Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

February 7, 2023
4:30 to 6:00 p.m.
In-person with Zoom available

Welcome and approval of minutes.	Tab 1	Simón Cantarero, presiding
Update on discussions with Supreme Court re Rules 8.4(c), 5.8, 1.16, and 1.2.		Simón Cantarero, Nancy Sylvester
Rule 8.3 (reporting misconduct in fee dispute resolution): Review comment to rule.	Tab 2	Nancy Sylvester
Rule 1.2 (advising cannabis clients). Review research.	Tab 3	Austin Riter, J.D. Lauritzen, Hannah Follender
Projects in the pipeline: • **Rule 8.4(c)** (*investigative activities*): will resubmit to Supreme Court with more background on the universe of investigative activities attorneys could undertake. Will discuss in March. • **Rule 1.2** (*cannabis advising*): was on 12/7/22 Supreme Court agenda for discussion. Submit research to Supreme Court on other states' approaches to lawyers and cannabis. • **Rule 5.8** (*referral fees between attorneys*): was on 12/7/22 Supreme Court agenda for discussion. Will take up again in March. • **Rule 8.3** (*reporting professional misconduct*): Coordinating amendments with Fee Dispute Resolution Committee. Need to finalize. • **Rules 8.4 and 14-301**: Assigned to Judicial Council's Fairness and Accountability Committee (*historical memo attached to August materials*).		--

Meetings are in-person at the Utah Law and Justice Center and are generally held on the 1st Tuesday of the month from 4 to 6 p.m.

2023 Meeting Schedule: ●January 3●February 7●March 7●April 4●May 2●June 6●August 1● ●September 5●October 3● November 7●December 5●

http://www.utcourts.gov/committees/RulesPC/

Tab 1

Utah Supreme Court's
Advisory Committee on the Rules of Professional Conduct

[Draft] Meeting Minutes
December 6, 2022

Zoom
16:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:
J. Simon Cantarero, Chair

Jurhee Rice
Billy Walker
Adam Bondy
Mark Hales
Ian Quiel
Gary Sackett
Hon. Mike Edwards
Dane Thorley
Alyson McAllister
Joni J. Jones
Robert Gibbons
Hon. James Gardner
Austin Riter
Hon. Trent Nelson
Julie Nelson
Hon. Amy Oliver
Christine Greenwood (ex officio)
Cory Talbot
Phillip Lowry

Excused:
Hon. M. Alex Natt, Recording Secretary

Staff:
Nancy Sylvester
Scotti Hill

Guests:

Martha Knudsen, Executive Director, Utah State Bar Wellbeing Committee

Chair Cantarero recognized the existence of a quorum, called the meeting to order at 4:03.

1. The meeting commenced with an announcement from Martha Knudsen about the new well-being initiatives from the Bar Commission, including the Bar's contract with "Unmind," a platform lawyers can access from any computer or mobile device as an app. The service makes recommendations based on a small assessment on a host of offerings, including physical and mental health as well as stress management using data-based methods. The second benefit is access to qualified mental health professionals in a quick manner, which is a service provided by new service provider Tava Health. The services will be available February 1, 2023.

2. **Welcome and approval of the November 1, 2022, meeting minutes (Chair Cantarero)**

   Chair Cantarero asked the committee if everyone had an opportunity to review the minutes from the November 1, 2022, meeting. Jurhee Rice indicated that the minutes incorrectly stated that she was absent. Chair Cantarero indicated that these would be corrected.

   Alyson McAllister motioned to approve the minutes contingent on this correction, Mark Hales seconded. The Motion passed by acclamation.

3. **Rule 1.2 discussion (Mr. Riter)**

   Subcommittee Chair Austin Riter presented the subcommittee's work on Rule 1.2(d). He reiterated that the subcommittee had been considering two options for the amended rule. Option 1 explicitly mentions cannabis law, and Option 2 is a more broadly applicable rule concerning advising clients on a conflict between state and federal law. In each proposed version, an accompanying amendment to Rule 8.4 (misconduct) has been included for suggestion.

   A) ***Option 1***

   Option 1 of the amended rule that appeared in the meeting materials was slightly different from the version discussed last time in light of committee suggestions. The new Option 1, refers to "Utah's cannabis statutes," as a general descriptor rather than listing specific statutes that would require the committee to continually update as the legislature re-orders the statutory numerical references.

   The amended language in Rule 1.2(d) reads:

A lawyer may also counsel a client regarding the validity, scope, and meaning of Utah's cannabis statutes and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer must also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.

The word "must" was included to describe the affirmative obligation to inform the client of the federal implications of the cannabis statutes to be more compliant with the Court's style guide.

Chair Cantarero suggested replacing the word "the" with "related" and replacing "*other state or local provisions implementing them*" with "ordinance."

In the explanatory notes, the statutes that are included in this category are listed as well as the three different rules of this kind from Vermont, Nevada, and Alaska.

The accompanying amendment to Rule 8.4 is an addition to Comment [2], which reads:

But actions that comply with Rule 1.2(d) do not constitute professional misconduct.

In addition, an explanatory note to Rule 8.4 was added:

This proposed revision to Comment 2 to Rule 8.4 is intended to clarify that the conduct allowed by Rule 1.2(d), including the cannabis-related advising and assisting now referenced in Rule 1.2(d), cannot be misconduct under related Rule 8.4.

Mr. Riter questioned whether an amendment to Rule 8.4 was necessary, and the committee largely agreed that it was not. The committee agreed to omit the amendments to Rule 8.4.

