1 IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED
APR 28 2015
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

2 In the Matter of an Amendment to Rule)
3 of Professional Conduct 1.2 Regarding) ADKT NO. 0495
Medical Marijuana)
)

4

5 **SUPPLEMENTAL BRIEF BY THE BOARD OF GOVERNORS, STATE BAR OF NEVADA.**

6 On March 11, 2014, the State Bar Board of Governors filed a petition to
7 amend Nevada's Rule of Professional Conduct (RPC) 1.2 (Scope of
8 Representation) in light of quickly-emerging regulations regarding medical
9 marijuana. On May 7, 2014, following a public hearing, the Supreme Court
10 adopted Comment [1] to Nevada's RPC 1.2, as follows:

11 > A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution, article 4, Section 38, and NRS
12 > chapter 453A, and may assist a client in conduct the lawyer reasonably believes is permitted by these constitutional provisions
13 > and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the
14 > lawyer shall also advise the client regarding related federal law and policy.

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16 In doing so, the Court was mindful that an expedited change to one rule
17 may lead to unintended consequences involving other rules and that a
18 comprehensive review was prudent. Therefore, the Court directed the Board of
Governors to file a supplemental brief,

19 > To address whether any further actions or additional rules might
20 > require amendment or commentary in view of RPC 1.2 and

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Comment [1], Nevada Constitution article 4, section 38, NRS chapter 453A; and any related federal statutes. The court directs the Board to consider in its supplemental analysis the eight "enforcement priorities" identified in the August 29, 2013, memorandum by Deputy United States Attorney James M. Cole.

Order for Supplemental Briefing and Extending Period for Public Comment, ADKT No. 0495 (May 8, 2014).

CONCLUSIONS AND RECOMMENDED ACTION.

1. The State Bar Board of Governors ("State Bar") has identified seven (7) additional Rules of Professional Conduct that are relevant to a lawyer's involvement in state-authorized medical marijuana that nonetheless violates the federal Controlled Substances Act (CSA), 21 U.S.C. § 801 *et seq.*

2. The State Bar recommends that the Court adopt a comment to Rule of Professional Conduct ("RPC") 8.4(b) (Criminal conduct reflecting adversely on the lawyer's fitness) to alert the lawyer that engaging in personal use, ownership or operation of medical marijuana may lead to federal prosecution and attendant disciplinary action based upon a criminal conviction. Aside from this comment, the State Bar does not believe that any further amendments or comments to the RPCs are needed.

3. The State Bar recommends that the State Bar Standing Committee on Ethics and Professional Responsibility consider and issue a formal opinion on the federal enforcement priorities and policies as it relates to a lawyer's

ethical duties under RPC 1.2 cmt. [1], RPC 1.13 (Organization as Client); RPC 1.16(a) Declining or Terminating Representation); RPC 8.4(b) (Misconduct involving criminal conduct) and RPC 8.4(f) (Misconduct involving assisting a judge in violating codes of judicial conduct).

4. The State Bar submits for the Court's consideration the need for an ethics opinion from the Nevada Standing Committee on Judicial Ethics regarding whether or not a judge's participation in a medical marijuana business or personal use of medical marijuana violates the applicable Code of Judicial Conduct.

ANALYSIS.

A. Introduction.

An analysis of the Rules of Professional Conduct in light of this issue begins with RPC 1.0A (Guidelines for Interpreting the Nevada Rules of Professional Conduct), which states that,

> The preamble and comments to the ABA Model Rules of Professional Conduct are not enacted by this Rule but may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, ...
>
> (a) The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas

under the Rules in which the lawyer has discretion to exercise professional judgment.

. . .

(c) Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

In addition, the eight (8) "enforcement priorities" that define the landscape of federal prosecution of lawful state-regulated marijuana activities are:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands, and;

8. Preventing marijuana possession or use on federal property.

Memorandum from James M. Cole, Deputy Attorney General, for All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (at http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (last visited December 19, 2014)) ("Cole Memo II").

The Office of Bar Counsel has confirmed that no other jurisdiction with legalized marijuana has amended their rules beyond Rule 1.2 (or added Rule 8.6, as is pending in Washington State). *See*, Exhibit 1, Affidavit of Bar Counsel, David A. Clark. In Oregon, medical marijuana is legal and there is a pending ballot measure to legalize it for recreational use. The Legal Ethics Committee of the Oregon State Bar has submitted a proposed comment to Rule 1.2 only to its Supreme Court. The Oregon Supreme Court is scheduled to consider the proposed comment in January 2015. *Id.*

The Florida Bar Board of Governors, on May 23, 2014, adopted a policy of non-prosecution of attorneys who advise clients about medical marijuana or assist in the licensing process, as long as the lawyer also advises the client "regarding related federal law and policy." *See*, "*Board adopts medical marijuana advice policy.*" Florida Bar *News* (June 15, 2014)

http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/Articles/575B2BA3C91F53DD85257CF200481980 (last visited December 19, 2014).

