

**STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL
RESPONSIBILITY**

Formal Opinion No. 30
March 25, 2005

BACKGROUND

This opinion is in response to a request received from a member of the bar who is also a director of a non-profit legal services organization (hereinafter, the “organization”).¹ The request for an opinion is based upon an apparent potential conflict between the lawyer’s duty of confidentiality under the Supreme Court Rules and the Nevada statutory reporting requirements in cases of child abuse and neglect.

The organization provides free legal representation for minors and adults in child welfare, juvenile court and death sentence proceedings. The organization is co-directed and actively supervised by a licensed attorney and a licensed social worker and is staffed by law students certified to practice under SCR 49.5 and graduate students who earn field placement credit toward their degrees in social work for their services.

Each client of the organization is assigned to and represented by a team of staff members, consisting of a licensed attorney, one or more law students, and one or more social work students. The mission of the law students is to represent and counsel the clients under the supervision and direction of the licensed attorney. The mission of the social work students is limited to assisting the legal team in the representation of the client by assisting in client interviews and in the analysis, investigation and preparation of the legal cases. They also provide expertise to assist the lawyers and law students to understand the social contexts and effects of the clients’ backgrounds and legal difficulties. The social work students do not provide any social work services directly to the clients and do not communicate directly with them outside the presence of the rest of the legal team.

In the course of their participation in legal representation teams, the social work students and their supervisor learn of confidential and privileged information about the clients and others, to the same extent as the licensed attorney and the law students. The social work students would not be able to participate and assist meaningfully if they were prevented from learning such information about the clients. For this reason, the policies and practices of the organization are clearly designed to require the social work students to limit their participation to that of a legal assistant and to require them to understand and observe the rules of attorney-client confidentiality applicable to legal assistants.

¹ Two members of the committee are affiliated with the primary sponsor of the organization and have participated in the formulation of this opinion. The entire committee is aware of this affiliation and does not believe that the affiliation requires the two members to abstain from this opinion or that it will otherwise interfere with or influence the committee’s neutral evaluation and opinion concerning the issues raised in this request.

Before commencing work for the organization, social work students are required to sign an acknowledgement of their duty as legal assistants to protect the confidentiality to the clients and of the information they learn in the course of their work.

The issues in this request concern the application of NRS chapter 432B to the attorneys, law students, social work supervisor and social work students working for the organization. That chapter generally requires persons who learn that a child has been abused or neglected to report that information to a state agency. The reporting statute expressly requires attorneys and social workers to report such information in their possession and appears to require the reporting of information covered by the attorney's duty of confidentiality under the Supreme Court Rules. The request is fundamentally to resolve the apparent conflict between the statutory reporting obligation and the lawyer's duty of confidentiality to the client.

QUESTIONS PRESENTED

The request states two questions, but raises three fundamental issues. The questions are therefore restated as follows:

1. If, in the course of representing a client of the organization, a lawyer, legal assistant or law student attorney learns or has reasonable cause to believe that a child has been or is being abused or neglected, is the lawyer, legal assistant or law student bound by the statutory reporting requirement in NRS 432B.200 or by the Supreme Court Rule mandating confidentiality?
2. If a social worker or social work student is employed as part of the legal team representing a client of the organization, is that social worker or social work student a "legal assistant" for purposes of SCR 156, and thus bound by the lawyer's duty of confidentiality under that rule?
3. If a social worker or other non-legal professional employed by the organization, or a student under his or her supervision, who might otherwise be required by state law to report cases of child abuse or neglect, learns in the course of his or her work for the organization that a child has been abused or neglected, is the social worker, student or other professional bound by the statutory reporting requirement or the lawyer's duty of confidentiality?

ANSWERS

1. SCR 156 clearly requires the lawyer, legal assistant or law student attorney to keep any such information confidential insofar as it relates to the representation of the client, with two potentially applicable exceptions. Disclosure is permitted by SCR 156(3) to prevent or rectify the consequences of a client's criminal act, but only when the lawyer's services have been used in the commission of the crime. Disclosure is required by both SCR 156(2) and NRS 432B.220 when the lawyer, legal assistant or law student attorney reasonably believes that disclosure is

necessary to prevent the client from committing a criminal act likely to result in imminent death or substantial bodily harm.

There obviously remains, however, a potential conflict when the information is required to be maintained confidential by SCR 156 and is subject to the statutory reporting requirement applicable to lawyers. Clearly the attorney's failure or refusal to disclose such information does not violate SCR 156. The duty of confidentiality, however, may prove to be an inadequate defense to a misdemeanor prosecution for failure to report under NRS chapter 432B.

