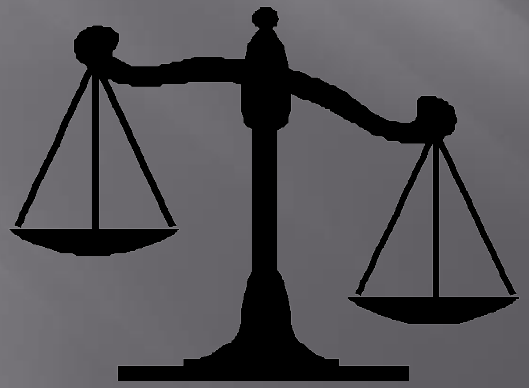
# ALL THINGS ETHICS:

## Lawyers As Witnesses, Ethical Implications of Marijuana Legalization; Ethical Considerations in Representing Public Bodies; Ethical Mishaps & Traps



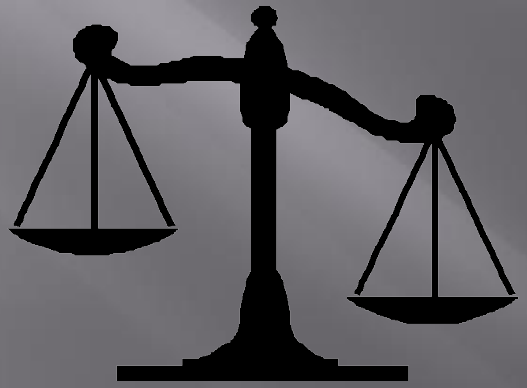
Brett Kandt & Neil Rombardo

# Why do we have rules of professional conduct?

"Ethics is that which is required and professionalism is that which is expected." *Evanoff v. Evanoff*, 418 S.E.2d 62, 63 (Ga. 1992).

The purpose of attorney discipline is to protect the public, the courts and the legal profession, not to punish the attorney. *State Bar of Nev. v. Claiborne*, 104 Nev. 115, 756 P.2d. 464 (1988).

# Lawyers As Witnesses



# When Does the Issue Arise?

- Lawyer foresees being a necessary witness for client at onset
- Lawyer becomes necessary witness in course of litigation
- Opposing counsel seeks lawyer as a witness (usually discovery stage)
- Lawyer serves as an expert witness in a case in which he/she is not representing a party

# Advocate-Witness Rule

**Rule 3.7. Lawyer as Witness.**

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

# Why?

Protects the fact-finder from confusion. "It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.7 cmt. 2.

Protects the opposing party from any unfair prejudice accompanying the lawyer's dual roles. "A lawyer testifying as a witness may explain evidence rather than offering it, unfairly influencing the jury in the process." Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes,* 25 AM. **J.** TRIAL Advoc. 17, 52 (2001).

Protects a lawyer-witness's client from conflicts of interest in the lawyer's dual roles. "If the lawyer (or a member of his firm) must give testimony that is adverse or ambivalent with respect to the client's cause, the cause may be damaged." 2 Hazard & Hodes, THE LAW OF LAWYERING § 33.5, at 33-6 (3d ed. 2001).

# Scope of Rule

Rule applies to lawyers in their representational capacity; it does not bar their testimony as witnesses in other proceedings.

Rule applies no matter which party the lawyer will testify on behalf of.

Rule limited to "at a trial." Authorities generally agree that even a lawyer who knows he/she is likely to be a necessary witness at trial is not prohibited from handling that matter throughout investigation, discovery and settlement negotiations, with client consent. *See, e.g., ABA Inf. Op. 89-1529 (1989); Pa. Ethics Op. 96-15 (1996); D.C. Bar Ethics Op.* 228 (1992).

However, some courts have held pretrial disqualification appropriate where the activity "includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual rule." *World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc.*, 866 F. Supp. 1297, 1303 (D. Colo. 1994).

# Scope of Rule

"Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest." ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.7 cmt. 5.

"If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7." ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.7 cmt. 7.

***So*** - vicarious disqualification *if* the conflict rules alone would preclude the testifying lawyer from acting as both advocate and witness.

