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Via First Class Mail
Ms. Tracie K. Lindeman
Clerk of the Supreme Court
201 South Carson Street,
Carson City, Nevada 89701

RE: ADKT 0495

Dear Ms. Lindeman,

Several months ago, I contacted the Bar with an issue that a lawyer brought to me. I advised the Bar that a client of mine was a lawyer and someone in his family was going through an awfully painful medical matter and the family member would like to try medical marijuana. Though medical marijuana was legal under State law, I recognized that Federal law still regarded marijuana differently. And, since the client was allowed to practice in Federal Court, I thought that this could also be a problem. However, the Bar assured me that it was not a problem especially via the Cole Memorandum of August 29, 2013.[1] Accordingly, I based my advice on that. Obviously, I was also well aware of Rule 8.4(b). However, since the Bar did not seem to be too concerned, neither was I.

Presently, however, there seems to be an issue brought forth by the Board of Governors due to the perceived conflict between Federal and State law and legal ethics per the Proposed Comment to Rule 8.4(b). However, I believe this Comment, while certainly well-intended, should not be effected. This issue came to light in a Supplemental Brief filed by the Board of Governors on April 28, 2015. Specifically, Conclusion Two (p.2) states that the criminal conviction is the issue.[2] However, in actuality, the issue isn't one of a criminal conviction—the issue is fitness as a lawyer. If a simple criminal conviction was the sole guiding principle, the Bar would automatically revoke the license of any lawyer convicted of any crime—be it a DUI or even disturbing the peace for protesting something one believes in. Instead, the criminal act should reflect adversely on the lawyer's honesty, trustworthiness or fitness. Using marijuana legally in the State of Nevada simply does not do so.

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[1] (See https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf)

[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." (emphasis added).

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Assuming a lawyer has a medical marijuana card (and/or is legally allowed by the State of Nevada to possess and consume marijuana—I state this because of the pending vote to allow recreational marijuana use in the State of Nevada), the issue is whether the individual has violated Rule 8.4 at all *simply by violating Federal law*. In an interesting article (that is admittedly somewhat one-sided), Goldstein, Weeding Out Ethical Issues: The Budding Cannabis Industry and Your License To Practice Law, 2016[3], Ms. Goldstein goes through the history of marijuana laws and, specifically, reviews 8.4(b) and its connection to marijuana. She concludes that 8.4 (b) "does not consider violations of criminal law misconduct; only activity that reflects negatively on [the lawyer's] trustworthiness or fitness as a lawyer is deemed misconduct." (Id. at p. 19). In other words, unlike the Board of Governors, she draws a distinction between the actual crime and whether that crime reflects adversely on the lawyer's honesty, trustworthiness or fitness. See, e.g. **Matter of Disciplinary Proceeding Against Curran**, 115 Wn.2d 747, 768, 801 P.2d 962 (1990) (attorney could not be disciplined under RPC 8.4(b) following vehicular homicide, because no nexus existed between that crime and the lawyer's fitness as an attorney). To be sure, Nevada has taken the stance that certain DUI's, fraud, various sexual offenses, and selling drugs have violated 8.4(b). However, each of those cases is a far cry from using or possessing marijuana for medical purposes and/or recreationally especially when such is in line with Nevada law and the Cole Memorandum. Most important, each of those cases is taken individually and reviewed individually. The Court has not set forth a bright line rule that if you do X, you have committed misconduct. The Board of Governors seems to want to instill this line—even though it is worded "merely" as a warning.

The Proposed Comment to 8.4(b) seemingly takes the position that the "criminal violation" itself would be tantamount to something that would reflect negatively on the honesty, trustworthiness or fitness of the lawyer. Granted, the Comment uses the word "may". But, again, the Bar is injecting itself in a controversy where there really isn't one. While it is certainly true that the Cole Memorandum does not change Federal law, it does set forth the type of prosecutions that the US Attorney's Office would engage in. And, based upon same, a person using and/or possessing marijuana in accordance with Nevada law would not be subject to prosecution. Of course, the DOJ interest may change per the political winds. But, so may the laws. The Rules of Professional Conduct should not change simply because a new Administration has entered the White House, or a different political party has gained power. The Rules are there to govern lawyers—they should not be subject to the political landscape. What happens if Federal law changes (even slightly) after this Court rules? Is this Court going to change the Rules again?