2. Yes. The social work students perform work traditionally done by a legal assistant and provide no other services to the clients. They learn of confidential client information in the course of the legal representation, and in the same manner and for the same purposes as a typical legal assistant. Generally, the law defines a legal assistant for such purposes to include consultants, translators, secretaries and paralegals, all of whom likewise learn of confidential information in the course of legal representation. The social work students are therefore "legal assistants" for purposes of SCR 156 and bound by the attorney's duty of confidentiality to the client.
3. Because the social work students are legal assistants in this context, they are bound by the statute and by SCR 156 to the same extent as the lawyer.

SUPREME COURT RULES INTERPRETED

SCR 156, 187

AUTHORITIES

Annotated Model Rules of Professional Conduct, 5th ed. (ABA, 2003), Rule 1.6 and accompanying commentary.

In the Matter of Amendments to the Supreme Court Rules of Professional Conduct, ADKT No. 370 (Filed March 10, 2004, Supreme Court of Nevada).

Interim Formal Ethics Opinion Re: The Effect of the SEC's Sarbanes-Oxley Regulations on Washington Attorneys' Obligations Under the RPCs (approved and adopted by the Washington State Bar Association Board of Governors, July 26, 2003).

McKay v. Board of County Commissioners, 103 Nev. 490, 495, 746 P.2d 124, 127, n. 5 (1987)

Minton v. Board of Medical Examiners, 110 Nev. 1060, 881 P.2d 1339 (1994)

Mosteller, Robert P., Chile Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant, 42 Duke L.J. 203 (1992)

Nevada Legislature, 63rd session, Summary of Legislation (1985)

NRS 49.095, 49.252, 432B.160, 432B.220, 432B.230, 432B.240, 432B.250

Nevada Assembly Journal, 1985

Nevada Senate Journal, 1985

Supreme Court Rules 156, 187

17 CFR Part 205

DISCUSSION

The Conflict

NRS 432B.220, which was added to the Nevada Revised Statutes in 1985, provides in part as follows:

1. Any person who is described in subsection 3 and who, in his professional or occupational capacity, ***knows or has reasonable cause to believe that a child has been abused or neglected*** shall:
 - (a) ... report the abuse or neglect of the child to an agency which provides child welfare services or to a law enforcement agency; and
 - (b) Make such a report as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that the child has been abused or neglected.

3. A report must be made pursuant to subsection 1 by the following persons:
 - ...
 - (e) A social worker ...
 - (i) An attorney, unless he has acquired the knowledge of the abuse or neglect ***from a client who is or may be accused of the abuse or neglect;***

.....

(emphasis added). The failure to make a report when required by this provision is a misdemeanor offense. NRS 432B.240. The mandatory report may be verbal or written, but must include the names and addresses of the suspect and of all known victims and “any other information known to the person making the report that the agency which provides child welfare services considers necessary.” NRS 432B.230(f).

Meanwhile, SCR 156 prohibits lawyers and their assistants from disclosing or revealing information “*relating to the representation of a client*” (emphasis added), unless the client consents after consultation. The only express exception requires the disclosure of such information “*to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm*” (emphasis added).

There is a conflict between the lawyer’s statutory obligation to report under NRS 432B.220 and his duty of confidentiality under SCR 156, in that the reporting exception to the Supreme Court Rule is much narrower than the lawyer’s exception to the mandatory reporting statute. Thus, some information that is not within the exception to the lawyer’s duty of confidentiality remains subject to reporting mandated by statute, such as evidence that the client committed child abuse in the past but poses no continuing threat to the child. This leaves the organization’s lawyers, law student attorneys, social worker supervisor and students in the position of having information that they are required to report under NRS 432B.220 but are prohibited from disclosing by SCR 156.

For another example, if the lawyer or assistant learns from the client in the course of the representation that someone other than the client (a spouse or relative or other) has abused or neglected a child in the past, NRS 432B.220 would require the lawyer to report, regardless whether a threat of further abuse or neglect exists. Because the client is not the one who “is or may be accused of the abuse or neglect,” the information is outside the lawyer’s exception to the reporting statute. However, the information is still within the scope of the attorney’s duty of confidentiality because it relates to the representation of the client and does not indicate or imply any reason to believe the client will commit a criminal act of any kind.

Legislative History

Pertinent legislative history concerning NRS 432B.220 is scarce, but appears to support the position that the legislature intended to exempt attorneys from any reporting of confidential client information. Any such intent, however, is apparently contradicted at least to some extent by the plain text of the statute itself.

