

Vermont Rules of Professional Conduct

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

Disclaimer: Not an official copy. Check the official publication or Lexis for the rules as adopted by the Vermont Supreme Court.

*This unofficial version was last updated on **November 14, 2022**.*

Kennedy's Highlights

(NOT a substitute for full research of the rule & opinions/decisions on it)

- *The most recent amendments to Rule 1.2 were in 2022.*
 - *Paragraph (c)(1) was added.*
 - *Comment [5] was added.*
 - *Comment 14 was renumbered as Comment 15 and was changed to reflect updates to Vermont statutes that regulate cannabis/marijuana.*
 - *In the text of the rule below, the 2022 additions are underlined, with the deletions ~~struck out~~. The changes took effect on November 14, 2022.*

Rule 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(1) A lawyer who has not entered a limited appearance but who provides assistance in drafting any document that the lawyer knows or should know will be presented to a tribunal shall advise the client to comply with any rules of the tribunal regarding participation by a lawyer in support of a pro se litigant.

(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.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

[5] It is not inconsistent with the lawyer's duty to seek the lawful objectives of a client through reasonably available means for the lawyer to accede to reasonable requests of opposing counsel that do not prejudice the rights of the client, to avoid the use of offensive or dilatory tactics, or to treat opposing counsel or an opposing party with civility.

Independence from Client's Views or Activities

[5-6] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6-7] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7-8] Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield

advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

~~[8 9]~~ All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6. Criminal, Fraudulent and Prohibited Transactions.

~~[9 10]~~ Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

~~[10 11]~~ When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

~~[11 12]~~ Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

~~[12 13]~~ Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

~~[13 14]~~ If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Criminal, Fraudulent and Prohibited Transactions

[14 15] With respect to paragraph (d), a lawyer may counsel a client regarding the validity, scope, and meaning of Title 7, chapters 31 through 39 of the Vermont Statutes Annotated and Title 18, chapters 84, 84A, and 86 of the Vermont Statutes Annotated, and may assist a client in conduct that the lawyer reasonably believes is permitted by these statutes and the rules, regulations, orders, and other state and local provisions implementing the statutes. In these circumstances, the lawyer shall also advise the client regarding the potential consequences of the client's conduct under related federal law and policy.

Board's Note—2022 Amendment

The second sentence of subdivision (c) is new. Ghostwriting is a permissible form of a limited representation and one that can increase access to legal services. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 446 (2007). Ordinarily, a person who receives legal assistance from a lawyer who

does not enter a limited appearance need not disclose the assistance. The new language, however, serves to remind lawyers that some tribunals require such disclosure. See, e.g., 2d Cir. R. 32.2. Competent representation includes advising the client as to the rules of the tribunal in which the client's matter is pending.

New Comment [5] is rooted in the fact that professionalism and civility are important aspects of professional responsibility. The new comment clarifies that, while the client controls the objectives of a representation, a lawyer does not violate any professional duty to the client by agreeing, for instance, to extensions of time or by affording professional courtesy to opposing counsel, parties, and witnesses while pursuing a client's objectives.

Old Comments [5] thru [14] are renumbered [6] to [15] to reflect the addition of new Comment [5].

Comment [14] is renumbered Comment [15] and is amended substantively to reflect statutory changes. The Comment was originally added in 2016. Since then, Vermont's regulatory scheme related to cannabis, cannabis products, and marijuana has changed significantly. Among other things, chapters 31 through 39 of Title 7 regulate cannabis, establish the Cannabis Control Board, and vest it with authority over cannabis establishments, licenses to engage in specified cannabis-related activities, the medical cannabis registry, medical cannabis dispensaries, and cannabis social equity programs. Title 7 creates a regulatory scheme that will require participants in cannabis-related activities to secure valuable legal advice. This amendment clarifies that a lawyer may counsel a client regarding the validity, scope, and meaning of Title 7, chapters 31 thru 39 so long as the lawyer abides by the existing requirement of advising the client regarding the potential consequences of the client's conduct under related federal law and policy.

Board's Notes – 2016 Amendment

Comment [14] is added to clarify that Rule 1.2(d) does not prohibit Vermont lawyers from providing legal advice and assistance to clients on matters related to Vermont's laws regulating marijuana and allowing some permissible uses. Rule 1.2(d) does not draw a distinction between state and federal law. Therefore, while the Department of Justice's current enforcement policy is to focus prosecutorial resources on activities other than those that are legal under state-approved regulatory schemes, marijuana remains an illegal controlled substance under the federal Controlled Substances Act. See 21 U.S.C. §§ 801-904. Arguably, a lawyer violates Rule 1.2(d) by providing a client with legal advice and assistance necessary to set up a dispensary of therapeutic cannabis that is legal under Vermont law. This amendment clarifies that such legal advice and assistance is not a violation of the Rule.

