

SHAHEEN & GORDON, P.A.

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NEW HAMPSHIRE
SUPREME COURT

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December 7, 2017

VIA E-MAIL

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

Re: Proposed change to New Hampshire Rule of Professional Conduct 1.2

Members of the Advisory Committee on Rules:

It is with great pleasure that we write to express our support for the Committee's proposed change to New Hampshire Rule of Professional Conduct 1.2, which will clarify that it is not a violation of the Rules of Professional Conduct for a lawyer to "counsel or assist a client regarding conduct expressly permitted by state or local law that conflicts with federal law." We strongly urge the Committee to recommend this proposed change to the Supreme Court.

As is exemplified by the ongoing conflicts playing out in numerous states – including here in New Hampshire – between state laws regulating the medical or recreational use of marijuana and federal laws criminalizing such use, there are times when states, being the "laboratories of democracy" that they are, enact legislation that may conflict with federal law. Currently, where such conflict exists between federal law and the laws of New Hampshire, lawyers are left in the dark regarding whether their counsel to clients on how to comply with duly-enacted state law may violate the Rules of Professional Conduct and result in disciplinary action. Although it seems counterintuitive, a strict reading of Rule 1.2(d), as currently written, would seem to suggest that a lawyer could face disciplinary consequences for counseling a client about a law that the people of New Hampshire, through their elected representatives in the General Court, sought fit to enact in spite of its conflict with federal law. Where such a conflict exists, clients who wish to comply with or take advantage of the state law may find themselves unable to obtain counsel due to fear among the bar that providing such counsel would violate Rule 1.2(d). In such situations, where the laws are complex, and where traditionally legal counsel is considered a necessity, it would be unreasonable to handcuff a lawyer's ability to counsel their client in compliance with state law and in areas such as non-profit law, business law, and government relations. Under the current formulation of Rule 1.2, it is the clients who

are hurt the most, as they are left to navigate a particularly-complicated legal environment on their own without assistance from counsel.

The proposed new paragraph (e) in Rule 1.2 removes all uncertainty regarding how lawyers may counsel clients when state law conflicts with federal law. Under the proposed rule, lawyers will be able to properly counsel their clients in such situations without fear of incurring disciplinary consequences. Importantly, the change includes a condition: “that the lawyer counsels the client about the potential legal consequence of the client’s proposed course of conduct under applicable federal law.” Certainly, we should expect nothing less from lawyers that their counsel in such situations will include advising the client that their proposed course of conduct, while in compliance with state law, could result in some adverse action due to its violation of conflicting federal law. This proposed change respects fully the role of lawyers as advisers to their clients and recognizes the plain fact that in situations of conflicting laws, ultimately the client will make the decision about whether to proceed with their proposed course of action.

It is for these reasons that we express our full support for the Committee’s proposed change to Rule 1.2 and urge the Committee to recommend the change to the Supreme Court.

Very truly yours,

The image shows two handwritten signatures in black ink. The signature on the left is for Kara J. Dowal, and the signature on the right is for Alexander W. Campbell. Both signatures are fluid and cursive.

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