The legislation was enacted in 1985 to “significantly change” the child abuse mandatory reporting requirements and to establish a separate section of the NRS to deal exclusively with child protection. Nevada Legislature, 63rd session, Summary of Legislation (1985). AB 199 contained a number of other provisions not relevant to this opinion and added the mandatory reporting provision that is now NRS 432B.220.

There is some discussion in the available legislative history of the specific application of the mandatory reporting law to attorneys. In a hearing before the Senate Committee on the Judiciary on April 25, 1985, Assembly representatives testified that the Assembly had “decided to eliminate the requirement that attorneys report” from the original bill. Explaining further, Assemblyman Stone stated,

[W]e found out . . . a client coming to see an attorney, telling me that he or she has abused or neglected their child in the past, is a privileged communication. I would not, under any circumstances, because of the code of professional responsibility, be able to disclose that. However, if I have a good faith belief, with the same code of professional responsibility, that that individual is going to go out and cause harm to another human being, I have to report that . . . we felt that adequately covered the situation.

Senate Journal, 1985, p. 1650. The Senate committee, however, then decided “to add an attorney to the list in section 21, exempting the attorney-client privilege.” Senate Journal, 1985, p. 1865. The committee’s amendment produced the current version of NRS 432B.220 and 432B.250 (which negates the privilege in cases covered by section 220).

While it is clear that the Senate rejected the Assembly’s proposal to exclude attorneys from AB 199 altogether, the legislative history as a whole provides some support for both sides of the issue. The Senate Committee’s intent to “exempt” the attorney-client privilege could be read several ways. It can reasonably be read as a response to the Assembly concern for the duty of confidentiality, evidencing intent to avoid the conflict with the Supreme Court Rules. The reference to privilege instead of confidentiality may have been misstatement or it may have been related to the other provisions prohibiting resort to the statutory privilege in defense of a failure to report. It is somewhat telling that the final bill did not “exempt” the attorney-client privilege in the sense of preserving it. In fact, the bill provided just the opposite.

Privilege

Statutory attorney-client privilege does not present a similar issue in this circumstance because NRS 432B.250 specifically prohibits a person from invoking “any privilege set forth in chapter 49” in defense of his failure to report when required by NRS 432B.220. Chapter 49 contains the attorney-client and social worker privileges. NRS 49.095; NRS 49.252. Unlike the issue of confidentiality, there is no direct conflict regarding privilege because the reporting statute clearly and explicitly overrides an otherwise-applicable claim of privilege. There is no question that the legislature intended to require attorneys to report information that might also have been covered by the attorney-client privilege or that the privilege will provide no defense to an attorney or legal assistant facing prosecution for failure to report child abuse or neglect when required by the statute.

However, there is no similar explicit reference to attorney-client confidentiality in the child abuse and neglect reporting statutes. While the absence of a direct provision regarding attorney-client confidentiality might be seen as conspicuous, NRS 432B.250 might equally indicate a legislative intent to require reporting of child abuse and neglect even when traditional rules would otherwise prevent the disclosure or excuse the failure to do so.

Moreover, the reporting statutes provide “civil and criminal” immunity for any person who makes a report pursuant to NRS 432B.220. Again, it is not clear whether that statute would provide immunity from Supreme Court proceedings against an attorney for violating SCR 156 while complying with NRS 432B.220. Nonetheless, the purpose of this opinion is to address the lawyer’s and legal assistant’s duty of confidentiality to their clients and not their potential defenses in the case of prosecution for failure to do so.

Conflict and Preemption

Similar questions concerning conflicts between rules of professional conduct and statutory obligations have been raised, but not necessarily resolved, in a few cases. While the authority is somewhat instructive to the issues presented in this opinion, no direct and controlling authority has been located.

The Washington State Bar Association, for example, gained national attention recently with an Interim Formal Ethics Opinion addressing the conflicts between the duty of confidentiality and the attorneys’ reporting provisions under the Sarbanes-Oxley Act. In its regulations under Sarbanes-Oxley, the SEC *authorizes but does not require* an attorney practicing before it to reveal otherwise confidential information about his or her client that the attorney “reasonably believes necessary” to prevent a material violation of SEC rules, to prevent the client from committing perjury or fraud, or to rectify the consequences of a material violation by the client. 17 CFR 205.3(d). The SEC openly recognized the conflict between its new reporting regulations and the attorneys’ traditional duty of client confidentiality and specifically provided in the regulations that “[w]here the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.” 17 CFR 205.1. The more direct conflict, however, is in the latter provision that an attorney who reports information in compliance with the SEC regulations is protected from liability for the disclosure under state conduct rules or statutes. 17 CFR 205.6(c).

