Editorial Preface to Revisions to Revised Nevada Rules of Professional Conduct

Marshal S. Willick, Esq.
Willick Law Group
3551 E. Bonanza Road, Ste. 101
Las Vegas, NV 89110-2198
ph. (702) 438-4100 x 103
fax (702) 438-5311
website willicklawgroup.com
business e-mail: marshal@willicklawgroup.com

TABLE OF CONTENTS

I. Synopsis

Nevada has re-examined and revised the entirety of its ethics provisions governing lawyer behavior for the first time since 1983. Examining the American Bar Association's comprehensive review and modification of the Model Rules known as "Ethics 2000," the Nevada rules were amended by a process starting with a Nevada committee, going through the Board of Governors of the State Bar, and ending with the Nevada Supreme Court. The resulting rule set has been re-titled, re-numbered, and re-worded throughout; terminology and interpretation guidelines were added. Substantively, the ethical rules were modernized, bringing them into harmony with current thinking on the proper balance to be achieved regarding confidentiality, duties to prospective and former clients, and screening lawyers rather than disqualifying firms, among other issues. Some notice provisions were tweaked to require client consents to be in writing, and the duty to provide *pro bono* services to persons of limited means was emphasized.

II. The Process of Creating the New Nevada Rules of Professional Conduct ("RPC")

A. The ABA "Ethics 2000" Project

The American Bar Association (ABA) adopted the original Canons of Professional Ethics on August 27, 1908, based on a Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn was based on a judge's lectures during the mid-1800's. Piecemeal amendments to the Canons occasionally followed.

In 1913, the ABA formed its Standing Committee on Professional Ethics (later renamed several times until, in 1971, it became the Committee on Ethics and Professional Responsibility).

A comprehensive review of the Canons of Professional Ethics was begun in 1964, resulting in the ABA's 1969 adoption of the replacement to the Canons – the Model Code of Professional Responsibility. Most state and federal jurisdictions followed suit.

In 1977, the ABA began what was termed a "comprehensive rethinking of the ethical premises and problems of the legal profession," which produced the Model Rules of Professional Conduct, adopted by the ABA on August 2, 1983.

Again, most jurisdictions (including Nevada) adopted new professional standards based on those Model Rules, which the ABA amended 30 times over the following 17 years. In 1997, the ABA established the *Commission of Evaluation of the Rules of Professional Conduct* (Ethics 2000 Commission) to again comprehensively review the whole rule set in light of changes in practice, technology, and social conditions.

That process took until 2002, when the ABA substantially amended the Model Rules to take into account the Ethics 2000 Commission's work, plus developments coming from the Commission on Multijurisdictional Practice, the Standing Committee on Ethics and Professional Responsibility, and the American Law Institute's *Restatement (Third) of the Law Governing Lawyers* (2000).

B. The Nevada E2k Effort

In January, 1986, the Nevada Supreme Court adopted the 1983 version of the Model Rules, "with certain amendments approved by this Court," as the Nevada Rules of Professional Conduct. *See* (prior) SCR 150(1). The Court elected not to adopt the preamble or comments, but indicated that they "may be consulted for guidance in interpreting and applying" the rules as adopted in Nevada, set out at SCR 150-203.5, inclusive.

During the next 18 years, the Court occasionally revised the SCRs. For instance, SCR 155, regarding "fees," was amended in 1993 and 1999. Changes were usually driven by cases, initiatives, or concerns internal to Nevada, however, and there was no coordinated review of changes being made by the ABA to the Model Rules over the same time. With both the Nevada and ABA rule sets being "nipped and tucked" over two decades, the Nevada rules became increasingly at variance with the ABA Model Rules.

Independently, the Nevada Standing Committee on Ethics and Professional Responsibility and the Nevada State Bar Board of Governors began initiatives to review the Ethics 2000 changes made by the ABA for the purpose of updating the rules of ethics in this State.

Eventually, the Board of Governors merged these efforts and appointed a committee (the "State Bar of Nevada E2k Committee") to consider whether Nevada's Rules of Professional Conduct should be amended in whole or in part, using the ABA Model Rule changes as a basis for discussion.