Given the conflict between state and federal law, and DOJ's current enforcement policy, this is an area in which advice from an attorney is critical and into which clients should not be forced to enter without counsel. Similarly, lawyers should not face professional discipline for providing legal advice and legal assistance on such an important issue, especially when the alternative is to leave clients to proceed at their own peril.

Reporter's Notes — 2009 Amendments

V.R.P.C. 1.2 is amended to conform to the changes in the Model Rule. In *State v. Tribble*, 2005 VT 132, ¶ 34, 179 Vt. 235, 892 A.2d 232, the Court held that "[t]he decision to raise an insanity defense is in effect a decision about entering a plea, which lies with the defendant" under the last sentence of V.R.P.C. 1.2(a). See also *In re Quinn*, 174 Vt. 562, 816 A.2d 425 (2002) (mem.) (coerced guilty plea not the client's own, citing V.R.P.C. 1.2(a)).

The ABA Reporter's Explanation is as follows:

TEXT:

1. Modify caption

The caption has been amended to more accurately describe the subjects addressed by the Rule.

2. Paragraph (a): Move "subject to paragraphs (c) and (d)" to beginning of paragraph (a).

The phrase “subject to paragraphs (c) and (d)” has been moved to clarify that all of the actions a lawyer may take pursuant to paragraph (a) are properly subject to the restrictions of paragraph (d) and some of them may be subject to the limitation in paragraph (c). In the current Rule, the limitations of paragraphs (c) and (d) only apply to the lawyer’s obligation to abide by the client’s decisions concerning the representation.

3. Paragraph (a): Modify to require consultation about means “as required by Rule 1.4”

The Commission recommends the addition of a cross-reference to Rule 1.4, which requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” The Commission believes that the current formulation is flawed because it might be read to always require consultation before the lawyer takes action. These changes also reflect the Commission’s decision that the lawyer’s duty to communicate with the client should be addressed in Rule 1.4 rather than in Rule 1.2.

4. Paragraph (a): Add sentence acknowledging lawyer’s implied authority to take action to carry out representation

The Commission believes that current paragraph (a) is flawed because the reference to the lawyer’s duty to consult about means can be read to imply that the lawyer always must consult in order to acquire authority to act for the client. The Commission has added a sentence to clarify that “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation” and has added a new Comment [2] that addresses the resolution of disagreements with clients about the means to be used to accomplish the client’s objectives. The new sentence in paragraph (a) parallels the reference in Rule 1.6(a) to the lawyer’s implied authority to reveal information relating to the representation. The scope of the lawyer’s implied authority is to be determined by reference to the law of agency. The Commission believes that this formulation strikes the right balance between respect for the lawyer’s expertise and the preservation of the client’s autonomy by allowing the lawyer to exercise professional discretion on behalf of the client, subject to consultation with the client as required by Rule 1.4(a)(2), but leaving open the possibility that a client might revoke such implied authority.

5. Paragraph (a): No general duty to abide by client instructions

Other than acknowledging the power of the client to revoke a lawyer’s implied authority, the Commission has not attempted to specify the lawyer’s duties when the lawyer and client disagree about the means to be used to accomplish the client’s objectives. As explained in Comment [2], the Commission believes that disagreements between a lawyer and client about means must be worked out by the lawyer and client within a framework defined by the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw from the representation if the lawyer has a fundamental disagreement with the client.

6. Paragraph (a): Replace “whether to accept an offer of settlement” with “whether to settle”

The reference in the current Rule to “accept an offer of settlement” is under-inclusive because it does not include making a settlement offer.