B) *Option* 2

A second option was presented that takes a more generalized approach to outlining the duty to advise clients on a conflict between state and federal law. This amendment to Rule 1.2(d) reads:

(d) 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 (i) discuss the legal consequences of any proposed course of conduct with a client; and may (ii) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; (iii) advise and assist a client in complying with and taking actions consistent with state laws, and rules,

regulations, orders, and other state or local provisions implementing state laws, while at the same time advising the client of the existence and consequences of federal law that may impose criminal and other *penalties for actions or matters permitted by state law; and (iv) advise and assist a client in complying with and taking actions consistent with federal laws, and rules regulations, orders, and other federal provisions implementing federal laws, while at the same time advising the client of the existence and consequences of state law that may impose criminal penalties for actions or matters permitted by federal law.*

Nancy Sylvester shared her screen to showcase the re-ordering of the rule she had performed to make it appear clearer to read.

Chair Cantarero suggested "and other penalties" be added after "criminal" in the rule language. Also, that the first mention of "state laws" should be singular, not plural, to read, "taking actions consistent with state law." He also suggested the addition of "vice versa" after (iii) to negate the need for an additional subsection (iv). Lastly, he suggested replacing mentions of "state law" with "Utah law."

Additional suggestions included "assist a client *to comply*," to be consistent with the rule elsewhere (line 123) and the inclusion of "this differs from the ABA Model Rule" at the end of the draft rule.

Billy Walker suggested that "consistent with" should be replaced with "consistent," to be more compliant with amendments made to Rule 5.5.

General discussion

The committee discussed at length whether both versions should be brought to the Utah Supreme Court to allow them to decide which version they prefer as a policy matter.

Chair Cantarero asked if there was one version the subcommittee preferred. Mr. Riter suggested both were given equal support.

Chair Cantarero expressed concern that the amendment was carving out a safe harbor for a particular type of business lawyer, something the rules generally do not do.

Gary Sackett expressed agreement and voiced opposition to the specialized Option 1.

Cory Talbot and Judge Nelson expressed support for the first option because it was consistent with other states that have adopted amendments on cannabis law and is narrowly tailored. They expressed concern in adopting a more generalized approach that would open the door to conduct the Committee is unable to anticipate at this time. Judge Nelson said that cannabis law merits a special

mention because of the unique nature of this legal issue and that a more broad rule could be a "free for all."

Judge Gardner suggested that if the Committee is split, it can send both options to the Court to decide, but generally make the Committee's preference known.

Mr. Riter moved to send both options to the Court and Mr. Walker seconded. The motion carried.

A second vote was warranted to convey which version the committee prefers.

Mr. Riter moved to recommend Option 2 with Judge Oliver seconding. The motion passed.

Mr. Riter also moved for option 2, with the changes suggested by the committee, including the addition of "vice versa" in subparagraph (iii) and to omit an accompanying reference to Rule 1.2 in Rule 8.4. Mr. Walker seconded. The motion passed.

4. Rule 1.16(e) discussion (Dane Thorley)

Mr. Thorley recapped the discussion on proposed amendments to Rule 1.16. In April 2022, public defender Doug Thompson spoke to the committee about creating a duty to advise criminal defense clients on the implications of criminal conviction and an appeal. The subcommittee met several times and drafted possible amendments to the rule. An amendment was officially approved and was published for comment over the Summer. Richard Mauro, head of SLDA, raised concerns about the impact such an amendment would have on members of the criminal defense bar, specifically whether the rule would result in more bar complaints that served only as a backdoor method for attacking a conviction.

Mr. Thorley observed that the committee was faced with several important questions. Namely, 1) whether this rule was necessary to achieve its stated purpose, 2) if it was, how expansive should the rule be, and 3) will this rule change attorney behavior or create a chilling effect?

Committee member Ian Quiel, an attorney at SLDA, said he was opposed to the amendment, noting that a similar obligation already exists at law. This is found in case law and other remedies that address a lawyer's ineffectiveness, such as Rule 4(f) motions, *Manning* motions, and ineffective assistance of counsel claims.

Mr. Walker indicated that OPC did not have a dog in this fight but questioned whether it was accurate that this amendment would result in an increase in bar complaints.

Stylistically, the committee suggested minor revisions to the proposed rule language. Judge Nelson suggested omitting "or guilty plea" from the proposed language. Mr. Thorley indicated that the original language published for comment was too expansive and the version proposed at the meeting omitted comment about "any preserved issues," which required appellate level knowledge. The new version also softened language about requiring lawyers to advise on the advantages and disadvantages of an appeal.

Judge Nelson reasoned that remedies at law did not negate the need for language in a rule to advise before the fact.

The Committee continued its discussions and ultimately the sentiment appeared to favor SLDA's concerns that this rule should not move forward. The judicial officers in attendance discussed the use of forms to accomplish the aim of the original proposal.

Judge Garner moved to not move forward with this proposed rule and to instead assist Doug Thompson in exploring alternative avenues, including court forms, for addressing this issue. Ian Quiel seconded the motion. The motion carried.

5. Adjournment.

The meeting adjourned at 6:22pm. The next meeting is scheduled to be held on January 3, 2022, at the Law and Justice Center and via Zoom.

Tab 2

UTAH COURT RULES – PUBLISHED FOR COMMENT

The Supreme Court and Judicial Council invite comments about amending these rules. To view the proposed amendment, click on the rule number.