# ABA Comments on Rule 3.7

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

# ABA Comments on Rule 3.7

[3] . . . Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action permitting the lawyers to testify avoids the need for a second trial with new counsel . . . . Moreover, in such a situation the judge has firsthand knowledge of the matter.

[4] . . . [P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

# Disqualifying the Lawyer vs. Excluding the Testimony

Substantial hardship exception is narrowly construed - "In essence, Rule 3.7(a)(3) allows a lawyer-witness's representation of a client any time the detriment to the client, caused by the lawyer's disqualification, outweighs the prejudice to the opponent, caused by the lawyer's dual roles." Richmond, *Lawyers as Witnesses*, 36 New Mexico Law Rev. 47, 54 (Winter 2006).

"[C]ourts generally view motions to disqualify opposing counsel with extreme caution because disqualification can be used to gain a tactical advantage and to harass the opposing party. . . Thus, the showing of prejudice needed to disqualify opposing counsel is more stringent than when the attorney is testifying on behalf of his client because adverse parties may attempt to call opposing lawyers as witnesses simply to disqualify them. *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 871 (N.D. 1993).

# ABA Comments on Rule 3.7

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing.

# *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012)

Club Vista and Gary Tharaldson entered into a real estate development project known as Manhattan West with Scott Financial.

When a multimillion dollar loan guaranteed by Tharaldson went into default, Club Vista hired attorneys Morrill and Aronson to determine whether legal action was warranted.

Based on their investigation, Morrill and Aronson filed an action on behalf of Club Vista against Scott Financial, alleging that Scott Financial, as lenders on the loan, had failed to ensure that certain pre-funding conditions were satisfied before advancing money on the loan. The complaint included claims of, among other things, fraud, constructive fraud, and breach of fiduciary duty.

# *Club Vista* continued

In their NRCP 16.1 initial disclosures, Club Vista identified attorney Morrill as a person who "may have discoverable information related to dealings between Scott Financial and Tharaldson and related companies."

During discovery, Scott Financial deposed Tharaldson, who testified that, with a few exceptions, he did not have any personal knowledge of the factual allegations underlying the complaint, nor did he know of anyone, other than his attorneys, who might have such information.

Scott Financial informed attorney Morrill that it intended to take his deposition as to the factual basis for the allegations in the complaint.

Morrill filed a motion for a protective order to preclude Scott Financial from taking his deposition.

# *Club Vista* continued

The discovery master recommended that the district court enter an order denying the motion for a protective order and permitting Scott Financial to depose Morrill as to factual matters supporting the allegations in the complaint.

The district court upheld the discovery master's recommendations, noting that the attorneys would be able to object to questions they believed impinged on a privilege, a record would be made such that the propriety of any specific question could be sufficiently addressed by the court, and the attorney-client and work-product privileges would not necessarily bar all questions that Scott Financial would ask.

Club Vista filed a writ petition to the Nevada Supreme Court.

# *Club Vista* continued

"Forcing an opposing party's trial counsel to personally participate in trial as a witness 'has long been discouraged and recognized as disrupting the adversarial nature of our judicial system.'" *Club Vista Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012) (quoting *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)).

A party seeking to take the deposition of an opposing party's counsel has the burden of proving that 1) the information sought cannot be obtained by other means, 2) the information sought is relevant and non-privileged, and 3) the information is crucial to the preparation of the case. *Id.* at 250.

Court granted the petition in part, directing the district court to evaluate the underlying facts and circumstances of the request for a protective order in light of the three-factor test.

# Lawyer as Expert Witness

A lawyer serving as an expert witness to testify on behalf of a party does not thereby establish an attorney-client relationship with that party. Therefore, Rule 1.9 governing conflicts of interest with former clients would not apply to prohibit a lawyer from subsequently taking an adverse position to the party for whom the lawyer testified as an expert witness, even where the matter for which the lawyer testified and the matter involved in the subsequent representation are substantially related to one another. However, any firm that hires a lawyer as an expert witness should assure that the lawyer's role as expert witness is made clear and should obtain the client's informed consent if the expert's role changes to that of co-counsel.

*D.C. Bar Ethics Op.* 337 (2006).

