

**Garden State CLE presents:**



**"The Gathering Storm"**

**Legalized marijuana and the  
Rules of Professional Conduct**

**Lesson Plan**

## **Part I - Highlights of the new law:**

- 1. Decriminalize possession of amount of as much as 1 ounce by people over the age of 21**
- 2. Decriminalizes amount between once ounce and less than 50 grams – possession of this amount becomes a non-arrest, civil offense punishable by a \$100 fine.**
- 3. Provides for immediate expungement of prior offenses under NJSA 2C:35-10(a)(4).**
- 4. Authorizes sale and possession of marijuana drug paraphernalia.**
- 5. Authorizes the cultivation, production, wholesaling, retailing, transportation and handling of marijuana as a business.**
- 6. Establishes a Division of Marijuana Enforcement within the Department of Law and Public Safety.**



**7. Allows for a wide variety of marijuana products including one ounce or less of marijuana; 16 ounces or less of marijuana infused product in solid form; 72 ounces or less in liquid form; 7 grams or less of marijuana concentrate; and up to 6 immature marijuana plants**

**8. Provides for an escalating, phased-in tax as follows:**

**Year 1 = 7%**

**Year 2 = 10%**

**Year 3 = 15%**

**Year 4 = 20%**

**Year 5 = 25%**



**9. Permits local control by ordinance of number of marijuana establishments and provides 3% of the tax collected locally to the municipalities.**

**10. Prohibits the smoking of marijuana in public places or any other place where the law prohibits the smoking of tobacco. Any fines that may be assessed for the smoking of tobacco in designated smoke-free places shall be applicable to the smoking of marijuana.**

## Part II – Current Federal Law

- 1.) **The possession, distribution, or cultivation of marijuana, even for medical purposes, violates the federal Controlled Substance Act (CSA) and Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. See [21 U.S.C. § 841\(a\)\(1\)](#)**
- 2.) **Under the CSA, controlled substances are categorized into five schedules based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. Marijuana is classified as a Schedule I controlled substance. 21 U.S.C. § 812 - Schedule I (c)(10) (classifying marijuana as a Schedule I controlled substance).**
- 3.) **Schedule I drugs are those considered to have a high potential for abuse, to lack currently accepted medical use in treatment, and to lack accepted safety for use under medical supervision. By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study. Additionally, as a Schedule I drug, physicians may not prescribe and pharmacists are precluded from dispensing marijuana. See [United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 \(2001\)](#).**  
  
[But see *Kadonsky v. Lee*, \_\_\_ N.J. Super. \_\_\_ (App. Div. 2017) holding that the Division of Consumer Affairs has the authority to reclassify marijuana as a schedule IV substance.]
- 4.) **Simple possession of marijuana for personal use is a misdemeanor under federal law that carries a sentence of up to one year in federal prison and a maximum fine of \$100,000 for a first offense. See [21 U.S.C. § 844\(a\)](#); [18 U.S.C. § 3571\(b\)\(5\)](#). It is a disorderly persons offense under NJSA 2C:35-10(a)(4).**



**5.) Furthermore, the cultivation of marijuana is a felony under federal law; See [21 U.S.C. § 841\(a\)\(1\)](#).**

**6.) The growth of just one plant carries up to five years in federal prison and a fine of up to \$250,000 for a first offense. 18 USC [841\(b\)\(1\)\(D\)](#). Despite the widespread recognition of the potential therapeutic benefits of marijuana, repeated attempts to remove marijuana from the CSA or have it re-scheduled on the federal level have failed.**

**7.) While the federal government has authority to enforce its laws throughout the United States, it has no authority (apart from the taxing and spending powers) to require states to enforce federal law or to force states to have laws that are identical to federal law. State medical-marijuana laws are not preempted by the CSA because they do not conflict with the federal law, and states may continue to enact medical-marijuana legislation.**

**8.) The Supreme Court has never explicitly ruled that the CSA preempts state medical-marijuana laws. *Gonzales v. Raich*, [545 U.S. 1, \(2005\)](#). The CSA does not preempt state medical-marijuana laws because Congress did not intend to occupy the field of drug regulation when it enacted the CSA, and it sought to leave regulation of the practice of medicine to the states. Further, thus far, no state law has been found to conflict with the federal law. In short, the state and federal governments simultaneously occupy the field of drug regulation. Thus, while Congress enacts criminal drug laws as an exercise of its Commerce Clause power, states do so also pursuant to their police powers to enact legislation for the protection of the health of their citizens.**

