

STATE BAR OF NEVADA  
STANDING COMMITTEE ON  
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 50  
Issued on October 27, 2011.

BACKGROUND

The Committee has received a request from a recent law school graduate, working in Nevada and for a Nevada-licensed lawyer that is not employed by the William S. Boyd School of Law clinical program,<sup>1</sup> concerning the scope of the meaning of “supervision” of the supervising lawyer under Supreme Court Rule [“SCR”] 49.5, Nevada’s student practice rule. Specifically, the law school graduate is inquiring that, if a law student has level 2 certification under SCR 49.5, whether the supervising lawyer may be excused from being physically present during a court or administrative tribunal appearance if this excusal is approved by the client, the supervising lawyer, and the presiding judge.

QUESTION PRESENTED

May a law student, certified under SCR 49.5, with level 2 certification, make an appearance before any court or administrative tribunal on behalf of the client without the physical presence of a supervising lawyer that is not part of the William S. Boyd School of Law clinical program?

ANSWER

No. Under SCR 49.5, the physical presence requirement of a supervising lawyer that is not part of the William S. Boyd School of Law clinical program cannot be circumvented, even if the client, supervising lawyer, and judge, approve. The supervising lawyer’s failure to supervise the law student may also result in ethical implications for the lawyer, and the law student.

AUTHORITIES

- a. Nevada Supreme Court Rule 49.5 (2010)
- b. ABA Model Student Practice Rule (1969)
- c. Nevada U.S. District Court Local Rule IA 10-5 (2006)
- d. U.S. Court of Appeals for the Ninth Circuit Rule 46-4 (2008)
- e. Nevada Eighth Judicial District Court Rule 7.44 (2007)
- f. Nevada Rule of Professional Conduct 5.3 (2010)
- g. Nevada Rule of Professional Conduct 5.5 (2010)
- h. Cases and Authorities as Cited Herein

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<sup>1</sup> Due to the nature of the request, this ethics opinion only addresses the physical presence requirement of a supervising lawyer that is not part of the William S. Boyd School of Law clinical program.

## DISCUSSION OF SCR 49.5

Several states have programs that allow law students to train in the legal profession while in law school, and codify such programs under a “student practice rule.” Most states, including Nevada, base their student practice rule upon language found in the American Bar Association’s Model Student Practice Rule.

Nevada’s student practice rule, SCR 49.5, contains several mandatory requirements in order for a law student to be eligible, including training, certification, and supervision by a lawyer that is admitted to practice in Nevada.<sup>2</sup> Under SCR 49.5, law students may engage in certain activities, depending upon whether they are authorized under level 1, or level 2, certification.<sup>3</sup> Under level 1 and level 2 certifications, law students must have “written consent of the client on whose behalf the student is performing the activities,” and engage in the activities “with the approval and under the supervision of a supervising lawyer.”<sup>4</sup>

Under the Model Student Practice Rule, a supervising lawyer is not required to be personally present in court in any civil matter, or criminal matter that does not constitutionally guarantee right to counsel, as long as there is written approval by the client, and the supervising lawyer.<sup>5</sup> A law student may also appear on behalf of the State in any criminal matter with the written approval of the prosecuting lawyer, and the supervising lawyer.<sup>6</sup> A supervising lawyer under the Model Student Practice Rule, however, must be “personally present throughout the proceedings” during any criminal matter where the defendant has the right to the assignment of counsel, and “present” during a law student’s oral argument in an appellate court.<sup>7</sup>

Unlike the Model Student Practice Rule,<sup>8</sup> SCR 49.5 specifically defines what

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<sup>2</sup> SCR 49.5(1)-(3).

<sup>3</sup> Law students permitted under level 1 certification may: (a) conduct investigations and interview witnesses; (b) interview and counsel clients; and (c) represent clients before legislative and administrative bodies. Law students permitted under level 2 certification may: (a) appear in any court or before any administrative tribunal in this state on behalf of any person; (b) counsel and give legal advice to clients; (c) negotiate and mediate the settlement of claims and disputes; (d) prepare documents to be filed in court or with a legislative or administrative body; or (e) prepare transactional documents such as contracts, incorporation papers and by-laws, and filing required by state, federal, or other governmental body. SCR 49.5(4)-(5).

<sup>4</sup> SCR 49.5(4)-(5).

<sup>5</sup> *Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 WM. & MARY L. REV. 363, 477 (1973) (ABA Model Student Practice Rule reprinted in Appendix IV).

<sup>6</sup> *Id.*

<sup>7</sup> *See supra* note 5, at 477, 479.

<sup>8</sup> The Model Student Practice Rule states that a supervising lawyer shall “assume professional responsibility” for the student’s guidance in any work, “supervise the quality of the student’s work,” as well as “[a]ssist the student in his preparation to the extent the supervising lawyer considers it necessary,” as well as describe activities that only “general supervision” is required. *See supra* note 5, at 478-479.