The Committee Chair was attorney Steven B. Wolfson. The other members were the Hon. Deborah Schumacher, and attorneys Bruce Beesley, James Bradshaw, Dennis Kennedy, Bridget Robb Peck, Stephen Rye, Jeffrey Stempel (a professor of ethics at the Boyd law school at UNLV), and Marshal Willick. Bar Counsel Rob Bare was appointed as the Committee's Reporter, who was ably assisted throughout by paralegal Kristina Marzec, CLA (to whom the entire Committee owes a great deal of thanks for her tireless efforts).

The E2K Committee met throughout 2003 and early 2004, and maintained a work file, which was ultimately reconstituted as the Committee's *Report and Draft Recommendations*, chronicling its discussions, research, and recommendations. The work file, committee minutes, research, etc., can be accessed at http://www.nvbar.org/Ethics/e2k.htm.

After public hearings, the Committee's *Report* was finalized in December, 2003. It formed the basis for the Supreme Court Petition, known as an ADKT (Administrative Docket Entry), which was drafted and presented to the Board of Governors for review and approval.

On March 5, 2004, the Board of Governors approved most of the recommendations proffered by the E2K Committee, making changes only to the proposals relating to SCR 155(5) (Fees), SCR 156 (Confidentiality), SCR 158(12) (Sex with client), and SCR 202.1 (Mandatory self-reporting of sanctions). Each of these is discussed below.

On February 6, 2006, the Nevada Supreme Court issued the final version of the rules (with certain reservations and later modifications), as detailed below.

C. ADKT 370 & Review By Nevada Supreme Court

The Nevada Supreme Court invited members of the Board of Governors and the Nevada E2k Committee to a public hearing on September 23, 2004, where all matters were taken under submission.

On February 6, 2006, the Court issued its Order repealing SCR 150-203.5, and replacing it with a new rule set "distinct from the Supreme Court Rules" entitled "Rules of Professional Conduct," effective as of May 1, 2006. Interestingly, the Court sided with what had been a minority on the Nevada E2k Committee and renumbered the Nevada rules entirely, to correspond with the ABA Model Rules. The Committee majority had thought that the change would cause confusion among Nevada practitioners; the minority, and the Court, felt that long-term benefits would be realized by facilitating easy comparison with the corresponding Model Rules.

The Court reserved ruling on proposed amendments to SCR 163 (Organization as Client, new Rule 1.13), and 199.2 (Sale of law Practice, new Rule 1.17). *Sua sponte*, the Court considered changes to SCR 191 (*Pro Bono Publico* Service, new Rule 6.1).

On February 21, 2006, the Court held a hearing on those reserved matters. It remanded Rule 1.13 to the Nevada E2k Committee to reconsider its original recommendation (that withdrawal of counsel from entity representation be required if an "entity client" acted at variance with the lawyer's recommendations under some circumstances).

On April 7, 2006, the Court issued a further *Order*, approving Rule 1.17 permitting the sale of a law practice (and conforming former SCR 188, now Rule 5.4, to match), and

substantially revising the phrasing of Rule 6.1 (*Pro bono*) in several important respects. Each of these changes is discussed below.

III. Introduction to the Nevada Rules of Professional Conduct

A. What Was Changed in the Nevada Ethics Rules, What Was Not Changed, and Why

The E2k Committee began with a systematic review of the Model Rules, as they had been when adopted in Nevada, as they had changed over time, and as they were changing again due to the Ethics 2000 changes. The Model Rules were then compared with the SCRs, as they had been amended up to this time. This "side-by-side" comparison indicated that there were seven different categories of rules.

First, and easiest, were Model Rules not changed by the Ethics 2000 effort, including many of the basic "core" precepts (competence, diligence, expediting litigation) which therefore needed no changes. The corresponding SCRs left unchanged were 151 (Competence), 153 (Diligence), 167 (Advisor), 171 (Expediting litigation), 173 (Fairness to opposing party), 181 (Truthfulness in statements to others), 186 (Responsibilities of subordinate lawyer), and 192 (Accepting appointments).

Next were the Model Rules that corresponded substantively to the Nevada SCRs prior to the Ethics 2000 amendments. Usually, these were rules in which the revised phrasing in Ethics 2000 simply brought the rules up to date, or harmonized terminology with other rule changes, or gave greater specificity of meaning to permitted or prohibited conduct. The

corresponding SCRs were 152 (Scope of representation), 154 Communication), 157 (Conflict of interest: general rule), 162 (Former judge or arbitrator), 163 (Organization as a client), 164 (Client under disability), 166 (Declining or terminating representation), 168 (Intermediary), 169 (Evaluation for use by third person), 170 (Meritorious claims), 172 (Candor toward tribunal), 174 (Impartiality of tribunal), 178 (Lawyer as witness), 180 (Advocate: nonadjudicative proceeding), 182 (Communication with represented parties), 183 (Dealing with unrepresented persons), 184 (Respect for third persons), 185 (Responsibilities of supervising lawyers), 187 (Responsibilities regarding non-lawyers), 190 (Restrictions on right to practice), and 203 (Misconduct).

