

20170408

Joint Committee on Attorney Standards

North Dakota Supreme Court
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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Hon. Dann E. Greenwood, Chair
51 Third St. E, Suite 202
Dickinson, ND 58601
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NOV 22 2017
STATE OF NORTH DAKOTA

October 17, 2017

Honorable Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard
Bismarck, ND 58505-0530

Re: Rule of Professional Conduct 1.2 - Proposed Amendment

Dear Chief Justice VandeWalle:

The Joint Committee on Attorney Standards approved a proposed amendment to the North Dakota Rule of Professional Conduct 1.2(e) related to counsel to clients regarding conduct permitted by North Dakota law. The Board of Governors has reviewed and approved the proposed amendment, with one note of caution.

The Joint Committee undertook a review of the current rule 1.2 in light of the recent adoption of North Dakota's Compassionate Care Act, the medical marijuana initiative. The Committee considered that some lawyers are already receiving questions from clients who are interested in the medical marijuana field and are uncertain of the counsel they may provide. These lawyers face an ethical quandary in attempting to provide advice or assistance related to conduct which is now expressly permitted by state law, but remains unlawful under federal law, including the production, distribution, and possession of medical marijuana. The Committee considered the importance of ensuring clients receive full, competent counsel and assistance and ensuring lawyers have guidance on the legal services they may ethically provide.

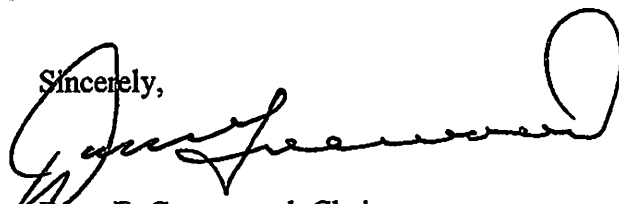
At its September 15 meeting, the Joint Committee considered various approaches taken by other states that have legalized medical and/or recreational marijuana to address the ethical dilemma of counseling clients regarding activities that remain prohibited by federal law. The Committee reviewed ethics opinions that have addressed the issue as well as recent amendments to the rules and comments to the Rules of Professional Conduct in various states. After consideration and discussion, the Committee drafted the enclosed proposed amendment, which adds a section (e) to Rule 1.2. The rule was modeled after Pennsylvania Rule of Professional Conduct 1.2(e). It modifies the Pennsylvania rule by requiring the lawyer to counsel a client about the legal consequences of the client's conduct under other applicable law only "[t]o the extent required by Rule 1.1." The rule would allow lawyers to counsel and assist clients in activities that are expressly permitted by North Dakota law, such as assisting a business in obtaining a distribution center permit in compliance with North Dakota law and regulations, provided the lawyers also counsel the clients on the implications of the actions under federal or other state law, if required for competent representation. The Committee intended the rule proposal to be broad

enough to cover other situations where there may be a conflict between state and federal law or between different state laws, such as recent Firearms Freedom Acts.

Following discussion and consideration, the Joint Committee approved the amendment for submission to the Supreme Court, pending review and comment by the SBAND Board of Governors as required by Administrative Rule 38, Section (3)(B). The Board of Governors reviewed the Committee's proposed amendment, and by enclosed letter dated October 13, 2017 from Darci Einarson, SBAND President, has indicated its approval of the proposed amendment, with one comment of concern.

The Joint Committee on Attorney Standards, after review and approval by the Board of Governors, respectfully submits the enclosed proposed amendment to the Supreme Court for consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Dann E. Greenwood", with a large, stylized loop at the end.

Dann E. Greenwood, Chair
Joint Committee on Attorney Standards

DEG/

cc: Penny Miller, Clerk of the ND Supreme Court
Lindsey Nieuwsma



State Bar Association of North Dakota

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Tony J. Weiler • *Executive Director*

October 13, 2017

Hon. Dann E. Greenwood
Judge of the District Court
51 Third St. E., Ste. 202
Dickinson, ND 58601

Sent via email: dgreenwood@ndcourts.gov

RE: Rule of Professional Conduct 1.2 – Proposed Amendment

Dear Judge Greenwood,

The Board of Governors met recently to discuss the Proposed Amendments to Rule of Professional Conduct 1.2, that were submitted for comment by the Joint Committee on Attorney Standards.

Joint Committee members Kara Erickson and Professor Michael McGinnis were invited to the meeting to answer any questions from the Board. The Board voted to support the language as adopted by the Joint Committee, but did express some concerns about the “under other applicable law” language contained in the proposed rule and the requirements it may put on North Dakota lawyers.

The Board of Governors recognizes and appreciates the good work done by the Joint Committee on Attorney Standards.

Sincerely,

Darcie Einarson

SBAND President

cc: Lindsey Nieuwsma

**RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF
AUTHORITY BETWEEN CLIENT AND LAWYER**

1 (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions
2 concerning the objectives of representation and, as required by Rule 1.4, shall consult
3 with the client as to the means by which they are to be pursued. A lawyer may take such
4 action on behalf of the client as impliedly authorized to carry out the representation. A
5 lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the
6 lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea
7 to be entered, whether to waive jury trial and whether the client will testify.

8

9 (b) A lawyer's representation of a client, including representation by appointment, does
10 not constitute an endorsement of the client's political, economic, social or moral views or
11 activities.

12

13 (c) A lawyer may limit the scope of the representation if the client consents in writing
14 after consultation.