**9.) When it was in office, the Obama administration vowed to refrain from prosecuting individuals who violate federal drug statutes if their actions are lawful under state law, a move that stands in stark contrast to the policies of both the Clinton and Bush administrations.**

**10.) Due to the prevailing criminal law, people involved in any aspect of the marijuana business may not avail themselves of the services of the federal government, including federally insured banks, the bankruptcy courts, the United States Postal Service and the civil courts. Moreover, interstate shipment of marijuana will likely bring an immediate and strong response from federal law enforcement authorities.**

**11.) State laws cannot protect individuals from federal prosecution, but they can offer considerable protection to patients. State and local law enforcement are responsible for about ninety-nine percent of marijuana-related arrests. The federal government has not prosecuted anyone living in the states with effective medical-marijuana laws for small amounts of marijuana. Thus, state lawmakers are in a position to afford patients almost absolute protection from prosecution related to medical-marijuana use.**



## **Part III. - Legislative response to the federal prohibition on marijuana**

- a. Law enforcement agencies in New Jersey shall not cooperate with or provide assistance to the government of the United States or any agency thereof in enforcing the Controlled Substance Act, 21 U.S.C. 801 et seq., solely for actions consistent with [this Act], except as pursuant to a valid court order**
- b. No agency or subdivision of an agency of the State of New Jersey may refuse to perform any duty under [this Act] on the basis that manufacturing, distributing, dispensing, possessing, or using marijuana is prohibited by federal law.**
- c. The division may not revoke or refuse to issue or renew a license [this Act] on the basis that manufacturing, distributing, dispensing, possessing, or using marijuana is prohibited by federal law.**

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### **a.) Discussion:**

**This legislative determination is analogous to the "sanctuary cities" controversy where local governments refuse to enforce federal immigration warrants. Generally, federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.**

**However, The Supremacy Clause provides a clear rule that federal law shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” [Art. VI, cl. 2](#). Under this principle, Congress has the power to preempt state law. There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.**



**State law must also give way to federal law in at least two other circumstances.**

**First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation “so pervasive ... that Congress left no room for the States to supplement it” or where there is a “federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”**

**Second, state laws are preempted when they conflict with federal law. This includes cases where “compliance with both federal and state regulations is a physical impossibility,” and those instances where the challenged state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In preemption analysis, courts should assume that “the historic police powers of the States” are not superseded “unless that was the clear and manifest purpose of Congress.”**

**[Arizona v. U.S., 567 U.S. 387 \(2012\).](#)**



## **b.) Impact on New Jersey Attorneys**

**a.) Please note that this statement of public policy by the Legislature cannot be binding on the practice of law. The power to regulate attorneys and the practice of law has been vested exclusively in our Supreme Court:**

**The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.**

**Article 6, section 2, paragraph 3, New Jersey Constitution of 1947.**

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**b.) The statement by the Legislature in the proposed law offers no protection to lawyers against claims of unethical conduct under the federal Rules of Professional Responsibility in place in our district. The federal RPC's do not make allowances for marijuana for any purpose.**

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**c.) The statement by our Legislature provides no protection for New Jersey attorneys against charges of RICO [18 USCA 1962(c)], conspiracy to violate RICO [18 USCA 1962(d)] or general conspiracy [18 USCA 371] or accomplice liability for aiding and abetting their clients in the marijuana business.**

**d.) It appears that the United States government could shut down the recreational marijuana industry at any time.**



## **Part IV. - Specific New Jersey Rules of Professional Responsibility that will need to be reviewed:**

### **1.) RPC 1.2(d)**

**A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.**

**A lawyer may counsel a client regarding New Jersey's medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy. [Amended September 1, 2016 as a result of the Compassionate Use of Medical Marijuana Act, NJSA 24:61-1 thru 16.]**