For example, subsection (a) of RPC 1.4 (Communication, prior SCR 154(1)) was changed from a single general sentence to five enumerated circumstances in which a lawyer should communicate with a client.

Most of the rule changes in this category were adopted without modification. There were two exceptions. First, the ABA repealed MR 2.2 (Intermediary), on which SCR 168 was modeled, in its entirety, in part because the Ethics 2000 Commission believed the matter adequately addressed in the comments to the revised MR 1.7 (Conflict of Interest: Current Clients). Since Nevada has not adopted the comments, *in toto*, however, it was believed better to retain the rule, which clarifies conflict of interests when a lawyer acts as an intermediary between parties.

Second, the ABA revisions to MR 3.5 (Impartiality and Decorum of the Tribunal and Relations With Jury) altered the rule on which Nevada had based SCR 174. Here, however, Nevada was apparently "ahead of the curve," since the new ABA language essentially added

a less detailed version of terms that Nevada already had in SCR 176 (Relations With Jury), for which there is no ABA counterpart. Since it was believed that we already had better wording for the same principle, the two rules were combined to maintain parallelism with the ABA counterparts, SCR 176 was repealed, and the language conformed as RPC 3.5(c)-(e), incorporating changes to MR 3.5 where applicable.

The third category consists of eight Nevada rules that had been altered at some point so that they were substantially similar, but not identical, to their ABA Model Rule counterparts before the E2k amendments. The corresponding SCRs were 155 (Fees), 158 (Conflict of interest: prohibited transactions), 160 (Imputed disqualification: general rule), 161 (Successive government and private employment), 165 (Safekeeping property), 188 (Professional independence of a lawyer), 195 (Communications concerning a lawyer's service), and 202 (Reporting professional misconduct).

Of these, several are addressed separately below. The remainder require only brief comments. Prior SCR 161 was replaced by the language developed by the ABA in MR 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees), and SCR 188 was altered to conform to MR 5.4 (Professional Independence of a Lawyer). SCR 195 (MR 7.1) (Communications Concerning a Lawyer's Services) was "skipped" because all of the advertising-related rules are being reviewed and addressed by a separate State Bar initiative and were the focus of separate scrutiny. SCR 202 adopted some slight ABA rephrasing from MR 8.3 (Reporting Professional Misconduct), and added that any information received through the "Lawyers Concerned for Lawyers" or similar assistance programs need not be reported.

RPC 1.15 (Safekeeping Property) replaced the prior language in SCR 165, except that certain language in the first and last sub-sections is at slight variance from the Model Rule.

The Fourth category consisted of 13 rules that were dissimilar from the Model Rules before the ABA modified them. The corresponding SCRs were 156 (Confidentiality of Information), 159 (Conflict of Interest: Former Client), 177 (Trial Publicity), 178 (Lawyer as Witness), 189 (Unauthorized Practice of Law), 189.1 (Registration of Private Attorneys in Extra-judicial Matters), 191 (Pro Bono Publico Service), 196 (Advertising), 197 (Communication with Prospective Clients), 198 (Communication of Fields of Practice), 199 (Firm Names), 199.1 (Registration of Multi-jurisdictional Law Firms), and 203.5 (Jurisdiction).

Of these, some are addressed separately below; the others are summarized here. The text of what became RPC 5.5 (Unauthorized Practice of Law) and 5.5A (Registration of Private Lawyers Not Admitted to Nevada in Extra-judicial Matters), Prior SCRs 189 and 189.1, were not touched because they had been separately and recently reviewed in a separate initiative that took into account the model rules. Prior SCR 199.1 (Registration of Multijurisdictional Law Firms) had no model rule counterpart and was tucked into the revised rules as RPC 7.5A.

