Ethics 2000[1]

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[1] Adapted from materials presented for "Nevada Legal Ethics" (Lorman Education Services, Las Vegas, Nevada, 2004), updated with developments through 4/22/06, and summarized for space considerations for the Nevada Lawyer. The expanded version, with footnotes and additional explanations, can be accessed on the Published Works page of the Willick Law Group website: http://willicklawgroup.com/page.asp?id=40.

I. Ethics 2000

The American Bar Association (ABA) began a comprehensive review of the Model Rules of Professional Conduct in 1997, which project took until 2002 to result in substantial amendments the Model Rules. The Nevada Bar appointed its own Ethics 2000 ("E2k") Committee to review the proposals and suggest changes to Nevada's Supreme Court Rules 150 to 203.5, where the then-current Model Rules had been adopted in 1986, with slight revisions at that time and since then.

The E2K Committee met throughout 2003 and early 2004. Its work file, minutes, research, etc., can be accessed at http://www.nvbar.org/Ethics/e2k.htm. On March 5, 2004, the Board of Governors approved most of the recommendations proffered by the E2K Committee, making changes only to a handful of rules (discussed below) and forwarding the Report to the Nevada Supreme Court.

On February 6, 2006, the Nevada Supreme Court issued the final version of most of the rules, repealing SCR 150-203.5, and replacing them with a new section of the Supreme Court Rules, to be termed "RPC" (for "Rules of Professional Conduct"), numbered in accordance with the ABA Model Rules,[2] to be effective as of May 1, 2006. Some rules reserved for further review were approved on April 7, 2006. The final version of the final rule (RPC 1.13) being reconsidered should be in place by summer.

[2] For convenience, this article refers to the prior SCR numbers, with the new RPC numbers in brackets.

A. Changes to Nevada Ethics Rules

Many rules were not changed by the Ethics 2000 effort, including many of the basic "core" precepts such as competence, diligence, expediting litigation, etc. Some changes were merely technical, or required updating or harmonizing language, and some were unnecessary since Nevada had already, independently, improved the rules addressing the subjects in question. Only the apparently significant changes are summarized here.

B. ADKT 370 & Review By Nevada Supreme Court

Of the reserved rules, the Court approved new Rule 1.17, on Sale of Law Practice, on April 7, 2006, at the same time conformed former SCR 188, now Rule 5.4, to match.

It *sua sponte* altered SCR 191 (*Pro Bono Publico* Service, new Rule 6.1, changing the neutral "should" to state that "Every lawyer has a professional responsibility to provide legal services to those unable to pay," and providing that volunteer activities for little or no fee to groups working for the public good, or improving legal education, are in ***addition*** to assisting the poor, and not an alternative to such assistance. While *pro bono* remains framed as aspirational and voluntary, there is no mistaking the emphatic nature of the call to act on that aspiration.

The other reserved rule (RPC 1.13) was approved in part and remanded to the Nevada E2k Committee to reconsider its original recommendation that withdrawal of counsel from entity representation be required if the entity client acted at variance with the lawyer's recommendations under some circumstances. The Committee conferred, reviewed further

developments, and unanimously agreed to alter that recommendation; it is expected at this writing that the change will be accepted by the Board of Governors and the Court and enacted as a Rule 1.13 quite similar to the ABA Model Rule.

C. Most Significant Changes

Some Ethics 2000 changes are particularly significant because they mark departure from prior practice, or establish regulation of conduct not previously addressed. Those particular rule changes merit separate discussion.

1. SCR 155 (Fees) [RPC 1.5]

The phrasing shifted from an affirmative requirement that a fee "be reasonable" to a proscription that a lawyer shall not make an agreement for, charge, or collect "an unreasonable fee, or an unreasonable amount for expenses." An affirmative requirement to notify a client of any changes in the basis or rate of charges was added. It is also now necessary to obtain a client's agreement, confirmed in writing (rather than a client's mere "non-objection") to a division of fees between lawyers not in the same firm.

