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IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

IN THE MATTER OF AN AMENDMENT
TO RULE OF PROFESSIONAL
CONDUCT 1.2 REGARDING MEDICAL
MARIJUANA

ADKT 0495

APR 30 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

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NATURE OF PROCEEDING: The Court issued an Order scheduling a Public Hearing on the Petition for May 6, 2014 and requested comment from the bar and public regarding the proposed amendment ("Order"). In response to the Order, The City of Reno, by and through its counsel, Fahrendorf Vilorina Oliphant & Oster, LLP, hereby files its public comment in support of the Board of Governors of the State Bar of Nevada ("Board of Governors") petition to amend Nevada's Rule of Professional Conduct 1.2(d) ("RPC 1.2(d)").

**PUBLIC COMMENT OF THE CITY OF RENO
IN SUPPORT OF AN AMENDMENT TO RULE OF PROFESSIONAL
CONDUCT 1.2 REGARDING MEDICAL MARIJUANA**

Submitted By:

R. Shawn Oliphant, Esq.
Nevada Bar No. 6441
FAHRENDORF, VILORIA
OLIPHANT & OSTER L.L.P.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

**IN THE MATTER OF AN AMENDMENT
TO RULE OF PROFESSIONAL
CONDUCT 1.2 REGARDING MEDICAL
MARIJUANA**

ADKT 0495

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**PUBLIC COMMENT OF THE CITY OF RENO
IN SUPPORT OF AN AMENDMENT TO RULE OF PROFESSIONAL
CONDUCT 1.2 REGARDING MEDICAL MARIJUANA**

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1 **I. PROCEDURAL HISTORY**

2 The procedural history of the legalization of medical marijuana in
3 Nevada is adequately addressed in the Board of Governor's Petition. In
4 summary, the Nevada Constitution was amended in 2000 and directed the
5 Nevada Legislature to enact legislation authorizing the use of marijuana for
6 medical purposes.
7

8
9 In 2013, Nevada's Legislature passed Senate Bill 374 which has been
10 codified in Nevada Revised Statutes Chapter 453A (the "Statute"). The
11 Statute regulates medical marijuana establishments which NRS 453A.116
12 defines as: (1) an independent testing laboratory; (2) a cultivation facility;
13 (3) a facility for the production of edible marijuana products or marijuana
14 infused products; and (4) a medical marijuana dispensary
15 ("Establishments").
16

17
18 The Nevada Division of Public and Behavioral Health (the "Health
19 Division") was required by NRS 453A.370 to adopt regulations related to
20 the certification of Establishments by April 1, 2014. The Health Division
21 has adopted such regulations¹ and therefore the State has taken all steps
22 necessary to regulate Establishments under State law. However, local
23 governmental jurisdictions are tasked with drafting applicable governmental
24
25
26

27 ¹ LCB File No. R004-14 Effective April 1, 2014.
28

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1 ordinances and rules related to Establishments, including without limitation,
2 zoning and business licensing ordinances and rules. In order to apply to the
3
4 Health Division for an Establishment registration, the applicant must provide
5 proof of licensure with the applicable local governmental authority or a letter
6 from the applicable local governmental authority certifying that the proposed
7
8 Establishment is in compliance with those restrictions and satisfies all
9 applicable building requirements.² Moreover, any Establishment registration
10 certificate issued by the Health Division is deemed provisional until such
11
12 time as the Establishment is in compliance with all applicable local
13 governmental ordinances or rules, and has been issued a business license for
14 the operation of the Establishment.³
15

16 On September 25, 2013, the Reno City Council ("Council") directed
17 staff to amend Title 4 and Title 18 to place a stay on the acceptance of
18 applications related to Establishments within the corporate limits of the City
19 of Reno. Council also adopted Resolution No. 7896, directing staff to not
20 accept any applications related to medical marijuana establishments. On
21
22 November 20, 2013, Council adopted Ordinance No. 6311, amending
23
24 Section 18.02.114 of the Reno Municipal Code to place a stay on the
25 acceptance of land use applications related to medical marijuana
26

27 ² NRS 453A.322(3)(a)(5).
28 ³ NRS 453A.326(3).

