TISHA BLACK CHERNINE
MICHELE T. LOBELLO
JOHN D. JONES*

S. DON BENNION
MICHAEL J. RYAN

*NEVADA BOARD CERTIFIED FAMILY LAW SPECIALIST

BLACK & LOBELLO
ATTORNEYS AT LAW

KRISTY L. BLACK
SABRINA M. DOLSON
KEVIN L. HERNANDEZ ⌘
MARTINA L. JACCARINO *
MICHAEL LI
STEVEN MACK
JEFFREY J. WHITEHEAD ^

⌘ ALSO LICENSED IN CALIFORNIA
* OF COUNSEL
^ ALSO LICENSED IN NEW YORK, ARIZONA & COLORADO

April 30, 2014

ADKT 0495

FILED

MAY 01 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Chief Justice Mark Gibbons
Nevada Supreme Court
201 South Carson Street, Suite 250
Carson City, NV 89701-4702

Dear Chief Justice Gibbons:

On April 1, 2014, Nevada entered a new era wherein Nevada became one of many states that enacted state law which on its face, contradicts Federal law. While there are many instances in *jurisprudence* where subparts of commercial regulations and the application of those regulations have been in conflict with Federal law, this is a patently unusual time where many states such as Nevada have passed laws intending to contradict Federal law. This conflict raises many ethical issues for Nevada's attorneys, and requires legal developments to adequately address these issues. In fact, because of similar laws in other states, the United States Supreme Court has addressed whether or not states permitting the palliative use of marijuana are in contradiction with the controlled substances Act of 1970.

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970[1], Title 2 of which is the CSA ("CSA"). To effectuate the statutory goals of the CSA, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense or possess any controlled substance except as authorized by the CSA. *21 U.S.C. §841(a) (1), 844(a).* All controlled substances were classified into five schedules based on their medical uses. Marijuana is classified as a Schedule 1 substance under the CSA based on its high potential for abuse specifically, marijuana has failed to be recognized as lending any medical benefit to its users. *§812(b) (1).* This classification renders the manufacture, distribution or possession of marijuana a criminal offense under federal law. *§841(a) & §844(a), page 2201-2204.*

RECEIVED
MAY 01 2014
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

[1] To date the U.S. Supreme Court has not addressed laws making recreational marijuana legal.

14-14131

There have been cases before the United States Supreme Court wherein states such as Colorado and California have taken the position that the CSA does not preempt state laws that permit medicinal marijuana. However, the United States Supreme Court found that the intrastate cultivation and distribution of marijuana has a rationally related interest to the interstate cultivation distribution and sale of marijuana, and thus, the Commerce clause of the United States Constitution gives the Federal government power over all state activities with regard to medical (or recreational) marijuana. *Gonzales v. Raich*, 545 U.S. 1, 2; 125 S. Ct. 2195, 2196 (2005). While the *jurisprudence* surrounding medical marijuana is a quickly evolving area of the law, *Gonzales* remains the controlling precedent from the United States Supreme Court.

Contradicting *Gonzales*, a court of appeals in the State of Colorado issued a decision stating that the CSA does not preempt Colorado's Constitutional Amendment allowing medical marijuana. *People v. Crouse*, 2013 WL 6673708, (Colo. Ct. App. Dec. 19, 2013) citing *Colo. Const. (a) XVIII §14(MM Amendment).* The Colorado Appellate Court based its decision on the presumption in constitutional law that Congress does not intend to occupy the entire field of an area of law unless it is specifically declared in the Federal law. Further, the Appellate court held that because the police power utilized enforcing controlled substance laws is traditionally in the hands of the states, pre-emption did not exist. *Id., 3.* Thus, Nevada attorneys advising medical marijuana clients are in a paradox. As they are asked to advise clients in an area where there is an open conflict between state law and Federal law.

As this Court is aware, Nevada Rule of Professional Conduct 8.4(d) forbids an attorney from engaging in conduct that is prejudicial to the administration of justice. There is a clear argument that it is unethical for a Nevada attorney to counsel a client with regard to future conduct that he or she knows is illegal under Federal law, such as the cultivation, distribution, or sale of marijuana. However, it is equally clear that it is permissible and expected that an attorney will advise a client with regard to Nevada law which allows for the production and distribution of marijuana. The conflict between the Nevada statute and Federal law has ethically hamstrung Nevada attorneys. It is clear that public policy considerations favor allowing Nevada attorneys to provide the full range of legal advice in order that clients may comply with Nevada's marijuana laws.