The Board of Governors would have had the language require fee splitting in proportion to work done in a case, but the Court eliminated the language inserted by the Board, making it still possible for lawyers in different firms to divide fees even if the fee split is ***not*** in proportion to the work they do, and even if the lawyers do ***not*** both retain joint responsibility for the case.

2. SCR 156 (Confidentiality) [RPC 1.6]

SCR 156 was adopted in 1986 and never modified until now; it represents one of the areas in which Nevada has been in the "progressive" category of states, and consideration of potential modifications of that rule occupied a good deal of the E2k Committee's time over a period of months. The Board of Governors re-debated the closest call in the revised rule, and changed it before sending it to the Supreme Court.

The prior rule largely matched the ABA Model Rule, except that § 2 was altered from "may" to "shall," making disclosure mandatory to prevent "a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Nevada also was at variance from the ABA standard by its inclusion of permissive disclosure when necessary to "preventing or rectifying the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used."

Nevada's SCR 156 already permitted or required greater disclosure than did the prior ABA standards. The new ABA Ethics 2000 proposal was closer to the existing Nevada rule, by permitting greater disclosure; it deleted the requirement of "criminality" to permit disclosure to prevent death or substantial bodily harm, and replaced the requirement of "imminence" with "reasonably certain," which deleted the time aspect. It still kept the disclosure discretionary, however, rather than mandatory (unlike the rule in Nevada and many other states).

The Nevada E2k made various small wording changes, bringing the syntax of the Nevada rule into conformity with the standard language used in the Ethics 2000 re-write.

The Committee split, however, on whether a lawyer should be permitted to reveal information relating to the representation of a client likely to result in death or substantial bodily injury, in the ***absence*** of a criminal act. By a 4/3 majority, the Committee approved such disclosure. After even more debate, the Board of Governors removed that provision, deleting it from the ADKT.

The Supreme Court reorganized the presentation, but restored the rule to the substance recommended by the Committee, ***permitting*** the lawyer to reveal information whenever reasonably necessary to prevent death or substantial bodily harm, and ***requiring*** the lawyer to do so if a criminal act is involved.

That left the Nevada disclosure rule in the "progressive" camp, while still at some variance with the ABA Model Rule. It provides for three types of disclosure. First, there is disclosure made pursuant to the client's informed consent, or disclosure that is impliedly authorized to carry out representation of the client.

Second, disclosure of client information is ***mandatory*** when the lawyer reasonably believes it necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm. In other words, while the harm need no longer be ***imminent***, it still must be caused by a criminal act to trigger mandatory disclosure.

Third, a lawyer ***may*** reveal information relating to the representation of a client in a variety of circumstances: to prevent reasonably certain death or substantial bodily harm ***not*** involving a criminal act; to prevent a client from ***committing*** a crime or fraud in which the lawyer's services were or are being used; to prevent, mitigate, or rectify the ***consequences*** of a client's criminal or fraudulent act in which the lawyer's services were or are being used;

when the lawyer seeks legal advice about compliance with the ethics rules; in a controversy between the lawyer and the client or in defense of allegations against the lawyer; or when necessary to comply with "other law or a court order."

Before revealing information to prevent a client from committing a crime or fraud, or trying to rectify the consequences of such a crime or fraud, the lawyer should first (if "practicable") try to get the client to correct the act in question.

3. SCR 156.1 (Refinement of Duties to a Prospective Client) [RPC 1.18]

New Model Rule 1.18 was adopted, with some comments added to the rule itself (with some modification), since Nevada has not adopted the entire ABA comments.

In essence, the new rule extends confidentiality protections to a prospective client, defined as "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." The rule provides that even when no client-lawyer relationship is formed, the lawyer is not permitted to "use or reveal information learned in the consultation, except as Rule 159 would permit with respect to information of a former client."