To submit a comment or view the comments of others, click on "Continue Reading." To submit a comment, scroll down to the "Leave a Reply" section, and type your comment in the "Comment" field. Type your name and email address in the designated fields and click "Post Comment."

Comments cannot be acknowledged, but all will be considered. Comments are saved to a buffer for review before publication.

Posted: November 8, 2022

Utah Courts

Rules of Professional Conduct and Rules Governing the Utah State Bar – Comment Period Closed December 23, 2022

RULES OF PROFESSIONAL CONDUCT

RPC08.03. Reporting Professional Misconduct. Amend. Clarifies that a lawyer or judge participating in a Utah State Bar-sponsored fee dispute resolution program is not required to disclose information gained in that program to the Office of Professional Conduct.

RULES GOVERNING THE UTAH STATE BAR

USB14-0111. Exemption from future testimony and confidentiality of records and information. Amend. Clarifies when the Bar may disclose confidential information and what information it may disclose; also clarifies that a Fee Dispute Resolution Committee member who participates in a fee dispute arbitration may not be called as a witness in any subsequent legal proceeding related to the fee dispute.

USB14-0116. Conduct of the mediation. Amend. Permits the fee dispute mediator to serve notice of the mediation by email on the mediating parties.

To view all comments submitted during a particular comment period, click on the comment deadline date. To view all comments to an amendment, click on the rule number.

CATEGORIES

This entry was posted in -Rules Governing the State Bar, -Rules of Professional Conduct, RPC08.03, USB14-0111, USB14-0116.

« Rules Governing the Utah State Bar – Mandatory Continuing Education – Comment Period Closed December 24, 2022

Rules Governing the Utah State Bar – Comment Period Closed December 23, 2022 »

UTAH COURTS

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One thought on "Rules of Professional Conduct and Rules Governing the Utah State Bar – Comment Period Closed December 23, 2022"

Thomas Rossa
November 8, 2022 at 10:23 am

The rule should not cancel or alter the obligations of a member of the bar, the bar itself, and any member of the fee dispute resolution system to report to civil authorities when such a person obtains knowledge of any actions by anyone causing harm or continuous or future harm such as, for example, on going sexual abuse of a minor, domestic violence and other activity causing bodily harm.

Nancy: I agree with this comment. There are extremely limited exceptions to the required reporting of child abuse. We are all reporters. So the statute controls here, rather than the rule. As to the point regarding other types of harm, Rule 1.6 contains a permissive standard aimed at the lawyer for the client revealing information that would otherwise be confidential when reasonably certain death or substantial bodily harm is at play. That does not address what Mr. Rossa is referring to. The rules governing the Fee Dispute Resolution committee should probably address when other participants come into contact with that kind of information. That scenario seems to fall outside the normal rules governing confidentialy of mediations and arbitrations.

- -Rules of Appellate Procedure
- -Rules of Civil Procedure
- -Rules of Criminal Procedure
- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Professional Practice
- -Rules of Small Claims Procedure
- ADR101
- ADR103
- Appendix B
- Appendix F
- CJA Appendix F
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0205
- CJA01-0302
- CJA01-0303
- CJA01-0304
- CJA01-0305
- CJA010-01-0404
- CJA010-1-020
- CJA02-0101
- CJA02-0103
- CJA02-0104
- CJA02-0106.01
- CJA02-0106.02
- CJA02-0106.03
- CJA02-0106.04
- CJA02-0106.05
- CJA02-0204
- CJA02-0206
- CJA02-0208
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- CJA03-0111
- CJA03-0111.01

Rule 8.3. Reporting Professional Misconduct.

(a) A lawyer who knows that another legal professional has committed a violation of the applicable Rules of Professional Conduct that raises a substantial question as to that legal professional's honesty, trustworthiness or fitness as a legal professional in other respects shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable Rules of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program or in a Utah State Bar-sponsored fee dispute resolution program.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the applicable Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule.

The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a legal professional whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

[6] Information about a lawyer's misconduct or fitness may also be received during a Utah State Bar-sponsored fee dispute arbitration or mediation. Providing an exception to the reporting requirements in such cases encourages lawyers to use the Bar's fee dispute resolution process and helps lawyers and clients resolve such matters without litigation.

Rule 14-1111. Exemption from future testimony and confidentiality of records and information.

(a) **Exemption from future testimony.** No Fee Dispute Resolution Committee member participating in a fee dispute ~~decision~~ arbitration or mediation ~~proceeding shall~~ may be called as a witness in any subsequent legal proceeding related to the fee dispute.

(b) **Confidentiality of records and information.** Records and ~~I~~information ~~and documentation~~ submitted in a fee dispute proceeding shall be deemed confidential and ~~shall~~ may not be disclosed other than to enforce a written decision or as provided in paragraph (c).

(c) ~~Notwithstanding the above, c~~**Disclosure of confidential information.** Confidential information in the Utah State Bar's possession may be disclosed if the request is made to the Bar by:

(c) Proposed Revision in response to comment: **Disclosure of confidential information.** Confidential information in the Utah State Bar's possession may be disclosed to law enforcement to the extent disclosure is necessary to prevent reasonably certain death or substantial bodily harm. Confidential information in the Utah State Bar's possession may also be disclosed if the request is made to the Bar by:

(~~a~~1) an agency authorized to investigate the qualifications of persons for admission to practice law;

(~~b~~2) an agency authorized to investigate the qualifications of persons for government employment;

(~~c~~3) a lawyer discipline enforcement agency; or

(~~d~~4) an agency authorized to investigate the qualifications of judicial candidates.

