

**FAMILY PRACTICE ETHICAL ISSUES  
AND A DISCUSSION ABOUT  
IDAHO CODE § 16-1605, et seq.**

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# **Statutory Authority**

# Reporting Abuse, Abandonment or Neglect

## Idaho Code § 16-1605

### **16-1605. Reporting of abuse, abandonment or neglect.**

(1) Any physician, resident on a hospital staff, intern, nurse, coroner, school teacher, day care personnel, social worker, **or other person having reason to believe** that a child under the age of eighteen (18) years has been abused, abandoned or neglected **or who observes the child being subjected to conditions or circumstances that would reasonably result in abuse, abandonment or neglect shall report** or cause to be reported within twenty-four (24) hours such conditions or circumstances to the proper law enforcement agency or the department.

## **§ 16-1606(1) Continued**

The department shall be informed by law enforcement of any report made directly to it. If the department knows or has reason to know that an adult in the home has been convicted of lewd and lascivious conduct or felony injury to a child in the past or that the child has been removed from the home for circumstances that resulted in a conviction for lewd and lascivious conduct or felony injury to a child, then the department shall investigate.

## **§ 16-1605(4)**

(4) Failure to report as required in this section shall be a misdemeanor.

## § 16-1605(2) and (3)

Contains an express exemption from the notification requirements for any confession or confidential communication to “a duly ordained minister of religion.”

No express exemption for attorneys or attorney-client privilege.

## Immunity

### Idaho Code § 16-1606

**16-1606. Immunity.** Any person who has reason to believe that a child has been abused, abandoned or neglected and, acting upon that belief, makes a report of abuse, abandonment or neglect as required in section 16-1605, Idaho Code, **shall have immunity from any liability, civil or criminal**, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any such judicial proceeding resulting from such report.

## **§ 16-1606 Continued**

...

**Any privilege** between husband and wife, or between any professional person **except the lawyer-client privilege**, including but not limited to physicians, counselors, hospitals, clinics, day care centers and schools and their clients **shall not be grounds for excluding evidence at any proceeding regarding the abuse, abandonment or neglect of the child or the cause thereof.**

## **Idaho Code § 16-1607**

**16-1607. Reporting in bad faith – Civil damages.** Any person who makes a report or allegation of child abuse, abandonment or neglect knowing the same to be false or who reports or alleges the same in bad faith or with malice shall be liable to the party or parties against whom the report was made for the amount of actual damages sustained or statutory damages of two thousand five hundred dollars (\$2,500), whichever is greater, plus attorney's fees and costs of suit. If the court finds that the defendant acted with malice or oppression, the court may award treble actual damages or treble statutory damages, whichever is greater.

**I.R.P.C., I.R.E. and Ethical Issues  
Relating to Reporting Child Abuse,  
Abandonment or Neglect**

## I.R.P.C. 1.6(a)

### RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal **information relating to 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).

## I.R.P.C. 1.6(b)(1)(2) and (6)

(b) A lawyer **may** reveal information relating to the representation of a client to the extent the lawyer **reasonably believes necessary**:

(1) to **prevent** the client from committing a crime, including disclosure of the **intention to commit a crime**;

(2) to **prevent reasonably certain** death or **substantial bodily harm**; . . . or

(6) to comply with **other law** or a **court order**;

## I.R.P.C. 1.6(c)

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

## ABA Model Rule 1.6 Annotation

The issue also arises in connection with statutes requiring that child abuse be reported. See, e.g., N.Y. City Ethics Op. 1997-2 (1997) (lawyer employed by social services agency may disclose information relating to abuse of minor client to social service agency if required by law); see also D.C. Ethics Op. 282 (1998) (lawyer must obtain client's informed consent to use services of social worker in connection with client's case if social worker required by law to report

suspected child abuse or neglect). See generally, *Child Abuse Reporting Law and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 Duke L.J. 203 (1992); Rosencrantz, *Rejecting “Hear No Evil, Speak No Evil”*: Expanding the Attorney’s Role in Child Abuse Reporting, 8 Geo. J. Legal Ethics 327 (1995).