B. RPC 8.4(b) and Lawyer's Personal Involvement in Use or Ownership of Regulated Medical Marijuana Business.

A large part of the national discussion involves the ethical implications of a lawyer either possessing or using medical marijuana under state-sanctioned authority or owning or operating a state-regulated business that grows or dispenses medical marijuana. At issue is RPC 8.4(b) (Misconduct):

> It is professional misconduct for a lawyer to: . . . (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

Criminal conduct, standing alone, is insufficient under this rule to constitute professional misconduct. The criminal conduct must also "reflect adversely" on the lawyer's honesty, trustworthiness, or fitness to practice law. *See, Model Rules of Professional Conduc*t Rule 8.4 cmt. [2], "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."

In applying RPC 8.4(b), this Court has previously declined to refer to the State Bar first-time convictions for misdemeanor DUIs, provided the lawyer timely reported the conviction and there were no aggravating factors, such as

1 bodily injury. RPC 8.4(b) is clear enough on its face and has been consistently
2 applied in the past to give lawyers sufficient guidance and notice as to what
3 constitutes misconduct when engaging in these activities.

4 However, that said, such conduct is circumscribed by the eight
5 "enforcement priorities" set out in the Cole Memo II. If a lawyer engages in
6 state-regulated activities that fall into one of the eight categories, this may well
7 prompt federal investigation and prosecution and constitute criminal conduct
8 that <u>does</u> reflect adversely on the lawyer's honesty, trustworthiness, or fitness to
9 practice law. Further, once there is a criminal conviction, SCR 111 directs bar
10 counsel to file the conviction with the Supreme Court for further review and
11 potential referral for disciplinary proceedings.

12 As such, it is incumbent on the lawyer, both for the lawyer's personal
13 conduct, as well as in adequately advising a client, to know the eight priorities
14 and avoid them. The Court clearly expressed the importance of this in the last
15 sentence of Comment [1] to RPC 1.2, "In these circumstances, the lawyer shall
16 also advise the client regarding related federal law and policy."

17 At its September 2014, meeting, the Board of Governors formed a Task
18 Force to review this specific issue. At its recent meeting in December, the
19 Board engaged in considerable and earnest debate of this matter. Ultimately,
20 the Board adopted the proposed comment to RPC 8.4(b):

> Because use, possession, and distribution of marijuana in any form still violates federal law, attorneys are advised that engaging in such conduct may result in federal prosecution and trigger discipline proceedings under SCR 111.

In deciding the need for and scope of a comment, the State Bar recognized that, in the same spirit that lawyers need to counsel their clients about federal prosecution policy before engaging in medical marijuana activities, so, too, the Rules of Professional Conduct should counsel lawyers about federal prosecution policy and its implications on the lawyer's professional obligations. Hence, the proposed comment to RPC 8.4(b) functions in the same manner that the already adopted comment to RPC 1.2 does in providing clearer guidance to participants in state-authorized medical marijuana activities.

In addition to the proposed comment, the State Bar recommends that the Standing Committee on Ethics and Professional Responsibility consider and issue a formal opinion regarding the counseling and conduct of medical marijuana activities in accordance with the eight enforcement priorities. Such an opinion might recommend specific disclosures and acknowledgements in retainer agreements and particular Rules relevant to a lawyer's representation. It would serve the added role of delineating improper conduct for the lawyer's benefit in assessing personal involvement in medical marijuana activities.

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Given the breadth and substance of federal law and policy, the State Bar believes that an ethics opinion can more completely address the issues and give effective guidance rather than the limited format of a comment or rule change.

C. Other Rules of Professional Conduct that referencing "crime" or "criminal" in a permissive or unrelated context.

Several of the Rules of Professional Conduct reference the word "crime" or "criminal" but do so in the context of permissive action the lawyer make take under the Rules. As such, the State Bar does not believe that those instances require further comment or amendment.

1. RPC 1.6 (Confidentiality of Information).

RPC 1.6(b)(2, 3) provides that,

> A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer *reasonably believes necessary*:
>
> . . . . .
>
> (2) To prevent the client from committing *a criminal or fraudulent act* in furtherance of which the client has used or is using the lawyer's services, ...;
>
> (3) To prevent, mitigate, or rectify the consequences of a client's *criminal or fraudulent act* in the commission of which the lawyer's services have been or are being used, . . . (emphasis added).

