

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 In the matter of Amendments to Nevada
3 Rules of Professional Conduct 1.0, 1.6
4 and 4.4 regarding technology and
5 confidentiality and the detection of
6 conflicts of interest and Nevada Rules
of Professional Conduct 1.18 regarding
duties to prospective clients.

ADKT NO.: 0493

FILED

FEB 11 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

8 **PETITION**

9 The Board of Governors of the State Bar of Nevada (“State Bar”) hereby
10 petitions this Court to amend Nevada Rules of Professional Conduct (“NRPC”)
11 1.0, 1.6 and 4.4 regarding the use of technology in electronic client
12 communications. Furthermore, the State Bar petitions this Court to amend NRPC
13 1.18 to reflect the changing ways in which attorney-client relationships are formed
14 and to expand an attorney’s duty to keep information learned through electronic or
15 other forms of communication confidential. Finally, the State Bar seeks an
16 amendment to NRPC 1.6 regarding the revelation of certain client information for
17 the purposes of resolving conflicts of interest.

18 **Technology and Confidentiality**

19 In August 2012, the American Bar Association (“ABA”) amended its model
20 rules regarding technology and confidentiality as outlined in its Resolution and
21 Report 105A. The ABA model rules set forth specific requirements regarding
22 confidentiality in light of changing technology and e-business practices.
23 Specifically, ABA Model Rule 1.0 expands the definition of written records from
24 e-mail to electronic communications in general; ABA Model Rule 1.6 seeks to
25 require an attorney to make reasonable efforts to prevent the inadvertent or

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1 unauthorized disclosure or access to confidential client information; and ABA
2 Model Rule 4.4 includes electronically stored information as information that
3 must be returned to the sender if inadvertently sent.

4 The State Bar supports these amendments as they heighten awareness in the
5 profession regarding electronic communications and provide clarity to members
6 regarding safekeeping of confidential information. The State Bar respectfully
7 requests amendments to NRPC 1.0, Terminology; NRPC 1.6, Confidentiality of
8 Information; and NRPC 4.4, Respect for Rights of Third Persons, in relevant
9 parts, as follows:

10 **NRPC 1.0. Terminology**

11 ...

12 (n) "Writing" or "written" denotes a tangible or electronic record of a
13 communication or representation, including handwriting, typewriting, print,
14 photostating, photography, audio or video recording and [~~email~~] electronic
15 communications. A "signed" writing includes an electronic sound, symbol or
process attached to or logically associated with a writing and executed or adopted
by a person with the intent to sign the writing.

16 ...

17 **NRPC 1.6. Confidentiality of Information.**

18 ...

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

20 **NRPC 4.4. Respect for Rights of Third Persons.**

21 ...

22 (b) A lawyer who receives a document or electronically stored information
23 relating to the representation of the lawyer's client and knows or reasonably
24 should know that the document or electronically stored information was
25 inadvertently sent shall promptly notify the sender.

Duties to Prospective Clients

In its Resolution and Report 105B, the ABA also amended its model rules regarding a lawyer's duty to and solicitation of prospective clients. The ABA recognizes that a prospective client may be entitled to receive protection afforded to clients, depending on the information disclosed to the lawyer, documents placed in the lawyer's custody, or upon the reliance of the lawyer's advice. Furthermore, a person can become a prospective client through consultation that occurs in a non-traditional or electronic manner. To address these non-traditional communication methods, the ABA amended Model Rule 1.18: Duties to Prospective Client to replace language regarding "discussions" with a prospective client to reflect modern practices.

The State Bar agrees with the ABA proposed amendment and respectfully requests amendments to NRPC 1.18. Duties to Prospective Client, in relevant part to read:

(a) A person who [~~discusses~~] consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has [~~had discussions with~~] learned information from a prospective client shall not use or reveal that information [~~learned in the consultation~~], except as Rule 1.9 would permit with respect to information of a former client.

...

...

The ABA Resolution and Report 105B also identifies amendments to model rules related to lawyer advertising and communications with prospective clients. Those amendments are not included in this ADKT and have been set aside for review at a future date.

1 **Detection of Conflicts of Interest**

2 The ABA also amended its Model Rule 1.6, Confidentiality of Information as
3 cited in its Resolution and Report 105F. The ABA recognizes the changing
4 environment of law practice today, including the frequent movement of lawyers
5 from firm to firm, mergers of firms, and sales of law practices altogether. The
6 ABA also recognizes that with these moves, mergers and sales, comes the sharing
7 of certain client information when presenting a lawyer's book of business or a
8 firm's overall assets. Furthermore, as discussed in the Resolution and Report, the
9 ABA noted that it is important to be able to disclose certain client information
10 prior to a change in employment in order to resolve any potential conflicts of
11 interest. The amendment proposed by the ABA, and supported by the State Bar,
12 further clarifies that while certain information can be disclosed, detailed
13 information regarding clients, their files, and the lawyer's representation of the
14 client remain confidential.

