attorney to disclose confidential information relating to the representation "to comply with other law." The statute mandating everyone to report child abuse is "other law" compelling disclosure. The RPCs allow lawyers to comply with that statutory duty. The relevant information can come from any source.

Under the ethics rules, a lawyer's duty to report is triggered by the "belief or conclusion of a reasonable lawyer that is based on information that has some foundation in fact and constitutes prima facie evidence" of the matters required or permitted to be disclosed. RPC 1.6. Once that standard is met, the reporting should be to appropriate authorities. Almost 50 years ago, despite the criminal penalty for not reporting past abuse, the Advisory Committee on Professional Ethics explicitly opined under then existing disciplinary rules that a lawyer must report his or her client's propensity for future, but not past, child abuse when the lawyer's belief is based on the client's communications

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with the lawyer. *Advisory Comm. on Prof. Ethics, Opinion 280 (Supp.),* 97 N.J.L.J. 753 (1974). Current criminal statutes, enhancing the penalty for not reporting child sexual abuse, clearly require disclosure of past child abuse also.

Lawyering can present hard choices. The Legislature and the Supreme Court have made the choice to report a reasonable belief that a child has been abused a simple one: lawyers must comply with the statutory mandate like everyone else, and lawyers may do so without violating their professional duties of maintaining confidences related to the representation of a client.

Protecting children from abuse is a compelling and weighty policy interest. Lawyers, after examining the applicable confidentiality rules, must act in furtherance of that interest even when the source of information giving rise to the conclusion that a child is at risk would ordinarily be kept secret and confidential. In this situation, legal obligations and ethical duties are in line with the moral and societal interest in protecting children from abuse.

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