## Comment on RPC 1.2(d) from Colorado Supreme Court:



### *Criminal, Fraudulent and Prohibited Transactions*

**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.**

**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](#).**

**Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.**

**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.**

**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\(a\)\(5\)](#).**



## **2.) RPC 1.4(d)**

**When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.**

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## **Comment on RPC 1.4(d) from Colorado Supreme Court:**

**The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in [Rule 1.0\(e\)](#).**



### **3.) RPC 8.4**

#### **RPC 8.4 Misconduct**

**It is professional misconduct for a lawyer to:**

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- (d) engage in conduct that is prejudicial to the administration of justice;**



## **Comment on RPC 1.4(d) from Colorado Supreme Court:**

**Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.**

**Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.**

**A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of [Rule 1.2\(d\)](#) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.**

## **4.) RPC 1.6(a) and (b) Confidentiality of Information**

**(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).**

**(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:**  
**(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;**

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### **NJRE 504(2) N.J.S.A. [2A:84A-20] Lawyer-Client Privilege**

**Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud....**

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## **Comment on RPC 1.6(a) and (b) from Colorado Supreme Court:**

**Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.**

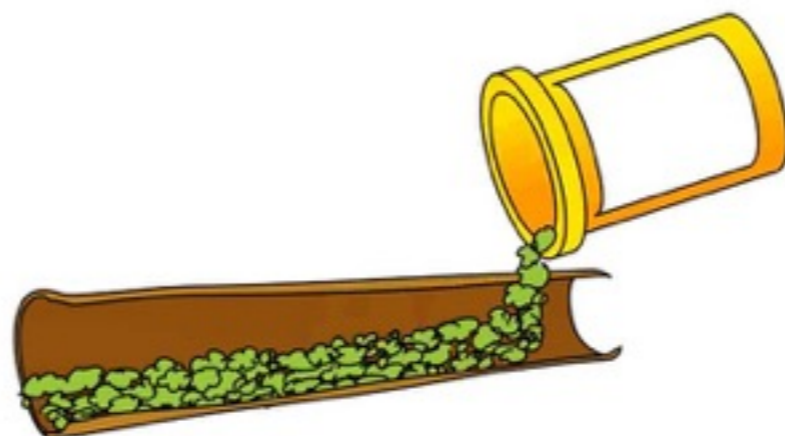
**Paragraph (b)(2) permits disclosure regarding a client's intention to commit a crime in the future and authorizes the disclosure of information necessary to prevent the crime. This paragraph does not apply to completed crimes. Although paragraph (b)(2) does not require the lawyer to reveal the client's intention to commit a crime, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal. See [Rule 1.2\(d\)](#). See also [Rule 1.16](#) with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and [Rule 1.13\(c\)](#), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.**

**Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a fraud, as defined in [Rule 1.0\(d\)](#), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is fraudulent.**



## **5.) RPC 1.13(b) - Organization as Client**

**(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.**



## **Comment on RPC 1.13(b) from Colorado Supreme Court:**

**In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization.**

**Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.**

**Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.**



## **6.) RPC 1.15 - Safekeeping Property**

**RPC 1.15 Safekeeping Property (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.**

**(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.**

**(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.**

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## **Federal reporting requirements & anti-structuring laws:**

**Federal law requires a domestic bank involved in a cash transaction exceeding \$10,000 to file a report with the Secretary of the Treasury, [31 U.S.C. § 5313\(a\)](#), [31 CFR § 103.22\(a\)](#); makes it illegal to “structure” a transaction—*i.e.*, to break up a single transaction above the reporting threshold into two or more separate transactions—“for the purpose of evading the reporting requirement,” [31 U.S.C. § 5324\(3\)](#); and sets out criminal penalties for “[a] person willfully violating” the anti-structuring provision, [§ 5322\(a\)](#).**



## **7.) RPC 1.16 - Declining or Terminating Representation**

**(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:**

**(1) the representation will result in violation of the Rules of Professional Conduct or other law;**

**(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:**

**(1) withdrawal can be accomplished without material adverse effect on the interests of the client;**

**(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;**

**(3) the client has used the lawyer's services to perpetrate a crime or fraud;**

**(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.**

## **Comment on RPC 1.16) from Colorado Supreme Court:**

**A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.**



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