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# Through the Looking Glass in Indiana: Mandatory Reporting of Child Abuse and the Duty of Confidentiality

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## ESSAY

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# THROUGH THE LOOKING GLASS IN INDIANA: MANDATORY REPORTING OF CHILD ABUSE AND THE DUTY OF CONFIDENTIALITY

*Alberto Bernabe\**

### INTRODUCTION

It is often said that the duty of confidentiality is the most important of all the fiduciary duties attorneys owe their clients.<sup>1</sup> This is so because without confidentiality, clients would presumably not feel free to seek legal representation, or at least, would not feel free to speak openly with their lawyers.<sup>2</sup> This notion is clearly the basis for the recognition of the duty, which the American Bar Association (ABA) Model Rules of Professional

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1 See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 129 (5th ed. 2016) (noting that the "[t]rust between lawyer and client is . . . the 'cornerstone of . . . effective assistance of counsel,' and fidelity to that trust is 'the glory of [the legal] profession'" (footnotes omitted) (first quoting *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981); and then quoting *United States v. Costen*, 38 F. 24, 24 (C.C.D. Colo. 1889)); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1.1 (1986) ("[B]oth sacred and controversial, the principle of confidentiality of client information is well-embedded in the traditional notion of the Anglo-American client-lawyer relationship.").

2 As explained by the Supreme Court in *Fisher v. United States*, 425 U.S. 391, 403 (1976), "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." See also FREEDMAN & SMITH, *supra* note 1, at 138 (stating that "confidentiality is essential to candid disclosure of embarrassing and potentially harmful truths from clients to their lawyers"); STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION 45–46 (2009).

Conduct<sup>3</sup>—the model for the rules in almost all American jurisdictions<sup>4</sup>—explain as follows:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.<sup>5</sup>

Yet, confidentiality can be a double-edged sword.<sup>6</sup> Protecting the secrecy of certain information can be dangerous. For example, it may create risks to others,<sup>7</sup> prevent the conviction of guilty defendants, result in

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3 MODEL RULES OF PROF'L CONDUCT (AM. BAR. ASS'N 2015).

4 The rules of forty-nine states, the District of Columbia, and the Virgin Islands are based on the ABA Model Rules. *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html) (last visited Sept. 7, 2016). Only California and Puerto Rico have not adopted the Model Rules. *See id.* For a complete list of the jurisdictions that have adopted the Model Rules, *see id.*

5 MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS'N 2015).

6 FREEDMAN & SMITH, *supra* note 1, at 130 (“No rule of law, no matter how fundamental and explicit, has ever been unwavering or free of ambiguities, and the protection of lawyer-client confidentiality is no exception.”)

7 GILLERS, *supra* note 2, at 46–47. There is a recurring debate over whether courts should allow settlement agreements that prevent the disclosure of information that could affect public safety. *See* DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 75–76 (2d ed. 2007) (asserting that “[m]any unsafe or unlawful practices would come to light sooner if there were more legislative or ethical prohibitions on . . . secrecy clauses”). For example, the issue was much discussed in the media, including an episode of the television program *60 Minutes*, in the wake of the news that Firestone Tire Company had settled lawsuits involving defective tires preventing the disclosure of the defects, which later caused injuries to others. *See, e.g.*, Frances Komoroske, *Should You Keep Settlements Secret?*, 35 TRIAL 55, 56 n.7 (1999) (citing *Williamson v. Superior Court*, 582 P.2d 126 (Cal. 1978)); Richard Zitrin, *The Fault Lies in the Ethics Rules*, 23 NAT'L L.J., July 9, 2001, at A-25; *see also* RICHARD ZITRIN & CAROL M. LANGFORD, *Keeping it Secret (Or, What You Don't Know Can Hurt You)*, in THE MORAL COMPASS OF THE AMERICAN LAWYER 183–208 (1999) (discussing secret settlement agreements in the context of products liability).

the conviction of innocent defendants,<sup>8</sup> and prevent the disclosure of information that could provide comfort or closure to victims.<sup>9</sup> Understanding this, the drafters of the ABA Model Rules also crafted many exceptions to the duty of confidentiality. In fact, many lawyers are surprised to learn that, when added up, there are more than a dozen recognized exceptions throughout the ABA Model Rules.<sup>10</sup> In addition,

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8 The case involving Mr. Alton Logan, who in 1982 was wrongfully convicted for a murder he did not commit, illustrates this point. Harold J. Winston, *Learning From Alton Logan*, 2 DEPAUL J. FOR SOC. JUST. 173, 173 (2009). In this case, the actual killer, Andrew Wilson, confessed to his two attorneys but did not consent to disclosure of his confession in order to exonerate Logan. *Id.* However, the attorneys convinced Wilson to consent to disclosure after his death. *Id.* Unfortunately for Logan, Wilson lived for another twenty-six years, during which Logan remained in prison, even though Wilson's lawyers knew he was innocent. *See id.* Logan was released from prison in 2008. *Id.* Logan's case and the issues it raises are discussed in Colin Miller, *Ordeal By Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. 391, 391 (2008) (citing *60 Minutes: 26-Year Secret Kept Innocent Man in Prison* (CBS television broadcast Mar. 9, 2008), <http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml> (last updated May 23, 2008)); Gary Rowe, *Potential Expansion, or Modification, to the Permissive Exceptions of Model Rule 1.6: Client-Lawyer Confidentiality in Criminal Law and "The Gap,"* 39 J. LEGAL PROF. 291, 291–92 (2015); Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: A Systemic Approach*, 17 TEX. WESLEYAN L. REV. 499, 511–14 (2011); Adam Belsey, Note, *When Innocence is Confidential: A New and Essential Exception to Attorney-Client Confidentiality*, 56 SANTA CLARA L. REV. 147, 149–53 (2016).

