IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF AN AMMENDMENT TO RULE OF PROFESSIONAL CONDUCT 8.4(b) REGARDING MEDICAL MARIJUANA.

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CLERK OF SUPREME COURT
BY S. Young
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PUBLIC COMMENT IN OPPOSITION TO AMENDMENT OF RULE OF PROFESSIONAL CONDUCT 8.4(b) REGARDING MEDICAL MARIJUANA

NATURE OF PROCEEDING: On May 27, 2016, this Court issued its *Order Scheduling Public Hearing and Requesting Public Comment* setting a public hearing and inviting written comment from the bench, bar and public regarding the recommendation by the State Bar of Nevada that it adopt a comment to Nevada Rule of Professional Conduct 8.4(b) that would read:

> [1] 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.

Based upon the following memorandum, Dominic P. Gentile Esq., and John L. Arrascada Esq., on behalf of Joseph S. Gilbert, State Bar No. 9033 hereby file this public comment in opposition to the Petition.

Dated: September 2, 2016

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16-27446

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I. PROCEDURAL HISTORY

The Nevada Constitution was amended in 2000 to include Article 4, Section 38, which directed the Nevada Legislature to lawfully permit the use of medical marijuana and authorize "appropriate methods for supply of the plant to patients authorized to use it." As mandated by this initiative based constitutional amendment, the Nevada legislature passed Senate Bill 374 in 2013 regulating medical marijuana establishments as codified in Chapter 453A of the Nevada Revised Statutes ("NRS"). This has prompted the adoption of numerous city and county codes and ordinances furthering the lawful regulation of medical marijuana as envisioned by the Nevada voters and legislature.

Notwithstanding the addition of Article 4, Section 38 and subsequent legislation authorizing the use of medical marijuana in Nevada, federal law under the Controlled Substances Act (21 U.S.C. §801 *et sec.*) ("CSA") currently classifies marijuana as a schedule I drug and prohibits its use, possession, manufacture or distribution for any purpose. Penalties for violation of CSA vary from a federal misdemeanor with no time served to a federal felony with a life sentence depending upon the amount and quantity and whether one is using, possessing, manufacturing or distributing. *See* 21 U.S.C. §§ 841, 842, 843.

The discrepancy between state and federal law put attorneys in an ethical quandary with regard to representing clients in the medical marijuana industry because Nevada Rule of Professional Conduct (RPC) 1.2 prohibits attorneys from advising clients to commit a crime, but makes no distinction between state and federal law. The ethical uncertainty presented by this disparity between state and federal law was not adequately addressed in RPC 1.2, or by any other rule in the Nevada RPC, leaving attorneys unable to ethically advise clients on the scope and contours of the Nevada laws authorizing the use, production, and sale of medical marijuana. To resolve this dilemma, on May 7, 2014, this Court entered an order adopting comment [1] to RPC 1.2, providing:

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

This Court's adoption of comment [1] to Nevada RPC 1.2 provides an avenue through which attorneys can ethically advise clients regarding medical marijuana so long as state medical marijuana laws are strictly complied with, even though such advice may itself be a violation of federal law.

This Court now considers whether attorney conduct with regard to use, possession, manufacture and distribution of medical marijuana violates Nevada RPC 8.4(b) even if such conduct strictly complies with state law. The language of proposed comment [1] 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.

II. ETHICS RULES

a. Nevada Ethics Rules

i. Comment [1] to Rules of Professional Conduct 1.2

This Court adopted Comment [1] to RPC 1.2 in response to the Board of Governors' petition to amend the rule. The Board of Governors supported this rule in order to facilitate the competent and ethical representation of clients seeking guidance under state medical marijuana laws despite conflicting federal law. Under comment [1] to RPC 1.2 attorneys are insulated from State Bar disciplinary action for representing clients engaged in medical marijuana related conduct so long as attorneys advise clients in a manner that complies with state law and counsel clients on conflicting federal law—even though such advice may be a violation of federal law. *See* 21 U.S.C. § 801 *et. seq.; but see* August 29, 2013 Cole memo; 21 U.S.C. § 708 [903]; CFCAA § 538.

ii. Rules of Professional Conduct 8.4(b)

