

Benjamin C. Tiller, Esq.
State Bar # 9976
46 11th Ave.
Helena, MT 59601

RE: Comments on Petition in Support of Revision of the Montana Rules of Professional Conduct

5 June 2019

Dear Hon. Justices of the Montana Supreme Court

I write to provide comments on the State Bar's Petition for the Revision of the Montana Rules of Professional Conduct.

Potential Conflicts of Interest Created by New Rule 1.6 Necessitate Mandatory Withdrawal Provision.

New Rule 1.6 permits a lawyer to disclose client confidences when the lawyer "reasonably believes it is necessary to prevent substantial injury to the financial interests or property of another." Situations in which the information may be disclosed are limited to those in which the client "has used or is using the lawyer's services." The Comments to ABA Model Rule 1.6 reference "Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances[.]" However, Rule 1.16 offers inadequate protection to the lawyer who wishes to withdraw, or the client who believes he is enjoying a confidential relationship.

If a lawyer reasonably believes disclosure of client confidences could prevent substantial injury to the financial interests or property of another and chooses to disclose, then the disclosure creates a conflict of interest which should *require* withdrawal, not simply authorize it. Rule 1.8 prohibits a lawyer from using "information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, *except as permitted or required by these rules*." New Rule 1.6 would *permit* the disclosure of disadvantageous material, which would immediately place the lawyer in direct conflict with the lawyer's client. Courts often look to Rule 1.16 when considering whether to allow a lawyer to withdraw. However, Rule 1.16 only *permits* an attorney to withdraw in this situation (assuming criminal activity has ceased); it does not require it. A lawyer whose conscience causes the lawyer to violate his or her client's confidences under a Rule that permits the disclosure should have the assistance of a Rule that requires his withdrawal. A client who has an attorney who is disclosing disadvantageous information should be confident that the attorney will no longer be able to represent him.

If the Court chooses to adopt New Rule 1.6, it should remedy the conflict explained above by making termination of representation mandatory. A simple resolution would be the addition of Rule 1.16(a)(4):

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(4) the lawyer has disclosed disadvantageous confidential information under these rules without the client's informed consent.

I see the secret disclosure of confidential information as irreconcilable with the attorney-client relationship. The preamble explains that "a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communication will be private." The public is less likely to seek legal advice if their lawyers can become their adversary without disclosure or withdrawal.

Adding a cannabis-specific safe harbor is political speech not appropriate for our Rules of Professional Conduct.

The Committee specifically rejected Illinois' content-neutral safe harbor for attorneys practicing in areas where state and federal law diverge in favor of pro cannabis language. If it is permissible for an attorney to wade into these unfiltered waters in one area of the law, it should be permitted in all areas. The Committee's reason for the limitation was "to help lawyers representing cannabis clients, not create a whole ring of exceptions for other state/federal law disparities." No explanation of the righteousness of this goal is provided. A preambulatory statement in the Rules is an implicit endorsement that representing cannabis clients is more in line with the lawyers' role in society than advocacy in other areas where state and federal law diverge.

If, indeed, a lawyer may represent individuals in the cannabis industry ethically under our rules (and I have no doubt that they can), they do so under the protection of Rule 3.1. There an attorney may advocate for a change in existing law when "a bona fide basis in law and fact exists for advocating doing so." However, they do it at their own risk of later being accused of participating in an activity that violates federal law, which would place them directly in violation of Rule 8.4(b) and, possibly, 8.4(d). In that situation, the proposed pro-cannabis language would offer no support.

I ask this Court to abstain from adding this to our preamble not because I believe representing the cannabis industry is morally wrong. I do not. I ask the Court instead to thoroughly consider the effect such a narrow exception could have on the public's perception of the justice system. For the past decade our country has witnessed changing popular opinion in favor of cannabis deregulation. However, our rules are not a popularity poll. While states throughout the nation enact laws authorizing the use of cannabis for various purposes, the federal government has failed to keep up. It is common knowledge that marijuana use and possession is prohibited by federal law.

However, the public has largely ignored the prohibition in favor of the seemingly more lenient state laws.

We are a nation of laws, however, and both the federal and state systems are authorized to enact criminal prohibitions. Compliance with state law is not a defense to a violation of federal law, nor should it be; the systems cannot exist in irreconcilable conflict. Our society depends on the rule of law, and on the respect for those laws by the public and all participants in the legal system. Every time a state shrugs its shoulders at the federal law, both systems lose credibility in the eyes of the public. This Court should not weigh in on this conflict, because doing so has far greater implications than “helping lawyers represent[] cannabis clients[.]” It is a prospective political statement that, at its core, weakens the public’s respect for the entire justice system.