Rule 14-1116. Conduct of the mediation.

(a) **Scheduling the mediation.** The designated mediator shall set the time and place for the mediation and shall cause written notice of the mediation to be served personally or by mail or email on all parties to the mediation.

(b) **Right to be represented by counsel.** In the notice of the mediation, the mediator shall inform the parties of their right to be represented by their own legal counsel at their own cost at any stage of the mediation process. Failure to be represented by legal counsel at any stage of the mediation is a waiver of this right at that stage of the mediation, although a party may use legal counsel later in the mediation process.

(c) **Right to be assisted at mediation.** A party may designate an individual to accompany that party to the mediation and to participate with the party in the mediation process.

(d) **Procedure.** The mediator may use joint or private caucuses during the mediation process. The process may be adjourned from time to time in the discretion of the mediator or at the request of the parties.

Tab 3

Memo

To: Supreme Court's Advisory Committee on the Rules of Professional Conduct

From: J. D. Lauritzen, Co-Chair, Utah Cannabis Law Section

cc: Hannah Follender, Co-Chair, Utah Cannabis Law Section

Date: 1/27/23

Re: Utah Rules of Professional Conduct 1.2(d); Advising, Assisting, and Representing Clients Engaged in Lawful Medical Cannabis Operations in Utah and Potential for Criminal Prosecution Under Federal Law for Attorneys Engaged in Such Activities

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BACKGROUND:

In June 2021, the Supreme Court's Advisory Committee on the Rules of Professional Conduct formed a subcommittee to study whether Rule 1.2(d) of the Utah Rules of Professional Conduct should be amended (or otherwise clarified) to provide a safe harbor for lawyers advising, assisting, or representing state legal medical cannabis businesses. Over the course of several months, the subcommittee, in conjunction with the co-chairs of the Cannabis Law Section, studied the issue and the different ways in which it had been addressed in other jurisdictions.

Ultimately, the advisory committee determined to present two suggested rule changes to the Supreme Court. Following a meeting with the Supreme Court, Mr. Cantarero sent an email to the co-chairs of the Cannabis Law Section indicating that the Court was "not ready to publish for comment a rule proposing a safe harbor for lawyers representing, advising, and assisting clients comply with the Utah Medical [Cannabis] laws." Mr. Cantarero then noted that the Court wanted additional information "about the actions by lawyers that would constitute 'assisting' clients in the area." More specifically, Mr. Cantarero stated that one of the members of the Court wanted to know what lawyers would be doing beyond advising medical cannabis clients and what the extent of that assisting would be.

In light of the questions from the Supreme Court, Mr. Cantarero asked the co-chairs of the Cannabis Law Section to provide a memo to assist the advisory committee and the Supreme Court to. Specifically, Mr. Cantarero asked for the memo to 1) "provide clear examples of actions or work by lawyers that … may be regarded as 'assisting' their clients and which the clients cannot do without an attorney," and 2) "whether undertaking such actions the lawyers may themselves be subject to criminal prosecution under the federal law."

QUESTIONS PRESENTED:

1. What actions or work by lawyers may be regarded as "assisting" as it relates to a lawyer's services that may be provided to a medical cannabis operator?

2. What assistance would a lawyer provide to a medical cannabis operator that the operator could not do without the services of a lawyer?

3. By undertaking to assist a medical cannabis operator with their business, would a lawyer subject himself or herself to criminal prosecution under federal law?

DISCUSSION:

I. SUMMARY OF APPLICABLE STATE AND FEDERAL CANNABIS LAWS.

In November 2018, Utah voters approved Proposition 2, the ballot initiative that sought to legalize medical cannabis in Utah. Following the election, the Utah Legislature took up the ballot initiative as part of a special session. HB 3001, more commonly referred to as the "Compromise," was proposed during the special session, setting forth several significant changes to the ballot initiative. After some give and take between lawmakers and advocates, HB 3001 was passed into law ushering in medical cannabis in Utah.

Under Utah's medical cannabis laws (*see* Utah Code §§ 4-41a-101, *et seq.* and 26-61a-101, *et seq.*), individuals with a qualifying condition may possess, use, and transport medical cannabis. The laws further provide a complex framework by which businesses may be licensed to cultivate, process, and dispense medical cannabis under the direction and control of the Department of Agriculture and Food ("UDAF") and the Department of Health and Human Services ("DHHS"). Beyond the statutes themselves, both UDAF and DHHS have promulgated a variety of rules to address the production, dispensation, and home delivery of medical cannabis to qualifying patients across the state.

Against the backdrop of Utah's medical cannabis laws is the federal Controlled Substances Act ("CSA"), which makes it illegal to manufacture, distribute, or dispense a controlled substance, including cannabis (*see* 21 U.S.C. § 841(a)(1)), or to conspire to do so (*see* 21 U.S.C. § 846). Despite the illegality of cannabis under the CSA, each year starting in 2014, Congress has included an amendment as part of various omnibus spending bills that provides specific protections for those individuals involved in state legal medical cannabis operations. This amendment, known as the Rohrabacher-Farr or Rohrabacher-Blumenauer amendment, provides that:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin, or with respect to either the District of Columbia or Guam, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical [cannabis]. (*See* H.Amdt.332 — 114th Congress (2015-2016).)

The foregoing amendment has been interpreted as prohibiting federal prosecutors from spending funds for the prosecution of individuals who engage in conduct permitted by state medical [cannabis] laws and are in full compliance with those laws. (*United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).) The amendment has been renewed repeatedly since 2014, most recently in March 2022 as part of the FY

2022 omnibus spending bill. It is important to note that in 2021 President Biden became the first president to propose a budget with the Rohrabacher–Farr amendment included.