# ABA Formal Ethics Opinion 97-407

A lawyer who serves as a testifying expert on behalf of a party represented by another law firm does not thereby occupy a client-lawyer relationship or perform a law-related service within the purview of Model Rule 5.7. He nevertheless should make the nature and scope of the relationship clear at the outset.

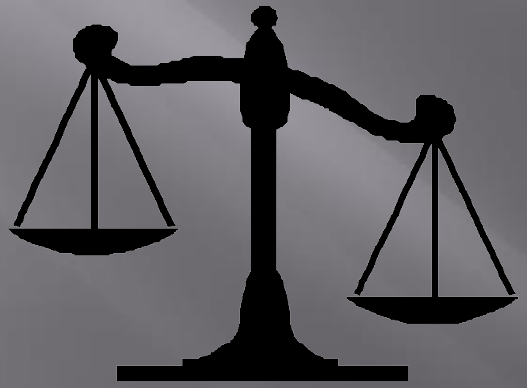
If the lawyer's role is or later becomes that of an expert consultant for the party, a client-lawyer relationship with the party is established, and the lawyer is subject to all of the Model Rules in connection with that engagement.

# ABA Formal Ethics Opinion 97-407

Even though service solely as a testifying expert is not as such governed by the Model Rules, concurrent representation of a client adverse to the party for whom the lawyer serves as a testifying expert ordinarily is barred by Model Rule 1.7(b) as a result of constraints imposed by other law.

Subsequent representation may, for the same reason, also be barred where the party's confidential information is relevant to the subsequent representation or where other factors make it unreasonable to conclude that the representation will not be adversely affected.

# Ethical Implications of Marijuana Legalization



# Ethical Implications of Marijuana Legalization

Medical marijuana - Nevada Const. art. IV, § 38 [Added in 2000. Proposed by initiative petition and approved and ratified by the people at the 1998 and 2000 general elections] – NRS chapter 453A implements.

Recreational marijuana – Initiative Petition No. 1 "Regulation and Taxation of Marijuana Act" [Proposed by initiative petition and approved and ratified by the people at the 2016 general election] – Codified in NRS chapter 453D.

# Medical marijuana – Special provision for law enforcement agencies

NRS 453A.800(4) - The provisions of chapter do not prohibit a law enforcement agency from adopting policies and procedures that preclude an employee from engaging in the medical use of marijuana.

"Law enforcement agency" includes: Attorney General, district attorneys, Gaming Control Board and any attorney, investigator, special investigator or employee who is acting in his or her professional or occupational capacity for such an office or the Nevada Gaming Control Board; or any other law enforcement agency and any peace officer or employee who is acting in his or her professional or occupational capacity for such an agency.

# Federal Law

Possession, use, and sale of *any* amount of marijuana is illegal under the federal Controlled Substances Act. *See* 21 U.S.C. §§ 841(a)(1) and 844(a).

Under the Commerce Clause, U.S. Congress may criminalize the production and use of home-grown cannabis even where states approve its use for medicinal purposes. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

Although federal and state governments both regulate controlled substances, federal law preempts state law when state law conflicts with the CSA. 21 U.S.C. § 903.

Marijuana is still a schedule I controlled substance under both federal and state (NRS 453.510) law.


