



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street  
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO  
*Attorney General*

RANDAL R. MUNN  
*Assistant Attorney General*

August 8, 2007

Rosalind Tuana, Executive Director  
Board of Examiners for Social Workers  
4600 Kietzke Lane—C-121  
Reno, Nevada 89502

Dear Director Tuana:

By letter dated April 16, 2007, you requested an opinion from this Office concerning the duty of social workers to report child or elder abuse or neglect. You asked whether a confidentiality exception may be extended to social workers who work with attorneys in different capacities, based either on a statutory reporting exemption for attorneys or the attorney-client privilege. You note in your request that the two applicable reporting statutes require that various professionals report such abuse or neglect and contain no express statutory exceptions to the reporting requirement for social workers.

NRS 432B.220 contains a limited exception to the reporting requirement for attorneys who have "acquired the knowledge of the [child] abuse or neglect from a client who is or may be accused of the abuse or neglect." You have asked whether social workers who work with attorneys may come within the reporting exception for attorneys contained in NRS 432B.220(4)(i).

Your request requires consideration of attorney-client confidentiality principles. On May 2, 2006, the Nevada Supreme Court repealed rules governing lawyer-client confidentiality requirements and replaced them with the Nevada Rules of Professional Conduct (RPC). The following analysis discusses the confidentiality requirements contained in the new rules and their relationship with the mandatory statutory reporting requirements as applied to social workers who work with attorneys.

### QUESTION ONE

Are social workers employed at the Clark County Public Defender's Office, or in similar agencies, mandated to report child abuse or neglect and/or elder abuse discovered in the normal course of their employment?

### ANALYSIS

The importance of the reporting statutes cannot be overstated. During hearings to consider the Nevada Child Protection Act,<sup>1</sup> the Joint Senate and Assembly Committees on Judiciary heard testimony concerning the alarming and exponentially increasing rate of child abuse in Nevada. In 1984 Nevada ranked fourth in the nation in the rate of reported child abuse cases.<sup>2</sup> While reported incidents of child and elder abuse may represent only a small portion of the actual number of victims, it is clear that the reporting requirements serve a critical legislative objective. Beyond the sheer numbers of victims, the crimes themselves demand institutional means for detecting abuse, preventing its recurrence, and effectively addressing treatment of victims and punishment of the perpetrators.<sup>3</sup> Initially, the reporting statutes required only medical care providers to report suspected child abuse. Since the 1960s, as awareness of both child and elder abuse has increased, reporting statutes have been expanded to mandate reports of known or suspected abuse by a variety of professionals.<sup>4</sup> Social workers are among the professionals held to mandatory reporting of child and elder abuse and neglect.

NRS 200.5093 provides in pertinent part that:

1. Any person who is described in subsection 4 and who, in his professional or occupational capacity, *knows or has reasonable cause to believe that an older person has been abused, neglected, exploited or isolated shall:*

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<sup>1</sup> NRS 432B.220 is contained in the Child Protection Act.

<sup>2</sup> *Hearing on A.B. 199 Before the Joint Senate and Assembly Committees on Judiciary*, 1985 Leg., 63rd Sess. 557 (February 27, 1985).

<sup>3</sup> Unfortunately, news of unreported child abuse cases appear all too frequently along with reports of dire consequences for the defenseless victims. During a May 7, 2007 hearing before the Nevada Senate Committee on Human Resources and Education, the committee was presented with a 2006 report released by an expert panel showing 79 Clark County suspicious child deaths between 2001 and 2004 which should have been investigated for abuse and neglect and were not. Strict compliance with the reporting statutes is obviously the first step in addressing this severe problem. See, e.g., Lisa Kim Bach, *Child Welfare Bill May Be Cut*, Las Vegas Review-Journal, May 8, 2007.

<sup>4</sup> Besharov, Douglas J., *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 466 (1978).