Prior SCRs 159 (Conflict of Interest: Former Client) and 177 (Trial Publicity) were replaced by the language developed by the ABA in RPCs 1.9 (Duties to Former Clients) and 3.6 (Trial Publicity), respectively. The ABA changes to MR 3.7 (Lawyer as Witness) were adopted in RPC 3.7, previously SCR 178 (Lawyer as Witness). SCRs 196 (Advertising), 197

(Communication with Prospective Clients), and 198 (Communication of Fields of Practice) were separately addressed in other rule reviews.

RPC 7.5 (Firm Names and Letterheads), previously SCR 199, was modified to delete the prior prohibition on trade names, incorporating language from MR 7.5 that permit such names as long as they are not misleading. New RPC 8.5 (Jurisdiction), previously SCR 203.5, restates the language in the first sentence of the first subsection of the Model Rule; the remainder of that paragraph (stating that a lawyer may be subject to discipline in more than one jurisdiction) and the second subsection (regarding choice of law in such cases) were not adopted.

The Fifth category consisted of just three Model Rules that were altered by Ethics 2000, but had no previous Nevada Counterpart. The one adopted, RPC 1.17 (Sale of Law Practice) is discussed below. Two were rejected as unnecessary: MR 5.7 (Responsibilities Regarding Law Related Services), and MR 7.6 (Political Contributions to Obtain Government Legal Engagements or Appointments by Judges).

The Sixth category consisted of three Nevada rules that had no specific counterparts in the Model Rules: SCRs 175 (Relations with Opposing Counsel), 176 (Relations with Jury), and 196.5 (Legal Service Information).

SCR 175 (Relations with Opposing Counsel), which is the rule embodiment of the holding of *Rowland v. Lepire*, 95 Nev. 639, 600 P.2d 237 (1979), was retained as RPC 3.5A. SCR 196.5 (Legal Service Information) was retained as RPC 7.2A. As discussed above, SCR 176 was repealed, and the language moved to RPC 3.5(e).

Finally, the seventh category consisted of three rules newly-created in the Model Rules as part of the Ethics 2000 Review: Model Rules 1.18 (Duties to Prospective Client), 2.4 (Lawyer Serving as Third Party Neutral), and 6.5 (Nonprofit and Court-Annexed Limited Services Programs). Of these, RPC 6.5 was adopted word for word, and the other two are discussed in detail below.

B. Detailed Explanation of the Most Significant Changes

Many of the Ethics 2000 changes served mainly to clarify, update, or supplement existing tenets of established ethics. However, the ABA Ethics 2000 Commission, and the Nevada E2k Committee, realized that some changes were – and would be perceived as – 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. RPC 1.0 & 1.0A (Terminology and Interpretation Guidelines)

A new provision at the top of the rules, as SCR 150.1, was adopted. This is significant because, to date, Nevada has had no "terminology" rule. ABA model language defining "informed consent," in place of "consent after consultation," is most notable throughout the rule set, but the new rule afforded definitions to a host of terms used throughout the rules, such as "knowingly," "reasonable," "screened," and "writing."

RPC 1.0A consists of portions of what had been the "Scope" section of the Model Rules, adopted as guidelines for interpreting the Nevada Rules, and are intended to be useful, if aspirational. They include direction to have the rules be rules of reason, and differentiating "shall" from "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.

2. RPC 1.5 (Fees; prior SCR 155)

Most of the pre-existing tenets regarding fees are unchanged. Structurally, the Committee voted to accept the ABA changes, altering the focus of the rule 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 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 further altered the language of that section to delete the ability of a client to agree in writing to a division of fees between lawyers in some way other than in proportion to the services they each perform.

The Supreme Court, however, eliminated the language inserted by the Board of Governors, essentially 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.

3. RPC 1.6 (Confidentiality; prior SCR 156)

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 attention over a period of months. Despite this – or perhaps because of it – the Board of Governors re-debated the closest call in the revised rule, and changed it before sending it to the Supreme Court – which promptly changed it back.

The 1986 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."

Thus, Nevada's SCR 156 already permitted or required greater disclosure – or, looked at another way, provided less protection to confidences – than did the ABA standards. There is evidence that the Nevada Supreme Court deliberately chose this line between "not being an 'instrument of fraud,' on the one hand, and not being a 'policeman' on the other." *See* Formal Ethics Opinion No. 9 (April 21, 1988).