Because the rule permits the lawyer ("may") to act rather than compels action, there is no necessity to amend the rule or provide an express comment to guide the lawyer through an impasse. In addition, this rule contains the same phrase, "criminal or fraudulent," that appears in RPC 1.2, and which Comment

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[1] already interprets as allowing assistance and counsel to a client for medical marijuana activities. Thus, the same reasoning can be applied consistently to this rule.

On the other hand, to the extent an unethical lawyer might use this as a loophole to justify an otherwise improper disclosure on the grounds that the client's action is technically a federal crime, the rule already provides that the scope of the disclosure must be "reasonably necessary." This affords a basis for disciplinary review and regulation in response to a client grievance. Therefore, the rule, as currently written, can be reasonably interpreted and enforced to accommodate medical marijuana representation in Nevada.

2. RPC 1.13 (Organization as Client).

RPC 1.13(b) provides, in part,

> 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* that reasonably might be imputed to the organization, *and that is likely to result in substantial injury to the organization*, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. (emphasis added).

While the phrase "violation of law" clearly would include the federal Controlled Substances Act, the duty to act imposed upon the lawyer is limited to those violations of law that are "likely to result in substantial injury to the organization." As long as the organization complies with state law, and dutifully navigates the eight "enforcement priorities" to avoid federal

1 prosecution, it can avoid substantial injury for medical marijuana activities.
2 Therefore, this rule already clarifies the type of legal violations that trigger an
3 ethical duty to act by the lawyer and an amendment or comment is unnecessary.

4 Again, however, a formal ethics opinion on the Cole Memo II factors
5 would assist a Nevada lawyer in counseling or monitoring a client's conduct for
6 activities federal prosecutors consider in bringing prosecutions for medical
7 marijuana activities. Thus, for purposes of RPC 1.13 (Organization as Client), the State Bar recommends a formal ethics opinion.

8 **3. RPC 1.16(b) (Declining or Terminating Representation).**

9 RPC 1.16(b) provides,

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

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

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

14 (3) The client has used the lawyer's services to perpetrate *a crime* or fraud; . . . (emphasis added).

15 For the same reasons stated above in connection with RPC 1.6, the State
16 Bar does not believe that this rule requires amendment or commentary. It is a
17 permissive rule that has a "reasonably believes" component and tracks the same language that is already addressed in RPC 1.2, Comment [1].

18 **4. RPC 3.3(b) (Candor Toward the Tribunal).**

19 Another rule also references "criminal or fraudulent" and, while it
20 imposes a mandatory duty to act, an existing comment to the Model Rule

clarifies that the scope of the duty is not affected by lawful medical marijuana activities.

RPC 3.3(b) states,

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in *criminal or fraudulent conduct related to the proceeding* shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal (emphasis added).

When read in isolation, this rule might seem to be impacted by the federal criminal nature of medical marijuana, particularly since a lawyer is most likely to be representing clients before adjudicative bodies on the very subject of medical marijuana licensing and business activities. However, the scope of the rule applies to criminal conduct "related to the proceeding" and requires disclosure of such to the tribunal. This implies that the client is engaging in surreptitious criminal activity that undermines the integrity of the proceedings, not that the subject matter of the proceedings is somehow criminal in nature, as can be argued about medical marijuana.

This interpretation is affirmed by comment [12] to Model Rule 3.3, which states in full:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer

> knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

*Model Rules of Professional Conduc*t Rule 3.3 cmt. [12] (2002). No further amendment or comment is necessary for this rule.

D. Two Rules of Professional Conduct that reference "other law" that may require clarification.

Two Rules of Professional Conduct use the phrase "other law" and impose mandatory duties upon attorneys. While these rules are rarely invoked in discipline prosecution cases or even in inquiries to the State Bar's Ethics hotline, there is an incongruity in the black-letter of the rule that requires clarification.

1. RPC 1.16(a) (Declining or Terminating Representation).

RPC 1.16(a) states that, "[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*[.]" (emphasis added). Clearly, representing a client in a state-sanctioned medical marijuana endeavor will result in a violation of the federal Controlled Substances Act, albeit one that may not be prosecuted.

Discipline prosecutions of this rule have involved cases where the client continues to engage in unlawful activity. *See, In Re Amer. Cont'l.*

Corp./Lincoln Sav. & Loan Lit., 794 F.Supp. 1424 (D. Ariz. 1992) (duty to withdraw if client refuses to cease securities violations); *In re Sharp*, 802 So.2d 588 (La. 2001)(duty to withdraw when client clearly intends to commit illegal act). However, such cases offer limited guidance since the violation of "other law" at issue is routinely prosecuted and lacks the shelter of prosecutorial deferment that state-authorized medical marijuana currently enjoys. The only standard that invokes mandatory withdrawal is a violation of "other law," not how serious a violation it may be or how popularly it may be prosecuted.

