STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 25
originally issued 3/20/01, conclusion amended 9/24/07

QUESTION
What are the ethical and professional responsibilities of an attorney who discovers subsequent to offering advice to a former client that the former client used the attorney's services to perpetrate a fraudulent act in a State or Federal Court?

ANSWER
An attorney may at the attorney's own discretion disclose information relating to the representation of the client. The attorney should first try to persuade the former client to correct the fraud before revealing such fraud. If the former client does not do so, the attorney may reveal the information to the former client's current attorney. If the former client still does not rectify the fraud, the attorney may disclose to the court such information.

AUTHORITIES RELIED ON
Nevada Rules of Professional Conduct (Supreme Court Rules) 156, 159, 172; 18 U.S.C. ß 4; Sloan v. State Bar, 102 Nev. 436, 726 P.2d 330 (1986); Annotated Model Rules of Professional Conduct (2nd Ed.) American Bar Association (1992); A.B.A. Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990); LR IA 10-7; LR 1001(b)(1); ABA/BNA Lawyer's Manual on Professional Conduct (1994); Clark v. United States, 289 U.S. 1 (1933); United States v. Zolin, 491 U.S. 554 (1989) In re Rindlisbacher, BAP No. cc-97-1831-PJO (9th Cir. 1998); Todd v. State of Nevada, 113 Nev. 18, 931 P.2d 721 (1997); and Lewis v. Statewide Grievance Committee, 669 A.2d 1202, 1210 (Conn. 1996).

INTRODUCTION
An individual consults an attorney about bankruptcy. The individual reveals to the attorney the type of assets the individual owns and the attorney tells the individual that these assets are non-exempt under Nevada law. The individual does not retain the attorney.

Later, the attorney sees the individual in bankruptcy court and hears the individual tell the trustee that the individual did not own any of the assets that the individual had previously told the attorney that she owned.

DISCUSSION
A. Rules of Professional Conduct.

The United States District Court for the District of Nevada and the Bankruptcy Court in Nevada apply the Nevada Supreme Court Rules of Professional Conduct. LR IA 10-7. LR 1001(b)(1). Obviously, they are applicable to state court.

Confidentiality: S.C.R. 156

Nevada Supreme Court Rule 156 addresses confidentiality of information:

1. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections 2 and 3.

2. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

3. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

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

(b) 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.

SCR 156 (1986).

The ABA, in Formal Opinion 90-358 addressed the scope of "information relating to representation of a client" with regards to a prospective client. The opinion stated that information imparted to a prospective client seeking legal representation is protected from revelation by confidentiality even if the attorney does not represent or perform legal services for the prospective client. A.B.A. Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990). The confidentiality rule "covers all information relating to the client's representation, whether or not it came from the client and whether or not it was imparted in confidence. It even extends to information that may be known to others." ABA/BNA Lawyer's Manual on Professional Conduct (1994). An attorney-client relationship can be implied in a situation such as this when the person consults an attorney for a legal matter, even if that attorney was not hired. Todd v. State of Nevada, 113 Nev. 18, 931 P.2d 721 (1997). Thus, all information that an attorney discovers about a client relating to why the client consulted a lawyer is covered by rule 156.

A lawyer "may", however, reveal confidential information if the prospective client used the attorney's services to commit a fraudulent or criminal act under Supreme Court Rule 156(3)(a) (if not subject to privilege restrictions, infra). The rule does not place an affirmative duty on an attorney to disclose such a fraud. Instead, the rule leaves to the discretion of the attorney whether to disclose a fraud or crime. Sloan v. State Bar, 102 Nev. 436, 443 (1986).

This situation is somewhat different from the facts in Sloan because the attorneys services were not used directly to commit a fraud. However, the attorney was consulted and the attorney's advice educated the client to conceal information from the next attorney making it arguable the attorney's services were used to commit a fraud.

An attorney may reveal confidential client information as allowed in Supreme Court Rule 156(3)(a) even if the attorney no longer represents the client. Nevada Supreme Court Rule 159(2) explicitly authorizes discretionary disclosure of information from a former client:

A lawyer who has formerly represented a client in a matter shall not thereafter:

2. Use information relating to the representation to the disadvantage of the former client except as Rule 156 would permit with respect to a client or when the information has become generally known.

SCR 159(2). The "except as Rule 156 would permit" language of Rule 159(2) explains that the attorney may still take actions allowed by Rule 156(3)(a) with regard to former clients.

On the surface, a recent bankruptcy case will seem to be authority prohibiting disclosure. The Ninth Circuit Bankruptcy Appellate Panel addressed a variation of this situation in In re Rindlisbacher, BAP No. cc-97-1831-PJO (9th Cir. 1998). In that case, an attorney represented a client in a divorce proceeding. During the course of the representation, the client confidentially told the attorney that the client actually received rental income that the client had denied in his deposition. After the divorce was completed, the client filed for bankruptcy while still owing a substantial fee to the attorney. The client did not disclose the rental income in the bankruptcy. The attorney, on behalf of himself, filed a motion to block the former client's discharge on the basis the client failed to disclose the rental income. The Bankruptcy Appellate Panel affirmed the summary judgment granted to the client which dismissed the attorney's claim. Among other findings, the Panel held that : (1) information about the rental income was confidential; and (2) the attorney's use of the information was not related to the attorney's protection of his own rights against a breach of duty by the client, and thus not excepted from nondisclosure pursuant to California ethical rules. The issue addressed was the California rule (Cal.Evid.Code ß 958) which is somewhat similar to Rule 156(3)(b). The Court and apparently the parties did not address any issues implicated by Rule 156(3)(a) (Cal.Evid. Code ß 956). Therefore, this case does not alter the conclusion herein.