The ABA Ethics 2000 Commission proposed altering the Model Rules in such a way that they would be in greater conformity with the standard as expressed in Nevada, insofar as the new rule permitted greater disclosure. Specifically, 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," deleting 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 Committee agreed unanimously on a number of small changes, bringing the syntax of the Nevada rule into conformity with the standard language used in the Ethics 2000 re-write, and adding provisions permitting disclosure where necessary to secure legal advice regarding compliance with the rules, or to comply with "other law or a court order."

The Committee split, however, on whether a lawyer should be permitted to reveal information relating to the representation of a client that was likely to result in death or substantial bodily injury, in the ***absence*** of a criminal act. By a 4/3 majority, the Committee agreed with the apparent position of the ABA and the American Law Institute that human life endangered is human life that should be saved, regardless of cause or the effect on the protection of attorney-client confidences, and 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.

4. RPC 1.7(4) (Conflict Waivers to be in Writing; prior SCR 157)

The Nevada conflict-of-interest waiver rule was amended to make explicit that it was intended to refer to current clients, and the language was replaced entirely to match the revised ABA language from Model Rule 1.7. The language is a bit cleaner, and phrased positively rather than negatively, but is substantively similar to the prior SCR with a single exception.

The substantive change in the current rule is that 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.

5. RPC 1.8(j) (Sex with Client)

Most, but not all, of the ABA Ethics 2000 Commission's changes to the Model Rule, were adopted. The ABA recommendation 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 (i.e., the sexual relationship must precede the attorney-client relationship to be permitted) 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 language (actually, the ABA Model 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)].

6. RPC 1.10 (Screening; prior SCR 160)

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

In prior practice (and with the exception of government lawyers going into private practice, as permitted by prior SCR 161), "screening" of ***any*** personnel, whether lawyers or non-lawyer staff, was essentially seen as impermissible, leading to disqualification of entire firms resulting from the hiring of a new associate, or even of a paralegal or typist, if the new

hire had previously worked at a firm representing a party with a substantially adverse interest in current litigation. *See Ciaffone v. District Court*, 113 Nev. 1165, 945 P.2d 950 (1997).

However, in recent years, the Nevada Supreme Court has reconsidered that position, and authorized the screening of non-attorney personnel, so long as adequate provisions are made for the protection of client confidences. *See Leibowitz v. District Court*, 119 Nev. 523, 78 P.3d 515 (2003).

Nationally, states are divided as to the permissibility of screening of lawyers as an alternative to disqualification. The Committee's research on this rule did not indicate that there was any finding of ineffectiveness or loss of public respect for the profession resulting in those jurisdictions that permitted screening. The ABA Ethics 2000 Commission came to similar conclusions.

The Committee considered reports that the hiring practices of some Nevada law firms was being distorted in favor of recruitment of attorneys from outside the State to avoid the risks of disqualification of the firm from existing cases, which necessarily had an impact on the availability of employment options for attorneys in Nevada.

Ultimately, 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 no less rigorous than the "instructive list of minimum requirements" set out for screening non-attorney personnel in *Leibowitz*.

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. RPC 1.13 (Organization as Client)

As noted above, the Nevada Supreme Court remanded Rule 1.13 (in part) to the Nevada E2k Committee to reconsider its original recommendation (that withdrawal of counsel from entity representation be required if an "entity client" acted at variance with the lawyer's recommendations under some circumstances).

The Committee was reconvened. It conferred, reviewing developments and commentary since 2004, and unanimously agreed to alter the earlier recommendation, so that such withdrawal is discretionary, rather than required. 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.

8. RPC 1.17 (Sale of Law Practice)

This is a new rule, modeled on MR 1.17, recognizing 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 Model Rule was focused on the seller's cessation of practice in a specific geographic area. The Nevada E2k Committee refocused the prohibition to relate to a practice or 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 turns of 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 sell or purchase a law practice, or an area of practice, including the good will of that practice.

9. RPC 1.18 (Refinement of Duties to a Prospective Client; prior SCR 156.1)

The ABA Ethics 2000 Commission proposed a new Model Rule 1.18, which a majority of the Nevada E2k Committee voted to adopt. Comments 2 & 5 to MR 1.18 were added to the rule itself, with some modification, as subsections (e) and (f), since Nevada has not adopted the ABA Model Rule comments as a body.

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 the rules would permit with respect to information of a former client." This follows the trend in case law regarding lawyer discipline cases in other jurisdictions.

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.

