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September 1, 2016

Via Federal Express

Tracie K. Lindeman
Clerk of Court
Supreme Court of Nevada
201 South Carson Street
Carson City, NV 89701

FILED

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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

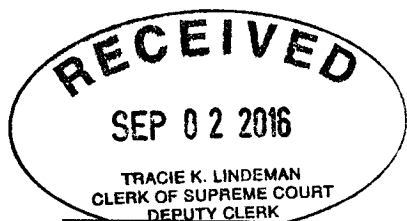
Re: In the Matter of an Amendment to Rule of Professional Conduct 1.2
Regarding Medical Marijuana, ADKT 0495

Dear Ms. Lindeman:

This letter is sent in response to the petition filed by the Board of Governors of the State of Nevada in the above referenced matter. For the following reasons, the undersigned support adoption of the State Bar's proposed comment to Nevada Rule of Professional Conduct ("RPC") 8.4(b).¹

All lawyers admitted to practice law in Nevada must take an oath swearing or affirming to "support the Constitution and government of the United States and of the State of Nevada." SCR 73. As "officers of the court," *In re Discipline of Droz*, 123 Nev. 163, 167, 160 P.3d 881, 884 (2007), lawyers must recognize and uphold the law, *In re Cox*, 874 P.2d 783, 784 (N.M. 1994). No distinction is drawn between state and federal law.

"[T]he public has a right to expect that lawyers will, in general, live as law-abiding citizens." *In re Horwitz*, 881 P.2d 352, 356 (Ariz. 1994). Stated differently, lawyers must "refrain from any illegal conduct" in order to maintain "[t]he integrity of the profession." *Disciplinary Counsel v. Dann*, 979 N.E.2d 1263, 1268 (Ohio 2012) (quotation marks and citation omitted). "Anything short of this lessens public confidence in the legal profession – because obedience to the law exemplifies respect for the law." *Id.*



¹ The proposed comment to RPC 8.4(b) is as follows: "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."

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Federal law makes it unlawful to use, possess, cultivate, sell, or distribute marijuana (a Schedule I controlled substance).² *See generally* 21 U.S.C. §§ 801 *et seq.* Thus, a lawyer who uses, possesses, cultivates, sells, or distributes marijuana violates the oath of office and fails to uphold the law that he or she swore to protect.

The first part of the proposed comment to RPC 8.4(b) reminds Nevada lawyers that use of or involvement with marijuana “may result in federal prosecution.” The United States Department of Justice (DOJ) will not, absent implicating other federal policies, pursue those engaged in the use, possession, cultivation, sale, or distribution of marijuana within the confines of a strict regulatory scheme implemented under state law. *See, e.g.,* Memo from James M. Cole, Deputy Attorney General, to All United States Attorneys (Aug. 29, 2013), *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. That being said, the DOJ’s enforcement policy could change at any time, and if it does, Nevada lawyers could be exposed to severe civil and criminal penalties.³ Those convicted of felony drug crimes could face disbarment. *See* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED STANDARDS FOR IMPOSING LAWYER SANCTIONS 233-34 (2015) (citing cases).⁴ Therefore, just as lawyers have a duty to advise their clients of the risks associated with marijuana, *see* RPC 1.2 cmt. [1], the Nevada Supreme Court should remind Nevada lawyers of the risks that they face if the DOJ subsequently decides to actively enforce the CSA despite conflicting state law.⁵

² On August 11, 2016, the Drug Enforcement Administration (DEA) publicly announced that marijuana will continue to remain a Schedule I controlled substance under the Controlled Substances Act (CSA) “because it does not meet the criteria for currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse.” *See* DEA Public Affairs, *DEA Announces Actions Related to Marijuana and Industrial Hemp* (Aug. 11, 2016), *available at* <https://www.dea.gov/divisions/hq/2016/hq081116.shtml>.

³ The penalties for violating the CSA by manufacturing, distributing, or dispensing marijuana are severe and, in certain instances, include imprisonment for not less than 10 years and a fine of \$10 million. (*See, e.g.,* Congressional Research Service, *Drug Offenses: Maximum Fines & Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws* (Jan. 20, 2015), *available at* <https://www.fas.org/sgp/crs/misc/RL30722.pdf>.) Moreover, persons cultivating, distributing, or selling marijuana may thereby become associated with a Racketeer Influenced and Corrupt Organizations (RICO) enterprise engaging in a pattern of unlawful racketeering activity. *See, e.g.,* 18 U.S.C. § 1961(1)(D) (defining “racketeering activity” to include “the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance . . . punishable under any law of the United States”).