9 The famous "buried bodies case" of the 1970s is still the best example of this concern. The case involved two lawyers who knew the location of their client's victims but did not disclose the information until much later. *See People v. Belge*, 372 N.Y.S.2d 798, 799–800 (N.Y. Sup. Ct.), *aff'd* 376 N.Y.S.2d 771 (N.Y. App. Div. 1975). One of the lawyers, Francis Belge, was charged with a violation of a public health statute, but the court dismissed the charges in an opinion that emphasized the importance of the concept of confidentiality. *Id.* at 803. Belge was quoted stating, "[K]nowing how the parents must feel, [we] wanted to advise them where the bodies were . . . . But since it was a privileged communication, we could not reveal any information that was given to us in confidence." *Slayer's 2 Lawyers Kept Secret of 2 More Killings*, N.Y. TIMES (Jun. 20, 1974), <http://www.nytimes.com/1974/06/20/archives/slayers-2-lawyers-kept-secret-of-2-more-killings-two-attorneys-for.html?url=http%3A%2F%2Ftimesmachine.nytimes.com%2Ftimesmachine%2F1974%2F06%2F20%2F79872271.html%3Dclick&region=ArchiveBody&module=LedeAsset&pgtype=article&contentCollection=Archives>, reprinted in RICHARD A. ZITRIN ET AL., LEGAL ETHICS IN THE PRACTICE OF LAW 119–20 (4th ed. 2013). The story behind this case has been told in numerous publications, including a book written by the other lawyer involved in the case, Frank Armani. *See TOM ALIBRANDI & FRANK ARMANI, PRIVILEGED INFORMATION* (1984); *see also* RICHARD ZITRIN & CAROL LANGFORD, *Buried Bodies: Robert Garrow and His Lawyers*, in THE MORAL COMPASS OF THE AMERICAN LAWYER 7–26 (1999).

10 Most of the exceptions to the duty of confidentiality are in Rule 1.6 of the Model Rules of Professional Conduct, but there are additional exceptions recognized in Rules 1.13

special statutes that impose an opposite duty—a duty to disclose information under certain circumstances—can affect the duty of confidentiality. Most common among this type of statute are state statutes that mandate disclosure of information related to child abuse. All American jurisdictions have enacted such statutes, but they vary greatly in the details.<sup>11</sup>

As one might expect, therefore, there may be circumstances in which a lawyer may find a conflict between the duty to keep information secret and the duty to disclose it. Assume, for example, that a lawyer learns through the representation of a client that the client, or someone else for that matter, has engaged or is engaging in sexual abuse of a minor. Assuming the information is confidential as defined by the applicable rules of professional conduct, does the lawyer have a duty to keep the information secret, or a duty to disclose it under the state's disclosure statute? The answer may vary from state to state and will likely depend on the specific language of the reporting statute and the rules of professional conduct in the particular jurisdiction. Yet, unfortunately, due to recent State Bar activity, the answer in Indiana is now even more confusing.

In 2015, the Legal Ethics Committee of the Indiana State Bar Association issued an Opinion (the "Opinion") addressing a lawyer's duty to conceal or disclose information regarding sexual abuse of a minor. It concluded that, under Indiana law, absent client consent, an attorney may *not* report information about suspected child abuse learned during the representation of the client unless the lawyer believes disclosing the information is necessary to prevent reasonably certain death or substantial bodily harm.<sup>12</sup> In reaching this conclusion, however, the Committee disregarded the text of the applicable Rule of Professional Conduct and did not consider the possible scenarios that could result from its interpretation of Indiana's mandatory disclosure statute, the doctrine of the attorney-client privilege, and the Rules of Professional Conduct.

In the end, the recent Committee Opinion creates confusion and defeats the purpose of providing guidance to lawyers about their ethical obligations. In an effort to clarify this confusion, this Essay will explain the issue presented by the Opinion and will suggest the analysis needed for

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and 3.3. See MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2, 1.13, 3.3 (AM. BAR ASS'N 2015).

<sup>11</sup> All fifty states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands have enacted statutes mandating disclosure of child abuse. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2016), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [hereinafter MANDATORY REPORTERS].

<sup>12</sup> See Ind. State Bar Ass'n Legal Ethics Comm., *Opinion No. 2 of 2015*, 59 RES GESTAE 24, 24 (2015).

its proper resolution according to the Indiana Rules of Professional Conduct. Part I of this Essay will briefly discuss the issue of child abuse in the United States, which has led many states to restructure or rethink their reporting obligations and confidentiality laws. Next, Part II will outline the Indiana Ethics Committee's Opinion, highlighting the flaws in the Committee's reasoning in light of the plain text of Indiana's mandatory reporting statute and Rules of Professional Conduct. Part III will then analyze the Opinion in light of the interplay between this mandatory reporting statute and the duty of confidentiality, as laid out in the Rules of Professional Conduct. In so doing, it will show that the conclusion reached by the Ethics Committee in its recent Opinion is unsubstantiated by the law. The Essay will conclude by providing a four-step analysis that attorneys should follow to determine whether the duty of confidentiality applies in a given situation.