(a) Except as otherwise provided in subsection 2, *report the abuse, neglect, exploitation or isolation of the older person* to:

(1) The local office of the Aging Services Division of the Department of Health and Human Services;

(2) A police department or sheriff's office;

(3) The county's office for protective services, if one exists in the county where the suspected action occurred; or

(4) A toll-free telephone service designated by the Aging Services Division of the Department of Health and Human Services; and

(b) Make such a report as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that the older person has been abused, neglected, exploited or isolated.

....  
4. A report must be made pursuant to subsection 1 by the following persons:

....  
(j) *Every social worker.*

....  
9. A person who knowingly and willfully violates any of the provisions of this section is guilty of a misdemeanor. [Emphasis added.]

NRS 432B.220 specifically applies to children:

1. Any person who is described in subsection 4 and who, in his professional or occupational capacity, *knows or has reasonable cause to believe that a child has been abused or neglected shall:*

(a) Except as otherwise provided in subsection 2, report the abuse or neglect of the child to an agency which provides child welfare services or to a law enforcement agency; and

(b) Make such a report as soon as reasonably practicable but not later than 24 hours after the person knows or has reasonable cause to believe that the child has been abused or neglected.

....  
4. A report must be made pursuant to subsection 1 by the following persons:

....  
(e) *A social worker . . . .*

....



(i) An attorney, *unless he has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect.*

.... [Emphasis added.]

While the two reporting statutes mandate reports by social workers of suspected child or elder abuse or neglect, certain social workers who work with and under the supervision of attorneys may be exempt from the reporting requirement by virtue of their function as legal assistants within the meaning of RPC. RPC 5.3 specifically holds "nonlawyer" legal assistants to the same standards of confidentiality as the lawyers with whom they work.<sup>5</sup> See *Ciaffone v. Eighth Judicial Dist. Court*, 113 Nev. 1165, 945 P.2d 950 (1997), *overruled by Leibowitz v. Eighth Judicial Dist. Court*, 119 Nev. 523, 530, 78 P. 3d 515, 519–20 (2003).

RPC 1.6 governs an attorney's duty of confidentiality to his client. RPC 1.6 states:

(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 (c).

(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*

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<sup>5</sup> RPC 5.3 (formerly Supreme Court Rule 187) provides, in pertinent part:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

....  
(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;  
....

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.*

(c) 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.* [Emphasis added.]

Although considered fundamental, the rule of confidentiality is not unqualified. An attorney *may* reveal confidential information he reasonably believes is necessary "[t]o prevent reasonably certain death or substantial bodily harm," "[t]o prevent the client from committing a criminal . . . act in furtherance of which the client has used or is using the lawyer's services, . . ." and "[t]o comply with other law or a court order." RPC 1.6(b)(1), (2), and (6). Further, "[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." RPC 1.6(c) (emphasis added). Pursuant to RPC 1.6, where an attorney has the reasonable belief that child or elder abuse or neglect is reasonably likely to cause death or substantial bodily harm or in order to comply with other law, including the reporting statutes, he may report the information. Where a lawyer believes that divulging client information is necessary to prevent a criminal act likely to result in certain death or substantial bodily harm, he *shall* report the information to the appropriate authorities.

The exception to attorney-client confidentiality is designed to prevent a client from committing a criminal act that the attorney believes is likely to result in death or substantial bodily harm. Confidences which evidence the reasonable likelihood of future crimes or a continuing course of abusive conduct likely to cause death or substantial bodily harm are not protected by the attorney-client privilege as set forth in RPC 1.6. A criminal defense attorney may have a reasonable belief based on disclosures from his client that child or elder abuse may have occurred and may continue. In this circumstance it would be appropriate for the attorney to advise the



client of the attorney's disclosure duty and indicate the likely consequences of such continued conduct. See RPC 1.2.<sup>6</sup>

In your letter you explain that the Clark County Public Defender's Office employs social workers as part of its legal staff. These social workers are subject to supervision by staff attorneys and provide the attorneys with valuable assistance in representing and developing legal defenses for clients of the office. These particular social workers, by virtue of their work, function as the equivalent of paralegals and are functionally nonlawyer assistants. Where social workers are employees of the Public Defender's office and work as legal assistants and integral members of defense teams, the staff social workers are held to the same rule of confidentiality applicable to the lawyers of the Public Defender's office. RPC 5.3. To the extent that the defense team "has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect," there is no duty to report imposed on the staff social workers. RPC 1.6; NRS 432B.220(4)(i).<sup>7</sup>