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1 establishments within the land use jurisdiction of the City of Reno. On
2 January 15, 2014, Council adopted Ordinance No. 6312, amending Section
3
4 4.04.065 of the Reno Municipal Code to place a stay on the acceptance of
5 business license applications related to medical marijuana establishments
6 operating within the corporate limits of the City of Reno. On April 16, 2014,
7
8 Council voted to allow Establishments within the corporate limits of the City
9 of Reno and directed staff to prepare applicable ordinances and rules related
10 to such Establishments to present to Council in conjunction with ordinances
11 repealing the previously adopted ordinances.
12

13 City of Reno staff is currently drafting such ordinances and rules
14 without the support of legal counsel due to RPC 1.2(d) and the State Bar of
15 Nevada Standing Committee on Professional Ethics and Responsibility's
16 ("Committee") opinion that an attorney may violate RPC 1.2(d) if that
17 attorney is involved in drafting regulations or ordinances for Establishments
18 or advising clients on how to proceed with such Establishments
19 ("Opinion").⁴ The Reno City Attorney's office was one of the parties who
20 requested the Opinion⁵, and because of the Opinion, has elected not to
21 advise City of Reno staff regarding the ordinances and rules necessary for
22
23
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25 ⁴ The Opinion only specifically refers to "public attorneys, in the course of their
26 representation of state or local government entities." However, it can be assumed the same
27 opinion would be reached for private attorneys with both public and private clients.

28 ⁵ See Petition Exhibit (2) letter from the Reno City Attorney's Office dated February 19,
2014.

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1 the regulation of such Establishments. The Council therefore authorized the
2 retention of Fahrendorf, Viloria, Oliphant & Oster, LLP ("FVOO") to
3 represent it in this matter, and, if RPC 1.2(d) is amended, to advise the City
4 of Reno with regards to the ordinances and rules related to the licensing and
5 regulations of Establishments within the City of Reno boundaries.
6 Therefore, the City of Reno requests this Court approve the Committee's
7 Proposal so that its retained counsel may render such advice without
8 violating RPC 1.2(d).
9

12 II. FEDERAL LAW AND ENFORCEMENT

13 Despite the recent changes in Nevada's law, marijuana is still classified as
14 a schedule I drug under the Controlled Substances Act (21 U.S.C. § 801 et
15 seq.) ("CSA"). The CSA prohibits the manufacture, possession, sale, and/or
16 distribution of marijuana (21 U.S.C. § 841). However, the U.S. Department
17 of Justice ("DOJ") has issued various memoranda to provide its U.S.
18 Attorneys with guidance. In October 2009, the DOJ adopted a
19 Memorandum from David W. Ogden which directed federal prosecutors to
20 not focus their prosecutor resources on "individuals whose actions are in
21 clear and unambiguous compliance with existing state laws providing for the
22 medical use of marijuana." See Memorandum for Selected United States
23 Attorneys from David W. Ogden (Oct. 19, 2009), available at
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1 <http://blogs.usdoj.gov/blog/archives/192>. However, the memorandum
2 confirmed that marijuana remained illegal under federal law. See Id.

3
4 More recently, in August 2013, the DOJ issued a memorandum
5 confirming marijuana's illegality under federal law and identifying
6 prioritized areas of enforcement by federal prosecutors. See Memorandum
7
8 for Selected United States Attorneys from James Cole (Aug. 29, 2013)
9 available at <http://www.justice.gov/opa/pr/2013/August/13-opa-974.html>
10 (“2013 Memorandum”). The 2013 Memorandum explains that the DOJ’s
11 enforcement actions surrounding marijuana have focused on, and will
12 remain focused on, protecting eight specific federal priorities. Those
13 priorities include: (1) preventing the distribution of marijuana to minors; (2)
14 preventing revenue from the sale of marijuana from going to criminal
15 enterprises, gangs and cartels; (3) preventing the diversion of marijuana
16 from states where it is legal to other states; (4) preventing state-authorized
17 marijuana activity from being used as a cover or pretext for the trafficking of
18 other illegal drugs or other illegal activity; (5) preventing violence and the
19 use of firearms in the cultivation and distribution of marijuana; (6)
20 preventing drugged driving and the exacerbation of other adverse public
21 health consequences associated with marijuana use; (7) preventing the
22 growing of marijuana on public lands and the attendant public safety and
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1 environmental dangers posed by marijuana production on public lands; and,
2 (8) preventing marijuana possession or use on federal property (“Federal
3 Enforcement Priorities”). The 2013 Memorandum emphasized that states
4 that have legalized marijuana in some manner must establish strict
5 regulatory schemes to ensure the Federal Enforcement Priorities are not
6 undermined. The 2013 Memorandum indicates that so long as states have
7 implemented strong and effective regulatory and enforcement systems,
8 “enforcement of state law by state and local law enforcement and regulatory
9 bodies should remain the primary means of addressing marijuana-related
10 activity.”
11
12
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14