### I. CHILD ABUSE AND REPORTING DUTIES

Over the years, there have been enough recurring reports of child abuse throughout the United States—whether involving clergymen, educational institutions, or just individuals—to support the statement that child abuse is a major societal problem.<sup>13</sup> Back in the 1980s, it was reported that state child protective agencies received more than one million complaints of child abuse and neglect that resulted in demonstrable harm every year.<sup>14</sup> A report in 2004 estimated that almost ten percent of students “in public schools experience some form of educator sexual misconduct, ranging from offensive comments to rape.”<sup>15</sup> More recently, an article published in May 2016 by the same team of *Boston Globe* journalists that produced the story behind the movie *Spotlight*<sup>16</sup> highlighted an

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13 See, e.g., Marci A. Hamilton, *Thank You, Penn State*, VERDICT (May 12, 2016), <https://verdict.justia.com/2016/05/12/thank-penn-state> (asserting that when the Sandusky scandal broke, it proved to the world that the issue of institution-based child sex abuse is a society-wide problem, not one isolated to particular institutions).

14 Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 203–04 (1992) (citing NAT'L CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CD-11794, STUDY FINDINGS: STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988, at 7-1 (1988)).

15 Katharine Q. Seelye, *Prep Schools Wrestle with Sex Abuse Accusations Against Teachers*, N.Y. TIMES (Apr. 17, 2016), [http://www.nytimes.com/2016/04/18/us/prep-schools-wrestle-with-sex-abuse-accusations-against-teachers.html?emc=edit\\_th\\_20160418&nl=todaysheadlines&nliid=69110943&\\_r=2](http://www.nytimes.com/2016/04/18/us/prep-schools-wrestle-with-sex-abuse-accusations-against-teachers.html?emc=edit_th_20160418&nl=todaysheadlines&nliid=69110943&_r=2).

16 *Spotlight* is a 2015 film that depicts a *Boston Globe* team of journalists' investigation into cases of widespread and systemic child sex abuse in the Boston area by numerous Catholic priests. SPOTLIGHT (Open Road Films 2015). For more information about the story and the film, see the articles collected in *The Story Behind the 'Spotlight' Movie*, BOS. GLOBE, <http://www.bostonglobe.com/arts/movies/spotlight-movie#spotlight>

investigation that revealed more than 200 victims, and at least ninety legal claims involving at least sixty-seven schools in New England.<sup>17</sup> Yet, the problem is difficult to confront, in part, because of the helplessness of the victims who most often do not report the offending conduct.

In an attempt to improve the detection of abuse, all states and U.S. territories have enacted some version of mandatory child abuse reporting laws.<sup>18</sup> Yet, the details vary greatly among them, some applying only to specific categories of people,<sup>19</sup> others being more general, and some recognizing exceptions to protect confidentiality duties or legal rights.<sup>20</sup>

Legal professionals are not often mentioned among those who are mandated reporters of child abuse.<sup>21</sup> In addition, the mandatory reporting statutes in most jurisdictions do not abrogate the attorney-client privilege.<sup>22</sup> Although some have argued that preserving the applicability of the privilege does not technically dispense of the duty to report,<sup>23</sup> it is

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(last visited Sept. 7, 2016); Meredith Goldstein, *How the 'Spotlight' Movie Got Made*, BOS. GLOBE (Oct. 30, 2015), <http://www.bostonglobe.com/lifestyle/names/2015/10/30/how-spotlight-movie-got-made/wXVXUiYPkoF3hEP9K4dydP/story.html>.

17 Jenn Abelson et al., *Private Schools, Painful Secrets*, BOS. GLOBE (May 8, 2016), <https://www.bostonglobe.com/metro/2016/05/06/private-schools-painful-secrets/OaRI9PFpRnCTJxCzko5hkN/story.html> (reporting on more than 200 victims and at least ninety legal claims involving at least sixty-seven private schools in New England).

18 See *supra* note 11 and accompanying text.

19 “[F]orty-eight states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands designate professions whose members are mandated by law to report child maltreatment.” MANDATORY REPORTERS, *supra* note 11, at 2. The most common professions listed are social workers, teachers, school administrators, physicians, nurses, counselors, therapists, childcare providers, and law enforcement officers. *Id.*

20 See *id.* at 3–4.

21 See *id.* at 2. However, there is uncertainty regarding the classification of lawyers who work as professors in law school, and, in particular, those who supervise student legal clinics.