15 The State Bar respectfully requests an amendment to NRPC 1.6.
16 Confidentiality of Information, in relevant part, as follows:

17 (a) A lawyer shall not reveal information relating to representation of a client
18 unless the client gives informed consent, the disclosure is impliedly authorized in
19 order to carry out the representation, or the disclosure is permitted by paragraphs
20 (b) and (c).

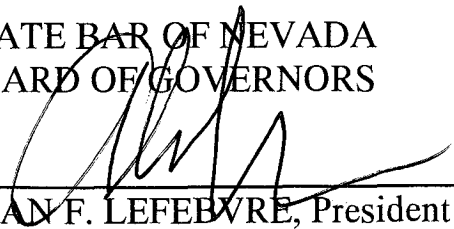
21 (b) A lawyer may reveal information relating to the representation of a client to
22 the extent the lawyer reasonably believes necessary:

23 ...
24 (7) To detect and resolve conflicts of interest arising from the lawyer's change
25 of employment or from changes in the composition or ownership of a firm, but
only if the revealed information would not compromise the attorney-client
privilege or otherwise prejudice the client.

1 The proposed amendments to the Nevada Rules of Professional Conduct are
2 attached hereto in their entirety as Exhibit A.

3
4 Respectfully submitted this 31 day of January 2014.

5 STATE BAR OF NEVADA
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1 **EXHIBIT A**

2 **NRPC 1.0. Terminology.**

3 (a) "Belief" or "believes" denotes that the person involved actually supposed the
4 fact in question to be true. A person's belief may be inferred from circumstances.

5 (b) "Confirmed in writing," when used in reference to the informed consent of
6 a person, denotes informed consent that is given in writing by the person or a
7 writing that a lawyer promptly transmits to the person confirming an oral
8 informed consent. See paragraph (e) for the definition of "informed consent." If it
9 is not feasible to obtain or transmit the writing at the time the person gives
10 informed consent, then the lawyer must obtain or transmit it within a reasonable
11 time thereafter.

12 (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership,
13 professional corporation, sole proprietorship or other association authorized to
14 practice law; or lawyers employed in a legal services organization or the legal
15 department of a corporation or other organization.

16 (d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the
17 substantive or procedural law of the applicable jurisdiction and has a purpose to
18 deceive.

19 (e) "Informed consent" denotes the agreement by a person to a proposed
20 course of conduct after the lawyer has communicated adequate information and
21 explanation about the material risks of and reasonably available alternatives to the
22 proposed course of conduct.

23 (f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact
24 in question. A person's knowledge may be inferred from circumstances.

25 (g) "Partner" denotes a member of a partnership, a shareholder in a law firm
organized as a professional corporation, or a member of an association authorized
to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a
lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a
lawyer denotes that the lawyer believes the matter in question and that the
circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes
that a lawyer of reasonable prudence and competence would ascertain the matter
in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a
matter through the timely imposition of procedures within a firm that are
reasonably adequate under the circumstances to protect information that the
isolated lawyer is obligated to protect under these Rules or other law.

1 (l) "Substantial" when used in reference to degree or extent denotes a material
matter of clear and weighty importance.

2 (m) "Tribunal" denotes a court, an arbitrator in a binding arbitration
3 proceeding or a legislative body, administrative agency or other body acting in an
4 adjudicative capacity. A legislative body, administrative agency or other body acts
5 in an adjudicative capacity when a neutral official, after the presentation of
evidence or legal argument by a party or parties, will render a binding legal
judgment directly affecting a party's interests in a particular matter.

6 (n) "Writing" or "written" denotes a tangible or electronic record of a
7 communication or representation, including handwriting, typewriting, print,
8 photostating, photography, audio or video recording and [~~email~~] electronic
communications. A "signed" writing includes an electronic sound, symbol or
9 process attached to or logically associated with a writing and executed or adopted
by a person with the intent to sign the writing.

10 (o) "Organization" when used in reference to "organization as client" denotes
11 any constituent of the organization, whether inside or outside counsel, who
12 supervises, directs, or regularly consults with the lawyer concerning the
organization's legal matters unless otherwise defined in the Rule.