Nevada RPC 8.4(b) can be violated only by a "criminal act that reflects adversely the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Assessing professional misconduct under RPC 8.4(b) presents a two-part test requiring: (1) a criminal act; (2) that reflects adversely on an attorney's ability to practice law. Nevada, along with 24 other states, the District of Columbia and Guam now have laws authorizing the use, possession, distribution and cultivation of marijuana under comprehensive legislative schemes. While such conduct is nevertheless a criminal act under federal law due to marijuana's current classification as a schedule I substance under the CSA, federal enforcement policy has left broad discretion to the states in implementing their own legislative scheme providing immunity from state prosecution for marijuana related conduct that complies with state law. *See generally, United States Government Accountability Office Report to Congressional Requesters on State Marijuana Legalization* (December 2015); *see also August 29, 2013 Cole memo.*

Moreover, the Department of Justice (DOJ) has released several memoranda announcing its enforcement priorities and the Consolidated and Further Continuing Appropriations Act (CFCAA) § 538 previously restricted the use of funding by the DOJ to interfere with state medical marijuana programs indicating the federal government's informal endorsement of states exercising their rights to enforce criminal penalties according to their own legislative schemes despite the federal CSA. On December 18, 2015, Congress enacted a new appropriations act, which appropriates funds through the fiscal year ending September 30, 2016, and includes essentially the same rider in § 542. See *United States v. McIntosh,* ___ F.3d ___, 2016 WL 4363168 (9th Cir.)(August 16, 2016). Therefore, although use, possession, cultivation and distribution of marijuana may still be a textual violation of federal law, current federal

enforcement policies demonstrate a patent diminished desire to prosecute individuals in full compliance with state medical marijuana laws.

Assuming for purposes of this public hearing that the United States Department of Justice rescinds the Ogden and Cole Memos and Congress once again allows DOJ to spend appropriations on prosecution of those involved in what is lawful conduct under Nevada constitutional mandate and legislative enactments, attorney conduct related to the federal crime, when examined under RPC 8.4(b), in itself does not reflect adversely on that attorney's honesty, trustworthiness or fitness to practice law in Nevada. This is particularly true in light of the overwhelming acceptance of the legitimacy and efficacy of marijuana in the Nevada culture by the same Nevada electorate that determines who shall be its executive, judicial and legislative officers. *See* David C. Leege, Kenneth D. Wald, Brian S. Krueger, Paul D. Mueller, *The Politics of Cultural Differences: Social Change and Voter Mobilization Strategies in the Post-New Deal Period.* http://users.clas.ufl.edu/kenwald/pos6292/pcd.pdf. Ronald Inglehart and Christian Welzel, *Modernization, Cultural Change and Democracy: the Human Development Sequence*. http://isites.harvard.edu/fs/docs/icb.topic96263.files/culture_democracy.pdf. That the powerful tools of referendum, initiative and recall reflect the attitude and culture of Nevada is irrefutable. See, William A. Galston and E.J. Dionne, Jr. *The New Politics of Marijuana Legislation: Why Opinion is Changing.* Governance Studies at Brookings Institute (May 29, 2013); Partnership at Drugfree.org, *Marijuana, It's Legal, Now What? A Dialogue About America's Changing Attitudes, Laws and What This Means for Families. July 16, 2013. http://www.drugfree.org/wp-content/uploads/2013/07/Marijuana-Attitudes-Survey-Summary-Report.pdf.*

Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers. *Leis v. Flynt*, 439 U.S. 438, 442,

99 S. Ct. 698, 700–01, 58 L. Ed. 2d 717, 11 O.O.3d 302 (1979). See *Paciulan v. George,* 229 F. 3d 1226, 1229 (9th Cir. 2000). The State Bar of Nevada is under the exclusive jurisdiction and control of the Supreme Court. *Compare* Nev. Const. art. 6, § 21 (constitutional referendum creating Judicial Discipline Commission) *with* NRS 7.275 (statute continuing state bar as a public corporation under the exclusive jurisdiction and control of the supreme court) and SCR 99 and 103 (Supreme Court Rule creating state bar disciplinary boards and hearing panels within the "exclusive disciplinary jurisdiction of the supreme court"). The State Bar disciplinary panels have no authority to suspend or disbar attorneys; they merely *recommend* such discipline to this court, which retains the ultimate power to impose any appropriate sanction. *Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 874, 900, 878 P.2d 913, 929-30, 1994 WL 389177 (1994) (Springer, J. *concurring*). The only constraints on the states' exclusive jurisdiction are constitutional in nature: a person may not be excluded from the practice of law in a manner or for reasons which contravene the Fourteenth Amendment, nor can the state court impose qualifications which lack "a rational connection with the applicant's fitness or capacity to practice law." *Brown v. Bd. of Bar Examiners of State of Nev.*, 623 F.2d 605, 609 (9th Cir. 1980) (*citing Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957).