The reason Comment [1] was added to RPC 1.2 was to facilitate competent and ethical representation of clients despite the fact the conduct is a technical violation of "other law." The comment also directs the lawyer to advise the client on federal law and policy, to ensure the conduct conforms to the eight "enforcement priorities."

However, if a client insists on acting contrary to that advice, for example, by promoting distribution of medical marijuana to minors, does this then become a different "violation of other law" that <u>would</u> require the lawyer to withdraw? The State Bar would certainly hope so. But the generic standard of "violation of other law" in the current rule fails to make

this distinction. The acceptable representation (within the enforcement priorities) and the unacceptable (outside of them) are both violations of "other law."

For both ethical guidance and due process in discipline enforcement, lawyers must be given better notice of when the acceptable becomes the unacceptable. Thus, the State Bar would recommend that the language in RPC 1.16(a) be included in the consideration by the Standing Committee for a formal opinion since the seriousness of the violation of "other law" turns on compliance with the Cole Memo II enforcement priorities.

2. Rule 8.4(f) (Misconduct).

RPC 8.4(f) states that, "It is professional misconduct for a lawyer to: Knowingly assist a judge or judicial officer in conduct that is a violation of applicable *rules of judicial conduct or other law*." (emphasis added). To the extent the Standing Committee addresses the phrase "other law," as discussed above, this would reduce confusion about a lawyer's obligation under this prong.

However, whether or not participating in a state-authorized medical marijuana business or the personal use of marijuana constitutes a violation of the rules of judicial conduct remains an unsettled question. The State Bar is

1 informed that the Nevada Standing Committee on Judicial Ethics has not issued
2 an opinion in this regard. *See*, Ex. 1, *Affidavit*, ¶ 6.

3 At least one jurisdiction which has legalized marijuana for recreational
4 use, Colorado, has a published opinion that judges, who use marijuana, violate
5 Rule 1.1 of the Colorado Judicial Code. *See*, Exhibit 2, Colorado Judicial
6 Ethics Advisory Board, *Advisory Opinion 2014-01*(July 31, 2014). Certainly
7 the State Bar is aware, as the Court likely is, that the Nevada Gaming Control
8 Board advised its privileged license holders to avoid participation in the
9 medical marijuana industry, despite state law, because such conduct still
10 violates federal law. *See*, Nevada Gaming Control Board, *Notice to Licensees,*
11 *Notice #2014-39*, (May 6, 2014) http://gaming.nv.gov/modules/showdocument.
12 aspx?documentid=8874(last visited December 19, 2014).

13 If a Nevada judge's involvement in medical marijuana constitutes a
14 violation of the Revised Nevada Code of Judicial Conduct, then a lawyer who
15 knowingly assists in that endeavor may violate this rule. Of course, since a

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1 determination of the scope and applicability of the Code of Judicial Conduct is
2 outside the Rules of Professional Conduct, the State Bar brings this to the
3 Court's attention for consideration of a referral to the Standing Committee on
4 Judicial Ethics or other action as the Court sees fit.

5 RESPECTFULLY SUBMITTED this 24th day of December 2014.

6 STATE BAR OF NEVADA
7 BOARD OF GOVERNORS

8

9 By: Elana T. Graham, Esq., Pres.
Elana T. Graham, Esq., President
10 Nevada Bar No. 3429
State Bar of Nevada
11 600 E. Charleston Blvd.
Las Vegas, NV 891

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EXHIBIT 1

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AFFIDAVIT OF BAR COUNSEL DAVID A. CLARK IN SUPPORT OF SCR 118 PETITION

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

David A. Clark, being first duly sworn, deposes and states as follows:

1. I am a Nevada attorney duly licensed in good standing. I am Bar Counsel for the State Bar of Nevada. I make this affidavit upon personal knowledge and, if called as a witness, could competently testify to the facts contained herein. I make this affidavit in support of the State Bar Board of Governor's Supplemental Brief in the ADKT Petition for Amendment to Rule of Professional Conduct 1.2 (Case No. 0495) as directed by the Supreme Court's Order entered May 8, 2014.

2. As part of my duties, I am in regular contact with bar counsel from other jurisdictions, both by personal contact and through a listserve operated by the National Organization of Bar Counsel.

3. The Office of Bar Counsel has confirmed that no other jurisdiction with legalized marijuana has amended their rules beyond Rule 1.2 (or added Rule 8.6, as is pending in Washington State).