STATE MARIJUANA LAWS IN 2018
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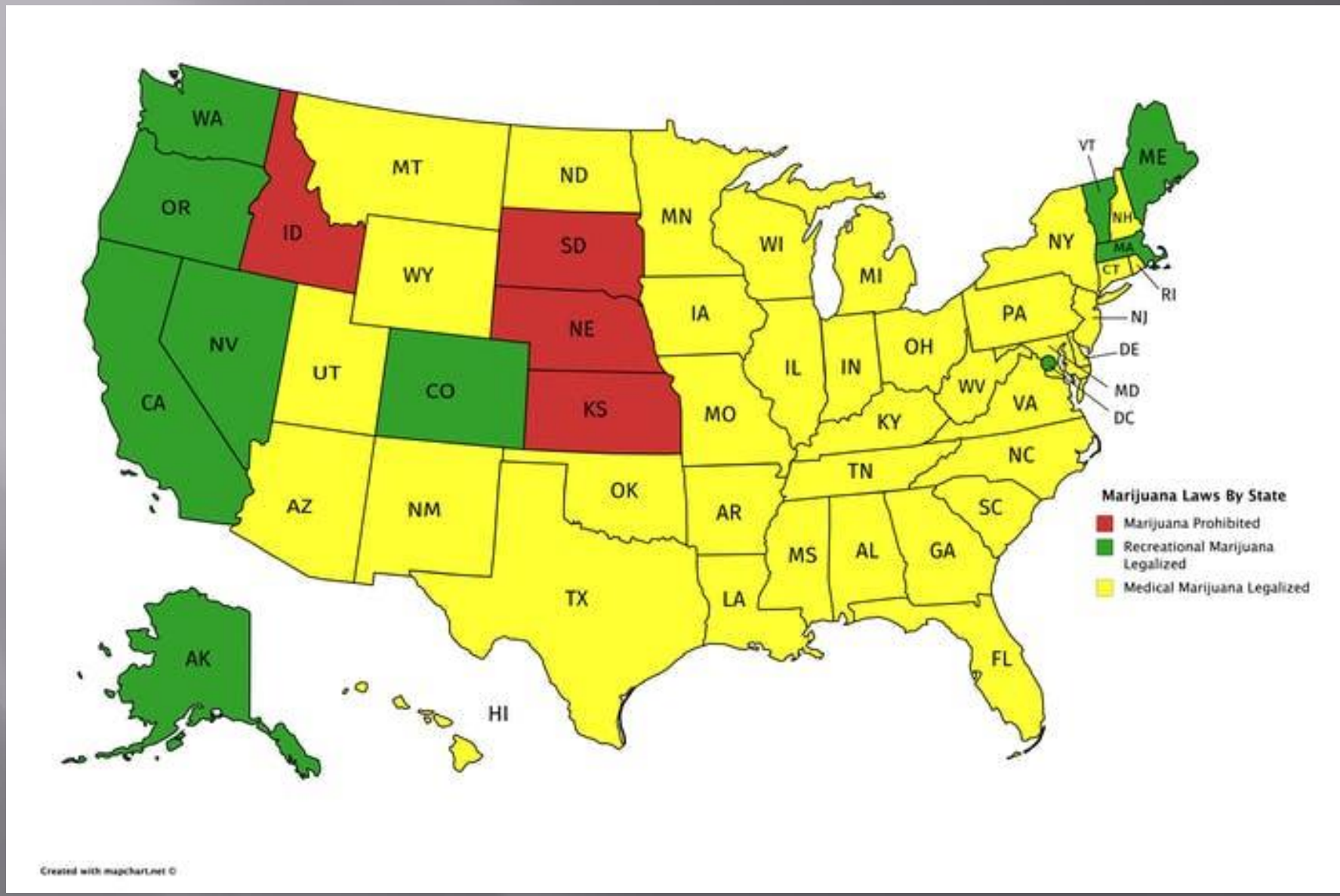
MEDICAL MARIJUANA LEGALIZED FOR RECREATIONAL USE
NO BROAD LAWS LEGALIZING MARIJUANA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Recreational Marijuana Legalized
Medical Marijuana Legalized
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# Federal Policy Under Trump

- Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, re Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) set forth federal enforcement priorities under prior administration.
- Attorney General Jeff Sessions rescinded the Cole Memo on January 4, 2018.
- In new memorandum, Attorney General Jeff Sessions directs all U.S. Attorneys "to enforce the laws enacted by Congress and to follow well-established principles when pursuing prosecutions related to marijuana activities."

# The First Ethical Conundrum

**RPC 1.2. Scope of Representation.**

(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.

The Rule makes **no distinction** between state and federal law in contemplation of what is "criminal" conduct.

# Nevada Supreme Court – ADKT 0495

Order of May 7, 2014, appended Comment (1) to RPC 1.2:

"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."

# The Second Ethical Conundrum

**RPC 8.4. Misconduct.**

It is professional misconduct for a lawyer to:

. . . . .

(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

The Rule makes **no distinction** between state and federal law in contemplation of what is "criminal" conduct.