Colorado courts facing the same ethical paradox reasoned; "It too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." Colorado Formal Opinion 125, citing *Hickman v. Taylor,* 329 U.S. 49, 514 (U.S. 1947). Colorado State Bar issued this formal opinion regarding the extent to which lawyers may represent clients regarding marijuana related activities on October 21, 2013. This opinion provides guidance for Nevada particularly in light of the fact that the Colorado Rules of Professional Conduct mirror the model rules, as do the Nevada Rules of Professional Conduct. In its opinion, the Colorado Bar acknowledged several areas where an attorney's involvement clearly is permissible; examples include, representing clients regarding the consequences of their past conduct, representing clients regarding the creation and application of zoning and other marijuana ordinances and advocating for changes in the applicable laws.

The Colorado Formal Opinion further opines that unless or until there is a change in applicable Federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution. The stated reasoning is that by fully advising clients of all of their options under Colorado's marijuana statutory scheme, the lawyer would be advising the client to engage in conduct that remains illegal under Federal law. That perspective would render advice about future conduct in violation of Colo. RPC 2.1, which mirrors NRPC 8.4(d). If Nevada were to apply this reasoning to our attorneys, Nevadans would be left to enter into our burgeoning and highly regulated new industry without the advice and counsel of attorneys. The regulations are necessarily complex and conformity with such extensive, detailed, and complicated regulations requires the assistance of counsel. Without the advice of attorneys the outcome would be negative for the prospective client as well as the citizens of Nevada who stand to benefit greatly from this new industry.

The few attorneys who have counseled clients in this new area of law in Nevada have been involved in the aspects that are clearly permissible even under Colorado's interpretation of the ethical obligations. As Nevada moves forward with its Medical Marijuana Program, there will be legal issues for patients stemming from the legal use of medical marijuana as well as legal considerations

in the employment context, the family law context, and the tax-planning context. Additionally, as Nevada's program moves forward, it must be anticipated that the medical marijuana enterprises will seek legal counsel not only for legal issues germane to a typical business operation, but specifically to ensure that they are in proper compliance with Nevada's Medical Marijuana Program and the ensuing changes.

In this regard, Colorado's interpretation of the ethical rules becomes unworkable and impractical. In apparent recognition of this fact, the Colorado Formal Opinion was amended to request that the Colorado Supreme Court draft an amendment to the Colorado Rules of Professional Conduct to specifically address attorneys working in the field of Medical Marijuana. Other states, such as Maine, Arizona, and Connecticut have also addressed the ethical obligations of attorneys in the context of marijuana.

The most practical resolution of this ethical conflict was issued by the Arizona Ethics Committee in formal opinion 11-01 (2011). The Arizona Ethics Committee refused to apply ER 1.2(d) in a manner that would prevent a lawyer from assisting a client with conduct that is in clear and unambiguous compliance with the state law. Arizona's reasoning was that this would deprive clients of the legal advice and assistance needed to engage in the conduct that the state law expressly permits. Arizona's ethical guidelines are thus, supplemented with a mandatory provision that attorneys working with marijuana related clients provide a written statement to those clients that the proposed conduct could be in violation of Federal law. This compromise is practical and necessary.

Until such time as the Federal law has changed, or the related ethical rules are amended, this office requests that the Nevada Supreme Court consider rendering an opinion that enables Nevada attorneys to provide legal advice to medical marijuana clients as long as those clients are noticed in writing by the attorney that their conduct (in relation to medical marijuana in the State of Nevada) is illegal under the CSR and further, that acting lawfully pursuant to Nevada's Medical Marijuana Program is not a defense to any Federal criminal charge. The ethical rules governing Nevada attorneys must protect attorneys who are enabling clients to conduct their business in a manner that is consistent with State laws.

Thank you for your consideration.

Respectfully,

BLACK & LOBELLO

Tisha Black, Esq.

TBC/jh