⁴ The Nevada Supreme Court consults the Annotated Standards for Lawyer Sanctions for guidance in assessing the appropriate level of discipline for professional misconduct. *See, e.g., In re Discipline of Serota*, 129 Nev. ___, ___, 309 P.3d 1037, 1039 (2013); *In re Lerner*, 124 Nev. 1232, 1246, 197 P.3d 1067, 1077 (2008).

⁵ The Ninth Circuit U.S. Court of Appeals recently held that the DOJ may not use federal funds appropriated by Congress under the Consolidated and Further Continuing Appropriations Act, 2015 to prosecute federal marijuana offenses if the defendants’ conduct was authorized under and strictly complied with state medical marijuana laws. *See U.S. v. McIntosh*, -- F.3d --, 2016 WL 4363168, at *8-*9 (9th Cir. Aug. 16, 2016).

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The second part of the proposed comment to RPC 8.4(b) cautions Nevada lawyers that use of or involvement with marijuana may “trigger discipline proceedings under SCR 111.” The State Bar has the power to institute disciplinary proceedings against Nevada lawyers who violate federal law.⁶ SCR 101. Because the legal profession is “largely self-governing,” ABA MODEL RULES OF PROF’L CONDUCT, PREAMBLE cmt. [10], it could raise public suspicion if the State Bar turned a blind eye toward those lawyers who choose to involve themselves in the marijuana industry, even if they are permitted to do so under state law. *See, e.g., Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Lyzenga*, 619 N.W.2d 327, 332 (Iowa 2000) (finding that the public “must [] be allowed to have confidence that attorneys who are duty bound to uphold the law will not go outside the law for their own personal gain”).

It is “professional misconduct” for a lawyer to “[c]ommit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” RPC 8.4(b). The fact that a lawyer has not been charged with or convicted of a crime is not a prerequisite to violating RPC 8.4(b). *See* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, at 674 (8th ed. 2015).⁷ A lawyer who violates RPC 8.4(b) is subject to professional discipline. *See* RPC 1.0A(c).

The issue presented is whether a lawyer’s use of or involvement with marijuana in violation of federal law reflects adversely on his or her honesty, trustworthiness or fitness as a lawyer in other respects. ABA MODEL RULES OF PROF’L CONDUCT, R. 8.4 cmt. [2] (“[A] lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law.”)⁸ That analysis is necessarily fact-intensive and “depends on the nature of the act and the circumstances of its commission.” RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 5 cmt. g.⁹

⁶ Notwithstanding NRS 453A.510, the Nevada Supreme Court retains exclusive jurisdiction over the admission of attorneys to practice law in Nevada and disciplinary authority over such attorneys. *See, e.g., In re Nort*, 96 Nev. 85, 89, 605 P.2d 627, 630 (1980); *In re Schaengold*, 83 Nev. 65, 69, 422 P.2d 686, 688 (1976); *see also* SCR 39 (“Authority to admit to practice and to discipline is inherent and exclusive in the courts.”).

⁷ The Nevada Supreme Court consults the Annotated Model Rules for guidance in interpreting and applying the Nevada Rules of Professional Conduct. *See, e.g., Liapis v. Second Jud. Dist. Ct.*, 128 Nev. ___, ___, 282 P.3d 733, 737 (2012); *Palmer v. Pioneer Inn Assocs., Ltd.*, 118 Nev. 943, 949 n.8, 59 P.3d 1237, 1240 n.8 (2002).

⁸ Although the comments to the ABA Model Rules of Professional Conduct were not adopted by the Nevada Supreme Court, they “may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct.” RPC 1.0A. They are also relied upon by the Nevada Supreme Court. *See, e.g., Palmer*, 118 Nev. at 949-50, 59 P.3d at 1241-42.

⁹ The Nevada Supreme Court relies upon the Restatement of The Law Governing Lawyers in addressing the ethical obligations of Nevada lawyers. *See, e.g., NC-DSH, Inc. v. Gardner*, 125 Nev. 647, 656, 218 P.3d 853, 861 (2009); *Leibowitz v. Eighth Jud. Dist. Ct.*, 119 Nev. 523, 531 n.19, 532 n.23, 78 P.3d 515, 520 n.19, 521 n.23 (2003).