7. Paragraph (c): Permitting “reasonable” limitations on the “scope” of a lawyer’s representation

The Commission recommends that paragraph (c) be modified to more clearly permit, but also more specifically regulate, agreements by which a lawyer limits the scope of the representation to be provided to a client. Although lawyers enter into such agreements in a variety of practice settings, this proposal in part is intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel.

a. Replace “objectives of the representation” with “scope of the representation”

The Commission has replaced the current reference to limiting the “objectives of the representation” with limiting the “scope of the representation.” Only the client can limit the client’s objectives. As indicated in Comment [6], the scope of a representation may be limited either by limiting the subject matter for which the lawyer will assume responsibility or the means the lawyer will employ.

b. Add requirement that limitation be “reasonable under the circumstances”

Unlike the [former] Rule, proposed paragraph (c) specifically precludes a limited representation that would not be “reasonable under the circumstances.” Comment [7] discusses this limitation. In cases in which the limitation is reasonable, the client must give informed consent as defined in Rule 1.0(e). Because a useful limited representation may be provided over the telephone or in other situations in which obtaining a written consent would not be feasible, the proposal does not require that the client’s informed consent be confirmed in writing. Comment [8], however, reminds lawyers who are charging a fee for a limited representation that a specification of the scope of the representation will normally be a necessary part of the lawyer’s written communication with

the client pursuant to Rule 1.5(b).

c. Replace “consents after consultation” with “gives informed consent”

The Commission is recommending that throughout the Rules the phrase “consent after consultation” be replaced with “gives informed consent,” as defined in Rule 1.0(e). No substantive change is intended.

8. Delete paragraph (e)

The Commission recommends that the substance of paragraph (e) be placed in a new paragraph (a)(5) in Rule 1.4. Comment [14] will serve as a cross-reference to Rule 1.4. The change is consistent with the Commission’s recommendation that the lawyer’s duty to communicate with the client be addressed in Rule 1.4 with appropriate cross-references in the Comment to Rule 1.2.

COMMENT:

Caption. The current caption does not accurately describe Comments [1] -[3], which relate to the allocation of decision-making authority between lawyer and client.

[1] Current Comment [1] has been modified to reinforce the three main points in paragraph (a) and to provide appropriate cross-references to Rule 1.4(a)(1) and (a)(2). The second to the last sentence in [former] Comment [1] has been incorporated into Comment [2].

[2] Comment [2] is new and addresses the situation in which lawyer and client disagree about the means to be used to accomplish the client’s objectives. The Comment explains why Rule 1.2 leaves such disagreements to be resolved by the lawyer and client with reference to the law of agency, the right of the client to discharge the lawyer and the right of the lawyer to withdraw in the event of a fundamental disagreement with the client.

[3] Comment [3] is new and recognizes the legitimacy of the lawyer’s reliance on advance authorization from the client. It also specifies that an advance authorization can be revoked by the client and that such an authorization will not be considered effective if there has been a material change in circumstances.

Caption. The caption has been modified to reflect the change to paragraph (c).

[6] Paralleling changes to paragraph (c), [former] Comment [4] has been modified to explain that a client’s decision to seek limited objectives may be relevant to determining the reasonableness of a limitation on the scope of the representation under the circumstances. Cost has been added as a factor that might justify limitation.

[7] This new Comment explains the requirement in paragraph (c) that a limitation on the scope of a representation must be reasonable under the circumstances. It also explains the relationship between a limitation on the scope of a representation and the lawyer’s duty of competence under Rule 1.1.

[8] This new Comment alerts the lawyer who is charging a fee for a limited representation that a specification of the scope of the representation will normally be a necessary part of the lawyer’s written communication with the client pursuant to Rule 1.5(b).

[9] The Commission has modified [former] Comment [5] to serve as a general reminder that all agreements between lawyers and their clients must conform with the Rules of Professional Conduct. No change in substance is intended.

[10] The Commission has made minor editorial changes to [former] Comment [6]. No change in substance is intended.

[11] The Commission has added language to [former] Comment [7] to provide more guidance to lawyers about what they must do to avoid assisting a client to commit a crime or fraud. Also added is a cross-reference to Rule 4.1, which specifies a lawyer’s duties in circumstances in which remaining silent will assist a client to commit a crime or fraud. No change in substance is intended.

[12] [no paragraph 12 in original].

[13] [Former] Comment [9] has been modified to eliminate the ambiguous reference to a “sham” transaction and to replace “should” with “must.” This provides a more precise example of a situation in which a lawyer will violate Rule 1.2(d) even though the defrauded person is not a party to the transaction.

[14] New Comment [14] has been added to provide a cross-reference to Rule 1.4(a)(5), which is substantively identical to deleted paragraph 1.2(e).

ANNOTATIONS

1. Plea bargaining. While lawyers often face difficult situations when counseling their clients regarding

plea bargaining, the plea entered still must ultimately be the client's decision, and the attorney must abide by that decision. In re Quinn (2002) 174 Vt. 562, 816 A.2d 425 (mem.).