4. In Oregon, medical marijuana is legal and there is a pending ballot measure to legalize it for recreational use. I am informed by General Counsel

1 to the Oregon State Bar that the Legal Ethics Committee of the Oregon State
2 Bar has submitted a proposed comment to Rule 1.2 only to its supreme court.
3 The Oregon Supreme Court is scheduled to consider the proposed comment in
4 January 2015.

5 5. On or about May 23, 2014, the Florida Bar Board of Governors
6 adopted a policy of non-prosecution of attorneys who advise clients about
7 medical marijuana or assist in the licensing process, as long as the lawyer also
8 advises the client "regarding related federal law and policy." Embedded in the
9 Brief is an accurate and active link to the article in the Florida Bar *News*
10 published June 15, 2014.

11 6. I have personally contacted the Nevada Standing Committee on
12 Judicial Ethics and have been informed that the Standing Committee has not
13 issued an opinion in this regard.

14 7. At least one jurisdiction which has legalized marijuana for
15 recreational use, Colorado, has a published opinion that judges, who use
16 marijuana, violate Rule 1.1 of the Colorado Judicial Code. Attached to this
17 Supplemental Brief as Exhibit 2, is a true and correct copy of the Colorado

18 . . .

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1 Judicial Ethics Advisory Board, *Advisory Opinion 2014-01*(July 31, 2014).

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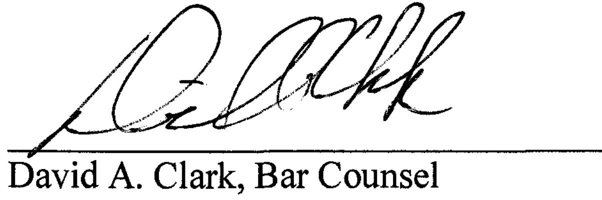

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David A. Clark, Bar Counsel

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SUBSCRIBED AND SWORN to before me
5 by David A. Clark this 23 day of December 2014.

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7 NOTARY PUBLIC

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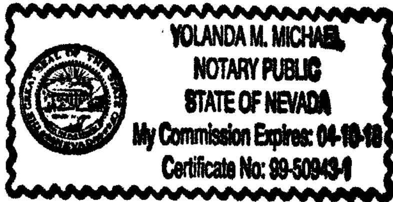

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EXHIBIT 2

Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2014-01
(Finalized and effective July 31, 2014)

ISSUE PRESENTED:

Colorado has decriminalized the use and possession of medicinal and small amounts of recreational marijuana, subject to some limitations. Colo. Const. Art. XVIII, sections 14 and 16; § 18-18-406(2)(a), (4), (5)(a), (b), C.R.S.; see also §§ 12-43.3-101 – 1001, C.R.S. However, the possession and use of marijuana for any purpose is still a crime under federal law. See Controlled Substances Act, 21 U.S.C. §§ 801 – 904.

In light of the fact that certain marijuana-related conduct is not a crime under Colorado law but remains a crime under federal law, the requesting judge requested an opinion addressing whether a judge who engages in the personal recreational or medical use of marijuana (as opposed to commercial use) in private and in a manner compliant with the Colorado Constitution and all related state and local laws and regulations violates Rule 1.1 of the Code of Judicial Conduct, or any other provision of the Canons.

CONCLUSION:

Because the use of marijuana is a federal crime, a judge's use of marijuana for any purpose is not a "minor" violation of criminal law and therefore violates Rule 1.1 of the Code of Judicial Conduct.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Rule 1.1 of the Code of Judicial Conduct provides:

> (A) A judge shall comply with the law, including the Code of Judicial Conduct.
>
> (B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.
>
> (C) Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority in writing of such conviction. . . . This obligation to self-report convictions is a parallel but independent obligation of judges admitted to the Colorado bar to report the same conduct to the Office of Attorney Regulation pursuant to C.R.C.P. 251.20.

The Terminology section defines "law" as encompassing "court rules and orders as well as statutes, constitutional provisions, and decisional law."