# Nevada Supreme Court – ADKT 0495

Order of February 10, 2017, appended Comment (1) to RPC 8.4(b):

"Because use, possession, and distribution of marijuana in any form still violates federal law, attorneys are advised that engaging in such conduct may result in federal prosecution and trigger disciplinary proceedings under SCR 111."

SCR 111 (Attorneys convicted of crimes) mandates self-reporting of criminal conviction and suspension for conviction of a felony and certain other crimes involving dishonesty, referral to disciplinary board for other crimes.

# U.S. District Court
# District of Nevada

LR IA 11-7. ETHICAL STANDARDS, DISBARMENT, SUSPENSION AND DISCIPLINE.

(a) Model Rules. An attorney admitted to practice under any of these rules must adhere to the standards of conduct prescribed by the Model Rules of Professional Conduct as adopted and amended from time to time by the Supreme Court of Nevada, except as these standards may be modified by this court. An attorney who violates these standards of conduct, or who fails to comply with this court's rules or orders, may be disbarred, suspended from practice before this court for a definite time, reprimanded, or subjected to other discipline as the court deems proper. This subsection does not restrict the court's contempt power.

Amended effective May 1, 2016.

# U.S. District Court
# District of Nevada

LR IA 11-7(c) mandates self-reporting of any disciplinary action in Nevada or another jurisdiction or conviction of felony or "other misconduct that reflects adversely on the attorney's honesty, trustworthiness, or fitness as an attorney."

LR IA 11-7(e) mandates reciprocal discipline for suspension or disbarment unless attorney can show cause.

LR IA 11-7(f) mandates disbarment for conviction of felony or "other misconduct" - attorney may show cause for reinstatement.

# Ninth Circuit Court of Appeals

Pursuant to FRAP 46-

(b) a member of a circuit court's bar may be suspended or disbarred if 1) the member has been suspended or disbarred from practice by another federal or state court or 2) the member is "guilty of conduct unbecoming a member of the court's bar."

(c) a circuit court may discipline an attorney for conduct unbecoming a member of the bar or for failure to comply with any court rule.

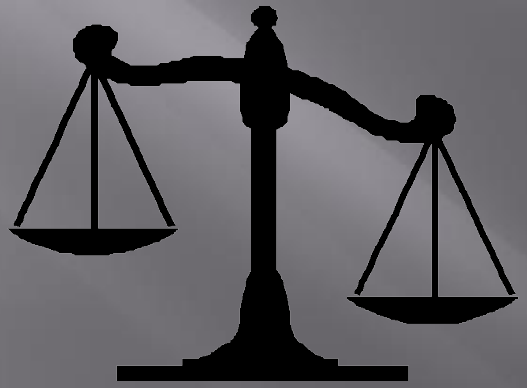
See also Circuit Rule 46-2.

# Marijuana & Federal Court Practice in Colorado

Under Local Rule D.C.COLO.L.Atty.R. 2(b)(2), lawyers are permitted to advise clients regarding the "validity, scope, and meaning" of Colorado's marijuana laws, but may not "assist a client in conduct that the lawyer reasonably believes is permitted by" such laws. [effective 12/1/14]

Rule excludes adoption of comment to Colorado RPC allowing lawyer to "assist the client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions" and implementing legislation. Colo. RPC 1.2(d), cmt. 14.

# Ethical Considerations in Representing Public Bodies



# Counseling Public Bodies to Follow the Law

**RPC 1.2. Scope of Representation.**

(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.

**Sunshine laws** are in place to ensure certain activities are conducted in an open and ethical nature. This allows members of the public to bear witness to certain activities or to request access to records pertaining to certain topics. They are designed to limit corruption within the affected organizations and increase public trust through willing transparency. **These laws often operate at the expense of efficiency.**

# Confidentiality vs. Transparency

"In view of the unrestricted language of Rule 1.6 (Confidentiality of Information), all lawyers should pause and think before revealing any information relating to the representation of a client unless the client has given informed consent." Nevada Standing Committee On Ethics and Professional Responsibility, Formal Opinion No. 41 (June 24, 2009).