Several years before the passage of the Rohrabacher-Farr amendment, then-Deputy Attorney General David W. Ogden issued a memo directing U.S. Attorneys in the Western United States to "not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of [cannabis]." The statements in the Ogden memorandum were furthered with the issuance of the Cole memorandum in August 2013. The Cole memorandum represented a significant shift in the federal government's stance on cannabis prosecution. The memo made clear that the federal government intended to move away from strict enforcement of federal cannabis prohibition and toward a more hands-off approach in the case of "jurisdictions that have enacted laws legalizing [cannabis] in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale and possession of [cannabis]." Indeed, the Cole memo went so far as to state that "a robust system may affirmatively address [federal] priorities by, for example, implementing effective measures to prevent diversion of [cannabis] outside the regulated system and to other states, prohibiting access to [cannabis] by minors, and replacing an illicit [cannabis] trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for."

Although the Cole memo was eventually rescinded by former Attorney General Jeff Sessions in January 2018, the federal government and the DOJ have been largely hands off when it comes to prosecuting those individuals involved in state legal cannabis ventures. In 2021, fewer than 1,000 federal cannabis charges were filed. This precipitous decline in federal cannabis prosecutions has been buttressed by statements from current U.S. Attorney General Merrick Garland. During a February 2021 congressional hearing, Mr. Garland indicated that he would reinstitute a version of the Cole memo. Mr. Garland would reiterate this statement almost a month later when he told the Senate Judiciary Committee that the Justice Department under his leadership would not pursue cases against Americans "complying with the laws in states that have legalized and are effectively regulating [cannabis]." Furthermore, a 2022 opinion from the 1st Circuit suggests that federal prosecutions should be most focused on those operating outside of state legal cannabis laws. (*United States v. Bilodeau*, 24 F.4th 705 (1st Cir. 2022).)

II. LAWYERS REPRESENTING OR OTHERWISE WORKING WITH STATE LEGAL CANNABIS BUSINESSES ROUTINELY "ASSIST" THOSE BUSINESSES IN CONDUCT PERMITTED BY STATE CANNABIS LAWS.

The first question posed by the Supreme Court to the advisory committee involves what specific actions lawyers would take that would constitute "assisting" the client as opposed to merely advising the client. While a general attorney-client relationship between a lawyer and business client usually involves the lawyer analyzing and advising a client as to a specific course of conduct, there are plenty of situations in which a lawyer actually assists a client to achieve their objective (assuming that objective is legal and/or ethical). For example, lawyers routinely assist clients by, among other things, incorporating their businesses, negotiating contracts and other commercial leases, drafting operating agreements, and developing compliance and other legal frameworks that guide the operations of the business. The same applies in the cannabis industry. Cannabis lawyers help businesses register with their respective states to do business. They then assist those companies to draft and submit the lengthy applications for state and local licensure, which also includes the requirement of obtaining a city or county business license. As part of the licensing process, lawyers assist clients in the preparation of their lengthy operating plans and standard operating procedures, which must be in strict adherence with state statutes, governing agency regulations, and any applicable city or other municipal ordinances. The failure to adhere to any statute or

regulation can result in significant fines and may put an operator's license(s) at risk. Once a cannabis business becomes operational, lawyers can play an integral rule in ensuring that the operator can stay in business by remaining compliant with all laws and regulations. To that end, the lawyer may be asked to assist the operator with developing a compliance program that will guide the company in its daily operations and will minimize any risk around the ramifications of non-compliance. Lawyers can also play an integral role around financing, supply chain issues, real estate/land use, employment issues, and taxation. The issue of taxation is of particular importance in the cannabis industry, as section 280E of the Tax Code generally prevents cannabis companies from taking normal business deductions. This is an area that has resulted in significant litigation and other administrative actions, so having the assistance of lawyers with taxation issues is imperative.

Lawyers also serve a vital role in the world of government affairs. Cannabis laws and regulations are constantly changing, sometimes changing multiple times within a single year. Each year, Utah lawmakers pass several bills that make important changes to the medical cannabis program in the state. This year alone, there are five bills that have been introduced that involve the medical cannabis and hemp industries. At least one of those bills, HB 72, will significantly change the way cannabis is governed in Utah. This change in the law will likely prompt lawyers to provide additional assistance to operators to ensure compliance with the new governance structure. The changes to how cannabis will be governed in Utah will likely prompt additional changes to the administrative rules controlling the industry, which may result in additional local ordinances (or changes to current ordinances) to reflect the changes in statute. The constantly changing political landscape for cannabis operators will only increase as federal decriminalization inches closer and closer. Suffice it to say, lawyers have played and will continue to play a vital role in the government affairs process, the least of which is assisting operators to ensure strict adherence to any changes in the law.

Without a doubt, the cannabis industry involves some of the most complex and onerous laws and regulations in the country. In Utah, cannabis is regulated by a combination of lawmakers, regulators from UDAF and DHHS, and city/county lawmakers. At the legislative level, production operators are faced with several dozen code provisions that control everything from licensing to operations to testing/enforcement. These statutes are further supported in administrative rule. Currently, there are at least five administrative rules that apply to producers, addressing things like cultivation, processing, quality assurance testing, transportation, and education. Similar to the statutes/regulations surrounding cannabis production, there are dozens of statutory code provisions that apply to medical cannabis pharmacies and home delivery businesses. The failure to adhere to these statutes and regulations can result in citations and fines ranging as high as $5,000 per violation. Given the complexity of the statutes and rules that apply to legal cannabis businesses, maintaining compliance is of the utmost importance, and few professionals are better suited to handle those situations than an attorney.