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[3] (See http://www.ebglaw.com/content/uploads/2016/04/WEEDING-OUT-ETHICAL-ISSUES-THE-BUDDING-CANNABIS-INDUSTRY-AND-YOUR-LICENSE-TO-PRACTICE-LAW-Epstein-Becker-Green-Robert-D-Reif-Fellowship.pdf)

Though I will suggest that this Court adopt certain language from Colorado (see, below), perhaps it would just be easier to do nothing. Perhaps this Court should stay out of adopting any changes and allow the law to either constrict or broaden. In any event, the Rules governing lawyers should be static and not change via the political winds. For example, after the first draft of this letter was written, the Ninth Circuit held that the Consolidated Appropriations Act of 2016 prohibited the Department of Justice from spending any funds on prosecuting persons engaged marijuana use as long as such is within a State's laws relating to same—See **United States v. McIntosh**, 2016 U.S. App. LEXIS 15029 (9th Cir. Cal. Aug. 16, 2016). If the DOJ cannot prosecute individuals involved in a State's legal marijuana program, then the issue at bar may have resolved itself. Though Congress may ultimately change the law, as of now, at least according to the Ninth Circuit, there is no issue. The point is, things may change each election and each Congressional term. The Rules governing lawyers should stay the same—not change each November.

Interestingly, in 2014, our Supreme Court approved a Comment to Rule 1.2 which allows lawyers to assist clients in setting up marijuana dispensaries and give counsel about same. So, the Court has allowed lawyers to be involved with the setting up of medical marijuana dispensaries but, when it comes to the actual use of marijuana for medical issues, the Bar seems to take a different tack. There is no warning in Rule 1.2 about how marijuana is still illegal under Federal law and how involvement in aiding a distribution setup could violate 8.4(b). It seems that if a lawyer helps a client in any way to set up a dispensary that said lawyer is in violation of Federal law and, subject to Rule 8.4(b).[4] Yet, the Court has given a safe harbor (to 8.4 issues) to commercial lawyers who set the dispensaries up, but has given a warning to lawyers who use or possess medical marijuana. This seems to be a distinction without a difference. In either case, there is a potential violation of Federal law. But, in the case of the user or possessor, at least the latter is being used for medical purposes—not a commercial enterprise.

The Colorado Bar Association, in Colorado Bar Opinion 124, has looked at the matter. Narrowly, the Opinion looks at a lawyer's use of marijuana for medical reasons and Rule 8.4, The Bar concludes that "a lawyer's medical use of marijuana in compliance with Colorado law does not, in and of itself, violate Colo. RPC 8.4(b). Rather, to violate Colo. RPC 8.4(b), there must be additional evidence that the lawyer's conduct adversely implicates the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." (emphasis added). Then, in Formal Opinion 125, the Colorado Bar Association asked for a wholesale change in the ethics laws relating to marijuana amending Rule 8.4 to make clear that an attorney's use of marijuana in accordance

[4] A lawyer aiding and abetting the setup of a dispensary could conceivably be charged with conspiracy. But, seemingly, the Bar does not see this as a problem as it has allowed a "carve out" for these practitioners.

with Colorado law "does not reflect adversely on the lawyer's honesty, trustworthiness or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law". However, the Colorado Supreme Court did not adopt this. Despite that, the Colorado Supreme Court's Office of Attorney Regulation Counsel has advised that:

> "This office's position on personal use by lawyers remains the same: The medical or personal use of marijuana in compliance with state law does not, in and of itself, constitute a criminal act "that reflects adversely on a lawyer's honesty, trustworthiness or fitness in other respects." This office agrees with the Colorado Bar Association's Formal Ethics Opinion 124 that in order to violate Colo. RPC 8.4(b), there must be additional evidence that the lawyer's conduct adversely implicates the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Of course, any attorney who uses marijuana lawfully under state law but violates other rules of professional conduct, such as those rules involving competence, diligence, adequate communication, conflict-free representation, or honesty, will be subject to discipline."

http://www.coloradosupremecourt.com/newsletters/spring2014/Lawyers%20Get%20the%20Green%20Light%20on%20Counseling%20and%20Assisting.htm.(emphasis added). See, also, Washington State Bar Association Advisory Op. 201501 (stating that a lawyer purchasing marijuana does not violate Rule 8.4) http://mcle.mywsba.org/IO/print.aspx?ID=1682. But, see, North Dakota Ethics Committee Op. Mo. 14-02 (stating that North Dakota does not allow any marijuana use and any marijuana use would be a violation of 8.4) https://www.sband.org/UserFiles/files/pdfs/ethics/Opinion%2014-02.pdf.