22 See *id.* at 3; see also Mosteller, *supra* note 14, at 223–24.

23 See Mosteller, *supra* note 14, at 224–35. The attorney-client privilege gives a client the right to prevent his or her lawyer from disclosing certain information in a proceeding in which the rules of evidence apply. See WOLFRAM, *supra* note 1, § 6.3.4, at 253; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 86 (AM. LAW INST. 2000) (privilege can be invoked “[w]hen an attempt is made to introduce evidence or obtain discovery” of a privileged communication). Reporting to a child welfare agency is not disclosing information within a proceeding where the rules of evidence apply. Presumably, therefore, a lawyer could be obligated to report the information, and still be able to raise the privilege in an evidentiary proceeding in order to prevent the admission of evidence regarding the communication. In other words, the state could force the lawyer to provide the information in order for the state to investigate, but could not force the lawyer to testify about it in a judicial proceeding. Thus, according to this interpretation, the obligation to report would not eliminate the availability of the privilege. Also, the privilege only covers information provided in confidence by the client to the attorney for the purpose of

commonly thought that preserving the privilege means that lawyers are not required to report information that would otherwise be protected by the privilege.<sup>24</sup>

In contrast, Indiana is one of just a few states<sup>25</sup> that have enacted a mandatory child abuse disclosure statute that imposes a duty to disclose on everyone;<sup>26</sup> and “everyone” presumably includes practicing lawyers.<sup>27</sup> On the other hand, subject to some exceptions, Rule 1.6 of Indiana’s Rules of Professional Conduct (the “Rule”) imposes a duty of confidentiality that covers all information related to the legal representation.<sup>28</sup> Thus, it is not surprising that the conflict that could potentially result from these two general principles prompted the Ethics Committee to address this matter in an Opinion.

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obtaining legal representation. *See* WOLFRAM, *supra* note 1, § 6.3.2, at 251 (“The attorney-client privilege is not a rule protecting privacy per se, but only privacy in the context and for the purpose of encouraging full disclosure to a legal adviser by one seeking legal services.”). If the attorney obtains the information about the child abuse from a third party, or from the client but in the presence of a third party, the information is confidential but not covered by the privilege. *See id.* § 6.3.6, at 262 (“Communications from a nonclient . . . are outside the attorney-client privilege.”); *id.* § 6.3.7, at 264 (explaining that the attorney-client privilege does not extend to statements made in the presence and hearing of a third party because such communications involve “an aura of nonconfidentiality”). In such a case, the attorney would have to disclose the information even if the statute stated that attorneys do not have a duty to report privileged information. *See* Mosteller, *supra* note 14, at 240. However, the obligation to report can defeat the policy behind the privilege in that it would affect the client’s trust and openness to discuss unfavorable information with the attorney. *See id.* at 230–31 (“Even if the state is ultimately prohibited from calling the lawyer as a witness at the client’s trial, the major damage would have been done, and the promise of secrecy . . . would prove ineffective in facilitating open and free confiding of sensitive information. . . . [and] if statements made by a client are known to be subject to mandatory disclosure . . . the privilege is wholly destroyed.” (footnotes omitted)).

<sup>24</sup> *See* MANDATORY REPORTERS, *supra* note 11, at 2.

<sup>25</sup> Eighteen states and Puerto Rico require any person who suspects child abuse or neglect to report. *Id.* at 2.

<sup>26</sup> IND. CODE ANN. § 31-33-5-1 (West 2016); *see also id.* § 31-33-22-1(a) (stating that a failure to report is a misdemeanor); MANDATORY REPORTERS, *supra* note 11, at 22; Ind. State Bar Ass’n Legal Ethics Comm., *supra* note 12.

<sup>27</sup> *See* Donald R. Lundberg, *Mandatory Child Abuse Reporting by Lawyers*, 55 RES GESTAE 31, 31 (2011) (noting that the mandatory reporting statute says all individuals who have reason to believe that a child is a victim of sexual abuse have a duty to report and “lawyers are ‘individuals’ for mandatory child abuse reporting purposes”).

<sup>28</sup> *See* IND. RULES OF PROF’L CONDUCT r. 1.6 (2016), [http://www.in.gov/judiciary/rules/prof\\_conduct/#\\_Toc418253513](http://www.in.gov/judiciary/rules/prof_conduct/#_Toc418253513).



## II. INDIANA STATE BAR ASSOCIATION ETHICS COMMITTEE OPINION NO. 2 OF 2015

The Opinion began by stating the specific question it sought to address: “If a lawyer learns, while representing a client, that a child is a victim of abuse or neglect, must the lawyer make a report to the Indiana Department of Child Services or local law enforcement?”<sup>29</sup> As the Opinion explained, the mandatory reporting statute in Indiana (the “Statute”) is broadly phrased, stating that any “individual who has reason to believe that a child is a victim of child abuse or neglect” is obligated to immediately make a report to the Department of Child Services or to the local law enforcement agency.<sup>30</sup> Making no explicit exceptions for lawyers, the Statute appears to require lawyers to disclose confidential information, which led the drafters of the Opinion to conclude that there is “a conflict between the lawyer’s ethical duty to keep silent and the apparent duty to speak.”<sup>31</sup> Yet, as discussed below, a careful reading of the Indiana Rules of Professional Conduct shows this supposed “conflict” does not really exist.

Having concluded that the Statute and Rules of Professional Conduct present a conflict for lawyers, the Committee proceeded to seek a solution to the conflict, concluding that lawyers must *not* comply with the Statute unless complying is necessary to prevent reasonably certain death or substantial bodily harm.<sup>32</sup> Although based on good intentions, the analysis underlying this conclusion is flawed.