# I.R.E. 502 Lawyer-Client Privilege

**(a) Definitions.** As used in this rule:

(1) Client. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is **rendered professional legal services** by a lawyer, **or who consults a lawyer with a view to obtaining professional legal services from the lawyer.**

## I.R.E. 502(a) Continued

(5) Confidential communication. A communication is "confidential" **if not intended to be disclosed to third persons** other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client **or those reasonably necessary for the transmission of the communication.**

## I.R.E. 502(b)

**(b) 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 which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative,

## I.R.E. 502(b) Continued

(3) among clients, their representatives, their lawyers, or their lawyers' representatives, in any combination, concerning a matter of common interest, but not including communications solely among clients or their representatives when no lawyer is a party to the communication,

## **I.R.E. 502(b) Continued**

(4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

## I.R.E. 502(c)

**(c) Who may claim the privilege.** The privilege may be claimed **by the client or for the client through the client's lawyer**, the guardian or conservator, or by the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication may claim the privilege but only on behalf of the client. The authority of the lawyer or lawyer's representative to do so is presumed in the absence of evidence to the contrary.

## I.R.E. 502(d)

**(d) Exceptions.** There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the **services** of the lawyer **were sought or obtained to enable or aid anyone to commit** or plan to commit what the client knew or reasonably should have known to be a **crime** or fraud;

These authorities present interesting issues relating to the disclosure of confidential information under I.R.P.C. 1.6 and the attorney-client privilege under I.R.E. 502.

# What we know.

- 1) In § 16-1605 “or other person” includes lawyers, thus we are reporters;
- 2) Idaho abrogates a religious privilege, but retains others, including attorney-client privilege. Thus, attorney-client privilege is not abrogated in § 16-1605.

3) Confidential Information under I.R.P.C. 1.6 is broader than the attorney-client privilege because confidential information includes information obtained from third parties and information from the client, but in the presence of others.

Thus, Idaho lawyers are obligated to report child abuse, abandonment or neglect under § 16-1605 if the abuse is learned from sources outside of the attorney-client privilege.

That is, if one has **reason to believe child has been** abused, abandoned or neglected **or who observes the child being subjected to conditions or circumstances that would reasonably result** in abuse, abandonment or neglect.

Thus, past abuse, if criminal, contrary to I.R.P.C. 1.6(b)(1).

Future abuse, perhaps possible within I.R.P.C. 1.6(b)(1).

The attorney-client privilege issue presents more of a dilemma.

Under § 1605 and § 1606, it seems pretty clear that attorney-client privilege is not a sufficient basis not to report. But under § 1606, attorney-client privilege is a basis to exclude evidence at any **abuse proceeding**.

What is an abuse proceeding?

Emergency removal;

Petition for Adjudicatory/Hearing;

Shelter Care Hearing;

Petition to Terminate Parental Relationship.

Could “abuse proceeding” mean a criminal proceeding for failure to report?

Very unlikely.

This creates a procedural dilemma for attorneys if one takes the position attorney-client privilege shields an attorney from a reporting obligation.

Risk:

Could be subject to criminal punishment before scope of attorney-client privilege is judicially determined.

Declaratory action is unrealistic.

Potential defense to misdemeanor?

Moreover, could be an exception to and thus no attorney-client privilege under I.R.E. 502(d)(1) if it falls within the crime-fraud exception.

i.e., enable or aid anyone to commit or plan to commit a crime.

Why the attorney-client privilege probably does not alter § 1605's duty to report.

1) Religious privilege abrogated, attorney-client privilege is not.

2) § 1606 relates to an evidentiary exclusion, not a reporting exclusion and the evidentiary exclusion would be unnecessary if the attorney-client privilege was a reporting exclusion.

3) Despite the extremely important purposes of attorney-client privilege:

(1) to ensure clients receive accurate and competent advice without fear information will be revealed to others;

(2) encourage candor; and

(3) allow lawyers to persuade clients to pursue legal alternative to illegal action.

The legislature has determined the reasons for reporting child abuse outweigh these purposes.

And, under § 1606, the attorney-client privilege in a child abuse reporting context is treated the same as these privileges:

- 1) husband-wife
- 2) doctor-patient
- 3) counselor-patient
- 4) hospital-patient
- 5) clinic-patient
- 6) daycare center
- 7) school

Conclusion: The attorney-client privilege does not alter our § 1606 reporting obligation.

Solution, albeit one we may not prefer.

Inform clients we are statutorily required to report child abuse, neglect or abandonment that falls within § 1606 and attorney-client privilege does not cover statements revealing possible abuse, abandonment or neglect.

Final odd issue:

If you report and client files a disciplinary grievance that you violated I.R.P.C. 1.6, do you have immunity from disciplinary consequence under § 16-1606?

Answer is No.

§ 16-1606 provides immunity from civil and criminal liability for anyone reporting child abuse, neglect or abandonment under 16-1605.

By rule, I.B.C.R. 525(a) disciplinary proceedings are neither civil or criminal but sui generis.