NRS 200.5093 and NRS 432B.220 direct that designated professionals, including social workers and attorneys, report child or elder abuse when such professionals know or have reasonable cause to believe that a child or elderly person has been abused, neglected, exploited, or isolated. The reporting duties are enforced by criminal penalties and supplemented by immunity from civil damages for reporting suspected abuse. NRS 432B.250, 432B.160, 200.5093, and 200.5096. As noted above, the only exception to the reporting requirement is for an attorney who "has acquired the knowledge of the abuse or neglect [of a child] from a client who is or may be accused of the abuse or neglect." NRS 432B.220(4)(i). The statutory exception is specifically tied to the attorney's function as the legal representative of the client who is or may face prosecution for the crime encompassing the abuse or neglect.<sup>8</sup>

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<sup>6</sup> In formal Opinion No. 30 dated March 25, 2005, the State Bar of Nevada's Standing Committee on Ethics and Professional Responsibility addressed the conflict between the reporting statutes and the duty of maintaining client confidences under former SCR 156. After analyzing NRS 432B.220 and SCR 156, the Committee found that if the information does not fall under the "criminal act likely to cause death or substantial bodily harm" exception in SCR 156, the social workers/legal assistants would violate SCR 156 for reporting the abuse. The Committee further opined that, in a disciplinary action under SCR 156, reliance on NRS 432B.220's reporting requirement would not likely be an adequate defense. The Committee did recognize, however, that the adoption of RPC 1.6 would change the outcome of the conflict analysis with the addition of RPC 1.6's exception "to comply with other law."

<sup>7</sup> NRS Chapter 200 contains no analogous attorney-client confidentiality provision to NRS 432B.220(4)(i). Where, however, social workers are part of the criminal defense team, RPC would apply the confidentiality requirements to all nonlawyer legal assistants involved in the criminal defense.

<sup>8</sup> In *Sheriff, Washoe County v. Sferrazza*, 104 Nev. 747, 766 P.2d 896 (1988), the Nevada Supreme Court considered an earlier version of NRS 432B.220 in a case involving an attorney's alleged failure to "immediately" report suspected child abuse. The attorney apparently acquired the knowledge in his legal practice but not within the narrow scope of his representation of a client "who is or may be accused of the abuse or neglect." NRS 432B.220(4)(i). The Nevada Supreme Court held that the term

Nevada is among a small group of states that expressly preserves the attorney-client privilege and exempts from the reporting requirement any knowledge of abuse an attorney acquires from a client who is or may be accused of the abuse or neglect.<sup>9</sup> In general, Nevada recognizes an evidentiary attorney-client privilege that is testimonial in nature. NRS 49.015-.115.<sup>10</sup> Nevada's statutory rule against testimonial compulsion is seen as an evidentiary rule founded upon a larger constitutional principle which works to ensure that a client will be "unfettered by fear" of disclosure of confidences shared with his attorney. *Tahoe Regional Planning Agency v. McKay*, 769 F.2d 534, 540 (9th Cir. 1985). The attorney-client privilege implicates the fundamental Sixth Amendment right to counsel. *Manley v. State*, 115 Nev. 114, 979 P.2d 703 (1999). The attorney-client privilege has been described as "merely a rule of evidence"; however, excessive government intrusion may constitute a violation of the Sixth Amendment when it "substantially prejudices" the defendant. *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985).

A "confidential" communication between an attorney and client is defined to be a communication "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." NRS 49.055. Where a client voluntarily reveals portions of the communications with the attorney, the revelations may amount to a waiver of the attorney-client privilege. *Manley*, 115 Nev. at 121, 979 P.2d at 707. The test for waiver is "whether [the witness's] answers were wide enough in scope and deep enough in substance to constitute a 'significant part of the communication.'" *Lisle v. State*, 113 Nev. 679, 701, 941 P.2d. 459, 474 (citing *Mitchell v. Superior Court*, 37 Cal.3d 591, 208 Cal. Rptr. 886, 891, 691 P.2d 642, 647 (1984)).