“supervising lawyer” and “supervision” means. Under SCR 49.5(3), a “supervising lawyer” has several required responsibilities, including a presence requirement when the student is before “any court or administrative tribunal,” showing that Nevada does not differentiate between civil and criminal matters as to personal supervisor presence:

3. *Supervision.* A “supervising lawyer” shall mean either a lawyer or law professor employed by the Boyd School of Law in a clinical program and admitted to practice in Nevada, or a member of the state bar in active practice.

(a) A supervising lawyer shall:

(1) Personally assume professional responsibility for all work undertaken by the student while under the lawyer’s supervision.

(2) Assist and counsel the student in the activities permitted by this rule and review such activities with the student, to the extent necessary for the proper training of the student and protection of the client.

(3) Read, approve, and personally sign any pleadings, briefs, or other papers prepared by the student before filing; read and approve any documents prepared by the student for execution by any person before submission to that person; and read and approve any correspondence prepared by the student before mailing.

(4) *Be present for any appearance by a student before a court or administrative tribunal.*<sup>9</sup>

Additionally, under SCR 49.5(3)(b), supervising lawyers that are not affiliated with Nevada’s William S. Boyd School of Law clinical program have additional requirements.<sup>10</sup> One of the requirements is that a supervising lawyer must be “*continuously personally present throughout*” certain law student level 2 activities, including an appearance before “*any court or before any administrative tribunal in this state on behalf of any person.*”<sup>11</sup>

The requirement of continuous personal presence of a non-clinical program supervising lawyer was also in the original version of SCR 49.5, showing that the Nevada Supreme Court intended personal presence of this particular supervising lawyer since Nevada’s adoption of its version of the Model Student Practice Rule. SCR 49.5 was added to Nevada’s Supreme Court Rules in 1977, and has undergone a number of changes since its inception. In 2000, the Nevada

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<sup>9</sup> SCR 49.5(3)(a)(1)-(4) (emphasis added).

<sup>10</sup> Supervising lawyers not part of the Boyd School of Law clinical program are also required to: (1) Be an active resident member of the state bar, and, before supervising [level 2 certification activities]... have actively practiced law in Nevada as a full-time occupation for at least five (5) years; (2) Supervise not more than one student, unless the student is participating in a Boyd School of Law externship program,...(4) Before commencing supervision of any student, file with the state bar a notice in writing signed by the supervising lawyer stating the name of the student and the period during which the lawyer expects to supervise the activities of the student, and (5) Notify the state bar in writing promptly whenever supervision the student pursuant to this rule ceases. SCR 49.5(3)(b)(1)-(2), (4)-(5).

<sup>11</sup> SCR 49.5(3)(b)(3), (5)(a) (emphasis added).

Supreme Court adopted a new version of SCR 49.5 to “include specific provisions to facilitate the William S. Boyd School of Law’s efforts to effectively administrate the law school’s clinical program.”<sup>12</sup> The “old” version of SCR 49.5 stated that the supervising lawyer, regardless of whether the supervising lawyer was part of the William S. Boyd School of Law clinical program, must have direct and immediate supervision, and have a “continuous personal presence” whenever the law student is “[a]ppearing on behalf of the client in any public trial, hearing, or proceeding pertaining thereto in a court or tribunal or before any public agency, referee, commissioner, or hearing officer, state or federal...”<sup>13</sup>

SCR 49.5’s requirement of continuous personal presence of the non-clinical program supervising lawyer is similar to the majority of other state student practice rules. Outside of Nevada, law students may appear in court under most student practice rules, as long as the supervising lawyer is present in the courtroom when the student appears on behalf of the client.<sup>14</sup> Additionally, during certain types of criminal proceedings, virtually every state requires supervisor presence in the courtroom.<sup>15</sup> As proof of the importance of personal presence of the supervising lawyer during criminal proceedings, law students in other states that have not had a supervising lawyer present have jeopardized case results, and denied defendants their right to Constitutional representation.<sup>16</sup>

As further evidence of its mandatory nature, SCR 49.5’s personal presence requirement is mirrored in both the local, and ninth circuit, federal student practice rules. Local Rule of Practice of the United States District Court for the District of Nevada (LR) IA 10-5, states that a law student “may” engage in certain lawyer tasks, including appearing and making “oral

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<sup>12</sup> ADKT 304, Order Repealing Supreme Court Rule 49.5 and Adopting New Rule 49.5 (2000).

<sup>13</sup> See SCR 49.5 (1991) (repealed in 2000).

<sup>14</sup> See, e.g. Utah Ct. R. 14-807; see also Ga. Sup. Ct. R.91; see also *Hooker v. State*, 569 S.W.2d 403 (1978) (Missouri court rejected allegation that law student was not certified for a juvenile defendant’s adult certification hearing when law student was in compliance with the student practice rule, and properly supervised by a licensed lawyer who was present in the courtroom).

<sup>15</sup> Joan Wallman Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, B. EXAMINER, Aug. 1994, at 46.