DISCUSSION:

Rule 1.1(A) requires judges to comply with the law. Although neither the Rule nor the Terminology section specifies that Rule 1.1 requires compliance with federal as well as state law, it is beyond dispute that judges are required to comply with federal laws. See Jud. Disc. & Disability Comm'n v. Thompson, 16 S.W.3d 212 (Ark. 2000) (judge disciplined for failure to pay federal income taxes); In re Ballance, 643 S.E.2d 584 (N.C. 2007) (same); In re Gallagher, 654 N.E.2d 353 (Ohio 1995) (judge charged with federal drug crimes prohibited from acting as a judge while charges were pending); In re Hamer, 537 S.E.2d 552 (S.C. 2000) (former judge publicly reprimanded following conviction of federal crimes). Indeed, the supreme court Committee to Consider Revisions to the Colorado Code of Judicial Conduct (Committee), which was tasked with considering revisions to the Code following adoption of the revised ABA Model Code in 2007, considered but declined to propose language in what is now Rule 1.1(B) specifying that the rule prohibits violations of "federal and state law," because "citing only federal or state criminal law might be too narrow and limiting to reach . . . violations of local or municipal law . . . that are in substance similar to misdemeanors under the criminal code." Committee to Consider Revisions to the Colorado Code of Judicial Conduct, Minutes of Apr. 22, 2008, Meeting, p. 2.

Federal law prohibits the use of marijuana for any purpose. See 21 U.S.C. §§ 802, 812(c), 841, 844. Because Colorado judges are required to comply with federal law, a judge's use of marijuana in compliance with Colorado law nevertheless violates the law within the meaning of Rule 1.1(A). Cf. Coats v. Dish Network, L.L.C., 303 P.3d 147, 150-51, 155-58 (Colo. App. 2013) ("[B]ecause activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law . . . , for an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be 'lawful' under the ordinary meaning of that term.") (cert. granted Jan. 27, 2014); People v. Watkins, 282 P.3d 500, 503-06 (Colo. App. 2012) (mandatory probation condition that a probationer not commit any criminal offense includes federal offenses, and because marijuana use for any purpose is a federal offense, it is an "offense" within the meaning of the probation statute, despite the fact that if it is not a criminal offense under state law); Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 975-77 (Colo. App. 2011) (employee terminated for testing positive for marijuana in violation of employer's policy prohibiting illegal drug use may be denied unemployment compensation benefits even if the worker's use of marijuana is "medical use" as defined in article XVIII, section 14 of the Colorado Constitution; "the illegality of marijuana use under federal law made its presence in any worker's system inappropriate under employer's policy").

However, the fact that a judge's use of marijuana violates the law within the meaning of Rule 1.1(A) does not resolve the requesting judge's question, because not every violation of the law constitutes a violation of the Code. Under Rule 1.1(B), "[c]onduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a

judge must comply with the law." The issue, then, is whether a judge's personal marijuana use is a "minor" violation of the law within the meaning of Rule 1.1(B). We conclude that it is not.

Initially, we note that Rule 1.1(A) is identical to Rule 1.1 of the Model Code, but Rule 1.1(B) appears to be unique to Colorado. The supreme court adopted it at the Committee's recommendation as part of the 2010 Code.[1] Neither the Rule nor the Terminology section defines "minor," but the minutes memorializing the Committee's discussion regarding the reasons for proposing the rule, the scope of the self-reporting requirement in Rule 1.1(C), and the annotation to Rule 1.1 shed light on the court's intent in adopting Rule 1.1(B).

The minutes include the following explanation for the Committee's recommendation that the court adopt what is now Rule 1.1(B):

> The . . . proposed [rule] was crafted in response to the committee's concerns, raised at previous meetings, that the requirement that "[a] judge shall comply with the law" is vague and confusing, and could potentially subject judge's to discipline for misconduct that is minor. . . . As the committee noted, the rule, if read literally and expansively, could subject a judge to discipline for failure to follow precedent in on-the-bench rulings (which would be one form of non-compliance with the law). It also could subject judges to discipline for what typically are regarded as minor infractions, such as receiving a parking ticket or permitting the judge's dog to run at large. Thus, the proposed [rule], which was drawn from a West Virginia Supreme Court opinion, was designed to clarify that judges should be subject to discipline under this rule for more serious failures to adhere to the law in their personal conduct, such as when engage[d] in conduct that would be criminal under state or federal law.

This explanation, particularly the parking ticket[2] and dog at large examples, suggests that the Committee's intent in drafting and the supreme court's intent in adopting Rule 1.1(B) was to exempt as "minor" only violations of relatively insignificant traffic offenses and local ordinances, not state or federal drug laws.

The self-reporting requirement in Rule 1.1(C) reinforces that conclusion, because it requires judges to report having sustained any criminal convictions other than "misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs." The rule thus reflects the court's determination that drug-related traffic offenses are sufficiently serious to trigger the self-reporting requirement while other traffic offenses are too insignificant to be of concern. Concluding that a judge's use of marijuana in violation of federal law is a

[1] The Committee proposed the language in Rule 1.1(B) as a comment to Rule 1.1, but the court adopted it as part of the rule.

