THE IOWA STATE BAR ASSOCIATION

Committee on
Ethics and Practice Guidelines

26 June 2010

Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
625 East Court
Des Moines, IA 50309

RE: Ethics Opinion 10-02 Release of Client Confidences Rule 32:1.6

The Committee has received a request for guidance regarding application of Iowa Rule of Professional Conduct 32:1.6 (b) and (c) concerning when an attorney may reveal confidential information imparted to the attorney during the attorney-client relationship. We accept the request because there is a substantial difference between the ethical duties of a lawyer under the prior Iowa Code of Professional Responsibility for Lawyers DR 4-101 and the present Iowa Rules of Professional Conduct Rule 31:1.6 (b) and (c).

For the purpose of this opinion we will make the following assumptions: an attorney-client relationship does in fact exist and confidential information concerning the attorney's reasonable belief that certain or imminent death or substantial bodily harm to another was communicated to the attorney during the course of that relationship.

We will address the issue in the context of the following hypothetical fact scenario:

> During the course of a preliminary conference with a potential client who seeks to engage the attorney for the purposes of a dissolution, the potential client divulges that her husband has been sexually abusing children in the past and is intending to abuse the children of his

current domestic partner. The potential client refuses to report the matter to the appropriate law enforcement agency. The issue is whether the attorney can disclose the information without violating Rule 32:1.6.

Comparison of the Code and the Rules

The prior Iowa Code of Professional Responsibility, DR-4-101 (A) made a distinction between information classified as "confidence" which was "…protected by the attorney-client privilege under applicable law," and "secret" which is "…other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." However the present Iowa Rules of Professional Conduct, Rule 32:1.6, does not make the same distinction. Instead Rule 32:1.6 references the nature of the information as that which relates "….to the representation of a client…" We believe the new rule to be more expansive than that which existed under the prior Code and includes all information relating to the representation regardless of the source. See *ABA Comm on Ethics and Professional Responsibility*, Formal OP 94-380(1944).

Under the Code, DR-4-101(C) regardless of whether the information was classified "confidence" or "secret" a lawyer "…may reveal (3) the intention of the client to commit a crime and the information necessary to prevent the crime." We note that the Code focuses on the future intent of the "client" to commit a "crime." The nature or severity of the crime is not addressed.

The Iowa Rules of Professional Conduct takes a substantially different approach. Rule 32:1.6 (a), et. seq. states:

> (a) 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 out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> ***

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reason ably believes necessary to prevent imminent death or substantial bodily harm."

Attention is called to the fact that the rule addresses the issue from the standpoint of what the lawyer "reasonably believes" concerning what is "reasonably certain"(32:1.6.(b)(1)) or "imminent" (32:1.6.(c)) death or substantial bodily harm. We believe this to be a significant departure from the ethical duties embodied in the prior Code. Central to both standards is the lawyer's belief.

The lawyer's basis for belief under Rule 32:1.6(b)(1) and (c)

Neither Rule 32:1.6(b)(1) or 32:1.6 (c) or the comments to thereto give guidance regarding the quality or nature of the facts which form the basis for the lawyer's belief. Clearly the rule implies that the lawyer is reacting to information that was imparted by the client during the attorney-client relationship. We recognize that it is impossible to define an objective or "bright line" rule as to what weight or credibility the lawyer should ascribe to the imparted information. Is the information from the client in and of itself sufficient or must the lawyer undertake some duty to corroborate it. The rule is silent. We believe that determination is best left to the lawyer who, after taking into consideration the nature and reasonable probability of the truth of the statement, the potential client's motives in making the statement, adverse or negative impact that the statement may have on the potential client's own interests and any other relevant circumstance that may add to or detract from the credibility of the client or truthfulness of the statement is in the best position to judge it. Unless the lawyer knows otherwise, the lawyer is entitled to believe that the client is telling the truth. See, for example *Purcell v Dist. Attorney*, 676 N.E.2d. 436 (Mass, 1997) (holding that a lawyer acted properly in disclosing a statement by his client that he intended to burn down a building.) and *State v. Hansen*, 862 P.2d. 117 (Wash 1993) holding that a lawyer acted properly in disclosing that his client threatened to kill a judge and other lawyers.) Additionally all factors should be weighed in the light of the risk of death or serious bodily harm referenced by the Rule.