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For example, a lawyer who uses marijuana solely for personal or medical purposes may not – without more – violate RPC 8.4(b). *See, e.g.*, Supreme Court of Ohio, Bd. of Prof'l Conduct, Op. No. 2016-6 (2016); Conn. Bar Ass'n, Informal Op. No. 14-08 (2014); Colo. Bar Ass'n Comm., Formal Op. No. 124 (2012).¹⁰ So long as such use does not adversely impact the lawyer's ability to comply with the RPC in representing a client, it is unlikely that the lawyer has committed an act that calls into serious question his or her ability to practice law.¹¹

By contrast, a lawyer who cultivates, sells, or distributes marijuana for pecuniary gain through an ownership interest in a marijuana cultivation facility or dispensary may violate RPC 8.4(b) given the ongoing nature of his or her activity. *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT, R. 8.4 cmt. [2] (“A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”); *see also In re Musto*, 704 A.2d 6, 10 (N.J. 1997) (“An attorney who breaks criminal laws relating to controlled dangerous substances commits ethical infractions that demonstrate a disrespect for the law, denigrate the entire profession, and destroy public confidence in the practicing bar.”); Supreme Court of Ohio, Bd. of Prof'l Conduct, Op. No. 2016-6 (2016) (indicating that multiple violations of federal law run afoul of Rule 8.4(b)). Such a lawyer may risk the loss of his or her license to practice law if he or she seeks to profit from the marijuana industry.¹²

¹⁰ The Nevada Supreme Court consults state bar ethics opinions for guidance in interpreting and applying the Nevada Rules of Professional Conduct. *See, e.g., Marquis & Aurbach v. Eighth. Jud. Dist. Ct.*, 122 Nev. 1147, 1159, 146 P.3d 1130, 1138 (2006).

¹¹ The Colorado Supreme Court rejected a proposed amendment to its version of RPC 8.4(b) stating that medical or personal use of marijuana does not violate the rule solely because such use may violate federal law. (*See* ABA, Section of Labor & Employment Law, Ethics & Prof'l Resp. Comm., *Lawyers & Marijuana: If it's Legal, Can it be Ethical?*, available at http://www.mosessinger.com/site/files/lawyers_marijuana_copy1.pdf.)

¹² The Nevada State Gaming Control Board has publicly advised gaming licensees that investing or being involved with marijuana cultivation facilities and dispensaries “would tend to reflect discredit upon gaming in the State of Nevada.” (*See* Memo from Terry Johnson, Esq., Board Member, to All Gaming Licensees & Applicants (May 6, 2014), available at <http://gaming.nv.gov/modules/showdocument.aspx?documentid=8874>.) Accordingly, a gaming licensee has a choice—e.g., he or she may own an interest in a gaming establishment, or a marijuana cultivation facility or dispensary, but not both.

Similarly, the Ninth Circuit U.S. Court of Appeals recently held that a person who possesses a Nevada medical marijuana registry card may be denied the right to purchase a firearm. *See generally Rowan v. Lynch*, -- F.3d --, 2016 WL 4537376, at *10 (9th Cir. Aug. 31, 2016) (finding that “Wilson does not have a constitutionally protected liberty interest in simultaneously holding a registry card and purchasing a firearm”).

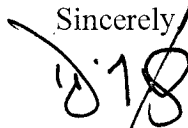
Finally, the DEA has notified Massachusetts healthcare providers that their federal licenses to prescribe, administer, and dispense controlled substances may be revoked if they invest in or become involved with marijuana cultivation facilities and dispensaries. (*See* Kay Lazar & Shelley Murphy, *DEA Targets Doctors Linked to Medical Marijuana*, THE BOSTON GLOBE, June 6, 2014, available at <https://www.bostonglobe.com/metro/2014/06/05/drug-enforcement-administration-targets-doctors-associated-with-medical-marijuana-dispensaries-physicians-say/PHSp0zRlaxXwnDazsohIOL/story.html>.)

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In sum, use, possession, cultivation, sale, or distribution of marijuana by a Nevada lawyer may violate RPC 8.4(b) and, depending on the circumstances, constitute grounds for professional discipline, up to and including disbarment. The proposed comment to RPC 8.4(b) is appropriate and should be adopted.

Thank you for your consideration of the above comments. Dennis L. Kennedy intends to appear and participate at the hearing scheduled for September 9, 2016, at 3:00 p.m., in Carson City, Nevada.

Sincerely,

A handwritten signature in black ink, appearing to be "D.L.K.", written over a horizontal line.

John R. Bailey
Dennis L. Kennedy
Joshua P. Gilmore

DLK\slr