Adopting the view of Colorado Bar Counsel would be a far better idea than the Proposed Comment. Come this November, marijuana use in Nevada may very well become similar to Colorado. Nevada should defend its lawyers right to use marijuana for medical (and, if legalized in Nevada, recreational) purposes. To be sure, just like alcohol, if one is arrested for DUI with marijuana that may very well violate 8.4. But, the point is, as long as the use or possession is within the bounds of Nevada law, such should not reflect adversely on the lawyer's fitness, honesty or trustworthiness. Nevada lawyers should certainly recognize that tomorrow, next year, or even five years from now, the Federal Government could alter the Cole Memorandum. But, as it stands right now, at the very least, according to Nevada law (*and only with respect to Nevada law*), lawyers should not have to worry about violating Bar Rules when using marijuana in accordance with Nevada law. Imagine the following scenario. Your spouse or child develops a disease like cancer. They are in horrific pain and have extreme nausea. It is well believed that marijuana may help these symptoms. So, as a loving spouse or parent, you do whatever is necessary to help. But, the Comment to Rule 8.4 is in the back of your mind. Is that necessary when you are dealing with life

and death? It is one thing for the Bar to intercede into commercial matters involving lawyers. It is quite another for the Bar to have any input on a father's desire to help his child or a wife wanting to help her husband. Lawyers, of any group of people, know the risks involved in terms of Federal and State law. Lawyers understand the Supremacy clause. So, why place a Comment in our Professional Rules that does nothing **except** keep that license risk in the back of one's mind at what may very well be the most trying time of one's life.

Additionally, the Legislature has spoken regarding this matter and, in effect (although certainly not specifically), uses the "in and of itself" language:

> **NRS 453A.510 Professional licensing board prohibited from taking disciplinary action against licensee on basis of licensee's participation in certain activities in accordance with chapter.** A professional licensing board shall not take any disciplinary action against a person licensed by the board on the basis that:
>
> 1. The person engages in or has engaged in the medical use of marijuana in accordance with the provisions of this chapter; or
>
> 2. The person acts as or has acted as the designated primary caregiver of a person who holds a registry identification card or letter of approval issued to him or her pursuant to paragraph (a) of subsection 1 of NRS 453A.220.

Basically, the Bar cannot take any disciplinary action against an attorney for using or possessing marijuana in and of itself. If the Federal government would convict a Member for such, it seems as if the Bar would be unable to take any disciplinary action since the "violation" would be the use/possession described in NRS 453A.510. So, the Proposed Comment would be in violation of Nevada law.

Whatever one may feel about the use of marijuana, the voters in Nevada have seen fit to allow such use within certain confines. The Rules for lawyers should accept such and at least not deem it a violation of Rule 8.4(b) in and of itself. While undoubtedly, the word "may" indicates that the bar would look at each instance individually, **it also keeps the issue in the minds of those lawyers who, at least for medical purposes, have enough to worry about with the medical issues**. The Colorado Bar accepted this fact with the "in and of itself" language. As long as the use is legal in Nevada and within the confines of the Cole Memorandum, the use should not be "in and of itself" a violation of 8.4. Obviously, if the use interferes with the lawyer's competence, or results in a DUI or some other crime that does impact one's honesty, trustworthiness or fitness, that is quite another story and would be in violation of 8.4.

I have recently read an article in the Las Vegas Sun regarding attorney ownership in Marijuana facilities. Apparently, those attorneys who have ownership in such facilities are concerned with the Proposed Comment. Though I certainly agree with their concerns especially regarding the *post hoc* nature of the change, my concern is not commercial—it is for medical care and, potentially, personal use. For example, a lawyer should not worry about Bar issues when he is a caregiver for his wife or child and, as a result, possesses marijuana. Similarly, a lawyer who has medical issues should be allowed to take whatever medication helps. And, if recreational marijuana is legalized in Nevada, as long as the lawyer is using same in accordance with Nevada law, and, not violating the Cole Memorandum's proscriptions, challenging that attorneys "fitness" based upon same, *in and of itself*, is not proper.

I have also heard the complaint that if personal medical use is allowed, then commercial sales by attorneys must be allowed. This is a false equivalency. Commercial enterprise has always been separated out from personal issues. For example, the First Amendment to the United States Constitution is tempered for commercial speech but is broadened for personal speech. See, e.g., **City of Cincinnati v. Discovery Network, Inc.**, 507 U.S. 410, 430-31 (1993) (striking down a city ordinance that banned commercial, but not noncommercial, news racks to promote the safety and aesthetics of public streets); **Coyote Publ., Inc. v. Miller**, 598 F.3d 592 (9th Cir. Nev. 2010) (allowing restrictions on brothel advertising). The point is, the commercial issues can be considered without any effect upon personal use issues.

I would urge the Court to accept the "in and of itself" language of Colorado. That being said, perhaps the best way of dealing with this rapidly evolving issue is to wait and see how the State law changes over the course of the next several months, and, how (and if) Federal law changes (especially per the **McIntosh**, supra, decision). Our Rules should not change each time something happens to either broaden or restrict State or Federal law. This is an evolving subject which we are better off watching than reacting to at this point.

Very truly yours,

MURDOCK & ASSOCIATES, CHTD.

Robert E. Murdock

REM/vam