

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA
[204 PA.CODE]

Amendments to the Pennsylvania Rules
of Professional Conduct Relating to
Scope of Representation and Allocation of Authority
Between Client and Lawyer

Notice of Proposed Rulemaking

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Pennsylvania Supreme Court that it adopt amendments to Pennsylvania Rule of Professional Conduct (PA RPC) 1.2 relating to scope of representation and allocation of authority between client and lawyer that were approved by the Pennsylvania Bar Association (PBA) in November 2015, and amend PA RPC 1.2, as set forth in Annex A.

The proposed changes to PA RPC 1.2 include the addition of language to paragraph (d) and the creation of new paragraph (e).

The genesis and development of the proposed amendments arose out of numerous inquiries received by the PBA's Legal Ethics and Professional Responsibility Committee and the Philadelphia Bar Association's Professional Guidance Committee from Pennsylvania lawyers asking whether it was ethically permissible to provide legal advice and assistance to clients engaged in the marijuana industry. The impetus behind the inquiries was the changing marijuana laws in the United States precipitating a growing need for legal assistance in this area. To date, over twenty states and the District of Columbia have enacted laws relating to marijuana. Pennsylvania enacted the Medical Marijuana Act on April 17, 2016.

Notwithstanding the trend toward some form of legalization of marijuana in this and other states, marijuana remains illegal under federal law. The Controlled Substances Act, 21 U.S.C. § 811 et. seq. provides that marijuana is a "Schedule I" drug thereby making it unlawful to "manufacture, distribute, dispense, or possess a controlled substance." The conflict between federal law and state legislation legalizing the use of marijuana creates an ethical dilemma for Pennsylvania lawyers because current PA RPC 1.2(d) states that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent..." Pursuant to the current Rule, a Pennsylvania lawyer arguably is prohibited from assisting a client in various activities such as drafting or negotiating contracts that may relate, directly or indirectly, to the purchase, distribution or sale of marijuana even though such activities may be legal under state law.

An analysis of the Rules of Professional Conduct in other jurisdictions that have enacted laws relating to the legal use of marijuana demonstrates that these jurisdictions

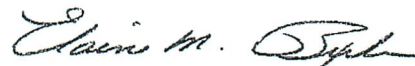
have varying ways of addressing this issue.¹ In Colorado and Washington, where medicinal and recreational use of marijuana is legal, a new Comment was added to Rule 1.2 to permit lawyers to advise and assist clients about marijuana issues without fear of discipline. Jurisdictions such as Arizona, Connecticut and Hawaii have amended Rule 1.2 to permit lawyers to ethically counsel or assist clients in matters that are permissible under their respective state laws. It is apparent that once a jurisdiction makes the policy decision to authorize some form of marijuana-related activity, those who choose to engage in such activity are better served if the legal profession is able to advise clients engaged in such activities without fear of professional discipline.

The purpose of the proposed amendments to PA RPC 1.2 is to reconcile the ethical concerns raised by inconsistent state and federal laws. The proposed amendments will provide guidance to Pennsylvania lawyers and remove uncertainty surrounding the duties of practitioners representing clients having some business relationship with the marijuana industry.

New language added to paragraph 1.2(d) provides for an exception found in new paragraph (e). Proposed new paragraph (e) permits a lawyer to counsel or assist a client regarding conduct expressly permitted by the law of the state where it takes place or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Interested persons are invited to submit written comments by mail or facsimile regarding the proposed amendments to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth Avenue, Suite 5600, PO Box 62625, Harrisburg, PA 17106-2625, Facsimile number (717-231-3382), Email address Dboard.comments@pacourts.us on or before June 3, 2016.

By the Disciplinary Board of the
Supreme Court of Pennsylvania



Elaine M. Bixler
Secretary of the Board

Note: Material to be added is in bold and underscored.
Material to be deleted is in bold and bracketed.

¹ http://www.americanbar.org/groups/professional_responsibility/policy/charts.html

Annex A

**Rule 1.2 Scope of Representation and Allocation of Authority Between
Client and Lawyer**

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(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, **except as stated in paragraph (e)**, 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.

(e) A lawyer may counsel or assist a client regarding conduct expressly permitted by the law of the state where it takes place or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

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