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"immediately" was unconstitutionally vague and the statute was subsequently amended to provide for a report to be made "as soon as reasonably practicable but not later than 24 hours" after receipt of such knowledge. NRS 432B.220(1)(b).

<sup>9</sup> Mosteller, Robert P., *Child Abuse Reporting Laws*, 42 DUKE L.J., Vol. 42, 203, 218 (1992).

<sup>10</sup> NRS 49.095 provides that:

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

1. Between himself or his representative and his lawyer or his lawyer's representative.
2. Between his lawyer and the lawyer's representative.
3. Made for the purpose of facilitating the rendition of professional legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.



Where there is no waiver, the mandatory reporting laws may indeed impact attorney-client communications and by logical extension appear to diminish an accused's Sixth Amendment right to counsel. Lawyers, like social workers, are specifically identified as having a duty to report. While there is no blanket exemption from reporting for lawyers, there is nevertheless a statutory recognition of the attorney-client relationship protecting confidences disclosed as part of an attorney's representation of a client facing charges of child abuse. NRS 432B.220(4)(i). Clearly, under Nevada law a defense attorney could not be called as a witness against his client for the same crime the client faces prosecution for.

Before adoption of RPC, former SCR 156 contained one express exception to an attorney's duty of confidentiality which allowed for the disclosure of information necessary to prevent a client from committing a criminal act likely to result in death or serious bodily harm. Unlike the present rule, SCR 156 did not contain an exception, permissive or otherwise, for an attorney to reveal information to comply with other laws. With the adoption of RPC, the ambiguity has been largely resolved.

#### CONCLUSION TO QUESTION ONE

Social workers working under the direction of attorneys as part of legal defense teams representing clients charged or facing charges for the crimes of child abuse or neglect are exempt from the mandatory reporting requirements. With respect to elder abuse or neglect, there is no statutory exemption from the reporting requirement. Nonetheless, because of the applicability of RPC 1.6 to nonlawyer legal assistants, social workers who are part of a criminal defense team would be exempted from disclosure. These social workers function as "nonlawyer legal assistants" and are subject to the rules applicable to attorneys contained in Nevada's newly adopted Rules of Professional Conduct.

#### QUESTION TWO

Are the social workers who are employed at Washoe County Senior Services or in similar agencies mandated to report elder abuse, neglect, exploitation, or isolation if they are working on a case in tandem with the Senior Law Project?

#### ANALYSIS

Washoe County Senior Services employs licensed social workers who provide various social services for Washoe County senior citizens. The Washoe County Senior Law Project provides legal services to elderly clients. Social workers from Washoe County Senior Services may be called to work in tandem with attorneys from the Washoe County Senior Law Project. Based both on your letter and the September 19, 2006, letter from Washoe County Senior Services, it appears that the social workers employed by Washoe County Senior Services, whether they work in



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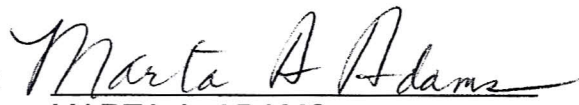
tandem with the Senior Law Project or not, are not within the definition of nonlawyer assistants contained in RPC 5.3. Providing "liaison, consultation and case management services to clients of the Senior Law Project," as stated in the Washoe County letter, does not place these social workers under the direct supervision of lawyers. Moreover, these social workers are not members of legal defense teams involved in representing clients charged with the crimes of child or elder abuse. From the description contained in your request, these social workers would not be exempt from reporting and would not otherwise be prohibited from disclosing information concerning elder abuse or neglect.

CONCLUSION TO QUESTION TWO

Social workers who incidentally work with attorneys are subject to the mandatory reporting requirements contained in NRS Chapters 200 and 432B.

Sincerely,

CATHERINE CORTEZ MASTO  
Attorney General

By:   
MARTA A. ADAMS  
Senior Deputy Attorney General  
Civil Division  
(775) 684-1237

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