15 The conflict between the CSA, the provisions of the Nevada
16 Constitution and NRS 453A, create a complex legal web which local
17 jurisdiction staff are being required to wade through without the help of
18 legal counsel as a result of RPC 1.2(d) and the Standing Committee’s
19 Opinion. Local jurisdictions, such as the City of Reno, should be allowed to
20 receive the advice of counsel when drafting ordinances and rules to regulate
21 Establishments such that they comply with Nevada law and do not
22 undermine the Federal Enforcement Priorities. Consequently, the City of
23 Reno requests the Court immediately adopt the Board of Governors
24
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1 proposed amendment to allow for the advice of counsel in this complex legal
2 area.

3 4 **III. NEVADA'S RULE OF PROFESSIONAL CONDUCT 1.2(d)**

5 **A. Nevada's Rule of Professional Conduct 1.2(d)**

6 Nevada's Rule of Professional Conduct 1.2(d) states:

7
8 A lawyer shall not counsel a client to engage, or assist a client,
9 in conduct that the lawyer knows is criminal or fraudulent, but a
10 lawyer may discuss the legal consequences of any proposed
11 course of conduct with a client and may counsel or assist a
12 client to make a good faith effort to determine the validity,
13 scope, meaning or application of the law.

14 Whether counseling clients with regards to marijuana establishments
15 authorized by state law violates RPC 1.2(d) has been addressed by several
16 states with varying results. In Colorado, Maine, and Connecticut, the ethics
17 committees concluded that attorneys who counsel clients with regards to
18 state authorized marijuana establishments may violate RPC 1.2(d) because
19 marijuana remains a schedule 1 drug under the CSA. Conversely, Arizona's
20 and Washington's ethics committees reached opposite conclusions. Despite
21 the differing ethics opinions, states, as well as Connecticut, Rhode Island,
22 and Washington, have proposed an amendment to their rules of professional
23 conduct to allow lawyers to counsel and assist clients with regards to
24 marijuana establishments authorized by state law.
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1 On March 6, 2014, Colorado's Supreme Court heard argument about
2 the proposed amendment to its rule of professional conduct. On March 24,
3
4 2014, the Colorado Supreme Court amended Rule 1.2 to expressly allow
5 lawyers to counsel a client regarding Colorado's medical marijuana and
6 personal marijuana use statutes, regulations, orders, and other state or local
7 provisions implementing them. See Colorado Rules of Professional Conduct
8 Rule Change 2014(05) attached hereto as Exhibit "1."

10 **B. The Nevada Supreme Court Should Adopt the**
11 **Proposed Amendment to Nevada's Rule of Professional**
12 **Conduct 1.2(d).**

13 The Board of Governors of the State of Nevada has proposed that
14 RPC 1.2(d) be amended as follows:

15
16 A lawyer shall not counsel a client to engage, or assist a client,
17 in conduct that the lawyer knows is criminal or fraudulent, but a
18 lawyer may discuss the legal consequences of any proposed
19 course of conduct with a client and may counsel or assist a
20 client to make a good faith effort to determine the validity,
21 scope, meaning or application of the law. Notwithstanding any
22 other provision of these rules, a lawyer shall not be in violation
23 of these rules or subject to discipline for engaging in conduct,
24 or for counseling or assisting a client to engage in conduct, that
25 by virtue of a specific provision of Nevada state law and
26 implementing regulations is either (a) permitted, or (b) within
27 an affirmative defense to prosecution under state criminal law,
28 solely because that same conduct, standing alone, may violate
federal law.