[2] We note that even parking tickets can give rise to judicial discipline. See In re Harrington, 877 A.2d 570 (Pa. Ct. Jud. Disc. 2005) (magistrate who repeatedly parked at expired parking meters and displayed parking tickets issued to others violated rule requiring judges to respect and comply with the law).

"minor" violation within the meaning of Rule 1.1(B) would lead to the illogical result that a judge's use of marijuana does not violate the requirement in Rule 1.1(A) that judges comply with the law, but that a judge is nevertheless required to report a federal conviction for marijuana use under Rule 1.1(C). We decline to construe Rule 1.1 as containing such an inherent inconsistency.[3] See People in Interest of S.M.A.M.A., 172 P.3d 958, 959-60 (Colo. App. 2007) (in determining the meaning of court promulgated rules, courts "give the words of the rules their plain meaning and read all the rules in pari materia to effectuate their intent and avoid inconsistencies").

The cases in the annotation to Rule 1.1 support our conclusion that the scope of the minor violations exception to the compliance with the law requirement is extremely narrow. In each case, the court found that the judge's unlawful conduct violated the equivalent of Rule 1.1(A) and warranted discipline; none concluded that the judge's violation of the law was so "minor" or "trivial" that it did not violate the state's Code of Judicial Conduct. See In re Conduct of Roth, 645 P.2d 1064, 1070 (Or. 1982) (noting that not every "violation of law, however trivial, harmless or isolated, would also be a violation" of the requirement that judges comply with the law, but concluding that the judge's misdemeanor criminal offenses warranted discipline, despite the dismissal of the charges); In re Sawyer, 594 P.2d 805, 811-12 (Or. 1979) (recognizing that some violations of law "such as minor traffic infractions[] may be of such a nature as to not come within the intended meaning of" the requirement that judges comply with the law, but concluding that the judge's part-time employment as a teacher at a state-funded college in violation of a state constitutional prohibition on officials of one state department exercising functions of another was not such a "minor" violation and warranted his temporary suspension); Matter of Vandelinde, 366 S.E.2d 631, 633-34 & nn.4, 6, 638 (W.Va. 1988) (noting that a judge's criminal conduct "may, unless the violation is trivial, constitute a violation of the requirement that a judge must comply with the law," but concluding that the judge's excessive contributions to a political organization that supported his candidacy – a misdemeanor offense under the applicable statute -- violated the requirement that judges comply with the law and warranted a public reprimand, despite the fact that the judge was not criminally charged) (citing West Virginia Jud. Inquiry Comm'n v. Dostert, 271 S.E.2d 427 (W. Va. 1980) (judge who violated gun licensing statute found to be in violation of Canon requiring compliance with the law)).

Analogizing Rule 1.1(B) to Rule 8.4(b) of the Colorado Rules of Professional Conduct, which provides that it is "professional misconduct" for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," the requesting judge notes that in Formal Opinion 124, the Colorado Bar Association Ethics Committee concluded that, by itself, a lawyer's personal use of marijuana constitutes a

[3] We recognize that the self-reporting requirement in Rule 1.1(C) applies only to convictions while Rule 1.1(B) provides that unlawful conduct – not just criminal convictions – may constitute a violation of the Code. See In re Conduct of Roth, 645 P.2d 1064, 1070 (Or. 1982) (conviction not required to support a finding that judge failed to comply with the law). We do not by this comparison suggest that a judge is required to report criminal conduct that does not result in a conviction, or that the requirement that a conviction be reported under Rule 1.1(C) is conclusive as to whether a violation is minor within the meaning of Rule 1.1(B). A violation may be other than a "misdemeanor traffic offense[] or traffic ordinance violation[] not including the use of alcohol or drugs" and still be a minor violation. Conversely, there may be some traffic offenses not involving alcohol or drugs that do not trigger the self-reporting requirement of Rule 1.1(C) but nevertheless violate the law within the meaning of Rule 1.1(A).

federal criminal act that does not violate R.P.C. 8.4(b). Relying on that analogy, the judge suggests that whether an offense is "minor" within the meaning of Rule 1.1(B) should be determined based on a "moral turpitude" test.