Public records law (NRS Chapter 239) and open meeting law (NRS Chapter 241) fall within scope of RPC 1.6(b)(6) permitting disclosure if required by law; certain statutory exceptions such as:

- Attorney-client privilege - *see* NRS 49.95; *see also Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 354, 891 P.2d 1180 (1995) (citing *Upjohn v. United States*, 449 U.S. 383 (1980); *McKay v. Board of County Comm'rs*, 103 Nev. 490, 746 P.2d 124 (1987) (privilege under OML).
- Work-product doctrine - *see* NRCP 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Nobles*, 422 U.S. 225 (1975); *Wardleigh v. Second Jud. Dist. Ct.*, 111 Nev. 354, 891 P.2d 1180 (1995); Op. Nev. Att'y Gen. No. 2001-37 (December 31, 2001) (scope of government work-product).

# Ethics in Open Government

"In enacting [the OML], the Legislature finds and declares that all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010(1).

"The exceptions provided to this chapter, and electronic communication, must not be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting, upon a matter over which the public body has supervision, control, jurisdiction or advisory powers." NRS 241.016(4).

The spirit and policy behind the OML favors open meetings and any exceptions thereto should be strictly construed. *McKay v. Board of Supervisors,* 102 Nev. 644, 730 P.2d 438 (1986).

All exceptions to the OML must be construed narrowly and in favor of openness. *Chanos v. Nevada Tax Comm'n*, 124 Nev. 232, 239, 181 P.3d 675, 680 (2008).

# Attorney-Client Communication

**Rule 1.4. Communication.**

(a) A lawyer shall:

(1) **Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required** by these Rules;

(2) **Reasonably consult with the client** about the means by which the client's objectives are to be accomplished;

(3) **Keep the client reasonably informed** about the status of the matter;

(4) **Promptly comply with reasonable requests for information**; and

(5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to **permit the client to make informed decisions** regarding the representation.

# Maintaining Communication

NRS 241.015(3)(b) defines "meeting" - does not include gathering of a quorum:

(1) Which occurs at a ***social function*** if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.

(2) To receive information from the attorney employed or retained by the public body regarding ***potential or existing litigation*** involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

"Nothing whatever precludes an attorney for a public body from conveying sensitive information to the members . . . by confidential memorandum; nor does anything prevent the attorney from discussing sensitive information in private with members of the body, singly or in groups less than a quorum." *McKay v. Board of County Commissioners*, 103 Nev. 490, 495-96, 746 P.2d 124, 127 (1987).

# Representing a Public Body in Litigation

- RPC 1.2 (a lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation);
- RPC 1.3 cmt. 1 (a lawyer should take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor);
- RPC 1.4 cmt. 3 (in certain circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation);
- RPC 1.13 (when the client is an organization, it is often impossible to inform every one of its members about legal affairs; ordinarily, the lawyer should address communications to the officials of the organization.)

# Filing a Protective Notice of Appeal

A panel of the Nevada Supreme Court in a split 2-1 decision, recently issued a published decision dismissing an appeal by the Commission of Ethics, ruling that an attorney for a public body must have authorization from the client in a public meeting prior to filing a notice of appeal. *Commission on Ethics v. Hansen*, 133 Nev. Adv. Op. No. 39 (June 29, 2017). The Court subsequently filed an order granting *en banc* reconsideration, reinstating the appeal and vacating the opinion. Oral argument before the *en banc* court was held on March 5, 2018.

Can a public body authorize legal counsel to take all necessary legal action, including filing any necessary appeals from adverse rulings?

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. ABA MODEL RULES OF PROF'L CONDUCT preamble and scope 18 (2015).

# Filing a Protective Notice of Appeal

> The District Council has a long-standing policy whereby its attorney is authorized and directed to file a protective notice of appeal whenever the District Council, for any reason, is unable to vote on an appeal during the prescribed statutory period for taking an appeal. The District Council thereafter acts, in the normal course of business, to ratify, or direct dismissal, of the appeal . . . In a governmental attorney-client relationship particularly, it is not uncommon to find an established policy giving the government attorney standing instructions and authority to take all actions necessary to protect the government client's appellate interests until such time as the client may adequately consider the matter . . . In an on-going attorney-client relationship, particularly such as exists here between the governmental client and its house counsel, and especially in view of the long-standing policy declaration in this case, the client rightfully may expect that the attorney will act to protect the client's right to appeal.