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1 The Standing Committee on Ethics and Professional Responsibility of
2 the State Bar of Nevada ("Standing Committee") has recommended a
3 change to RPC 1.2(d) which would expressly allow "a lawyer to counsel or
4 assist a client in an effort to comply with the mandate of Nev. Const. Art. 4,
5 Sec. 38 or the exercise of any right conferred thereunder notwithstanding
6 any conflicting provision of federal law." In addition, the Standing
7 Committee has recommended the addition of Rule 8.6 which contains the
8 same language as the Board of Governors addition to RPC 1.2(d).
9
10

11 Both proposed amendment have well defined limits and only
12 authorizes attorneys to counsel clients in areas which are permitted under
13 state law. The City of Reno therefore supports the proposed amendments.
14 As stated by the Board of Governors, "(t)he Nevada bar requires guidance in
15 navigating RPC 1.2(d) from both the public and private." The need for
16 amendment to RPC 1.2(d) is immediate as the State of Nevada has adopted
17 regulations allowing for Establishments, but such Establishments require
18 local government entity authorization. The local jurisdictions, such as the
19 City of Reno, require access to legal counsel's advice when drafting
20 ordinances and rules to regulate Establishments such that they comply with
21 Nevada law, continue to establish the strict regulatory scheme demanded by
22 the federal government, and do not undermine the Federal Enforcement
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1 Priorities. After such rules and regulations are established, the local
2 governmental agencies, and private individuals seeking to operate an
3 Establishment, will continue to need legal counseling in addressing issues
4 that may arise when such Establishments are operating. The proposed
5 amendment of RPC 1.2(d) before the Court will expeditiously and directly
6 provide attorney's the ability to ethically counsel their clients regarding state
7 authorized Establishments, and should be immediately adopted.

8
9
10 **IV. CONCLUSION**

11
12 The conflict between the CSA, the provisions of the Nevada
13 Constitution and NRS 453A, create a complex legal web which clients, both
14 public and private require immediate legal guidance. Local jurisdictions,
15 such as the City of Reno, should be allowed to receive the advice of counsel
16 when drafting ordinances and rules to regulate Establishments authorized by
17 state law, such that they comply with Nevada law and do not undermine the
18 Federal Enforcement Priorities. Consequently, the City of Reno requests the
19 Court immediately adopt the Board of Governors proposed amendment to
20 RPC 1.2(d), or the Standing Committee's change to RPC 1.2(d) and the

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1 addition of Rule 8.6, to allow for the advice of counsel in this complex legal
2 area.

3
4 DATED this 29 day of April, 2014.

5
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ATTORNEY CERTIFICATION

1
2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

5
6 a. This brief has been prepared in a proportionally spaced typeface
7 using Microsoft Word in 14 point Times New Roman font.
8

9 2. I further certify that this brief complies with the page- or type-volume
10 limitations of NRAP 32(a)(7) because, excluding the parts of the brief
11 exempted by NRAP 32(a)(7)(C), it is:

12
13 a. Proportionately spaced, has a typeface of 14 points or more, and
14 contains 2024 words.
15

16 3. I hereby certify that I have read this Public Comment, and to the best
17 of my knowledge, information, and belief, it is not frivolous or interposed
18 for any improper purpose. I further certify that this brief complies with all
19 applicable Nevada Rules of Appellate Procedure. I understand that I may be
20 subject to sanctions in the event that the accompanying brief is not in
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1 conformity with the requirements of the Nevada Rules of Appellate
2 Procedure.

3
4 DATED this 29 day of April, 2014.

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EXHIBIT "1"

EXHIBIT "1"

RULE CHANGE 2014(05)

Colorado Rules of Professional Conduct

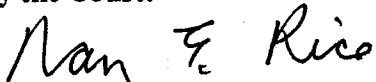
Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

Comment

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, 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.

**Amended and Adopted by the Court, En Banc, March 24, 2014, effective immediately.
Justice Coats and Justice Eid would not approve Comment [14].**

By the Court:


Nancy E. Rice, Chief Justice