Formal Opinion No. 60

Question Presented

May a Nevada attorney require a prospective client to sign a non-disclosure agreement ("NDA") as a condition for receiving legal advice?

This Opinion is based on the following hypothetical facts: A prospective client was asked to sign, and agreed to sign, an NDA prepared and presented by a Nevada attorney as a condition for receiving legal advice. The prospective client then sought legal advice from a second Nevada attorney, who asked questions regarding what work the first attorney had done on the case and the advice that had been given to the client by the first attorney. The prospective client was hesitant to answer and stated that they were unable to disclose the first attorney's advice because it was "confidential." The prospective client eventually revealed that they had signed an NDA with the first attorney. For this reason, the prospective client was reluctant to reveal the first attorney's advice, despite such information being necessary for the second attorney to render the requested legal assistance to the prospective client.

Answer to Question Presented

No, a Nevada attorney cannot require a client or prospective client to sign an NDA as a condition for receiving legal advice, as such a requirement is contrary to the language and intent of the Nevada Rules of Professional Conduct. Not only does an NDA violate professional rules and prejudice the client, it is also contrary to the policies underlying the attorney-client privilege, which is held by the client for the benefit of the client – not the attorney. An NDA impedes the purposes of the attorney-client privilege and infringes upon a client's rights arising out of an attorney-client relationship.

Pertinent Rules and Statute

The pertinent portions of Nevada Rule of Professional Conduct 1.6 ("Confidentiality of Information") are:

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

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

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

(2) To prevent the client from committing a criminal or fraudulent act in 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;

(3) To prevent, mitigate, or rectify the consequences of a client's criminal 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 effort to persuade the client to take corrective action;

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

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

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

(7) To detect and resolve conflicts of interest arising from the lawyer's change 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.

(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.

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

NRPC 1.6 (as amended 2014) (emphasis added).

The pertinent portions of Nevada Rule of Professional Conduct 1.18 ("Duties to Prospective Client") are:

(a) A person who 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 learned information from a prospective client shall not use or reveal that information*, except as Rule 1.9 would permit with respect to information of a former client.

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(e) 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 this Rule.

(f) A lawyer may 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.

NRPC 1.18 (as amended 2014) (emphasis added).

Nevada Rules of Evidence, NRS 49.095, provides, in full, as follows:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1.   Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.

2.   Between the client's lawyer and the lawyer's representative.

3.   Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

NRS 49.095 (emphasis added).

Discussion

A.   The NRPC prohibit a lawyer, not a client, from revealing confidential information because they recognize that confidential information belongs to the client, not the lawyer.

The duty of confidentiality is among the most sacred aspects of the attorney-client relationship. The attorney-client privilege is likewise sacrosanct, and has been codified into an evidentiary privilege in Nevada. *See* NRS 49.095. "The purpose of the attorney-client privilege is to encourage clients to make full disclosures to their attorneys in order to promote the broader

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public interests of recognizing the importance of fully informed advocacy in the administration of justice." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Court in & for Cnty. of Clark*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017). The statute provides that, "A client has a privilege to refuse to disclose, *and to prevent any other person from disclosing*, confidential communications" in connection with the provision of legal services. NRS 49.095 (emphasis added).

As has been discussed by this Committee in prior Opinions, the ethical duty related to the protection of a client's information imposed by NRPC 1.6 is broader than the evidentiary privilege. It is based, in part, on general rules of agency law that prohibit an agent from using or disclosing information given to an agent on a confidential basis by the principal or acquired by the agent during the course of the agency relationship. *See* RESTATEMENT OF THE LAW OF AGENCY, THIRD, § 8.05. The comments to ABA Model Rule of Professional Conduct 1.6 discuss the distinction between the evidentiary privilege and the ethical duty by noting that, "The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to *all information* relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." ABA Model R. of Prof'l Conduct, R. 1.6, Cmt. 3 (emphasis added); *see also* State Bar of Nev., Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 41 (2009) [hereinafter Formal Op. No. 41].

The plain language of NRPC 1.6(a) is a prohibition on *the lawyer*, not the client, from revealing information relating to the representation of a client, with limited exceptions. *See also* Formal Op. No. 41 (discussing the difference between a lawyer being *compelled* to reveal confidential information versus a lawyer *volunteering* confidential information). The rule's text corresponds with its purpose: the duty of confidentiality is for the benefit of the client, not the lawyer. *See* ABA Model R. of Prof'l Conduct, R. 1.6, Cmt. 1 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.").

## B.	The confidentiality duty extends to prospective clients.

The duty of confidentiality also applies to prospective clients. The guidelines for interpreting the Nevada Rules of Professional Conduct expressly provide that, "[T]here are some duties, such as the duty of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider where a client-lawyer relationship shall be established." NRPC 1.0A(b) (*citing* NRPC 1.18).

In general, a prospective client needs to reveal certain amounts of confidential information to an attorney during the initial consultation in order for the attorney to determine, among other things, whether a conflict exists (or is reasonably likely to arise in the future) and whether the attorney is capable of undertaking the representation. Under these circumstances, "if a lawyer obtains a confidence from a prospective client, *the lawyer owes an obligation to protect it*." Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics, The Lawyer's Deskbook on Professional Responsibility*, p. 759 (ABA 2018) (emphasis added). As one well-reasoned treatise states, "not all prospective clients become clients, but all current and former clients were once prospective clients." *Id.*

Just like NRPC 1.6, the plain language of NRPC 1.18 generally prohibits *the lawyer*, not the client, from revealing information related to the potential representation: "Even when no client-lawyer relationship ensues, *a lawyer who has learned information from a prospective client shall not use or reveal that information*, except as Rule 1.9 would permit with respect to information of a former client." NRPC 1.18(b) (emphasis added).[1] Once an attorney agrees to consult with a prospective client about a matter, the attorney owes that prospective client some limited obligations under the NRPCs, including a duty of confidentiality.