*City Council v. Dutcher*, 780 A.2d 1137, 1145 (2001).

# Statements in Public Meetings

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a **substantial likelihood of materially prejudicing** an adjudicative proceeding . . . RPC 3.6(a); *see also* ABA MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 3 (2002).

Information Subject to Disclosure:

- The claim, offense or defense involved;
- Information contained in a public record;
- Confirm investigation is in progress;
- Scheduling or result of any step of litigation;
- Request for assistance in obtaining evidence and information;
- Warning of danger if likelihood of substantial harm to individual or public interest.

RPC 3.6(b); *see also* ABA MODEL RULE OF PROFESSIONAL CONDUCT Rule 3.6 cmt. 4 (2002).

# Transacting Business on Personal Devices

Case law from other jurisdictions has held that government-related information created or held on government employees' personal devices and personal accounts is subject to disclosure, usually on the basis that the record was created in the transaction of public business and thus fell within the definition of "public record" under the applicable law. *See Bradford v. Dir, Employment Sec. Dept.*, 128 S.W.3d 20 (Ark. Ct. App. 2003); *City of San Jose v. Superior Court*, 389 P.3d 848 (Cal. 2017); *City of Champaign v. Madigan*, 992 N.E.2d 629 (Ill. App. Ct. 4th Dist. 2013); *Adkisson v. Paxton*, 459 S.W.3d 761 (Tex. Ct. App. 2015); *Nissen v. Pierce County*, 357 P.3d 45 (Wash. 2015).

Generally these courts have concluded that it is the substance of the communication, rather than the medium by which the communication is created, transmitted, or stored, that matters. "The determining factor is the nature of the record, not its physical location." *State v. City of Clearwater*, 863 So.2d 149, 154 (Fla. 2003).

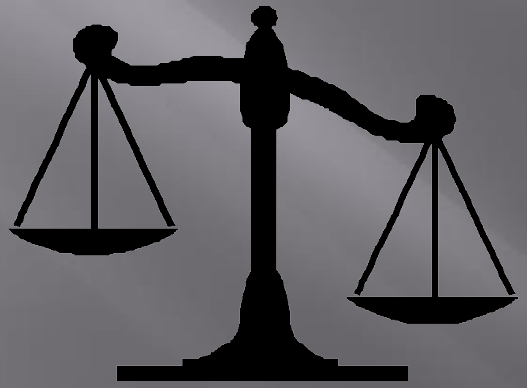
# Transacting Business on Personal Devices

The Nevada Supreme Court recently joined the majority in a case involving a writ petition to compel disclosure where members of the Lyon County Board of Commissioners conducted county business on private cellphones and email accounts, stating:

- Public records are not limited to records maintained in government offices, but include all records concerning the provision of a public service; and
- Records that can be generated or obtained by the county or its commissioners are within the county's control.

*Comstock Residents Ass'n v. Lyon Cty. Bd. of Comm'rs*, 134 Nev. Adv. Op. No. 19 (March 29, 2018).

# Ethical Mishaps and Traps



# Stumbling into a Lawyer-Client Relationship

- You work for the firm "Dewey, Cheatum and Howe" and represent the Board of Humor. Its membership consists of Larry, Moe and Curly.
- Larry comes to you and complains about Moe.
- Larry in a deposition states that you're his lawyer, and you do not correct him.
- A lawsuit has now arisen between Larry and the Board.
- Larry moves to have you conflicted off case.
- What would you do as a judge? RPC Issues?

# Stumbling into a Lawyer-Client Relationship

One court held that when an individual shared confidential information with organizations lawyer in the belief that a relationship existed, the lawyer had a conflict of interest, but the lawyer's firm could stay on with appropriate safeguards of information provided by that individual.

*Advanced Manufacturing Technologies Inc. v. Motorola Inc.*, No. CIV99-01219PH XMHMLOA (D. Ariz. July 2, 2002).

