

# 124

## A Lawyer's Medical Use of Marijuana

Adopted April 23, 2012, Addendum December 10, 2012

### *Introduction*

The CBA Ethics Committee (Committee) has been asked to opine whether a lawyer who, under Colorado law, may cultivate, possess, and use small amounts of marijuana solely to treat a debilitating medical condition may do so without violating the Colorado Rules of Professional Conduct (Colorado Rules, Rule, or Colo. RPC). The Committee first summarizes the relevant federal law criminalizing possession and use of marijuana. Next, the Committee summarizes Colorado law applicable to the medical use of marijuana. The Committee then identifies ethics rules and case law that frame its analysis of when a lawyer's medical use of marijuana may violate the Colorado Rules.

The Committee has tried to analyze the ethics issues without being drawn into the public debate about the value or efficacy of medical marijuana. There are strong opinions for and against the medical use of marijuana. The conflict between federal and state law is just one example.

The Committee recognizes that the public discourse about the use of marijuana, even medical marijuana, frequently considers the issue of impairment. Use and misuse of marijuana—or, for that matter, any other psychoactive substance, including alcohol, prescription medications, and certain over-the-counter drugs—even when permitted by law, can affect a lawyer's reasoning, judgment, memory, or other aspects of the lawyer's physical or mental abilities. A lawyer's medical use of marijuana, like the use of any other psychoactive substance, raises legitimate concerns about a lawyer's professional competence and ability to comply with obligations imposed by the ethics rules. Consequently, this opinion includes a discussion of the Colorado Rules and relevant ethics opinions addressing lawyer impairment.

Our conclusion is limited to the narrow issue of whether personal use of marijuana by a lawyer/patient violates Colo. RPC 8.4(b). This opinion does not address whether a lawyer violates Rule 8.4(b) by counseling or assisting clients in legal matters related to the cultivation, possession, or use by third parties of medical marijuana under Colorado law.

## ***Syllabus***

Federal law treats the cultivation, possession, and use of marijuana for any purpose, even a medical one, as a crime. Although Colorado law also treats the cultivation, possession, and use of marijuana as a crime, it nevertheless permits individuals to cultivate, possess, and use small amounts of marijuana for the treatment of certain debilitating medical conditions. Cultivation, possession, and use of marijuana solely for medical purposes under Colorado law, however, does not guarantee an individual's protection from prosecution under federal law. Consequently, an individual permitted to use marijuana for medical purposes under Colorado law may be subject to arrest and prosecution for violating federal law.

This opinion 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).<sup>1</sup> 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.

A lawyer's use of medical marijuana in compliance with Colorado law may implicate additional Rules, including Colo. RPC 1.1, 1.16(a)(2), and 8.3(a). Colo. RPC 1.1 is violated where a lawyer's use of medical marijuana impairs the lawyer's ability to provide competent representation. If a lawyer's use of medical marijuana materially impairs the lawyer's ability to represent the client, Rule 1.16(a)(2) requires the lawyer to withdraw from the representation. If another lawyer knows that a lawyer's use of medical marijuana has resulted in a Colo. RPC violation that raises a substantial question as to the using lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, then the other lawyer may have a duty under Colo. RPC 8.3(a) to report those violations to the appropriate disciplinary authority.

## ***Analysis***

### **A. Federal Law**

The federal government regulates marijuana possession and use through the Controlled Substances Act, 21 USC § 811 (CSA). The CSA classifies "marihuana" as a Schedule I controlled substance. 21 USC § 812(b). Federal law prohibits physicians from dispensing a Schedule I controlled substance, including marijuana, by prescription. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (no medical necessity exception to CSA prohibition of marijuana). The CSA makes it a crime, among other things, to possess and use marijuana even for medical reasons. *Id.*; 21 USC §§ 841 to 864. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the U.S. Supreme Court recognized the authority of the federal government to prohibit marijuana for all purposes, even medical ones, despite valid state laws authorizing the medical use of marijuana.<sup>2</sup>

## *B. Colorado Law*

The Colorado Uniform Controlled Substances Act of 1992 (UCSA) substantially mirrors the federal CSA. See CRS §§ 18-18-101 to -605. Colorado's UCSA, like the federal CSA, treats marijuana as a "controlled substance." See CRS § 18-18-102(5). Like federal law, Colorado law criminalizes the possession and use of marijuana. See CRS § 18-18-406.