13 **NRPC 1.6. Confidentiality of Information.**

14 (a) A lawyer shall not reveal information relating to representation of a client
15 unless the client gives informed consent, the disclosure is impliedly authorized in
16 order to carry out the representation, or the disclosure is permitted by paragraphs
(b) and [~~e~~] (d).

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

18 (1) To prevent reasonably certain death or substantial bodily harm;

19 (2) To prevent the client from committing a criminal or fraudulent act in
20 furtherance of which the client has used or is using the lawyer's services, but the
lawyer shall, where practicable, first make reasonable effort to persuade the client
to take suitable action;

21 (3) To prevent, mitigate, or rectify the consequences of a client's criminal
22 or fraudulent act in the commission of which the lawyer's services have been or
are being used, but the lawyer shall, where practicable, first make reasonable
23 effort to persuade the client to take corrective action;

24 (4) To secure legal advice about the lawyer's compliance with these
Rules;

25 (5) To establish a claim or defense on behalf of the lawyer in a
controversy between the lawyer and the client, to establish a defense to a criminal

1 charge or civil claim against the lawyer based upon conduct in which the client
2 was involved, or to respond to allegations in any proceeding concerning the
3 lawyer's representation of the client; or

4 (6) To comply with other law or a court order.

5 (7) To detect and resolve conflicts of interest arising from the lawyer's
6 change of employment or from changes in the composition or ownership of a firm,
7 but only if the revealed information would not compromise the attorney-client
8 privilege or otherwise prejudice the client.

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

12 [(e)](d) A lawyer shall reveal information relating to the representation of a
13 client to the extent the lawyer reasonably believes necessary to prevent a criminal
14 act that the lawyer believes is likely to result in reasonably certain death or
15 substantial bodily harm.

16 **NRPC 1.18. Duties to Prospective Client.**

17 (a) A person who [~~discusses~~] consults with a lawyer about the possibility of
18 forming a client-lawyer relationship with respect to a matter is a prospective
19 client.

20 (b) Even when no client-lawyer relationship ensues, a lawyer who has [~~had~~
21 ~~discussions with~~] learned information from a prospective client shall not use or
22 reveal that information [~~learned in the consultation~~], except as Rule 1.9 would
23 permit with respect to information of a former client.

24 (c) A lawyer subject to paragraph (b) shall not represent a client with interests
25 materially adverse to those of a prospective client 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 in the matter, except as provided in
paragraph (d). If a lawyer is disqualified from representation under this paragraph,
no lawyer in a firm with which that lawyer is associated may knowingly undertake
or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in
paragraph (c), representation is permissible if:

(1) Both the affected client and the prospective client have given informed
consent, confirmed in writing, or:

(2) The lawyer who received the information took reasonable measures to
avoid exposure to more disqualifying information than was reasonably necessary
to determine whether to represent the prospective client; and

(i) The disqualified lawyer is timely screened from any participation
in the matter and is apportioned no part of the fee therefrom; and

1 (ii) Written notice is promptly given to the prospective client.

2 (e) A person who communicates information to a lawyer without any
3 reasonable expectation that the lawyer is willing to discuss the possibility of
4 forming a client-lawyer relationship, or for purposes which do not include a good
5 faith intention to retain the lawyer in the subject matter of the consultation, is not a
6 "prospective client" within the meaning of this Rule.

7 (f) A lawyer may condition conversations with a prospective client on the
8 person's informed consent that no information disclosed during the consultation
9 will prohibit the lawyer from representing a different client in the matter. If the
10 agreement expressly so provides, the prospective client may also consent to the
11 lawyer's subsequent use of information received from the prospective client.

12 (g) Whenever a prospective client shall request information regarding a lawyer
13 or law firm for the purpose of making a decision regarding employment of the
14 lawyer or law firm:

15 (1) The lawyer or law firm shall promptly furnish (by mail if requested)
16 the written information described in Rule 1.4(c).

17 (2) The lawyer or law firm may furnish such additional factual
18 information regarding the lawyer or law firm deemed valuable to assist the client.

19 (3) If the information furnished to the client includes a fee contract, the
20 top of each page of the contract shall be marked "SAMPLE" in red ink in a type
21 size one size larger than the largest type used in the contract and the words "DO
22 NOT SIGN" shall appear on the client signature line.

23 **NRPC 4.4. Respect for Rights of Third Persons.**

24 (a) In representing a client, a lawyer shall not use means that have no
25 substantial purpose other than to embarrass, delay, or burden a third person, or use
methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information
relating to the representation of the lawyer's client and knows or reasonably
should know that the document or electronically stored information was
inadvertently sent shall promptly notify the sender.