All Nevada lawyers – which includes its judges and justices – must uphold the laws of the United States of America as well as those of the State of Nevada. However, in creating and interpreting its ethical rules and meting out discipline of the members of its bar, the Supreme Court of the State of Nevada is free to recognize that the will of its citizenry as expressed at the ballot box is a loud expression of their values and the culture of this State. The Colorado State Bar did exactly that in Formal Opinion 124 which concluded there is no nexus between attorney use, possession and cultivation of marijuana for medicinal or recreational purposes and that attorney's honesty, trustworthiness or fitness to practice law. Similarly, the Washington Committee on Professional Ethics in Advisory Opinion 201501 determined that attorney use, possession, cultivation or distribution of marijuana does not reflect adversely on an attorney's honesty, trustworthiness or fitness to practice law. In fact, none of the 25 states, District of

Columbia, Guam or Puerto Rico with medical marijuana laws have indicated that an attorney's medical marijuana related conduct reflects adversely on that attorney's honesty, trustworthiness or fitness to practice law.

In doing so, these jurisdictions follow the well-established duty of common law courts to reflect contemporary social values and ethics. As Justice Cardozo wrote in his celebrated essay 'The Growth of the Law' chapter V, pages 136—137: 'A rule which in its origin was the creation of the courts themselves, and was supposed in the making to express the Mores of the day, may be abrogated by courts when the Mores have so changed that perpetration of the rule would do violence to the social conscience. . . . This is not usurpation. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.' *Green v. Superior Court*, 10 Cal. 3d 616, 640, 517 P.2d 1168, 1184, 111 Cal. Rptr. 704, 720 (1974) (*en banc*).

iii. Rules of Professional Conduct 1.8

Neither the Nevada RPC nor the American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC) forbid an attorney from representing a client in exchange for an equity interest in a client's business so long as the requirements in RPC 1.8 are adhered to. Due to the cost-prohibitive nature of starting a medical marijuana establishment in Nevada, many clients may find this a favorable method for compensating attorneys. Puzzlingly, an attorney compensated in such a manner may then be insulated from State Bar disciplinary proceedings by comment [1] to Nevada RPC 1.2, yet may be subject to discipline under proposed comment [1] to Nevada RPC 8.4(b). Thus, adoption of proposed comment [1] to Nevada RPC 8.4(b) would create an unnecessary inconsistency in the application of State Bar disciplinary action. Moreover, the Committee on Professional Ethics in Washington concluded in their Advisory Opinion that it would be improper to subject an attorney to discipline for owning an interest in a client's medical marijuana business under current federal enforcement policies so long as the attorney's conduct

conforms to state law and does not violate RPC 1.8 or any of the eight federal enforcement priorities.

iv.Nevada Supreme Court Rule 111

Nevada Supreme Court Rule (SCR) 111 creates a duty to inform the State Bar counsel of any criminal conviction other than misdemeanor traffic violations not involving the use of alcohol or a controlled substance. Under SCR 111 an attorney must report such criminal convictions to State Bar counsel within 30 days.

For a criminal conviction to be referred to the disciplinary board it must meet the definition of a serious crime, defined in SCR 111 as:

> (1) a felony and (2) any crime less than a felony a necessary element of which is, as determined by the statutory or common-law definition of the crime, improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file an income tax return, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

There is no distinction in SCR 111 between federal and state convictions and there is no exception in SCR 111 for situations where state and federal law conflict. The proposed comment [1] to RPC 8.4(b) does nothing to provide clarity or guidance on how the State Bar intends to treat attorney conduct that results in a federal marijuana criminal conviction despite such conduct strictly conforming to state law. Any federal conviction for a marijuana related criminal charge would fit squarely within the duty to inform State Bar counsel under SCR 111. Thus, the addition of proposed comment to RPC 8.4(b) is superfluous, as SCR 111 already makes it clear that attorneys are obligated to report a federal criminal conviction involving a schedule I substance.

To further complicate matters, a federal prosecutor might argue that an attorney providing legal advice to a client that is cultivating or distributing medical marijuana is an aider and abettor or a co-conspirator under federal law and could face felony criminal charges (a "serious crime" under SCR 111), even if the attorney counsels the client in a manner that strictly complies with

state law. Recognizing the divergence between state and federal law on this issue, this Court adopted comment [1] to RPC 1.2 insulating attorneys from disciplinary proceedings in order to facilitate the legal representation of individuals involved in the medical marijuana business.