Unlike federal law, however, the Colorado Constitution provides that a "patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition." Colo. Const. art. XVIII, § 14(4)(a). An individual must obtain "written documentation" from a physician stating that he or she has been diagnosed with a debilitating medical condition that might benefit from the medical use of marijuana. *Id.* at § 14(3)(b)(I). A "debilitating medical condition" is defined as:

- (I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;

- (II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or

- (III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.

*Id.* at § 14(1)(a).

"Medical use" is defined as:

- The acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians. . . .

*Id.* at § 14(1)(b).

The Colorado statutes codify the medical use exemption for marijuana in the Constitution. A Colorado patient is exempted from application of Colorado law criminalizing cultivation, possession, and use of marijuana if the individual can establish that the cultivation, possession, or use was solely for medical purposes as permitted by Colorado law. See CRS § 12-43.3-102(b).

### C. Colo. RPC

Colo. RPC 1.1 requires lawyers to represent their clients using “the legal knowledge, skill, thoroughness and preparation reasonably necessary” for the task.

Colo. RPC 1.16 prohibits a lawyer from representing a client where the lawyer’s “physical or mental condition materially impairs the lawyer’s ability” to do so.

Colo. RPC 8.4(b) 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[.]” Colo. RPC 8.4(b) sets out a two-part test. First, there must be evidence of a criminal act. Second, the evidence must establish that the criminal act reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects. *See, e.g., People v. Andersen*, 58 P.3d 537, 541 (Colo. OPDJ 2000) (stating in *dictum* that not all convictions of the criminal laws necessarily justify the conclusion that Colo. RPC 8.4(b) has also been violated).

### D. Misconduct

All lawyers admitted to practice law in Colorado take an oath that they will support the U.S. and Colorado Constitutions. They also swear to faithfully and diligently adhere to the Colo. RPC at all times. Unfortunately, the Colo. RPC do not provide lawyers with clear guidance on proper ethical conduct when federal and Colorado laws conflict as they do in the unique circumstance regarding an individual’s medical use of marijuana.

The Supremacy Clause of the U.S. Constitution unambiguously provides that if there is any conflict between federal and state law, federal law prevails. *Gonzales v. Raich*, 545 U.S. 29. Consequently, even if a lawyer is permitted to cultivate, possess, and use small amounts of marijuana under Colorado law solely for medical use, such medical use may nevertheless constitute a violation of federal criminal law.

The Committee concludes, however, that a Colorado lawyer’s violation of federal criminal law prohibiting the cultivation, possession, and use of marijuana where the lawyer’s cultivation, possession, or use is for a medical purpose permitted under Colorado law does not necessarily violate Colo. RPC 8.4(b). The Committee reads Colo. RPC 8.4(b) as requiring a nexus between the violation of law and the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects. *See People v. Hook*, 91 P.3d 1070, 1073-74 (Colo. OPDJ 2004) (the fact that a lawyer may have committed the felony of illegal discharge of a firearm does not by itself determine the professional discipline he should receive); *People v. Senn*, 824 P.2d 822, 825 (Colo. 1992) (linking a lawyer’s discharge of a firearm directly over his wife’s head during an argument to a “critical failure of judgment” and “a contempt for the law which was at odds with [his] duty to uphold the law”).

Colorado has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. No controlling judicial authority has yet held that Colorado law permitting medical use of marijuana for persons suffering from debilitating conditions is unconstitutional, preempted, void, or otherwise invalid. Consequently, even if a lawyer's cultivation, possession, or use of medical marijuana to treat a properly diagnosed debilitating medical condition under Colorado law may constitute a federal crime, the Committee does not see a nexus between the lawyer's conduct and his or her "honesty" or "trustworthiness," within the meaning of Colo. RPC 8.4(b), provided that the lawyer complies with the requirements of Colorado law permitting and regulating his or her medical use of marijuana. The Committee also does not see a nexus between the lawyer's conduct and his or her "fitness as a lawyer in other respects," provided that (a) again, the lawyer complies with the requirements of Colorado law permitting his or her medical use of marijuana, and (b) in addition, the lawyer satisfies his or her obligation under Colo. RPC 1.1 to provide competent representation. *E.g., Iowa Sup. Ct. v. Marcucci*, 543 N.W.2d 879, 882 (Iowa 1996) ("The term 'fitness' as used in [Rule 8.4(b)] . . . embraces more than legal competence.").