Because the reporting provisions, as they relate to attorneys, are permissive but not mandatory, the Washington State Board of Governors found no direct conflict with the duty of confidentiality. It therefore found no need to decide whether, in the event of a direct conflict, the SEC regulations would be deemed to preempt the state Rules of Professional Conduct. It went on to opine, however, that an attorney who reveals confidential information “cannot as a defense against an RPC violation fairly claim to be complying in good faith with the SEC regulations” because reporting under those rules is voluntary while disclosure under the RPC’s is forbidden. The Board therefore concluded that “to the extent that this SEC regulation authorizes but does not require revelation of client confidences and secrets, the Washington lawyer cannot reveal such confidences and secrets unless authorized to do so under the Washington RPC’s.” Interim Formal Ethics Opinion Re: The Effect of the SEC’s Sarbanes-Oxley Regulations on Washington Attorneys’ Obligations Under the RPCs, approved and adopted by the Washington State Bar Association Board of Governors, July 26, 2003.

The opinion drew a quick response from the SEC, which noted in a public letter to the Washington Bar three days before the Washington opinion was adopted, that because securities were regulated by the federal government as interstate commerce, the federal regulations would certainly preempt and state law in any form to the contrary. While this may or may not be so in this context, the federal-state conflict at play in that matter distinguishes it clearly from conflict addressed in this opinion. Even if it is conclusively decided that federal regulations preempt all conflicting forms of state law in matters of exclusive or primary federal jurisdiction, it would not necessarily follow that state statutes preempt state Supreme Court rules in similar contexts. Moreover, the reporting provisions under Sarbanes-Oxley are permissive, while the Nevada child abuse reporting statute at issue here is mandatory and backed by criminal sanctions.

Although distinguishable in many respects, the Washington Board of Governors' opinion is instructive at least in the application of professional conduct rules concerning confidentiality. This committee agrees with the general proposition that a state or federal statute either allowing or requiring conduct that violates a rule of professional conduct does not necessarily absolve an attorney of the professional consequences for the violation. The attorney's duty of confidentiality under SCR 156 explicitly prohibits some of the very disclosures that are required by NRS 432B.220. While the Nevada statute purports to grant immunity similar to the SEC regulations referenced above, we share the Washington Board of Governor's doubts about the efficacy of a statutory immunity in proceedings for professional misconduct. The Nevada Supreme Court maintains primary authority over the conduct of lawyers in Nevada, and there is no reliable authority for the position that it would be bound to observe a statutory immunity from disciplinary proceedings when the attorney has violated the letter of the Supreme Court Rule.

There is no certain resolution of a conflict between the Supreme Court Rules and the Nevada Revised Statutes. In a somewhat related case in 1987, the Supreme Court provided some guidance:

There is certainly a point at which legislation could be seen as an unwarranted intrusion into the judicial process or into the attorney-client relationship. For example, a statute could not lawfully interfere with the right of a criminally accused to meet privately with an attorney. Another example would be a law which prohibited all confidential communications between members of public bodies and their attorneys. . . . Confidentiality goes to the very heart of the advisor-advisee relationship, and there comes a point at which mandatory disclosure of confidences or prohibition of all confidential communication could destroy the relationship.

McKay v. Board of County Commissioners, 103 Nev. 490, 495, 746 P.2d 124, 127, n. 5 (1987). That point, however, was not reached in McKay because the open meeting law at issue in that case did not require the attorney to reveal confidential information. It required only that meetings between the commission and its attorney regarding a proposed insurance claim settlement be held in public. Because the open meeting law did not require the disclosure of confidential information, and left the attorney free to meet

privately with individual commissioners, the Court found no actual conflict in need of resolution. The “point” foreseen by the Court in the case, however, may be reached in the form of NRS 432B.220. At the least, the Court’s statement in McKay supports the proposition that in some cases, a conflict between a statutory obligation and the duty of confidentiality will be resolved in favor of the Supreme Court Rules.

The Nevada Supreme Court clearly exercises independent and broad authority to govern the legal profession. See, e.g., Minton v. Board of Medical Examiners, 110 Nev. 1060, 881 P.2d 1339 (1994). Inasmuch as confidentiality goes to the very heart of the attorney-client relationship, it seems more likely than not that the conflict will eventually be resolved in favor of the Supreme Court Rule. Attorneys are among dozens of professionals and others listed in NRS 432B.220 as subject to mandatory child abuse reporting. The duty of attorney-client confidentiality, however, is peculiar to that relationship and does not exist, at least in equal strength and tradition, in most other relationships affected by the statute.