This provision for disqualification, with allowance for screening of the individual lawyer, is compatible with RPC 1.10 (Screening), discussed above.

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. At least one Committee member believed this concern was strong enough to militate against adopting the rule at all, but the majority believed that

inserting some of the comments provided by the Ethics 2000 Commission (with some amendments) into the rule itself provided sufficient protection to lawyers.

The incorporated comments provide, first, 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 second comment-based 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. In prior case law, a "client," for purposes of confidences, included anyone who contacts a lawyer for the purpose of obtaining legal representation. *Todd v. State*, 113 Nev. 18, 931 P.2d 721 (1997). The new rule contains a somewhat more sophisticated analysis, attempting 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.

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

Some members of the Committee were concerned with the observation that a lawyer could commit significant acts in violation of the rules of ethics that could escape notice by Bar counsel, because they occurred in another jurisdiction, or for other reasons. They therefore put forward the idea for a new rule with no Model Rule counterpart; this proposal was destined to take up more time and effort than any other single item considered by the Committee during its existence.

Over a period of several months, the Committee debated the merits of 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 and the language was in flux all the way until submission to the Board of Governors.

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, and the Court did not see fit to try to fashion one.

11. RPC 2.4 (Lawyer Serving as Third-Party Neutral; former SCR 168.1)

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.

12. RPC 6.1 (*Pro Bono Publico* Service; former SCR 168.1)

These changes were enacted by the Nevada Supreme Court *sua sponte*; the Committee had left the language in prior SCR 191 (*Pro Bono Publico* Service) unchanged since the rule had recently been amended (in 2003) with Nevada-specific terms, and the Board of Governors had proposed no revision.

The Court, however, changed the rather neutral prior statement that a lawyer "should" perform such service to the admonition that "Every lawyer has a professional responsibility to provide legal services to those unable to pay." The new rule further defined what activities may be claimed as *pro bono* work, and required that if *pro bono* work is done, there must be a written fee agreement with the client, which refers to the rule.

Specifically, emphasis was placed on actually providing professional services to persons of limited means. The rule defined the professional responsibility as providing 20 hours of legal services per year – without compensation or expectation of compensation – to

"persons of limited means" or a public service or charitable group "in matters that are designed primarily to address the needs of persons of limited means."

The rule revisions appeared to respond to the results of mandatory *pro bono* reporting, which revealed that many lawyers seemed to think that they were executing their professional responsibility by diverse activities for family and friends. The rule expanded the list of specified activities that do ***not*** qualify as *pro bono* legal service, to include legal services written off as bad debts, legal services performed for family members, and activities that do not involve the provision of legal services, such as serving on the board of a charitable organization.

The revised rule focused on the duty of every lawyer to provide at least 20 hours per year of free direct legal services to the poor. While the "substantial majority" of anything to be considered *pro bono* should be by such direct service, any additional services should be by providing legal services "at no fee or substantially reduced fee" to individuals or organizations to protect civil rights, civil liberties, or public rights, or charitable, civic, community, governmental, and educational purposes, to further the purposes of such organizations, by participating in activities for improving the law, legal system, or legal profession, or delivery of legal education for a Nevada Bar association or court.

The revised rule states that as an alternative to the 20 hours of direct service, a lawyer can provide at least 60 hours of services "at a substantially reduced fee" to the poor, or contributing at least $500 to an organization that provides *pro bono* services. The Court also added a $100 fine to be levied against any lawyer who fails to file the mandatory annual report of *pro bono* service.

The amended rule continues to provide that the professional responsibility to provide *pro bono* services remains "aspirational rather than mandatory," and reassures reporting lawyers that the failure to render such services will not subject a member to discipline. In other words, lawyers remain free to disregard the stated professional responsibility to provide legal services to the poor, but they are required to self-report the fact that they do so.

The Supreme Court's revisions to RPC 6.1 indicate that it is not yet willing to institute a program of mandatory *pro bono* service, but is clearly stating just what services are expected of lawyers in this State, and is getting serious about acquiring the information showing the degree to which that expectation is being fulfilled.

IV. Conclusions

The past century has pretty well proven that while the 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 the expressed hope of all those who participated in the current updating and evolution of the Nevada Rules of Professional Conduct that they better serve the interests of the Bench, Bar, and public in assisting and governing the ethical conduct of lawyers in Nevada, until they are in turn deemed in need of further revision or replacement.