III. RULEMAKERS IN OTHER JURISDICTIONS HAVE RECOGNIZED THAT CANNABIS BUSINESSES SHOULD NOT BE FORCED TO GO IT ALONE WHEN IT COMES TO OPERATIONS IN FURTHERANCE OF THE LEGAL CANNABIS MARKET.

The second question presented above asks what assistance a lawyer may provide to a cannabis operator that the operator could not perform for itself. As is evident from the above examples, well-trained lawyers with expertise in the states cannabis laws, corporate governance/operations, contract/lease negotiations, compliance, and government affairs, are incredible assets to the industry, and as more fully detailed below, it would unnecessarily hamstring the cannabis industry to allow these lawyers to only advise clients as to their business operations on the front end and then represent them in court or in front of an

administrative body when something goes wrong. The assistance portion of a cannabis lawyer's relationship with his or her client is perhaps the most valuable service the lawyer can provide.

If a lawyer was only allowed to advise a client on a particular course of conduct, and then undertake to represent a client further in the event that the course of conduct proved wrong or was otherwise deemed non-compliant, this would leave the operator unnecessarily exposed at the most critical juncture of their business. One would wonder what other areas of the laws might be interpreted similarly. Are lawyers that are engaged in other wellness industries limited to providing only advice or other counseling? Or are those lawyers allowed to actually assist their clients in their endeavors? The answers to these questions would seem to be that those lawyers would not be so limited, and while cannabis may remain federally illegal, a lawyer should be allowed to assist a legal cannabis operator in furtherance of the state's medical cannabis laws and regulations. It would be an extremely difficult situation to prohibit a cannabis operator from utilizing a lawyer's assistance in furtherance of their state legal objectives.

In other jurisdictions, those promulgating the rules of professional conduct, as well as those issuing ethics opinions interpreting Rule 1.2(d), have seemed to agree that a lawyer must be able to 1) counsel/advise a client regarding the validity, scope and meaning of the relevant cannabis laws and regulations, 2) assist operators in a course of conduct that the lawyer reasonably believes is permitted by those laws and regulations (and any other state or local provisions implementing those laws and regulations), and 3) representing operators in front of courts or other administrative bodies in the event that something goes awry. (*See* Attached - Compilation of Ethics Opinions, Ethical Rules, and Other Resources Addressing a Lawyer's Ability to Advise, Assist, and Represent Cannabis Operators.) As one ethics opinion put it, "if a lawyer is permitted to advise a client on how to act in a manner that would not result in a California crime, the lawyer should be able to assist a client in carrying out that advice so the California crime does not occur." (*See id.*) The prior quote is well-taken, especially where cannabis remains federally illegal, and the DOJ has repeatedly stated over the last decade or so that their prosecutorial focus is on those operating outside the law. Quoting again from the California Bar's Standing Committee on Professional Responsibility and Conduct's Formal Opinion No. 2020-202:

> Given the complexity and pervasiveness of the California regulatory scheme, and the potential severe consequences of a violation of current federal law, it makes sense to construe the client's right to assistance to encompass every situation where such a violation could occur. Furthermore, a rule that permits assistance in interpreting and complying with California cannabis law (for example, helping to obtain a permit) but denies the same service with respect to the full range of laws applicable to the formation and operation of that business would hardly advance the California substantive policies in question. Finally, to the extent that the concern is the degree of conflict between federal and state law, it would make little sense to authorize assistance in interpreting or complying with California law that conflicts with federal law, while denying such assistance with respect to California laws that raise no issue of conflict. (*See id.*)

An ethics opinion issued by the Illinois State Bar Association echoed the above sentiments, stating:

> The Committee believes that it is reasonable to permit Illinois lawyers, whose expertise in draftsmanship and negotiations is of great value to the public, to provide the same services to medical marijuana clients that they provide to other businesses. One of the purposes of legal representation is to enable clients to engage in legally regulated businesses efficiently, and that purpose is advanced by their retention of counsel to handle matters that require legal expertise. A lawyer who concludes that a client's conduct complies with state law in

a manner consistent with the application of federal criminal law may provide ancillary services to assure that the client continues to do so. (*See id.*)

In summary, those bar associations and corresponding ethics bodies that have looked at this issue have recognized the wisdom that a lawyer should be allowed to offer the same legal services to cannabis businesses as they do to any other lawful business. This should be a persuasive point to the Utah Supreme Court and the advisory committee. No company, even medical cannabis companies, should be forced to go it alone when it comes to business operations. This will only perpetuate the legal issues presented by the illicit market, and will jeopardize the overall progress made by the nascent legal cannabis industry.

IV. ALTHOUGH THE FEDERAL GOVERNMENT'S RELAXED STANCE ON STATE LEGAL CANNABIS OPERATIONS MAY CHANGE AT ANY TIME, FEDERAL CANNABIS PROSECUTIONS REMAIN FOCUSED ON ILLEGAL BUSINESSES.