"May" and "shall" reveal.

The rule sets two standards to be used regarding the release of information, one is discretionary (Rule 32:1.6(b)(1) "…A lawyer may reveal" the other mandatory (Rule 32:1.6 (c) "…A lawyer shall reveal…". The determining factor is the temporal aspect of the term "imminent" regarding death or substantial bodily harm. Comment [19] provides the following guidance:

> "[19] For purposes of rule 32:1.6 "reasonably certain" includes situations where the lawyer knows or reasonably believes the harm will occur, but there is still time for independent discovery and prevention of the harm *without the lawyer's disclosure*. For purposes of this rule, death or substantial bodily harm is imminent" if the lawyer knows or reasonably believes it is unlikely that the death or harm can be *prevented unless the lawyer immediately* discloses the information." [emphasis added].

Further, we reference the underlying philosophy favoring disclosure in this type of situation referenced in that portion of Comment [6] which states:

> [6]…. Such harm is reasonably certain to occur if it will be suffered in the near future or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

Consequently the lawyer must engage in a two part analytical process: Can prevention occur without the lawyer's disclosure and is there time for independent discovery. If the answer to either of these questions is "yes" the lawyer is not mandated to reveal the information. Conversely if the answer is "no" then disclosure is mandatory.

"Death or substantial bodily harm."

The Rule 32.1.6(b) and (c) hazard standard of "substantial bodily harm" must be judged in relation to the unique facts of each situation.

Rule 32:1.6 (1)(b) and (c) Application Algorithm

Based upon the above we provide the following Rule 32:1.6 (1)(b) and (c) Application Algorithm for use by the Bar in deciding whether to disclose what would otherwise be protected attorney-client information.

1. The lawyer should determine if the information in question relates to the representation of the client by the lawyer. If it was imparted by the client as a part of the attorney client relationship the presumption will be that the information is protected. If the information does not relate to the representation of the client by the lawyer or was not imparted pursuant to an attorney-client relationship or one giving rise to the invocation of the attorney-client privilege or other rule of confidentiality or work product, then the information is not protected. However if the information is protected the lawyer should proceed on to the next step in the analysis.

2. The lawyer should document the factual basis for the lawyer's belief that the information is credible or believable. If the lawyer determines that the information is not credible or believable disclosure would not be warranted and the information protected. However if the lawyer believes the information to be credible or believable the lawyer should proceed on to the next step in the analysis.

3. The lawyer should document the basis for the lawyer's belief that death or substantial bodily harm will result to an individual. If there is no objective or reasonable basis for the lawyer's belief the information is protected and disclosure would not be warranted. However if the lawyer belief is that death or substantial bodily harm will result the lawyer should proceed on to the next step in the analysis.

4. The lawyer should determine and document whether prevention of the death or substantial bodily harm can occur without the lawyer's disclosure. If "no" then disclosure is mandatory; if "yes," disclosure is discretionary and the lawyer should proceed on to the last step in the analysis.

5. The lawyer should determine and document whether there is time for independent discovery and consequently prevention. If the answer is "no" then disclosure is mandatory; if "yes" then disclosure is discretionary.

Disclosure Protocol

If the lawyer determines that disclosure is mandated or the lawyer elects to exercise his or her discretion and disclose the information we suggest that the following disclosure protocol be considered:

1. The lawyer should first identify the individual, entity or agency to disclose information to who would have the ability to best protect the individual who is likely to suffer death or substantial bodily harm should the risk be realized. In this regard the presumption is in favor of a law enforcement agency.

2. Only so much of the information, if possible without revealing the identity of the client, should be disclosed to the appropriate agency as will be necessary to protect the individual who is likely to suffer death or substantial bodily harm .

3. If time permits the lawyer should advise the client of the lawyer's intent to disclose the specific information and the lawyer's basis therefore but only to the extent that the risk of harm to the individual who is likely to suffer death or substantial bodily harm is not increased.

The Committee notes that Rule 32:1.6 (b)(4) allows a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes it necessary to " (4) to secure legal advice about the lawyer's compliance with these rules."

The Committee stands ready to assist all members of the Bar in discharging their ethical obligations in this regard.

For the Committee,

NICK CRITELLI, Chair
Iowa State Bar Association
Ethics and Practice Guidelines Committee