# Stumbling into a Lawyer-Client Relationship

- Rule 1.0A(b) discusses attorney-client relationship fact-based.
- Rule 1.6 duty of confidentiality attaches when considering even if no resulting attorney-client relationship.
- Rule 1.18 – Duties to Prospective Client.
- Third Restatement of Law Governing Lawyers §14 states relationship is formed when:
  - Lawyer manifests consent, or
  - Lawyer fails to manifest lack of consent and the lawyer should know that the person expects representation.

# Who Is the Client?

Public lawyer - **RPC 1.13. Organization as Client.**

- Who is the organization? Public Bodies? Executive Director? City Manager? County Manager?
- Who speaks for organization - especially public bodies?

DANGER Will Robinson!!!

- Be weary of the public body member or administrator who needs to chat.
- Remember public bodies must vote to direct you.

# Who Is the Client?

Duties articulated in RPC 1.13(a), regarding representation of an organization acting through its **duly authorized constituents**, apply to the representation of a government entity. Immediate attorney-client relationship exists between the attorney and the government officials acting in their official capacities on behalf of the government entity. ABA MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 9 (2002)

In dealing with an organization's . . . constituents, a lawyer **shall explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent**. RPC 1.13(f) as amended by Nevada Supreme Court Order entered November 8, 2006; see also comments to RPC 1.13.


In *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980), the court upheld nearly $650,000 in judgments against a firm that thought it had declined a representation.

The court ruled that an inadvertent lawyer-client relationship had been created, and thus the firm should have advised the plaintiff about the statute of limitations that governed her original claim

# Dealing With the Public

**Rule 4.2. Communication With Person Represented by Counsel.** In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

**Rule 4.3. Dealing With Unrepresented Person.** In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

# Is It a Conflict If Everyone Is Happy?

- Mr. Unscrupulous is a Lawyer.
- He represents Ms. Piggy, an elderly woman with dementia, in estate planning, i.e., trusts and wills.
- He also represents Mr. Wolf in the same matter who is claiming part of the estate.
- The State's Elder Protection Department has an order against Mr. Wolf.
- Mr. Unscrupulous to both client's satisfaction leaves the estate to Mr. Wolf. Issue?

# Is It a Conflict If Everyone Is Happy?

NRPC Rule 1.7 – A lawyer should not represent a client in direct conflict to another client.

In actual case, lawyer received reprimand after admitting a violation.

*State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, Relator v. Ralph E. Peppard, Respondent,* 869 N.W.2d 700 (Neb. 2015).

# Is It a Conflict If Everyone Is Happy?

- The Count, a well known divorce lawyer, represents Ms. Piggy in a divorce from Mr. Kermit.
- The Count and Ms. Piggy begin a sexual relationship during his representation of her.
- He bills Ms. Piggy for ALL the time they spend together.
- Issues?

# Is It a Conflict If Everyone Is Happy?

Court suspended Count for 15 months.

Violations of:

- Rule 1.5(a) and (b) – Fees
- Rule 1.7(a)(2) – Personal interests of a lawyer
- Rule 1.8(j) – Even if consented too, no sexual relationship.

*In Re Disciplinary Action against Lowe*, 824 N.W.2d 634 (Minn. 2013).

# Better Call Saul

- During highly publicized trial, Salacious Saul had his paralegal approach opposing counsel one evening at a restaurant, flirt and get him drunk.
- Paralegal claimed she was stranded and insisted drunk lawyer drive her home.
- Salacious Saul was monitoring and arranged for police officer to arrest hapless lawyer for DUI when he entered car.
- Issues?

# Better Call Saul

Violation of Florida Rule 3–4.3 which provides, in pertinent part, that the "commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline."

Comparable to Rule 8.4 – Professional misconduct for a lawyer to:

> (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) Engage in conduct that is prejudicial to the administration of justice;

Investigation resulted in permanent disbarment.

*Fla. Bar v. Diaco*, No. SC14–1052, 2016 WL 374277 (Fla. Jan 28, 2016).

# The Impact of Social Media

- Use of Social Media by Government Agencies
- Personal Use of Social Media by Public Officials and Employees

# Questions?

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The opinions, findings, conclusions, and recommendations expressed herein are those of the author and do not necessarily reflect the views of the Nevada State Board of Pharmacy or the Washoe County School District.