The last question presented asks whether lawyers assisting, and not just advising or representing cannabis operators, may face federal criminal prosecution based upon that assistance. As outlined in Point I, while cannabis remains illegal under federal law, the federal government and the DOJ have deprioritized cannabis prosecutions since at least 2013. As should be the case, the federal government is prohibited by law from expending resources on prosecutions involving legal medical cannabis operators. So, although a lawyer could technically be arrested and charged with a crime for assisting a cannabis business, the Rohrabacher-Farr amendment should step in to block any prosecution (so long as the lawyer is advising and assisting a business as part of a legal medical cannabis operation).

Furthermore, the DOJ's stance, as stated by AG Merrick Garland, should give lawyers better than average confidence that so long as they are advising, assisting, and representing cannabis businesses under the laws of the State of Utah (or another jurisdiction that has legalized cannabis), while at the same time advising their clients as to the continued illegality of cannabis under federal law, then they should be pretty well insulated against federal prosecution. Simply put, the federal government is much more focused on stopping illegal cannabis businesses and not those that are operating in compliance with state law.

CONCLUSION:

There are perhaps few other industries that require the legal expertise, counseling, and assistance from lawyers in the same as the cannabis industry. The nascent cannabis industry presents a complex web of state and local laws and regulations that operators must strictly navigate to remain in business and stay away from the potential for criminal prosecution, IRS problems, and fines/licensure suspensions or revocations from regulators. As such, having the assistance of competent legal counsel is paramount. It is not enough that a lawyer be allowed to only advise or represent a cannabis business. The lawyer must also be allowed to assist their clients to achieve their legal objectives. In so doing, lawyers should be given the peace of mind that their actions will not result in discipline form their state bar association. Accordingly, Utah should follow the lead of the numerous other jurisdictions that have amended their rules of professional conduct to provide a safe harbor for cannabis lawyers.

Rule 1.2(d) Research
Addressing a Lawyer's Ability to Advise, Assist, and Represent Cannabis Operators

Alaska:

https://public.courts.alaska.gov/web/rules/docs/prof.pdf

Arizona:

https://www.azbar.org/for-lawyers/ethics/ethics-opinions/

https://www.azcourts.gov/LinkClick.aspx?fileticket=DFbP3RbD1KA%3D&portalid=26

California:

https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/Formal-Opinion-2020-202-17-0001.pdf

https://www.calbar.ca.gov/Portals/0/documents/publicComment/2019/17-0001-Advising-a-Marijuana-Business-90-day-public-comment.pdf

https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.2.1-Exec_Summary-Redline.pdf

Colorado:

https://www.cobar.org/Portals/COBAR/repository/rules_of_prof_conduct.pdf (See comment 14 to Rule 1.2(d))

Connecticut:

https://www.ctbar.org/docs/default-source/publications/ethics-opinions-informal-opinions/2013-opinions/informal-opinion-2013-02.pdf?sfvrsn=dddb9d4d_6

https://www.jud.ct.gov/publications/PracticeBook/PB.pdf

Florida:

No formal rule or ethics opinion, but the state has adopted a non-prosecution policy for cannabis attorneys.

Illinois:

https://www.isba.org/sites/default/files/ethicsopinions/14-07%20%28Board%20Revised%20Medical%20Marijuana%29.pdf

https://casetext.com/rule/illinois-court-rules/illinois-supreme-court-rules/article-viii-illinois-rules-of-professional-conduct-of-2010/rule-12-scope-of-representation-and-allocation-of-authority-between-client-and-lawyer

Maryland:

https://www.msba.org/ethics-opinions/do-the-maryland-rules-of-professional-conduct-prohibit-attorneys-from-advising-clients-seeking-to-engage-in-conduct-pursuant-to-marylands-medical-marijuana-laws-similarly-do-the-rules-prohi/

Massachusetts:

No formal rule or ethics opinion, but the state has adopted a non-prosecution policy for cannabis attorneys.

Minnesota:

https://lprb.mncourts.gov/articles/Articles/Ethics%20Opinion%20No.%2023%20and%20Medicinal%20Marijuana.pdf

https://www.revisor.mn.gov/statutes/cite/152.32

Nevada:

https://www.leg.state.nv.us/courtrules/rpc.html

New Jersey:

https://www.njcourts.gov/notices/2020/n201119a.pdf

https://tcms.njsba.com/PersonifyEbusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/NJSBA%20Letter%20Re%20Amendments%20to%20RPC%201.2%20-%2011.18.2020.pdf

New York:

https://nysba.org/ethics-opinion-1225/

https://nysba.org/ethics-opinion-1177/

https://nysba.org/ethics-opinion-1024/

Ohio:

https://www.supremecourt.ohio.gov/ruleamendments/documents/Medical%20Marijuana%20Amendment%20(FINAL).pdf

Oregon:

https://www.osbar.org/_docs/rulesregs/2015ORPCAmendments.pdf

Pennsylvania:

https://www.padisciplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct#rule-107

Rhode Island:

https://www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/17-01.pdf

Vermont:

https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDComment%20to%20V.R.Pr_.C.%201.2.pdf

Virginia:

https://www.vsb.org/docs/Petition21-4_Rule%201.2_110521.pdf

https://www.vsb.org/docs/Petition21-4_APPENDIX.pdf

https://www.vacourts.gov/courts/scv/amendments/part_six_sect_ii_rule_1_2.pdf

Washington:

https://www.courts.wa.gov/court_rules/pdf/RPC/GA_RPC_01_02_00.pdf

Other Sources:

https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2663&context=sulr

https://www.sfbar.org/wp-content/uploads/2019/09/Ethics-Opinion-2015-01.pdf

https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6731&context=lalrev

https://deliverypdf.ssrn.com/delivery.php?ID=161070001067087065095125080027014123120047030012065075094104117097003027100005067120049062054045104022006125118003083012121104123011053034003093095007084105110025084001048073117069088085104093031081096101110115103005099099103072102028097077070094099&EXT=pdf&INDEX=TRUE