<sup>16</sup> See, e.g. *Cheatham v. State*, 364 So.2d 83 (1978) (where Florida student practice rule required presence in court, to the extent required by the trial judge, of a supervising lawyer, defendant’s motion for postconviction relief granted when defendant tried and convicted while being represented by a law student assigned to the defendant without knowledge or agreement, and without proper supervision by a lawyer); see also *Benbow v. Mississippi*, 614 So.2d 398, 402 (1993) (supervising lawyer was not present at hearing or any of the law student’s meetings with defendant, when Mississippi rule required presence and supervision of a licensed lawyer during trial or hearing, does not constitute representation by counsel as guaranteed by the Constitution); see also *Adams v. State*, 693 N.E.2d 107 (1998) (Indiana defendant “effectively unrepresented” at sentencing hearing in violation of constitutional right to counsel where defendant represented by law student unfamiliar with the case, and unsupervised by a lawyer).

presentations before the court when accompanied by” the supervising lawyer.<sup>17</sup> LR IA 10-5(c)(3) further describes that a supervising lawyer “shall...[a]ppear with the student at all oral presentations before the court.” Under the student practice rule of the United States Court of Appeals for the Ninth Circuit, the supervising lawyer, among other requirements, must: (1) “appear with the student in any oral presentations,” (2) “assume personal, professional responsibility for the student’s work,” and (3) “be responsible to supplement oral or written work of the student as necessary to ensure proper representation of the client.”<sup>18</sup> Additionally, the ninth circuit rule states that law students, upon fulfilling certain student practice rule requirements, may only appear and make oral presentations before the court if “accompanied by” the supervising lawyer.<sup>19</sup>

Finally, even if the plain language of various court rules and case law proved unpersuasive, it is indicative that not only law students but also lawyers admitted *pro hac vice* are not allowed to appear in a local court without a Nevada-licensed lawyer. In Nevada’s Eighth Judicial District Court, lawyers who have not been admitted to the State Bar of Nevada cannot appear in any case without the “presence” of associated Nevada counsel.<sup>20</sup>

#### ETHICAL IMPLICATIONS OF SCR 49.5

It is the charge of this Committee to issue Opinions that depend principally upon a question of law related to legal ethics.<sup>21</sup> Law students, as well as their supervising lawyers, should be aware that they are potentially subject to ethical implications if they fail to adhere to the supervision requirements of the student practice rule.

For law students, SCR 49.5 states that whenever a law student files an application under the student practice rule, it equals consent “to be subject to all disciplinary processes of the state bar.”<sup>22</sup> The potential result of this disciplinary process under SCR 49.5 includes “suspension or forfeiture of the student’s privilege of taking the bar examination and being licensed to practice law” in Nevada.<sup>23</sup>

For supervising lawyers, failure to supervise the law student may be evidence of breach of the standard of care that the supervising lawyer owes to his or her client,<sup>24</sup> and evidence of

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<sup>17</sup> LR IA 10-5(e).

<sup>18</sup> United States Court of Appeals for the Ninth Circuit, PROCEDURES FOR PARTICIPATION FOR LAW STUDENTS PURSUANT TO CIRCUIT RULE 46-4 (2008) available at [http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/0b1c1ad3d7dddc3a88256771006d2738/\\$FILE/RequirementsForStudentPractice.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/0b1c1ad3d7dddc3a88256771006d2738/$FILE/RequirementsForStudentPractice.pdf).

<sup>19</sup> *Id.*

<sup>20</sup> EDCR 7.44(a).

<sup>21</sup> SCR 225(7)(d).

<sup>22</sup> SCR 49.5(1)(d).

<sup>23</sup> *Id.*

<sup>24</sup> RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS 108 (Third ed., American Law Institute 2000) (at comment “a” to ABA Model Rule 11 regarding supervision).

breach of the applicable standards of conduct,<sup>25</sup> including Nevada Rules of Professional Conduct [“NRPC”] 5.3, and 5.5. Under NRPC 5.3, a supervising lawyer must make “reasonable efforts” to ensure that the nonlawyer law student’s conduct, including conduct during appearances, is “compatible with the professional obligations of the lawyer.”<sup>26</sup> Additionally, under NRPC 5.3, the supervising lawyer is responsible for the nonlawyer’s misconduct if the lawyer orders, ratifies, or fails to take remedial action, regarding the misconduct.<sup>27</sup> Finally, a supervising lawyer’s failure to supervise the law student may result in a violation of NRPC 5.5, for assisting the law student in the unauthorized practice of law.<sup>28</sup>

### CONCLUSION

According to the plain language of SCR 49.5, all supervising lawyers not affiliated with the William S. Boyd School of Law clinical program must be continuously personally present whenever the law student is before a court, or administrative tribunal. The requirement of continuous personal presence is shared with a majority of other state student practice rules, local and circuit federal student practice rules, and a former version of SCR 49.5. Law students as well as their non-clinical program supervising lawyers should be aware of ethical implications for failure to adhere to the continuous personal presence requirements of SCR 49.5.

**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 persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.**

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<sup>25</sup> NRPC 1.0A(d).

<sup>26</sup> NRPC 5.3(b).

<sup>27</sup> NRPC 5.3(c).

<sup>28</sup> NRPC 5.5(a)(2) (“[a] lawyer shall not...[a]ssist another person in the unauthorized practice of law.”)