

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
RULE OF PROFESSIONAL CONDUCT 1.2**

PETITION OF THE VIRGINIA STATE BAR
VSB 21-4

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed changes to Rule of Professional Conduct 1.2, as set forth below. The proposed changes were approved by a vote of 57-3 of the Council of the Virginia State Bar on October 29, 2021 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics has proposed amendments to Rule 1.2(c) and a new Comment [13] to accompany the amendment. Comment [12] also requires a change to match the numbering of the amended Rule.

This proposed amendment addresses the situation of lawyers who are struggling with whether, and how, they can advise clients who wish to

engage in marijuana-related activities that are legal under state law (whether Virginia or other states) but illegal under federal law. The current version of Rule 1.2(c) provides that:

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Accordingly, under the current rule, a lawyer can advise a client of the fact that the client's proposed conduct is legal under state law but illegal under federal law, but cannot advise or assist in the client's conduct.

Without the proposed amendment, a lawyer cannot, for example, advise a client who wants to open a marijuana-related business about how to do so, nor can the lawyer represent that client in ordinary business matters because that would constitute "assistance" in the client's illegal activity.

However, those clients may be especially in need of legal assistance and advice because of the rapidly changing legal landscape. Interests of the lawyers, the clients, and the public would be served by a clarification that lawyers may provide assistance in these matters, as long as clients are also advised about applicable federal law and policy.

The committee determined that a rule amendment is the best option

to address this dilemma, since it is modifying rather than simply explaining the application of Rule 1.2(c). The committee's research revealed that 12 other jurisdictions¹ have made a similar amendment to their versions of Rule 1.2, with eight² more adding only a comment to Rule 1.2 to address the same issue (Appendix, Pages 3 and 24, respectively).

As proposed Comment [13] states, this proposed amendment is motivated by the acute issues surrounding marijuana legalization, but the Rule and Comment are not limited to marijuana laws and provide a framework for lawyers advising on any current or future situation where state and federal criminal laws are in conflict.

The proposed rule changes are included below in Section III.

II. Publication and Comments

The Standing Committee on Legal Ethics approved the amendments to Rule 1.2 at its meeting on June 24, 2021 (Appendix, Page 48). The Virginia State Bar issued a publication release dated June 29, 2021, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 49). Notice of the proposed rule amendments was also published in the *Virginia Lawyer*, Vol. 70, page 56 (Appendix, Page 51), in

¹ Alaska, Connecticut, Hawaii, Illinois, New Hampshire, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, West Virginia.

² California, Colorado, Maryland, Montana (Preamble to Rules), Nevada, New Mexico, Vermont, Washington.

the Bar's July 2021 newsletter (Appendix, Page 52), on the Bar's website on the "Actions on Rule Changes and Legal Ethics Opinions" page (Appendix, Page 56) and on the Bar's "News and Information" page on June 29, 2021 (Appendix, Page 60).

Five comments were received, from Andy Herrick (Appendix, Page 62), Leonard C. Heath, Jr. (Appendix, Page 63), Stephen Pudner (Appendix, Page 65), Agustin Rodriguez (Appendix, Page 66), and Amy McDougal (Appendix, Page 82). The committee revised the proposed rule and comment to incorporate the wording suggestions from Mr. Herrick and Mr. Rodriguez's comments, and further revised proposed Comment [13] to emphasize the fact that the rule is generally applicable and not limited to or singling out marijuana laws as a special exception to the rules. The committee continues to believe that this issue needs to be addressed to give guidance to members of the bar and to allow clients to receive necessary legal guidance.

III. Proposed Rule Changes

RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a

client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the objectives of the representation if the client consents after consultation.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may

(1) discuss the legal consequences of any proposed course of conduct with a client; ~~and~~

(2) ~~may~~ counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law; ~~and~~

(3) counsel or assist a client regarding conduct expressly permitted by state or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.

(d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third

persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

[2-3] *ABA Model Rule* Comments not adopted.

[4] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Services Limited in Objectives or Means

[6] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which

representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[7] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

[8] *ABA Model Rule* Comment not adopted.

Criminal, Fraudulent and Prohibited Transactions

[9] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not

permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. Paragraph (c)(2) ~~The last clause of paragraph (c)~~ recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. See also Rule 3.4(d).

[13] Paragraph (c)(3) addresses the dilemma facing a lawyer whose client wishes to engage in conduct that is permitted by applicable state or other law but is prohibited by federal law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to

a client seeking to engage in conduct permitted by state law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (c)(3) applies, but is not limited in its application, to any conflict between state and federal marijuana laws.

IV. Conclusion

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and Rules of Professional Conduct are promulgated and implemented. The proposed rule changes were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the Bar requests that the Court approve the proposed changes to Rule 1.2 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

A handwritten signature in black ink, appearing to read "Jay B. Myerson". The signature is written in a cursive style with a long horizontal stroke at the bottom.

Jay B. Myerson, President

A handwritten signature in black ink, appearing to read "Karen A. Gould". The signature is written in a cursive style with a large, looped flourish at the end.

Karen A. Gould, Executive Director

Dated this 5th day of November, 2021.