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https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=3222&=&context=tlr&=&sei-redir=1&referer=https%253A%252F%252Fscholar.google.com%252Fscholar%253Fhl%253Den%2526as_sdt%253D0%25252C45%2526q%253Drule%252B1.2%252Bcannabis%2526btnG%253D#search=%22rule%201.2%20cannabis%22

Rule 1.2. Scope of representation and allocation of authority between client and lawyer. Licensed paralegal practitioner notice to be displayed.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle 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'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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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. A lawyer may also counsel a client regarding the validity, scope, and meaning of Utah's cannabis statutes and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and related rules, regulations, orders, and ordinances. In these circumstances, the lawyer must also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.

(e) A licensed paralegal practitioner shall conspicuously display in the licensed paralegal practitioner's office a notice that shall be at least 12 by 20 inches with boldface type or print with each character at least one inch in height and width that contains a

statement that the licensed paralegal practitioner is not a lawyer licensed to provide legal services without limitation.

Comment

Allocation of Authority between Client and Lawyer

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

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

[4] In a case in which the client appears to be suffering diminished capacity, 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, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be 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. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time

allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

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

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. 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 required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

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

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) 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.

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

[14] Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients.

[14a] This rule differs from the ABA Model Rule by adding section (e) which requires licensed paralegal practitioners to post a conspicuous notice of their limited licensure status.

***Explanatory Notes**:

These proposed revisions to Rule 1.2(d) reflect an approach whereby attorneys can both advise and assist cannabis businesses. If the Utah Legislature has decided that cannabis companies can conduct medical marijuana business in Utah, then, in our subcommittee's view, Utah lawyers need to be able not only to advise such businesses on the law but also actively assist them with organizing and operating their businesses, including such matters as establishing and licensing businesses that meet the requirements of the statutes, adopting operating policies and procedures, and representing clients in state court and state agency proceedings regarding compliance with the statutes and licensing and certification issues. Such assistance is necessary to the practical functioning of the businesses, which are not illegal, whereas the intent of Rule 1.2 is to prohibit lawyers from assisting with criminal activity like money laundering. If lawyers can only advise but not assist, then both cannabis lawyers and cannabis business are hamstrung in their ability to take practical action steps to enforce the rights provided by the statutes and comply with the obligations required by the statutes.

The term "Utah's cannabis statutes" is meant to encompass:

58-37-3.7. Utah Controlled Substances Act

58-37-3.7. Medical cannabis decriminalization

58-37-3.8. Enforcement

58-37-3.9. Exemption for possession or use of cannabis to treat a qualifying illness

4-41a. Cannabis Production Establishments

26-61. Cannabinoid Research Act

The proposed language is drawn from the following sources:

- Cmt. 14 to Vermont's Rule 1.2(d)

https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDComment%20to%20V.R.Pr_.C.%201.2.pdf

"With respect to paragraph (d), a lawyer may counsel a client regarding the validity, scope, and meaning of Title 18, chapters 84, 84A, and 86 of the Vermont Statutes Annotated, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, other state and local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy."

- Cmt. 1 to Nevada's Rule 1.2

https://www.leg.state.nv.us/courtrules/rpc.html

"A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution Article 4, Section 38, and NRS Chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

- Alaska's Rule 1.2(f):

https://public.courts.alaska.gov/web/rules/docs/prof.pdf

"A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If

Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

Rule 1.2. Scope of representation and allocation of authority between client and lawyer. Licensed paralegal practitioner notice to be displayed.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle 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'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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) 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 may~~

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

(3) advise and assist a client to comply with and take actions specifically provided by Utah law, while also advising the client of the existence and consequences of federal law that may impose criminal or other penalties for actions or matters permitted by Utah law, and vice versa.

(e) A licensed paralegal practitioner shall conspicuously display in the licensed paralegal practitioner's office a notice that shall be at least 12 by 20 inches with boldface

type or print with each character at least one inch in height and width that contains a statement that the licensed paralegal practitioner is not a lawyer licensed to provide legal services without limitation.

Comment

Allocation of Authority between Client and Lawyer

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

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation.

See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

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

[4] In a case in which the client appears to be suffering diminished capacity, 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, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be 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. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem,

the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

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

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. 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 required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

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

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. Subparagraph (2) of paragraph (d) 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.

[12a] Subparagraph (3) of paragraph (d) recognizes that, at times, Utah law and federal law may diverge. When federal law prohibits conduct permitted by Utah law, a lawyer may advise and assist a client to comply with and take actions specifically provided by Utah law that may conflict with federal law. But the lawyer must also advise the client of both the conflict between Utah and federal law and of any potential criminal or other penalties for violation of federal law. Likewise, when Utah law prohibits conduct permitted by federal law, a lawyer may advise and assist a client in complying with and taking actions specifically provided by federal law that may conflict with Utah law. But the lawyer must also advise the client of both the conflict between federal and Utah law and of any potential criminal or other penalties for violation of Utah law.

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

[14] Lawyers are encouraged to advise their clients that their representations are guided by the Utah Standards of Professionalism and Civility and to provide a copy to their clients.

[14a] This rule differs from the ABA Model Rule. ~~by adding section (e) which requires licensed paralegal practitioners to post a conspicuous notice of their limited licensure status.~~