

8984 SPANISH RIDGE AVENUE
LAS VEGAS, NEVADA 89148-1302
TELEPHONE 702.562.8820
FACSIMILE 702.562.8821
WWW.BAILEYKENNEDY.COM

BAILEY ❖
KENNEDY
ATTORNEYS AT LAW

DENNIS L. KENNEDY
DIRECT DIAL
702.851.0047
DKENNEDY@BAILEYKENNEDY.COM

September 23, 2016

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Via Federal Express

Tracie K. Lindeman
Clerk of Court
Supreme Court of Nevada
201 South Carson Street
Carson City, NV 89701

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

Re: In the Matter of an Amendment to Rule of Professional Conduct 8.4(b)
Regarding Medical Marijuana, ADKT 0495; Supplement to Written Submission
and Oral Comments of Dennis L. Kennedy

Dear Ms. Lindeman:

This letter contains a supplement to the written submission of John R. Bailey, Dennis L. Kennedy and Joshua P. Gilmore dated September 1, 2016, and to the comments of Dennis L. Kennedy made at the hearing on ADKT 0495 held on September 9, 2016.

I. The Purpose of the Rules and Comments.

At the hearing, I explained that the Rules of Professional Conduct established the “black letter” structure of a lawyer’s ethical obligations and that this structure was animated and explained by the Comments, which are intended to provide guidance to lawyers. The Rules and Comments evolve over time, in response to changes in society and the profession.

A. Prohibition of Bias

The example that I used at the hearing was Comment [3] to Rule 8.4, condemning the exhibition of bias or prejudice by an attorney in the course of representing a client. The Comment was first proposed in 1994, following a 1992 ABA report on the existence and effects of bias and prejudice in the legal profession. The Comment was adopted in 1998 following several years of debate. *See* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 at pp. 807-821 (ABA 2006). Comment [3] was incorporated into the Rule itself on August 8, 2016 and is now codified as Model Rule 8.4(g).

B. Technology

Another example is the advent of technology. Rule 1.1 requires a lawyer to be competent, and “competence” traditionally contemplated substantive legal skills and knowledge. However, in response to the advances in information technology, language was added to Comment [8] in 2012 making it “explicit that a lawyer’s duty of competence includes keeping

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abreast of the benefits and risks associated with relevant technology.” See Annotated Model Rules of Professional Conduct at p. 21 (8th ed. 2015).

II. The Legalization of Marijuana.

Like the social progress leading to the professional condemnation of bias and prejudice, and the technological progress leading to the recognition of a professional obligation to understand technology, the advent of state-legalized (and federally criminalized) marijuana necessitates the further clarification of lawyers’ obligations.

A. Comment [1] to Rule 1.2

This Court has already recognized the need for further clarification by its adoption of Comment [1] to Nevada R.P.C. 1.2 (ADKT 0495; May 7, 2014). Simply stated, lawyers were uncertain as to whether they could advise clients on conduct permitted by state law but prohibited by federal law. Comment [1] to Nevada R.P.C. 1.2 answered this question and provided guidance as to the meaning of the Rule.

B. Proposed Comment to Rule 8.4(b)

The proposed Comment to Rule 8.4(b) will accomplish the same purpose – i.e., provide guidance to lawyers regarding the Rule’s meaning and application. The principal objection to the proposed Comment was that it is unnecessary. This was expressed by several speakers and was implicit in Justice Hardesty’s question to me. (“Don’t lawyers already know this?”). Here is why that objection should not prevent the adoption of the proposed Comment.

(1) Even if lawyers should know it, the Rules should still say it

The Rules and Comments are the standards against which lawyers’ conduct are measured and judged. Lawyers should know that it is wrong to exhibit bias and prejudice, just as they should realize the necessity of understanding technology and comprehending their ability to counsel clients through the thicket of conflicting state and federal laws on marijuana. None of these assumptions prevented the adoption of Comment [3] to Rule 8.4, the addition of Comment [8] to Rule 1.1 or this Court’s adoption of Comment [1] to Nevada R.P.C. 1.2.

(2) Lawyers don’t know it

In addition to my comment at the hearing about my experience representing lawyers – many of whom lack an understanding of their ethical obligations – and Justice Douglas’ observation that the disciplinary orders appearing monthly in the last few pages of the *Nevada*

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Lawyer indicate the same, the best evidence of the need for the proposed Comment to Nevada R.P.C. 8.4(b) is found in the written submissions made in this matter.¹ The majority of the lawyers submitting written comments opposing the proposed Comment argued that NRS 453A.510 prohibited this Court from disciplining a lawyer for marijuana-related conduct authorized by Nevada law – even if the lawyer was convicted of a federal crime for that conduct:

(a) Letter from the law firm of Maddox/Seegerblom/Canepa (June 30, 2016). (“[A]ttorneys who are either investors in an MME or attorneys hired by an MME for counsel, are furthering business relating to the medical use of marijuana and cannot be disciplined by the State Bar (a licensing board) pursuant to NRS 453A.510.”)

(b) Letter from Robert Murdock (August 19, 2016). (“If the Federal government would convict a member for such [use or possession of marijuana], it seems as if the Bar would be unable to take any disciplinary action since the ‘violation’ would be the use/possession described in NRS 453A.510.”)

(c) Memorandum from Dominic Gentile and John Arrascada, pp. 12-13 (September 2, 2016), stating that disciplinary action cannot be taken against a lawyer who complies with NRS 453A.510.

As stated in footnote 6 of my letter of September 1, 2016, this Court has the exclusive jurisdiction over the licensing and discipline of attorneys. It is not a “professional licensing board” and it is not subject to NRS 453A.510. The views expressed above in paragraphs (a) – (c) – while no doubt sincerely held – are the best evidence of why the proposed Comment should be adopted.

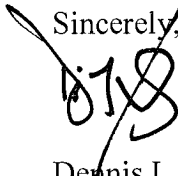
¹ This criticism is offered respectfully. Most of these commenting lawyers are friends and colleagues; however, their analysis is wrong, proves my point, and answers Justice Hardesty’s question.

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III. Conclusion.

The proposed Comment to Nevada R.P.C. 8.4(b) is both necessary and appropriate, and should be adopted by this Court.

Sincerely,

A handwritten signature in black ink, appearing to read "DLK", written over the word "Sincerely,".

Dennis L. Kennedy
John R. Bailey
Joshua P. Gilmore

DLK\slr