

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

Formal Opinion No. 32  
March 25, 2005

**BACKGROUND**

This opinion is issued in response to frequently asked questions regarding the formation of the attorney-client relationship - particularly following the advent of the internet and electronic means of communication.

**QUESTIONS**

1. Can an attorney-client relationship be created as the result of the unilateral act of the prospective client; for example, by the sending an unsolicited letter containing confidential information to the attorney?
2. Does the analysis change if the letter containing confidential information is sent in response to an advertisement, or is transmitted by e-mail to the attorney's web-site?
3. If there is no attorney-client relationship, what is the attorney's obligation (if any) with respect to confidential information sent by someone requesting legal services?

**ANSWERS**

1. Generally not; however, an attorney-client relationship may be created by implication as the result of acts and events following the prospective client's unilateral act.
2. Yes. An attorney who advertises or maintains a web-site may be deemed to have solicited the information from the prospective client, thereby creating a reasonable expectation on the part of the prospective client that the attorney desires to create an attorney-client relationship.
3. Unsolicited information received by an attorney from a person having no reasonable expectation that the attorney desires to create an attorney-client relationship does not implicate the SCR 156 duty of confidentiality; however, communications from a prospective client having a reasonable expectation that the attorney desires to create an attorney-client relationship may impose upon the receiving attorney a duty that they be kept confidential.

**AUTHORITIES RELIED ON**

*Todd v. State*, 113 Nev 18, 931 P.2d 721 (1997); *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992).

J. T. Westermeier, Ethics and the Internet, 17 Georgetown Journal of Legal Ethics, 267 (2004).

Restatement, Third, The Law Governing Lawyers §§14, 15 (2000 ed.)

Nevada Supreme Court Rule 156

Proposed Nevada Supreme Court Rule 156.1

Model Rule of Professional Conduct 1.6

Annotated Model Rules of Professional Conduct (5th ed. 2004).

Arizona State Bar Committee on the Rules of Professional Conduct, Opinion No. 02.04 (2002).

State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2003-161.

## DISCUSSION

1. The attorney-client relationship is a consensual one, and generally does not arise without the manifest intent of both parties that it exist. Nevada law requires no particular set of "formalities" in the creation of the relationship, *Williams v. Waldman*, 108 Nev. 466, 471, 836 P.2d 614 (1992); however, it is generally necessary to the formation of the relationship that the prospective client manifests to an attorney the prospective client's intent that the attorney provide legal services, and the attorney manifests an intent to do so. Restatement, Third, The Law Governing Lawyers §14(1)(a) (2000 ed.). Thus, a unilateral act of a prospective client (such as sending a letter containing confidential information to an attorney) is not sufficient to create an attorney-client relationship. *See, e.g.* Restatement §14. Illustration 3 (Letter to lawyer describing medical malpractice suit and requesting that it be filed by lawyer is not sufficient to create attorney-client relationship, where lawyer neither answered letter, nor otherwise communicated willingness to represent the letter writer.)

There are, however, circumstances under which an attorney-client relationship can be created in the absence of the attorney's express agreement to represent the prospective client. One such case is *Todd v. State*, 113 Nev. 18, 931 P. 2d 721 (1997).

Mr. Todd was residing in the Washoe County jail pending his trial on charges arising out of events at the Eldorado Hotel, when he had a chance encounter with Sam Bull, an attorney who was at the jail visiting another client. Mr. Todd told attorney Bull that he wanted to sue the Eldorado

for "police brutality," and Mr. Bull - who "never turned anybody down" - instructed Mr. Todd to write down everything that happened and send it to him. Mr. Todd did so, sending attorney Bull five pages of notes. There were no further communications between Mr. Todd and attorney Bull.

Mr. Todd was later convicted of an armed robbery and a kidnaping which he had committed at the Eldorado Hotel, and which he had detailed in the five pages of notes previously sent to attorney Bull. When attorney Bull learned of Mr. Todd's conviction, he sent those five pages of notes (along with a letter expressing his own opinions on Mr. Todd's guilt) to the judge, suggesting that they be considered in determining Mr. Todd's sentence. Based on the record, the Supreme Court found a strong indication that the letter from attorney Bull and Mr. Todd's notes had been read by the sentencing judge, and held that this required the vacation of Mr. Todd's sentence.