Rule 7.4(a) should be preserved to prevent confusion about case limitations and concentration.

The Committee opines that New Rule 7.2 and existing Rule 7.1 “absorb the critical requirements of 7.4.” However, Rule 7.4 expressly authorizes an attorney to advertise case limitations and concentrations, whereas the amendment would not. Eliminating this express authorization could slow lawyers’ adaptation to the public’s changing legal needs. Experience does not equate to competence, nor does competence come solely from experience. Lawyers should be allowed to build a practice in areas of law they would like to practice, and where the demand is greatest, subject to the Rule 1.1 competence requirement. Expressly authorizing attorneys to advertise case limitations and concentrations allows them to do so.

This authorization should remain. It can be incorporated into New Rule 7.2 by simply adding Rule 7.2(e):

(e) A lawyer may communicate that his/her practice is limited to or concentrated in a particular field of law if such communication is not false or misleading.

Thoughts on Specialization

Finally, a discussion of lawyer advertising is never complete without an acknowledgement that legal consumers’ access to information about the lawyers they hire is far greater today than it was when these Rules were initially drafted. Claims of specialization, even in the new proposal, are still restricted absent a “certification.” However, Montana, unlike states like Texas, does not have a certification committee. Thus, available certifications are created by advertising forces, not by consumer need. It has led to prohibitive costs to claim “specialization,” and prevents all *true* specialists from informing the general legal consumer of their expertise.

Rule 7.1(e) states that advertising that “compares the quality of a lawyer’s or law firm’s services with other lawyers’ services, unless the comparison can be factually substantiated,” is misleading. Presumably, certification from a private certification

company meets the “factually substantiated” requirement. What it hides from the consumer is that there are equally-skilled lawyers who cannot make the claim because they have chosen not to pay the \$800.00 application and examination fee, the \$295.00 annual fee, and quinquennial \$400.00 recertification fee.¹ Shouldn’t that also be disclosed if the goal of the Rule is full disclosure and fair comparison?

The reality is that a consumer today can quickly determine if an attorney has the particularized skills they claim to have with a simple internet search. The advertising rules have not put an end to lawyers taking cases they really weren’t qualified to take. Thankfully Rule 1.1 has always been there to cover those non-advertising attorneys.

I believe the time has come for our Rules to abandon “certified specialization,” and authorize attorneys to inform their potential clients of the type of law they are best at. If a lawyer is a specialist, he or she should be allowed to say so.² This will aid the public in finding the lawyer best-suited to address their needs, not just those lawyers who have chosen to pay for the right to claim specialization.

As I write this, I received an e-mail from Lawyers of Distinction, which leads me to my final point. The e-mail states, “It is our sincere pleasure to welcome you to an elite community of highly accomplished attorneys like yourself who represent the “best of the best.”” While I’m flattered that “US provisional Patent #62/743,254” has recognized my accomplishments, I also know that this “distinction” comes with an annual fee of \$475-\$775 per year. It also comes with “a customized national press release announcing this honor for immediate publication.”³ As far as I know membership in this group has not been proscribed by any state bars. However, to the general legal consumer, is there a difference between “Nationally Recognized Lawyer of Distinction” and “Certified Civil Litigation Specialist?” I doubt it.

Respectfully



Benjamin C. Tiller, Esq.

¹ <https://www.nbtalawyers.org/fee-schedule>

² I recognize that the Rule does not expressly proscribe the use of “specialist” without certification, only “certified specialist.” However, caselaw throughout the country interpreting similar language fails to acknowledge the distinction. See *In re Anonymous*, 689 N.E.2d 434 (Ind. 1997); *Loughlin v. Tweed*, 310 F.R.D. 323, 336 (E.D. La. 2015); and *In re Dickey*, 396 S.C. 500, 503, 722 S.E.2d 522, 523 (2012).

³ In addition to a “genuine rosewood plaque.”

CERTIFICATE OF SERVICE

I, Benjamin Clay Tiller, hereby certify that I have served true and accurate copies of the foregoing Other - Other to the following on 06-05-2019:

Betsy Brandborg (Attorney)
P.O. Box 577
Helena MT 59624
Representing: State Bar of Montana
Service Method: eService

Eric Edward Nord (Attorney)
2708 First Avenue North
Suite 300
Billings MT 59101
Representing: State Bar of Montana
Service Method: eService

Peter F. Habein (Interested Observer)
490 N. 31st St., Ste. 500
P.O. Box 2529
Billings MT 59103-2529
Service Method: Conventional

Electronically Signed By: Benjamin Clay Tiller
Dated: 06-05-2019