The Committee began this analysis with the broad assertion that because the Indiana Constitution recognizes that the Indiana Supreme Court has jurisdiction over attorney discipline and the authority to regulate the legal profession, recognizing that the Statute imposes a duty on lawyers would violate the principle of separation of powers.<sup>33</sup> According to this argument, a statute that imposes a duty on lawyers would be unconstitutional because the Legislature is constitutionally prohibited from interfering with the Judiciary’s authority to regulate the legal profession.

There are a number of flaws in this argument. First, although it is true that the Indiana Supreme Court has the authority to regulate the legal profession, that authority is not necessarily exclusive. There are many statutes that regulate the profession both directly and indirectly,<sup>34</sup> as do doctrines related to malpractice and contract law.<sup>35</sup> The fact of the matter

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29 Ind. State Bar Ass’n Legal Ethics Comm., *supra* note 12, at 24.

30 *Id.*

31 *Id.* at 25.

32 *See id.*

33 *See id.*

34 *See, e.g.*, IND. CODE ANN. § 33-43-1-1 (West 2016) (prohibiting practice of law by non-attorneys).

35 *See, e.g., id.* § 33-43-1-3 (describing the duties of an attorney).

is that the legal profession is highly regulated by a combination of sources of authority including court decisions, legislation, and administrative regulations. As explained by noted legal ethics author and professor Stephen Gillers, “many of the rules governing the behavior of lawyers do in fact come to us not from a code of ethics but from court decisions (in the areas of malpractice, fiduciary duty, tort, and agency law among others), legislation, and agency rules.”<sup>36</sup> If the Committee’s argument were correct, as long as the Rules of Conduct were adopted under the authority of the Indiana Supreme Court, the Legislature could never adopt legislation or rules to regulate any aspect of the legal profession.

In support of the second part of its conclusion, the Committee simply repeated the policy reasons behind the duty of confidentiality. The Committee reiterated that “requiring lawyers to protect their client’s confidences likewise protects the attorney-client relationship,”<sup>37</sup> that if forced to disclose confidential information clients will likely withhold information,<sup>38</sup> and that a betrayal of a client’s trust could result in “irreversible harm to the client’s relationship to any attorney.”<sup>39</sup>

Based on this general policy behind the duty of confidentiality, the Committee then attempted to reach a compromise. As explained in the Opinion, the compromise position is that lawyers have a duty to disclose in certain cases and a duty not to disclose in all others. The Committee explained its conclusion as follows:

[T]he Committee believes a lawyer *must* report that a child is a victim of abuse or neglect “to prevent reasonably certain death or substantial bodily harm.”

Initially, the constitutional conflict mentioned above is no longer present, as the Supreme Court, through the Rules of Professional Conduct, specifically authorizes lawyers to disclose client information in such situations. More significantly, while the prudential concerns (harm to the attorney-client relationship chief among them) remain, Rule 1.6 “recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.” The reasons for “exempting” attorneys from the general reporting rule being, in such situations, either nullified or substantially negated,<sup>40</sup> the general reporting requirement applies, and lawyers must report.

Interestingly, the first part of the Committee’s conclusion—that lawyers must disclose confidential information to the extent the lawyer

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36 GILLERS, *supra* note 2, at 3 (“So-called codes of ethics . . . are just one part . . . of the regulatory architecture for lawyers.”).

37 Ind. State Bar Ass’n Legal Ethics Comm., *supra* note 12, at 25.

38 *Id.* at 27.

39 *Id.*

40 *Id.* at 28 (footnotes omitted).

believes reasonably necessary to prevent reasonably certain death or substantial bodily harm—is correct, but not for the reasons suggested in the Opinion. The Committee based this conclusion on the argument that the duty of confidentiality essentially supersedes the Statute, and since the Rules of Professional Conduct recognize “the overriding value of life and physical integrity,” the duty of confidentiality must require disclosure under circumstances where disclosure could prevent death or substantial harm.<sup>41</sup>

The Committee’s argument misinterprets what the Rule says and substitutes its text with what the Committee would like it to say. Even though part of the policy behind the exception to the duty of confidentiality is the recognition of the value of life and physical integrity, the Rule does not impose a duty to disclose. Even in cases of possible death or substantial bodily harm, whether to disclose is always left to the discretion of each attorney.<sup>42</sup> The Rule states that “[a] lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary” to “prevent reasonably certain death or substantial bodily harm,”<sup>43</sup> and, as the Rules themselves also explain, rules that use “the term ‘may,’ are permissive and define areas . . . in which the lawyer has discretion to exercise professional judgment.”<sup>44</sup> Most importantly, the Rules also state that as to rules that use the term “may,” “[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.”<sup>45</sup> Thus, it is wrong to assume, as the Committee appears to have done, that the Rules of Professional Conduct impose a duty to disclose in order to prevent death or substantially bodily harm. Maybe that is what the Rule should say; maybe it is what the Committee would prefer it to say. But it is not what the Rule does say.<sup>46</sup>

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41 *Id.* (quoting IND. RULES OF PROF’L CONDUCT r. 1.6 cmt. 6)

42 *See* IND. RULES OF PROF’L CONDUCT r. 1.6(b).

43 *Id.* (emphasis added).

44 *Id.* at scope 14.