But the analogy fails, because Rule 1.1(A) is broader than R.P.C. 8.4(b): it provides that it is judicial misconduct for judges to violate laws in general, not just laws relating to honesty, trustworthiness and professional fitness. The premise of the judge's argument for application of a "moral turpitude" test akin to the test used under R.P.C. 8.4(b) is also flawed, because, while the "moral turpitude" test applied under the now obsolete Code of Professional Responsibility, it is not the standard for determining which offenses constitute professional misconduct under current R.P.C. 8.4(b). As comment 2 to that Rule makes clear, the relevant test is not whether the offense is one of "moral turpitude" but whether it "indicate[s] lack of those characteristics relevant to law practice."[4]

If the supreme court had intended the minor violation exception in Rule 1.1(B) to mirror R.P.C. 8.4(b), it could have done so expressly, by including language in the rule itself or explaining in a comment that "minor" violations are those that do not reflect adversely on the judge's honesty, trustworthiness and professional fitness. But the court did not do so. Indeed, we note that the self-reporting requirement in Rule 1.1(C) expressly refers to the corollary self-reporting requirement for attorneys under C.R.C.P. 251.20. The court was thus aware of the interplay between the rules governing the professional conduct of attorneys and rules governing the conduct of judges when it promulgated Rule 1.1, and we presume that its decision not to analogize the minor violations exception in Rule 1.1(B) to R.P.C. 8.4(b) was intentional. See S.M.A.M.A., 172 P.2d at 960.[5] Moreover, we note that the Standing Committee on the Colorado Rules of Professional Conduct recently proposed an amendment that would have added a comment to R.P.C. 8.4 expressly protecting a lawyer from being disciplined for the personal or medical use of marijuana consistent with Colorado law, but the supreme court did not adopt the

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[4] Comment 2 to R.P.C. 8.4(b) explains that "[m]any 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."

[5] Nor do the cases in the annotation to Rule 1.1 suggest that the minor violations language in Rule 1.1(B) is intended to exempt crimes that do not involve moral turpitude. See, e.g., Sawyer, 594 P.2d 811-12 (part-time teaching job at state funded college); Vandelinde, 366 S.E.2d at 638 (excess campaign contributions). In fact, one specifically held that a judge may be disciplined for behavior that does not affect judicial fitness or the ability to perform judicial duties, and discussed the gravity and seriousness of the judge's conduct in the context of deciding whether it warranted discipline, not in the context of discussing whether it violated the Code. In re Conduct of Roth, 645 P.2d at 1067-70.

proposed comment. We presume that the court likewise would not approve exempting a judge's use of marijuana from discipline under Rule 1.1(A).

We recognize that simple possession of marijuana is a misdemeanor under federal law and that, in some circumstances, marijuana use is an infraction punishable only by a civil penalty. See 18 U.S.C. § 3559(a)(6)-(9); 21 U.S.C. §§ 802(13), (44), 844(a), (c), 844a(a). It is nevertheless a violation of federal criminal law and, in our view, while not necessarily a "serious" offense, it is not a "minor" offense within the meaning of Rule 1.1(B). It is significantly more serious than the parking ticket and dog at large violation referred to in the Committee minutes, and is no less serious than the unlawful conduct of the judges involved in Sawyer and Vandelinde.

Other states have disciplined judges for using and possessing marijuana, concluding that such conduct violates the requirement that judges comply with the law. See, e.g., Matter of Marquardt, 778 P.2d 241, 247-48 (Ariz. 1989); In re Peters, 715 S.E.2d 56, 58 (Ga. 2011); In re Whitaker, 463 So.2d 1291, 1303 (La. 1985); In re Gilbert, 668 N.W.2d 892, 894-95 (Mich. 2003); In re Sherrill, 403 S.E.2d 255, 257 (N.C. 1991); In re Toczydlowski, 853 A.2d 20, 22 (Pa. Ct. Jud. Disc. 2004), overruled on other grounds by In re Murphy, 10 A.3d 932 (Pa. Ct. Jud. Disc. 2010); In re Binkoski, 515 S.E.2d 828 (W. Va. 1999). While marijuana use was illegal under state law when those opinions were issued and the judges' marijuana use was, in many cases, not the only basis for discipline, the requesting judge did not cite and we are not aware of any judicial ethics opinions on this issue from states that have decriminalized the personal use of medicinal or recreational marijuana. Moreover, the difficult issue in those decisions was not whether a judge's illegal marijuana use violates the requirement that judges comply with the law, but whether such a violation warrants discipline. Because we are authorized only to provide state judicial officers with opinions "concerning the compliance of intended, future conduct with the Colorado Code of Judicial Conduct," not regarding whether such conduct is censurable, see CJD 94-01(I)(A), (XI)(A), (XIII)(A), we do not address whether a judge who uses marijuana consistent with Colorado law should be disciplined for violating Rule 1.1(A) of the Code.

Having concluded that a judge's use of marijuana violates Rule 1.1, we need not address whether it also violates the requirement in Rule 1.2 that judges "act at all times in a manner that promotes public confidence in the . . . integrity . . . of the judiciary" and "avoid impropriety and the appearance of impropriety."

FINALIZED AND EFFECTIVE AS MODIFIED this 31st day of July, 2014.