As recognized by the Nevada Supreme Court, "RPC 1.18(b) states that even when no attorney-client relationship is formed, a lawyer shall not use or reveal information learned in a consultation with a prospective client, 'except as Rule 1.9 would permit with respect to information of a former client.'" *Richman v. Eighth Jud. Dist. Court ex. rel. Haines & Krieger, LLC*, No. 60676, 2013 WL 3357115, at *2 (Nev. May 31, 2013) (internal citations omitted). This Rule creates a duty that runs from the attorney to the client, not vice versa.

C.   An NDA defeats the purposes of the attorney-client privilege and ethical duty of confidentiality.

In general, an NDA prohibits the receiving party from revealing information provided by the disclosing party. Depending on the language of the agreement, penalties can range from monetary liquidated damages to injunctive relief. While such agreements may be appropriate between a business and its employees or as part of a joint venture agreement, requiring an existing client or a prospective client to sign an NDA controverts Nevada law on privileges and violates an attorney's ethical obligations, for numerous reasons.

First, as discussed above, the duty of confidentiality is for the benefit of the client or prospective client – not the attorney.

Second, an NDA disrupts the ability of clients to give informed consent. Many aspects of an attorney's relationship with a client or prospective client include obtaining the client's informed consent. *See* Rules 1.2, 1.4, 1.6, 1.7, 1.8, 1.9, 1.11, 1.12, 1.13, 1.18, and 2.3. Part of the "informed consent" process may include retention of independent legal counsel of the client's or prospective client's own choosing to assist the client in making an informed decision.[2] An NDA would prohibit the attorney from securing informed consent because it would preclude the client or prospective client from consulting with independent legal counsel to understand the material risks and reasonably available alternatives to a proposed course of conduct recommended by the attorney who requested the NDA.

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[1] NRPC 1.18 references NRPC 1.9 with respect to circumstances by which a lawyer *may* reveal information received from a prospective client. Those circumstances are beyond the scope of this Opinion.

[2] "Informed consent" denotes "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." NRPC 1.0(e).

For example, NRPC 1.8 prohibits an attorney from making an agreement prospectively limiting liability for legal malpractice unless the client is independently represented when making the agreement. An NDA would prohibit a client from consulting with independent legal counsel regarding the proposed agreement limiting the attorney's liability and subject the client to damages or penalties for doing so, depending on the NDA's terms.

Third, if a client terminates representation of his or her attorney, or if a prospective client elects to not retain the attorney, an NDA would inhibit the client or prospective client from retaining another attorney by limiting the types of disclosures that could be made to subsequent counsel, including the prior attorney's work (or prospective attorney's advice) on the matter. This is prejudicial to the administration of justice. *See* NRPC 8.4(d).

Fourth, NDAs may violate NRPC 1.7, which governs concurrent conflicts of interest between the attorney and the client. This Rule prohibits representation where there is "significant risk that representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." NRCP 1.7(a)(2). The NDA exists to benefit the attorney and impose penalties on the client (or prospective client) receiving the attorney's advice. If signed, the need for the NDA may cause the attorney to question whether the client (or prospective client) will adhere to its terms, calling into doubt the attorney's ability to exercise "independent professional judgment and render candid advice" to the client (or prospective client), as required by NRPC 2.1. Rule 1.7 is also implicated if, during the course of the representation, the attorney seeks to enforce the terms of the NDA (thereby advancing his or her own personal interests) by precluding the client from disclosing advice rendered by the attorney to others.

Fifth, an NDA may inhibit a client (or prospective client) from obtaining advice from other professionals, such as tax advisors and financial consultants, thereby impeding the client (or prospective client) from obtaining the services of other professionals.

Finally, an NDA would enable an attorney to keep hidden if the attorney gave bad legal advice to the client. The NDA, if sought to be enforced by the attorney, could impair a disciplinary authority's or tribunal's ability to review the attorney's work, whether in the context of a disciplinary proceeding or a legal malpractice claim. Further, it may impede the client (or prospective client) from revealing the attorney's advice for fear of liability for breaching the NDA.

The Committee thus concludes that an attorney cannot require a client or prospective client to sign a non-disclosure agreement that prohibits the person from disclosing legal advice received from the attorney to others, including other legal counsel.[3]

Conclusion

An attorney who presents an NDA to a prospective client or current client as a condition for receiving legal advice violates the Nevada Rules of Professional Conduct. An NDA

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[3] That said, it remains prudent for an attorney to advise a client (or prospective client) of the consequences of disclosing the attorney's legal advice to others, such as waiver of the attorney-client privilege, and to advise the client (or prospective client) to avoid such disclosures for purposes of maintaining the attorney-client privilege.

impermissibly inverts the confidentiality duty to the current client or prospective client, is contrary to Nevada's codified evidentiary privilege, and impedes the administration of justice.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 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.

Authorities

Nevada Rule of Professional Conduct 1.0(e)
Nevada Rule of Professional Conduct 1.0A(b)
Nevada Rule of Professional Conduct 1.6
Nevada Rule of Professional Conduct 1.9
Nevada Rule of Professional Conduct 1.18
Model Rule of Professional Conduct 1.6 and related comments
State Bar of Nev., Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 41 (2009)
NRS 49.095
Richman v. Eighth Judicial Dist. Court ex rel. ex rel. Haines & Kreigger, LLC, No. 60676, 2013 WL 3357115 (Nev. May 31, 2013)
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Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics, The Lawyer's Deskbook on Professional Responsibility* (ABA 2018)
RESTATEMENT OF THE LAW OF AGENCY, THIRD, § 8.05

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