Additionally, the lawyer is not permitted, after such consultation, to represent a different client with interests materially adverse to those of the prospective client, at least in the same or a substantially related matter, if the lawyer received information from the prospective client that could be significantly harmful to that person. Exceptions are provided, if both the prospective and actual client give informed consent, confirmed in

writing, ***or*** the lawyer "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client" ***and*** that lawyer, having been disqualified, is "timely screened" from the case, receives "no part of the fee therefrom," ***and*** written notice is promptly given to the prospective client.

The comment-based additions to the new rule are designed to cope with the situations in which a party intentionally "consults" with an entire pool of qualified or specialized lawyers in a geographic area with the intent of conflicting all of them and thereby impeding the opposing party's access to counsel.

The first provision taken from the comments provides that a person who communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, or for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation, is not a "prospective client" within the meaning of the rule.

The other provision permits a lawyer to "condition" conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

The new rule represents a re-balancing of concerns, updating the concept of a "client," for purposes of confidences by a somewhat more sophisticated analysis. It attempts to extend legitimate confidentiality protection to those who seek it in good faith, while protecting lawyers from those who seek to purposefully disqualify them, and giving lawyers

an explicit means of preventing disqualification in advance of a consultation if they are concerned with the potential of such disqualification.

4. SCR 158(12) (Sex with client) [RPC 1.8(j)]

The E2k Committee recommendation (following the ABA proposal) was to prohibit "sexual relations" between attorney and client unless "a consensual sexual relationship existed between them when the client-lawyer relationship commenced." For corporate clients, the rule extended to "a lawyer for the organization, whether inside or outside counsel," and "a constituent of the organization who supervises, directs, or regularly consults with the lawyer concerning the organization's legal matters."

The intent was to make the prohibition sufficiently straightforward to ensure that it was clear that the prohibition of sex with clients is not waivable. The Committee debated the pros and cons of attempting to define sex for the purpose of the rule, noting the ABA decision to use "sex" rather than, for example, "romantic relationship." Ultimately, it was decided that the proposed rule was a "notice rule" – and that an attempt to define "sex" might create more problems than it would solve.

When this rule was reviewed by the Board of Governors, however, it was substantially softened, from a direct time-based prohibition to the much more subjective test that "A lawyer shall not have a sexual relationship with a client unless the sexual relationship is consensual and non-exploitative."

The Supreme Court restored the Committee's original language, but eliminated any complexity regarding organizational clients by adding that the provision "does not apply

when the client is an organization." Additionally, the Court added language that the prohibition on sexual relationships does not carry over to ***other*** lawyers in the same firm [RPC 1.8(m)].

5. SCR 157 (Conflict Waivers to be in Writing) [RPC 1.7(4)]

The Nevada conflict-of-interest waiver rule now explicitly refers to current clients, and the language was entirely replaced to match the ABA phrasing. It is substantively the same with one exception: conflict waivers now have to be in writing, based on the client's informed consent, to be permissible. Notably, such a "writing" is not required to bear the client's signature, so a confirming letter from the attorney is sufficient.

6. SCR 160 (Screening) [RPC 1.10]

This rule change may, in practice, have the biggest impact on lawyers' practices regarding hiring of associates and changing firms, of any in the Ethics 2000 set of changes.

Historically, it was not possible to "screen" any personnel, whether attorney or non-attorney; if that person had previously worked at a firm representing a party with a substantially adverse interest in current litigation, the firm hiring the person was required to withdraw from the case.

That began to change in the last few years, when the Nevada Supreme Court held that it was permissible for a hiring firm to screen non-attorney personnel, so long as adequate provisions were made for the protection of client confidences. E2k Committee research

revealed no significant problems in those states following the same rules for screening lawyers, which was recommended by the ABA Ethics 2000 proposal.

The Committee concluded that adoption of screening as an alternative for disqualification of the hiring firm would adequately protect client confidences, serving the interests of attorneys seeking to change positions, law firms seeking talented and necessary personnel, and clients regarding their ability to hire counsel of their choice. The old law firm disqualification language was deleted, and the ABA Model Rule language permitting screening was adopted.