It is perjury and a felony to lie under oath in regard to a material fact. NRS 199.120. It is also felony perjury to conceal from a trustee or other officer of the court, any property belonging to a debtor. 18 U.S.C. ß 152. It should also be noted by attorneys that there is a federal law requiring the reporting of felonies.

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 U.S.C. ß 4. We have not located any case discussing the interplay between this statute and state ethical rules concerning attorney's duties relating to client confidences. However, mere silence is not considered to be concealment, which requires an affirmative act. U.S. v. Ciambrone, 750 F.2d 1416 (9th Cir. 1985). Thus an attorney that knows the truth but chooses to remain silent has not violated 18 U.S.C. ß 4 id.

To encourage full and open communication between a client and attorney, the attorney should employ the least harmful means to prevent or rectify the consequences of a client's criminal or fraudulent act. Supreme Court Rule 156 states that the attorney should first try to persuade a client to correct the client's act. By first consulting the client, the attorney may uncover an explanation for an apparently fraudulent act. If this does not persuade the client to correct the client's action, the former attorney may disclose to the client's present attorney the information that the former attorney obtained from the client. As a last resort, Rule 156(3)(a) allows the former attorney to disclose the information to the court. By following the preceding order of disclosure, the attorney provides the greatest protection to the client's information and helps protect himself against possible ethics violations or malpractice.

In a recent decision by the Connecticut Supreme Court, the reprimand of an attorney for disclosing client confidences was upheld. The attorney claimed, in part, that the disclosure was permitted under the Connecticut rule similar to SCR 156. The attorney's former clients asserted a complaint against their real estate agency asserting it improperly released a deposit of $19,100 from escrow. At the request of the representative of the real estate agency, the attorney wrote a letter saying his former clients never disclosed to him that the funds were supposed to be put in escrow. The Court held that the disclosure was not proper to rectify an alleged fraud because the clients had not used the attorney's services to commit the alleged fraud. The Court said "general legal advice in which an attorney explains, in good faith, why a client's case is unlikely to succeed or is destined to fail does not, however, constitute aiding a fraud if the client chooses to hire another attorney and attempts later to prosecute the case." Lewis v.

Statewide Grievance Committee, 669 A.2d 1202, 1210 (Conn. 1996). Lewis is different from the facts in this matter in that the attorney was, at most, presented with an inconsistency in his former client's claim, not the specific information revealed in this matter. The Connecticut court noted that the alleged inconsistency was not necessarily a fraud because the former clients claim against the real estate company could be reconciled with the information provided to the attorney.

Candor Toward the Tribunal: SCR 172

Even though SCR 156 allows the attorney to disclose confidential information at the discretion of the attorney, SCR 172 (Candor toward the tribunal) places an affirmative duty on the attorney to disclose client perjury. Mandatory disclosure applies pursuant to Rule 172 even if the information to be disclosed is information protected by Rule 156. Rule 172 reads as follows:

1. A lawyer shall not knowingly:

(a) make a false statement of material fact or law to a tribunal;

(b) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(c) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(d) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

2. The duties stated in subsection 1 continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 156.

3. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

4. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

SCR 172.

There is very little authority as to whether Rule 172 applies to former clients in our fact scenario. Subsection 2 of Rule 172 states that the duty to disclose client perjury continues to the end of the proceeding. The subsection where this applies in the situation under discussion is Subsection 1(b) of Rule 172. This duty to disclose in Rule 172(1)(b) is triggered only if disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Analysis of SCR 159 suggests that the duty in SCR 172(1)(b) does not relate to a former client.

Nevada Supreme Court Rule 159(2), supra, only allows an attorney to disclose disadvantageous information relating to the representation of a former client if disclosure is allowed under SCR 156. The Nevada Rules of Professional Conduct were modeled after the ABA Model Rules of Professional Conduct. ABA Model Rule 1.9(c) is the ABA's equivalent rule to Nevada Supreme Court Rule 159(2). ABA Rule 1.9(c) reads as follows:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client. ABA Rule 1.9(c) [emphasis added].

ABA Model Rule 3.3, referred to above in ABA Model Rule 1.9(c), has the exact wording of Nevada Supreme Court Rule 172 concerning candor toward the tribunal. Thus, the ABA Model Rules specifically relates to information from a former client in order to comply with the requirements of "Candor toward the tribunal."

The Nevada Supreme Court in its rule 159(2) appears to have intentionally omitted the application of Rule 172 (Candor toward the tribunal) to prior clients whereas the ABA Model Rules specifically applies Rule 3.3 to information obtained from prior clients. This omission of the requirement of disclosing former client perjury suggests that the Nevada Supreme Court intended for attorneys to have no affirmative duty or ability to disclose former client perjury in order to comply with SCR 172. Thus, the attorney cannot disclose a former client's perjury if the lawyer's services were not used by the former client to commit the perjury or commit the fraud.

CONCLUSION

Since the client actually used the services of the first attorney consulted to perpetrate a fraud on the bankruptcy court, the attorney may disclose the information received from the client to prevent the continued fraud but is not required to do so.