According to Comment [1] to Nevada RPC 1.2, attorneys may counsel a client regarding the validity, scope, and meaning of state and local law and may assist a client in conduct that the lawyer reasonably believes is permitted by state and local law. However, Nevada RPC 8.4(b) subjects an attorney to discipline for criminal acts that reflect adversely on an attorney's honesty, trustworthiness or fitness to practice law. Proposed comment [1] to Nevada RPC 8.4(b) makes no distinction between an attorney's personal use, possession or distribution of medical marijuana and actions taken by an attorney that facilitate or further another's use, possession or distribution of medical marijuana. So despite the insulation the State Bar intended to provide attorneys from discipline under Nevada RPC 1.2, Nevada RPC 8.4(b) provides another avenue through which attorneys may be subject to discipline for representing clients in the marijuana industry and the proposed comment makes the prospect of such discipline even less clear.

b. NEVADA REVISED STATUTE 453A.510

Under NRS 453A.510, a professional licensing board is prohibited from taking disciplinary actions against a licensee in the medical marijuana industry so long as licensee is in compliance with state law. The statute specifically provides as follows:

> **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

Thus, disciplinary action taken against an attorney may violate NRS 453A.510 if such disciplinary action is taken against an attorney in strict compliance with NRS Chapter 453A.

c. AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT RULE 8.4(b) COMMENT [4]

The American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC) rule 8.4 comment [4] states that:

> 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.

Accordingly, an attorney may violate RPC 8.4 under a good faith belief that no valid obligation exists. Given that 25 states, Puerto Rico, Guam and the District of Columbia all have medical marijuana laws on the books; the DOJ has issued a memorandum enumerating its enforcement priorities and none of which include enforcing CSA for medical use of marijuana in compliance with state law; and the CFCAA curtailed the DOJ's use of funding to limit states from implementing their own medical marijuana laws, attorneys have a strong argument for a good faith belief that no valid obligation exists with regard to an attorney's personal use, possession, distribution or cultivation of medical marijuana in compliance with state law.

III. ETHICS OPINIONS

a. NEVADA STANDING COMMITTEE RECOMMENDATIONS

On February 27, 2014, the Nevada Standing Committee on Ethics and Professional Responsibility (standing committee) made recommendations to the Board of Governors for Amendment and Addition to the Nevada RPC relating to medicinal use of marijuana. The standing committee made two recommendations: (1) an amendment to Rule 1.2(d) insulating attorneys from State bar disciplinary proceedings for advising clients participating in the medical marijuana industry so long as such advice complies with state law and counsels on conflicting federal laws;

and (2) the suggested addition of RPC 8.6 which stipulates that an attorney shall not be subject to discipline for conduct that is permitted by state law, even though it may be a violation of federal law. The Board of Governors took the advice of the standing committee with regard to the adoption of comment [1] to Nevada RPC 1.2; however, the recommended rule 8.6 was never petitioned before this Court to be added to the Nevada RPC.

b. COLORADO FORMAL OPINION

On April 23, 2012, the Colorado Bar Association adopted formal opinion 124, which addresses attorney's personal use, possession and cultivation of marijuana for medical purposes. The Colorado Ethics Committee concluded that an attorney's violation of federal criminal law prohibiting cultivation, use and possession of medical marijuana is not a violation of Colorado RPC 8.4(b) so long as such cultivation, use and possession comply with state laws and such use would not be a violation of attorney competency under Colorado RPC 1.1. In other words, the Colorado Ethics Committee found no nexus between the violation of federal criminal marijuana laws under current federal enforcement policies and the lawyer's honesty, trustworthiness or fitness to practice law when state law is adhered to and attorney competency is not effected under Colorado RPC 1.1.

On December 10, 2012, the Colorado Bar Association adopted an addendum to formal opinion 124 after Colorado passed Amendment 64 to the Colorado Constitution allowing for the recreational use, possession and distribution of marijuana. This addendum concluded in the same manner as formal opinion 124 that an attorney's use, possession and cultivation of marijuana for recreational purposes does not reflect adversely on an attorney's honesty, trustworthiness, or fitness to practice law as long as such conduct comports with state law and does not interfere with attorney competency under Colorado RPC 1.1.