The matter of the adequacy of screening and the possibility of disqualification remains a case-by-case matter for courts in the litigation process, and it is presumed that in practice the requirements for adequacy of screening of lawyers in any given case will be at least as rigorous as is required for screening non-attorney personnel.

The Supreme Court added one additional wrinkle – that the screened lawyer "did not have a substantial role in or primary responsibility for" the matter causing disqualification. So it is apparently possible to screen off an attorney who worked for the firm representing an opposing party, but apparently not if it was that attorney who was in charge of the case at his or her prior firm.

7. SCR 168.1 (Lawyer Serving as Third-Party Neutral) [RPC 2.4]

This is a new rule, following new Model Rule 2.4. It was believed that a rule providing ethical guidance would be useful for lawyers, clients, and third parties in this emerging area, which is particularly applicable to family law practice. It serves primarily to

define when a lawyer is acting as neutral (as an arbitrator, mediator, or other capacity), and indicates that such a lawyer should inform unrepresented parties that the lawyer does not represent them, and explain the lawyer's role in the matter.

8. SCR 199.2 (Sale of Law Practice) [RPC 1.17]

This new rule tries to recognize the "real world business environment" in which lawyers must practice today while enacting fairly stringent requirements so that clients are not "treated as a commodity."

The ABA proposal focused on the seller ceasing practice in a given place. The Nevada E2k Committee refocused the prohibition to relate to a practice area in a specific geographical location for a "reasonable period of time," which was further defined as not less than six months. The idea was to allow for unexpected events, such as when a practice is sold for health reasons, or a lawyer runs for political office or applies for a judicial vacancy.

Safeguards adopted for clients include notice of any such sale and a prohibition on any increase in the fees charged to clients "by reason of the sale." So long as the safeguards are put into place, a lawyer or law firm may now sell or purchase a law practice, or an area of practice, including the good will of that practice.

9. SCR 202.1 (Mandatory Self-Reporting; the Little Rule that Isn't)

Some Committee members proposed a rule requiring "self-reporting" of "sanctions" imposed by any court or tribunal to Bar counsel, failure to do which would itself be a violation of the ethical rules, and would suspend the statute of limitations for the imposition

of discipline. Problems included separating client misconduct from that of lawyers, separating actual ethical violations from the multitude of exclusionary or fee orders in fields such as family law, and a host of related practical difficulties.

Eventually, the Committee voted five to four to recommend a modified rule with monetary thresholds, and a definition of what might constitute a "sanction," but a final form to such a rule could never be agreed upon.

A similarly closely-divided Board of Governors voted eight to five to delete the rule from the ADKT altogether. As had the dissenters on the Committee, the majority of the Board liked the idea in concept, but was of the opinion that it was "too difficult to formulate enforcement elements that could be fairly and equally applied to all lawyers in the state." No such proposed rule was therefore included in the submission to the Nevada Supreme Court.

10. Terminology and Interpretation Guidelines [RPC 1.0 & 1.0A]

These are new provisions. ABA model language defining "informed consent" in place of "consent after consultation," is most notable throughout the rule set, but the new provision affords definitions to a host of terms used throughout the rules.

RPC 1.0A is made up of portions of what had been the "Scope" section of the Model Rules, as guidelines for interpreting the Nevada Rules. They are intended to be useful, if aspirational. They include direction to have the rules be rules of reason, and differentiating "shall" with "may" provisions. Reference is made to case law and other treatments of ethical standards, and to the requirement that any "violations" of ethics rules must be case specific. The interplay between ethics violations and malpractice and other liability is discussed.

D. Conclusions

While basic principles of ethical conduct remain the same, the rules necessary to govern the ethical conduct of attorneys in a changing world continue to evolve. It is hoped that the current updating better serve the interests of the Bench, Bar, and public in assisting and governing the ethical conduct of lawyers in Nevada.

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