45 *Id.*

46 A better argument in support of the Committee’s conclusion can be found in Section 63 of the Restatement (Third) of the Law Governing Lawyers, which suggests that, even though a lawyer’s duty not to disclose confidential information is superseded when the law specifically requires disclosure, a lawyer has a duty to resist the disclosure of confidential information if there is a non-frivolous argument that the law does not require the lawyer to disclose. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 63 cmts. a–b (AM. LAW INST. 2000). The problem with this argument, however, is that the Restatement concedes that the duty of confidentiality would be superseded by a mandatory reporting statute that applies to lawyers and that in such a case, the argument against the duty to disclose under the statute, although not frivolous, would be significantly weakened.

### III. INTERPLAY BETWEEN INDIANA'S DISCLOSURE STATUTE AND RULES OF PROFESSIONAL CONDUCT

Ironically, the Committee's conclusion is actually correct for the opposite reason it seems to embrace. Given the interplay between the mandatory disclosure statute and the Rules of Professional Conduct, lawyers must disclose information regarding child abuse because *the Statute* says they must,<sup>47</sup> not because the Rules do so.<sup>48</sup> In other words, the Statute imposes a duty to disclose, whereas the Rules allow lawyers to comply with that duty. Since the duty to disclose imposed by the Statute is mandatory, the net effect is that, unless they want to face criminal charges,<sup>49</sup> lawyers are obligated to disclose.

For the same reason, however, the Committee's other conclusion—that attorneys are barred from disclosing confidential information in all other cases—is wrong. This is so because Rule 1.6(b)(6) of the Indiana Rules of Professional Conduct recognizes that a lawyer may disclose confidential information to comply with other laws.<sup>50</sup> In other words, according to the clear text of the Rule itself, under circumstances that do not involve possible death or substantial harm, a lawyer can comply with the mandatory disclosure statute without violating the duty of confidentiality.

In the end, the language in both exceptions to the duty of confidentiality recognized in the Rules shows that the Committee erred in concluding that there is a conflict between the Statute and the Rules of Professional Conduct. In fact, there is no such conflict at all. The Statute says a lawyer must disclose, and the Rules say the lawyer can do so.<sup>51</sup> Disclosing under those circumstances (either because there is risk of death or substantial harm, or simply because the statute requires it) does not

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47 See IND. CODE ANN. § 31-33-5-1 (West 2016) (“[A]n individual who has reason to believe that a child is a victim of child abuse or neglect shall make a report as required by this article.”).

48 For a discussion of the relationship between state reporting statutes and the rules of professional conduct, see Mosteller, *supra* note 14, at 238 (stating that the command that a lawyer keep information confidential as part of her professional responsibility cannot supersede an otherwise mandatory legal duty to report, so the lawyer is obligated to report abuse if learned from sources outside the attorney-client privilege).

49 See IND. CODE § 31-32-22-1 (stating that failure to report on child abuse as required by the statute is a Class B misdemeanor).

50 IND. RULES OF PROF'L CONDUCT r. 1.6(b)(6) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.”).

51 RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY, A STUDENT'S GUIDE § 1.6-12, at 290 (2012–2013) (“If disclosure is permitted or required under state law, such as a child abuse reporting statute, one would think that the state policy promoting disclosure would override a general confidentiality rule. But, given the exception under Rule 1.6(b)(6), such analysis is not needed.”).

constitute a violation of the ethical duty to keep the information confidential.<sup>52</sup> Thus, by concluding that, other than in cases of reasonably certain death or substantial bodily harm, a lawyer cannot report the relevant information when the Rules say the lawyer can report, the Committee's interpretation of the Rule is now in conflict with its actual text.

Given that the Indiana mandatory disclosure statute does not state whether attorneys are exempted from the duty to disclose, nor whether it abrogates the attorney-client privilege, there are three possible interpretations of the interplay between the Statute, the attorney-client privilege, and the duty of confidentiality in the Rules of Professional Conduct. However, as shown below, the Committee's Opinion, reaches a conclusion that is not compatible with any of the possible interpretations.

The first way to interpret the state of the law is that the Statute applies to lawyers but does not abrogate the attorney-client privilege. In such a case, there are two possible results. In the first instance, lawyers would be mandated to report abuse of children, but such information would not be admissible in evidence in proceedings during which the client could raise the privilege. In the second one, lawyers would not be mandated to report because the recognition of the attorney-client privilege would be interpreted to mean that there is no duty to disclose under the Statute.

In the first of these two scenarios, once it is accepted that lawyers have a duty to disclose under the Statute, it follows that they would be allowed to do so without violating the ethical duty of confidentiality, because Rule 1.6 recognizes an exception to comply with statutes, regardless of whether there is a risk of death or substantial harm. The Committee's conclusion is incompatible with this because it limits the duty to disclose to cases of a risk of death or substantial harm, instead of recognizing that the duty to disclose would apply in all cases.

In the second scenario, lawyers would not be required to disclose under the Statute but would be allowed to do so at their discretion under the exception that states that lawyers may disclose to the extent they deem reasonably necessary to prevent reasonably certain death or substantial harm. The Committee's conclusion is incompatible with this analysis because it states that attorneys have a mandatory duty to disclose under such circumstances. That conclusion is not supported by the text of the Rules of Professional Conduct.