c. KING COUNTY ETHICS ADVISORY OPINION

On October 4, 2013, the King County Bar Association in Colorado in its Ethics Advisory Opinion on I-502 and Rules of Professional Conduct also found no nexus between an attorney's ownership interest in or employment by a marijuana dispensary in compliance with Colorado law and attorney characteristics relevant to legal practice under Colorado RPC 8.4(b), i.e. honesty, trustworthiness, and fitness to practice law.

d. WASHINGTON ADVISORY OPINION

In 2015, Washington State Bar Association Committee on Professional Ethics (committee) released Advisory Opinion 201501, dealing with several aspects of attorney ethics in relation to state marijuana laws and conflicting federal law. This advisory opinion deals specifically with attorneys owning an interest in a medical marijuana business. In the committee's opinion, two situations of attorney ownership in a marijuana business are addressed: (1) Attorney ownership in a marijuana business that is separate and apart from the lawyer's practice of law; and (2) Attorney ownership in a marijuana business with one of the attorney's clients.

Under the first scenario, attorneys owning a marijuana business separate and apart from the practice of law, the Washington committee found that it would be inappropriate to interpret rule 8.4(b) as prohibiting such activities given the nature of federal enforcement policy and current state law allowing for such ownership. In other words, the committee found that ownership in a marijuana business in compliance with state law did not reflect adversely on an attorney's honesty, trustworthiness or fitness to practice law despite conflicting federal law.

In the second scenario, the Washington committee concluded that attorney ownership in a marijuana business with a client would not reflect adversely on an attorney's honesty, trustworthiness or fitness to practice law despite conflicting federal law, but the attorney's ownership would have to comply with Washington RPC 1.8(a). Under Washington RPC 1.8(a), attorneys are permitted to transact business with clients and or acquire pecuniary interests adverse

to clients' interests so long as certain requirements are met. *See Washington RPC 1.8(a).* Thus, in both situations the Washington committee concluded that attorney ownership of a marijuana business in compliance with state law does not involve moral turpitude, does not reflect disregard for the rule of law, does not reflect adversely on fitness to practice law, and is not a violation of the lawyer's oath of office provided that other Washington RPC rules implicated are complied with and federal enforcement policy does not change in a manner that would render such conduct unethical.

The Washington committee also weighed in on attorney ethics with regard to the purchase and use of marijuana and government lawyers implementing state marijuana laws allowing for the purchase of marijuana. The Washington committee concluded that the purchase and use of marijuana and the implementation of state marijuana laws are not a violation of Washington RPC 8.4(b) in that such conduct does not reflect adversely on attorney's honesty, trustworthiness or fitness to practice law so long as such purchase and use of marijuana does not render the attorney incompetent under Washington RPC 1.1.

IV. ETHICS REGULATIONS ON OTHER PROFESSIONS

Some states have prohibited or at least placed restrictions on certain professions participating in state medical marijuana businesses. Colorado, for example, under Colorado Revised Statute (C.R.S.) §12-43.3-307, limits eligibility to apply for a Medical Marijuana Business License for licensed physicians making patient recommendations, a sheriff, deputy sheriff, police officer, prosecuting officer or employees of state or local licensing authority. This regulatory scheme deals with the potential conflicts of interest for members of professions that could deceitfully stand to make a profit based upon their positions in society. C.R.S. §12-43.3-307 is in no way indicative of the state's ethical concerns for technical violations of federal law under current federal enforcement policies.

Other states have also shown concern for physicians both owning an interest in medical marijuana establishments and recommending the use of medical marijuana. California, for example, under Article 5 §2525(a) of Senate Bill 643, prohibits physicians who recommend cannabis to a patient for a medical purpose from accepting, soliciting, or offering any form of remuneration from or to a medical marijuana facility when the physician has a financial interest that facility. Again, however, these regulations are aimed to prevent deceitful financial gain from abuse of authority and not meant to address any ethical concerns for the dichotomy between state and federal marijuana laws.

V. FEDERAL LAW AND ENFORCEMENT

a. DEPARTMENT OF JUSTICE MEMORANDA

Under the CSA, marijuana is classified as a schedule I drug and its use, possession, manufacture and distribution is prohibited under federal law. However, the U.S. Department of Justice (DOJ) has issued three different memorandums setting forth the DOJ enforcement priorities providing guidance to states that have exercised their rights to determine state enforcement of the CSA by passing legislation providing immunity from state prosecution for marijuana related activities. The October 19, 2009 Ogden memorandum, and the June 29, 2011 and August 29, 2013 Cole memorandums culminated in the DOJ's eight federal marijuana enforcement priorities.

The eight priorities enumerated by the DOJ in the August 29, 2013 Cole memorandum are as follows:

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.