Moreover, a similar conflict is presented by NRS 432B.160, which provides immunity “from civil or criminal liability” for persons who report child abuse in good faith in accordance with NRS 432B.220. The statute does not expressly purport to provide immunity from bar disciplinary proceedings, but it does provide that such immunity applies “in any proceedings”. Even if it is intended to preclude disciplinary action for violation of SCR 156, it seems unlikely that the Nevada Supreme Court would defer to the legislature in a matter of attorney discipline. Thus, the committee is of the opinion that, although the issue is far from settled under current law, when faced with the issue the Nevada Supreme Court will place the duty of confidentiality ahead of the statutory reporting obligation, meaning that an attorney who reports confidential information pursuant to NRS 432B.220 may still face disciplinary action for violation of SCR 156.

Few other states place attorneys in a similar predicament, because most other state child abuse reporting statutes expressly preserve attorney-client confidentiality. One scholar studying the issue concluded that the benefits of mandatory child abuse reporting are far outweighed by their potential damage to the attorney-client relationship, “particularly by the dangers inherent in approving threatened criminal sanctions as a means of transforming lawyers into mandatory reporters of crime.” Mosteller, Robert P., Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant, 42 Duke L.J. 203, 276-78 (1992). This further supports the position that the duty of confidentiality should take priority over the mandatory reporting statutes as they apply to attorneys.

A comparison between the Nevada SCRs and the ABA Model Rules is also instructive. The Model Rules were recently amended to add an exception to the lawyer’s duty of confidentiality “to comply with other law or court order.” Model Rules of Professional Conduct, 5th ed., Rule 1.6(b)(4) (2003). The comments accompanying the change consist of the following statement:

Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

Model Rules of Professional Conduct, 5th ed., Rule 1.6, comment [10]. This change would resolve the conflict with NRS 432B.220 if it were adopted in Nevada, because the reporting of child abuse or neglect would be “to comply with other law” and the lawyer’s only obligation to the client would be to advise him of the report. Of course the attorney would be required to maintain the confidentiality of the information in all other respects, but under the amended Model Rules, the report would not be a violation of the attorney’s duty of confidentiality under Rule 1.6.

SCR 156 already differs from the Model Rule 1.6 in several respects before the 2002 amendments to the Model Rules, so it can not be assumed that the Nevada Supreme Court would adopt the recent changes. It must be noted, however, that the current “Ethics 2000” petition to amend the Supreme Court Rules includes the addition to SCR 156 of the critical exception “to comply with other law or court order”. *In the Matter of Amendments to the Supreme Court Rules of Professional Conduct*, ADKT No. 370 (Filed March 10, 2004). The committee’s final recommendation, while not adopting the amended Model Rule 1.6 entirely, supports the addition of the exception “to comply with other law or a court order.” Reporter’s Supplement E2K Report: Board of Governors Final Vote Taken, www.nvbar.org/Ethics/e2k.htm. But unless and until so amended, SCR 156 makes no such exception for otherwise mandatory disclosure of confidential client information so, the attorney’s compliance with other laws, including NRS 432B.200, does not relieve him or her of the duty of confidentiality.

By the same token, a prosecution of an attorney for failure to report under NRS 432B.220 may not be preempted by the attorney’s duty of confidentiality under SCR 156. It is fairly clear that the legislature intended to require attorneys to report even information that is otherwise privileged. Its failure to account for the attorney’s duty of confidentiality when drafting AB 199, whether by design or by oversight, does not imply an intent to exempt confidential client information from the mandatory reporting law. The legislature’s intent, however, is not relevant if the Nevada Supreme Court holds that the statute is superseded by SCR 156.

CONCLUSION

It is beyond the charge and authority of this committee to definitively resolve the conflict between NRS 432B.220 and SCR 156. But because the Nevada Supreme Court has made no exception to SCR 156 that would absolve an attorney for a violation when the violation was required by state statute, we must conclude that SCR 156 continues to apply equally to confidential client information both within and without the scope of

mandatory reporting under NRS 432B.220. There is no reliable basis to conclude either that a disclosure required by the statute would be immune from discipline under SCR 156 or that a failure to report in violation of NRS 432B.220 would be excused on account of the attorney's duty of confidentiality.

So long as this conflict is resolved by neither the legislature nor the Supreme Court, the organization's attorneys, legal assistants and law student attorneys are left in the unenviable position of violating one or the other when they come into possession of information that lies in the gap. The committee believes, however, that the most likely resolution of this conflict will be in favor of preserving attorney-client confidentiality.

Because the social work students are clearly working for the organization as legal assistants, they are bound as legal assistants to the Supreme Court Rules and thus to the same duty of confidentiality. Thus, this opinion may be read to apply equally to all of them.

NOTE: This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada pursuant to SCR 225. It is advisory only. It is not binding on the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibility, or any other member of the State Bar of Nevada.