Finally, the third possibility is to hold that the Statute applies to lawyers and that the privilege is abrogated. Obviously, this would mean

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<sup>52</sup> See Megan M. Smith, Note, *Causing Conflict: Indiana's Mandatory Reporting Laws in the Context of Juvenile Defense*, 11 IND. HEALTH L. REV. 439, 451–52 (2014) (“[I]t appears that an attorney would be excepted from keeping confidential information pertaining to the abuse of a child because child abuse is a crime that could result in death or substantial bodily harm, and the mandatory reporting laws requiring any individual to report meet the exception for complying with another law.”).

attorneys have a duty to disclose under the Statute and that the Rules of Professional Conduct would allow them to do so regardless of whether there is a risk of death or bodily harm under the exception that allows attorneys to disclose confidential information to comply with “other laws.” Since the Rules allow attorneys to comply with the other law, and the other law imposes a mandatory duty to disclose, under this interpretation, attorneys would have a mandatory duty to disclose in all cases. Again, since the Committee concluded there is only a duty to disclose in some cases, its conclusion is inconsistent with the proper analysis of the doctrine.

#### IV. POSSIBLE CONSEQUENCES OF THE COMMITTEE’S OPINION

Because it reinterprets the Statute and the Rules of Professional Conduct to say something they do not say, the Committee’s Opinion may produce a number of regrettable consequences. First and foremost, the Opinion generates confusion as to what the duty of a lawyer is. As stated above, the Opinion set out to answer a specific question: “If a lawyer learns, while representing a client, that a child is a victim of abuse or neglect, must the lawyer make a report to the Indiana Department of Child Services or local law enforcement?”<sup>53</sup> The Committee says the lawyer has a duty to keep the information confidential except in cases where disclosure is reasonably necessary to prevent death or substantial bodily injury. Yet, the Rules say the lawyer can disclose to satisfy the mandatory disclosure statute.

As a result, in a case in which disclosure is not necessary to prevent death or substantially bodily injury, if a lawyer follows the Committee’s conclusion and does not disclose, the lawyer may be found to be in violation of the Statute and charged with a misdemeanor. The Committee’s Opinion, which does not have the force of law,<sup>54</sup> would not be a bar to such prosecution.<sup>55</sup> If, on the other hand, the lawyer discloses to comply with the Statute, the lawyer may be found to have acted in violation of an ethical duty and be subject to discipline—including disbarment—if the state disciplinary authorities agree with the Committee’s interpretation. Finally, lawyers who disclose information because they disagree with the Committee’s interpretation that there is a duty not to disclose under the Statute may open themselves to civil claims for negligence or breach of fiduciary duty.

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53 Ind. State Bar Ass’n Legal Ethics Comm., *supra* note 12, at 24.

54 The opinion itself starts by reminding readers that it is only advisory in nature and does not have the force of law. *See id.*

55 David L. Hudson, Jr., *Conflicted Over Confidentiality: Indiana Ethics Opinion Says Lawyers Not Always Obligated to Report Child Abuse*, 35 CHILD L. PRAC. 42, 43 (2016) (Hudson quotes Professor Peter A. Joy of the Washington University School of Law in St. Louis, stating, “The ethics opinion does not and could not bar such a prosecution, and the opinion even states at the start that it ‘does not have the force of law.’”).

One would think that lawyers would abide by the Statute and then argue, if necessary, that the Rules of Professional Conduct allow the disclosure. But, because of the Committee's Opinion, lawyers may fear they will be subject to sanctions or civil lawsuits if they disclose the information. Thus, oddly, the Opinion needlessly puts at risk the safety of both children and attorneys at the same time.<sup>56</sup>

#### CONCLUSION

When Alice, the main character in Lewis Carroll's *Through the Looking-Glass*, walks through a mirror into an alternative reality, she finds herself in a world where things and words, appear, to her, to be reversed.<sup>57</sup> Something like that seems to have happened in Indiana, where the Ethics Committee of the State Bar Association announced that a permissible duty under the Rules of Professional Conduct was a mandatory duty, and that, at the same time, conduct that used to be permissible would no longer be allowed. In this alternative reality created by the Committee, lawyers have a duty to disobey a mandatory statute—thus, a duty to commit a misdemeanor—and a duty to keep secret information the Rules allow them to disclose.

Hopefully, something can be done to walk back from the other side of the mirror. Once back, the Committee should withdraw the Opinion and reconsider strategies to achieve a more satisfactory result than the one promoted by the current state of the law.<sup>58</sup> Evidently, Indiana has taken the view that maximizing the efforts to help victims of child abuse is more important than protecting the policy behind the need for confidentiality within the attorney-client relationship. However, although excepting lawyers from the statutory duty to disclose will eliminate one possible source of information needed to provide help for abused children, it could also be argued that preserving the confidentiality of the information disclosed within the attorney-client relationship is the better policy.<sup>59</sup> The

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<sup>56</sup> See *id.* (quoting Professor Joy saying, "In my opinion, any lawyer in Indiana who relies on this ethics opinion would be going out on a limb if the lawyer does not report suspected child abuse or neglect"). Indiana Department of Child Services spokesperson James Wide has been quoted as saying that the Committee's Opinion "puts the safety of children at risk." *Indiana Lawyers Say They're Not Bound to Report Child Abuse*, J. GAZETTE (Oct. 12, 2015), <http://www.journalgazette.net/news/local/indiana/Indiana-lawyers-say-they-re-not-bound-to-report-child-abuse-9316910>.