Conduct that strictly conforms to state medical marijuana laws in Nevada would not violate any of the aforesaid DOJ enforcement priorities. Any violation of the eight enumerated enforcement priorities in the Cole memorandum would not only be a violation of federal law and subject to federal enforcement, but it would also be a violation of state law and such violation could be punished criminally under both state and federal law. Moreover, an attorney in violation of any of the eight enforcement priorities would not have protection under state law and would therefore be unassailably subject to State Bar disciplinary action. However, the federal government may still bring charges against an attorney for conduct that lay outside the scope of the enumerated enforcement priorities in the Cole memorandum even if that conduct is in complete compliance with state law. *See 21 U.S.C. §801 et sec.; August 29, 2013 Cole memo; but see CFAA §538 (prohibits use of funding to DOJ for enforcement interfering with state medical marijuana laws).* Proposed comment [1] to Nevada RPC 8.4(b) provides no guidance for situations in which an attorney strictly complies with state law, but nevertheless violates federal law under the CSA without violating the eight enforcement priorities.

b. CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT

On December 17, 2014, congress enacted the Consolidated and Further Continuing Appropriations Act (CFCAA). Under CFAA §538, congress stipulated that none of the funds made available in this Act to the Department of Justice (DOJ) may be used to prevent any state in the United States from implementing state laws that authorize the use, distribution, possession, or cultivation of medical marijuana. The enactment of §538 within the CFCAA to limit DOJ use of funds evidences the federal government's recognition of the existence of beneficial medicinal

applications of marijuana. On December 18, 2015, Congress enacted a new appropriations act, which appropriates funds through the fiscal year ending September 30, 2016, and includes essentially the same rider in § 542. See United States v. McIntosh, ___ F.3d ___, 2016 WL 4363168 (9th Cir.)(August 16, 2016). Moreover, the limitation of funding directly corresponds with the eight enforcement priorities enumerated in the August 29, 2013 Cole memorandum, further illustrating the federal government's stance on medical marijuana and indirectly demonstrating Congressional endorsement of states' exercising their rights to enact legislation limiting the enforcement of marijuana under CSA.

VI. CONCLUSIONS AND RECOMMENDED ACTION.

1. We recommend that the Court reject proposed comment [1] to RPC 8.4(b). Attorneys should not be subject to discipline for use, possession, cultivation or distribution of marijuana so long as attorney conduct strictly complies with state law; does not violate any of the 8 enforcement priorities enumerated in the Cole Memo; and does not impact attorney competency with regard to RPC 1.1; or violate RPC 1.8 with regard to attorney ownership of a marijuana business and representing that same business as a client.

2. We recommend the adoption of ABA model rule comment [4] to RPC 8.4 to the Nevada RPC. Comment [4] to ABA MRPC 8.4 provides that a lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The addition of this comment would provide some measure of protection from State Bar disciplinary action for attorneys ethically involved in the marijuana industry that strictly comply with state law and federal enforcement priorities.

3. We recommend the adoption of the Nevada Ethics Committee's recommended addition of RPC 8.6 made to the State Bar Board of Governors. Nevada RPC 8.6 would read as follows: "A lawyer shall not be in violation of these rules or subject to discipline for engaging in conduct, or for counseling or assisting a client to engage in conduct, that by virtue of a specific provision of Nevada state law and implementing regulations is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone,

may violate federal law."

4. We conclude that the Nevada State Bar Board of Governors' stated purpose for adopting comment [1] to RPC 1.2 mentioned in the Board of Governors supplemental brief to RPC 1.2, "to facilitate competent, ethical representation of clients" is not furthered by proposed comment [1] to RPC 8.4(b). Not only does proposed comment [1] to RPC 8.4(b) not further the purpose for adopting comment [1] to RPC 1.2, but it compromises its effect because no distinction is made between an attorney's personal use, possession or distribution of medical marijuana and attorney's assistance in conduct that furthers such activity.

5. We also conclude that proposed comment [1] to Nevada RPC 8.4(b) does not accomplish the State Bar Board of Governors' purpose for the proposed comment: "to provide attorney participants in the medical marijuana industry with clearer guidance." Proposed comment [1] to RPC 8.4(b) does not provide any measure of clarity beyond which is already ascertainable under SCR 111. The proposed comment does not give any guidance for how attorney conduct in complete compliance with state law and not in violation of any of the eight enumerated enforcement priorities will be treated.

DATED: September 2, 2016

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