15

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

20

21 (e) A lawyer may counsel or assist a client regarding conduct expressly permitted by
22 North Dakota law. To the extent required by Rule 1.1, a lawyer shall counsel such a client
23 about the legal consequences, under other applicable law, of the client's proposed course
24 of conduct.

25 **Comment**

26
27 **Scope of Representation**

28
29 [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes
30 to be served by legal representation, within the limits imposed by law and the lawyer's
31 professional obligations. The decisions specified in paragraph (a), such as whether to
32 settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's
33 duty to communicate with the client about such decisions. With respect to the means by
34 which the client's objectives are to be pursued, the lawyer shall consult with the client as
35 required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry
36 out the representation.

37
38 [2] On occasion, however, a lawyer and a client may disagree about the means to be used
39 to accomplish the client's objectives. Clients generally defer to the special knowledge and
40 skill of their lawyer with respect to the means to be used to accomplish their objectives,
41 particularly with respect to technical, legal and tactical matters. Conversely, lawyers
42 usually defer to the client regarding such questions as the expense to be incurred and

43 concern for third persons who might be adversely affected. The lawyer should consult
44 with the client and seek a mutually acceptable resolution of any disagreement. If such
45 efforts are unavailing and the lawyer has a fundamental disagreement with the client, the
46 lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client
47 may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(4).

48

49 [3] At the outset of a representation, the client may authorize the lawyer to take specific
50 action on the client's behalf without further consultation. Absent a material change in
51 circumstances and subject to Rule 1.4, a lawyer may rely on such an advance
52 authorization. The client may, however, revoke such authority at any time.

53

54 [4] In a case in which the client appears to have limited capacity, the lawyer's duty to
55 abide by the client's decisions is to be guided by reference to Rule 1.14.

56

57 **Independence From Client's Views or Activities**

58

59 [5] Legal representation should not be denied to people who are unable to afford legal
60 services, or whose cause is controversial or the subject of popular disapproval. By the
61 same token, representing a client does not constitute approval of the client's views or
62 activities.

63

64 **Agreements Limiting Scope of Representation**

65 [6] The scope of services to be provided by a lawyer may be limited by agreement with
66 the client or by the terms under which the lawyer's services are made available to the
67 client. Paragraph (c) allows the lawyer to limit the scope of representation if the client
68 consents. When a lawyer has been retained by an insurer to represent an insured, for
69 example, the representation may be limited to matters related to the insurance coverage.
70 A limited representation may be appropriate because the client has limited objectives for
71 the representation. In addition, terms upon which representation is undertaken may
72 exclude specific means that might otherwise be used to accomplish the client's objectives.
73 Such limitations may exclude actions that the client thinks are too costly or that the
74 lawyer regards as repugnant or imprudent.

75

76 [7] Although an agreement for a limited representation does not exempt a lawyer from the
77 duty to provide competent representation, the limitation is a factor to be considered when
78 determining the legal knowledge, skill, thoroughness and preparation reasonably
79 necessary for the representation. See Rule 1.1.

80

81 [8] All agreements concerning a lawyer's representation of a client must accord with these
82 Rules and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

83

84 **Criminal, Fraudulent, and Prohibited Transactions**

85

PROPOSED AMENDMENT

86 [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to
87 commit a crime or fraud. The prohibition, however, does not preclude the lawyer from
88 giving an honest opinion about the actual consequences that appear likely to result from a
89 client's conduct. Nor does the fact that a client uses advice in a course of action that is
90 criminal or fraudulent of itself, make a lawyer a party to the course of action. There is a
91 critical distinction between presenting an analysis of legal aspects of questionable
92 conduct and recommending the means by which a crime or fraud might be committed
93 with impunity.

94

95 [10] When the client's course of action has already begun and is continuing, the lawyer's
96 responsibility is especially delicate. The lawyer is not permitted to reveal the client's
97 wrongdoing, except where required or permitted by Rule 1.6. The lawyer is required to
98 avoid assisting the client, for example, by drafting or delivering documents that the
99 lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A
100 lawyer may not continue assisting a client in conduct that the lawyer originally supposed
101 was legally proper but then discovers is criminal or fraudulent. The lawyer must,
102 therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a).
103 In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer
104 to give notice of the fact of withdrawal and to disaffirm any opinion, document,
105 affirmation or the like. See Rule 4.1.

106

PROPOSED AMENDMENT

107 [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in
108 dealings with the beneficiary.

109

110 [12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction.
111 Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent
112 avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense
113 incident to a general retainer for legal services to a lawful enterprise. The last clause of
114 paragraph (d) recognizes that determining the validity or interpretation of a statute or
115 regulation may require a course of action involving disobedience of the statute or
116 regulation or of the interpretation placed upon it by governmental authorities.

117

118 [13] If a lawyer comes to know or reasonably should know that a client expects assistance
119 not permitted by these Rules or other law or if the lawyer intends to act contrary to the
120 client's instructions, the lawyer must consult with the client regarding the limitations on
121 the lawyer's conduct. See Rule 1.4(a)(5).

122

123 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards
124 Committee as amended 10/21/83, 02/03/84, 03/16/84, 05/23/84, 06/27/84; Minutes of the
125 Joint Committee on Attorney Standards on 11/15/02, 02/28/03, 09/25/03, 11/19/04,
126 02/26/16, 09/15/17.