In a thoughtful opinion, a majority of the Court found that the dealings between Mr. Todd and attorney Bull - the jailhouse conversation, attorney Bull's instructions to Mr. Todd to write down everything that happened and send it to him, and Mr. Todd's compliance with those instructions - had given rise to an attorney-client relationship by implication. The Court stated the rule as follows:

An attorney-client relationship may be implied when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.

113 Nev. at 24.

The holding in *Todd* is consistent with the Restatement and the law in other states. See, Restatement §14(1)(b) and cases cited in *Todd*. See, also, State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 203-161, which contains an exhaustive list of factors to be considered, including: (i) whether the attorney volunteered his services; (ii) whether the attorney agreed to investigate the case and provide advice; (iii) whether the attorney had previously represented the person; (iv) whether advice had actually been provided; (v) whether fees were paid; (vi) whether the consultation was made in confidence; and (vii) whether the individual reasonably believed that he was consulting the attorney in a professional capacity.

In sum, the attorney-client relationship is ordinarily created by mutual assent; however, it may be created by implication. A prudent attorney, faced with the act of a prospective client evidencing an expectation that the relationship has been created and who does not want to represent that person, is well advised to expressly decline the representation and otherwise disaffirm the existence of the relationship.

2. The foregoing analysis changes somewhat if the communication from the prospective

client is in response to an advertisement or a solicitation contained on the attorney's web-site. While the rule stated in *Todd v. State* would still apply, the application of the last criterion would differ; that is, a communication received from a prospective client in response to an advertisement or a web-site cannot be deemed to be unsolicited, and an attorney who places advertisements or solicits e-mail communications has a heightened duty to ensure that prospective clients do not interpret the advertisement or solicitation as the attorney's agreement that the attorney-client relationship is created solely by virtue of the prospective client's response.

Most attorneys have addressed this issue by posting disclaimers to the effect that nothing contained on the web-site or communicated through it by the prospective client will create an attorney-client relationship. See, J. T. Westermeier, *Ethics and the Internet*, 17 *Georgetown Journal of Legal Ethics* 267, 297-98 (2004). This should be effective, since no one responding to the web-site could - in the face of such an express disclaimer - reasonably believe that an attorney-client relationship had been created.

3. And what, then, of the unsolicited material sent by the prospective client, either directly to the attorney or communicated through the web-site? Assuming that no attorney-client relationship is created, what, if any, are the duties of the attorney respecting the information which was provided by the prospective client?

Nevada Supreme Court Rule 156 requires that an attorney preserve the confidentiality of information received from a "client," which presumes the existence of the attorney-client relationship. This includes attorney-client relationships which arise by implication, *Todd v. State*, and the duty also applies to and protects discussions between an attorney and prospective client pertaining to representation where no such relationship ensues. See Restatement §15(1); Annotated Model Rules of Professional Conduct, p.93 (5<sup>th</sup> ed. 2004). The rationale underlying this principle is clear: persons seeking legal advice should be "encouraged to seek legal assistance and to communicate fully and frankly with the lawyer," comment 2 to Model Rule of Professional Conduct 1.6, and such communications will be encouraged if the person knows that they will be kept confidential. Annotated Model Rules p.83.

It is presently unclear, however, whether the duty of confidentiality also attaches to communications which are unsolicited where no attorney-client relationship (either express or implied) exists. A recent opinion of the State Bar of Arizona ethics committee states that unsolicited communications to an attorney (not in response to an advertisement or web-site) are not confidential, since the sender could not have a reasonable expectation of privacy in the communication. Arizona State Bar Committee on the Rules of Professional Conduct, Op. No. 02-04. The opinion contains a well-reasoned dissent which argues otherwise, however.

This issue may be resolved by the Nevada Supreme Court when it considers the proposed amendments to the Nevada Rules of Professional Conduct. Proposed Supreme Court Rule 156.1 (which is based upon Model Rule 1.18), embodies the duty of confidentiality to prospective clients, but provides that "prospective clients" do not include persons who communicate information without any reasonable expectation that the attorney is willing to form an attorney-client relationship.

In sum, an unsolicited communication to an attorney from a person having no reasonable expectation that the attorney is willing to form an attorney-client relationship does not give rise to the duty of confidentiality; however, such a duty may be implied where the communication is in response to an advertisement or web-site. Attorneys who advertise or maintain websites should therefore take appropriate precautions such as warnings and disclaimers.

**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 upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.**