<sup>57</sup> See LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* (N.Y. MacMillan & Co. 1875).

<sup>58</sup> For a good discussion of that question, see Mosteller, *supra* note 14, at 271 nn. 204–05.

<sup>59</sup> For an argument in favor of the position that lawyers should not be required to disclose confidential information under the mandatory reporting statute see Smith, *supra* note 52, at 453, 455–57, 458–69 (mandatory reporting undermines the attorney-client

application of the Statute to lawyers weakens the duty of confidentiality and the principles upon which it is based. It diminishes the value of the trust clients have on their lawyers, and affects the attorney-client relationship by essentially “deputizing” lawyers to monitor their own clients or to become informants against them. Thus, because protecting the confidentiality of the information and the attorney-client relationship serves important legal and social goals, lawyers should not be obligated to disclose confidential information.<sup>60</sup>

Unfortunately, however, the Committee’s position is not supported by the text of the Statute or the Rules.<sup>61</sup> For that reason, those who prefer the Committee’s view on this issue should work to amend the Statute to reflect a different public policy. Indiana could, for example, adopt the approach taken in Illinois, where the mandatory reporting statute holds that the reporting requirements do not apply to the contents of a privileged communication between attorneys and their clients or to confidential information within the meaning of the Illinois Rules of Professional Conduct.<sup>62</sup> The new statute should also explicitly recognize that the attorney-client privilege will be available in proceedings in which the Rules of Evidence apply. Such an approach would better define the proper

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privilege, can violate a client’s rights under the Sixth Amendment, and can create a conflict of interest between the client’s interests and defense counsel’s own interest in complying with the law).

60 See Mosteller, *supra* note 14, at 230–31 (“Even if the state is ultimately prohibited from calling the lawyer as a witness at the client’s trial, the major damage would have been done, and the promise of secrecy . . . would prove ineffective in facilitating open and free confiding of sensitive information.” (footnote omitted)).

61 In fact, it can be argued that the proper interpretation of the statute and the rules leads to the opposite conclusion. See Smith, *supra* note 52, at 452 (“Because the communications provided for in the duty of confidentiality encompass the communications of the attorney-client privilege, one could argue that, by excepting the duty of confidentiality, Indiana automatically carved out an exception to the attorney-client privilege.”).

62 See 325 ILL. COMP. STAT. 5/4 (2014) (“The reporting requirements of this Act shall not apply to the contents of a privileged communication between an attorney and his or her client or to confidential information within the meaning of Rule 1.6 of the Illinois Rules of Professional Conduct relating to the legal representation of an individual client.”); see also ILL. RULES OF PROF’L CONDUCT r. 1.6 (2016). It is important to note how the Illinois statute covers both information protected by the attorney-client privilege and confidential information under the rules of professional conduct. If the statute only protected privileged information, the attorney would still be required to disclose confidential information in some cases. The privilege only covers information provided by the client to the attorney in confidence for the purpose of obtaining legal representation. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 2000). If the attorney obtains the information about the child abuse from a third party, or from the client but in the presence of a third party, the information is confidential but not covered by the privilege. In such a case, if the statute only covered privileged information, the attorney would have to disclose the information.



relationship between the Statute, the Rules of Evidence and the Rules of Professional Conduct. Although this approach does eliminate the availability of one possible source of information in the efforts to identify victims of abuse, it also preserves an important, indeed indispensable, component of our system of justice.

Meanwhile, lawyers should follow a relatively simple four-step analysis to determine if they can, or must, disclose information obtained during the course of the representation of a client. First, the lawyer should determine if the information falls within the definition of confidential information according to the Rules of Professional Conduct.<sup>63</sup> If it does not, the duty of confidentiality does not apply and the attorney can decide what to do with, or about, the information. On the other hand, if the information is confidential, the second step is to determine if there is a duty to disclose it, whether a statute, court order, or rule of professional conduct imposes that duty. If there is a duty to disclose, the attorney must disclose according to that duty. If there is no duty to disclose, the third step is to determine if there is an exception that allows the attorney to disclose the information at his or her discretion. If not, then the duty is to keep the information secret.<sup>64</sup> If there is an exception, then the final step is for the attorney to use his or her discretion and determine whether to disclose based on a careful consideration of the advantages and disadvantages and possible consequences of disclosure.

Using this relatively straightforward flow-chart-like analysis, lawyers can always determine how to best apply the duty of confidentiality. Applied to the question asked by the Ethics Committee in Opinion No. 2 of 2015, the answer should be that, under the current state of the law, lawyers must abide by the duty imposed by the Statute and, therefore, must disclose any information that gives them reason to believe that a child is a victim of abuse or neglect. This is not the ideal result and the law should be changed. Until that happens, however, given the state of law, it is the correct result.

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63 Section 59 of the Restatement (Third) of the Law Governing Lawyers provides the most commonly used definition. It states that “[c]onfidential client information consists of information relating to representation of a client, other than information that is generally known.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 (AM. LAW INST. 2000).

64 If an attorney feels strongly enough that certain information should be disclosed even though there is a duty to keep the information secret, the attorney can always disclose the information understanding he or she will have to face the consequences of having violated an ethical duty.