

## ETHICS OPINION 100310

### Facts:

Section 1-5-416(1)(g), MCA provides that all Montana notaries "keep and maintain an official notary journal recording the details of each notarial act performed" including the date, the type of notarial act, the type and date of the document, name, address and signature of the individual and type of identification used, among other information. Section 1-5-419, MCA mandates transfer of a notary's journal to the county clerk and recorder upon a notary's expiration, resignation, death or removal.

### Question Presented:

Does 1-5-416(1)(g) require attorneys who are notaries or notaries who work for attorneys to make public disclosures which violate their duty to maintain the confidences of their clients?

**Short Answer:** Yes, but attorneys may choose to exercise their responsibilities under the Rules of Professional Conduct and may choose to not file the journal with the clerk and recorder as required by the statute.

### Discussion:

The issue presented pits the obligations and responsibilities of lawyers, who are constitutionally authorized officers of the court, opposite notaries, who are statutorily mandated witnesses of executed documents. It is this Committee's opinion that the Montana Rule of Professional Conduct on confidentiality, adopted pursuant to the judiciary's inherent constitutional power to define, regulate and control the practice of law, overrides a legislatively enacted general statute regulating the witnessing of documents.

Much of the mandated information in a law office's notary journal is considered confidential information. As explained by the requesting attorney, clients have little interest in having the required journal information filed in the public arena:

"Within the last several weeks, as I have notarized clients' signatures, I have asked a number of clients about delivering to the local clerk and recorder their names, addresses, signatures, and a description of the document notarized. Without exception, each client responded with "no"

or a stronger, earthier variation of “no” which I will refrain from putting in this letter.”

Rule 1.6 of the Montana Rules of Professional Conduct provides, in relevant part:

(a) A lawyer shall not reveal information relating to the 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 paragraph (b).

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

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

(emphasis supplied). In short, the rule provides that a lawyer *may* reveal confidential information to comply with other law. The rule does not contain a mandate, it contains permission. The lawyer has a choice.

The Montana Supreme Court possesses original and exclusive jurisdiction in the enforcement of professional ethics and conduct of the members of the Unified Bar of Montana, as provided in the Montana Constitution, Art. VII, section 2, and the Montana Rules of Professional Conduct. It is not within the purview of this Committee to address the statute’s constitutionality. The Rules of Professional Conduct provide ample protection for information contained in the notary journals. The legislature intended by the statute to protect the information contained in the journal by having it filed with the clerk and recorder. The information contained in an attorney’s or attorney’s staff’s notary journal is protected by the confidentiality rule and protocols lawyers have in place for the orderly transition of their files in the event their practice is closed. Lawyers may choose, as a matter of comity, to follow the direction provided by the legislature. However, lawyers may also choose, as contemplated by the permissive language of Rule 1.6 (b), to not comply with the legislative direction and protect their client’s confidential information in accord with their office’s protocols.

This statute, 1-5-416(1)(g), MCA, is taken from a much larger model act which addresses the attorney confidentiality issues. While the attorney confidentiality issue was briefly raised in the legislative hearing on the Montana statute, it is clear the full extent of the impact of the statute on attorney notaries and attorneys who employ notaries within their offices was not fully understood or appreciated. The Committee also understands this statute may be amended in future legislative sessions. At least one state utilizing the model act, Arizona, has specifically provided that the journal containing entries subject to attorney client confidentiality is the property of the employer of the notary and the journal is retained by the employer at termination of employment.<sup>1</sup>

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<sup>1</sup> Arizona Revised Statutes 41-317, 41-319. Section 41-319 (E) provides: If one or more entries in a notary public's journal are not public records, the notary public may keep one journal that contains entries that are not public records and one journal that contains entries that are public records. A notary public's journal that contains entries that are not public records is the property of the employer of that notary public and

The Committee also proffers a number of suggestions to address the concerns about violations<sup>2</sup>. But these suggestions do not address the issue presented: Does a general regulatory statute trump the Montana Rules of Profession Conduct? We believe attorney core rules of professional conduct, most specifically the rule on confidentiality, override this particular general legislative regulatory mechanism.

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shall be retained by that employer if the notary public leaves that employment. A notary public's journal that contains only public records is the property of the notary public without regard to whether the notary public's employer purchased the journal or provided the fees for the commissioning of the notary public.

<sup>2</sup> In summary, alternatives available to safeguard confidential information contained in notary journals of notaries who resign, die, are removed or whose term expire include: 1. Request that the journal be sealed by the District Court, with language specifying that access to the journal is only via Court ordered access to a particular page of the document: "In re Sealing the Notary Journal of [the notary]." 2. The Secretary's Office also agreed that one signature per page in the journal is acceptable, as long as the page reflects that the other entries were left intentionally blank. It is not appropriate to keep two journals. 3. Not all documents require notarization. Confirm the necessity prior to recording otherwise confidential information. 4. Prior to notarizing a document, distinguish whether the lawyer is performing the service as a witness or as a lawyer. The witness/lawyer rule potentially preempts future representation. 5. In the journal, use general terms of art. Instead of writing "Prenuptial Agreement" write "contract " or " agreement ." Those seeking additional information about Montana's current notary statutes can visit the Secretary of State's website at <http://sos.mt.gov/Notary/Changes.asp>.