Although not directly on point, cases addressing parenting time, where medical use of marijuana is an issue, similarly prohibit restrictions on parenting time simply because a parent is permitted to use and uses medical marijuana pursuant to state law. *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo.App. 2010) (before parenting time could be restricted, requiring evidence that use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested a risk of harm).

#### E. Impairment

Colo. RPC 1.16's prohibition against representing a client when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" reflects the position that allowing lawyers who do not possess the requisite capacity to make professional judgments and/or follow the standards of ethical conduct harms clients, undermines the integrity of the legal system, and denigrates the legal profession.

Under the Rules, not every debilitating medical condition, treatment regimen, use of medicine, or combination of these factors, will result in mental impairment adversely affecting a lawyer's professional behavior. To violate Rule 1.16, the condition and/or treatment must "materially impair[]" the lawyer's ability to represent a client. *See* Colo. RPC 1.16(a)(2). *See also* American Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 03-429, "Obligations With Respect to Mentally Impaired Lawyer in the Firm" (2003). In that circumstance, a lawyer must not undertake or continue representation of a client.

Every lawyer has a personal responsibility to ensure that the lawyer's physical condition or the substances the lawyer ingests or consumes do not adversely affect the lawyer's ability to follow the ethics rules. Impaired and unimpaired lawyers alike are required, among other things, to act competently. Colo. RPC 1.1. If a lawyer cannot do that because of a substantial impairment, Colo. RPC 1.16(a)(2) requires the lawyer to withdraw from the representation and take "reasonably practical" steps to protect the client's interests. Colo. RPC 1.6(d). As for the lawyer, there are sources of assistance to help deal with the impairment.<sup>3</sup>

Unfortunately, some lawyers will be unaware of, or will deny, the fact that their ability to represent clients is materially impaired. They may be unwilling or unable to take appropriate action to decline representation or withdraw. *See* ABA Formal Op. 03-429 at 3. When the materially impaired lawyer is unable or unwilling to deal with the consequences of that impairment, the firm's partners and the impaired lawyer's supervisors have obligations under Colo. RPC 5.1(a) and (b) to take reasonable steps to ensure that the impaired lawyer complies with the ethics rules.<sup>4</sup>

If the firm's lawyers believe they have prevented the impaired lawyer from substantially violating any ethical rules while the impaired lawyer was practicing in the firm, the firm's lawyers have no duty to report the lawyer's condition to the authorities. *See* ABA Formal Op. 03-429 at 4-5. However, if the firm's lawyers believe that the impaired lawyer has violated the ethical rules in a way that raises a substantial question about the lawyer's fitness to practice law, they are required to report the lawyer's condition to the appropriate disciplinary authority. *See* ABA Formal Op. 03-429 at 5; Colo. RPC 8.3(a).

Colo. RPC 8.3(a) addresses the more general obligation of any lawyer with knowledge that another lawyer's conduct has violated the ethics rules. The rule requires a lawyer to report another lawyer to "the appropriate professional authority" when the lawyer "knows" that the other lawyer's violation of the ethics rules raises a "substantial question as to that [other] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." A lawyer outside the firm who is aware of another lawyer's impairment and who knows that another lawyer has violated the ethical rules in a manner that raises a "substantial question" regarding the lawyer's "honesty, trustworthiness, or fitness as a lawyer" has a duty to report the violation to the appropriate authority. Only those violations that raise a "substantial question" as to the lawyer's ability to represent clients, however, must be reported.

"Substantial" refers to the seriousness of the offense, not to the amount of evidence of which the lawyer is aware. Colo. RPC 8.3, cmt. [3]. An impaired lawyer's failure to refuse or terminate representation of clients ordinarily raises a "substantial question" about the lawyer's fitness as a lawyer. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 03-431 "Lawyer's Duty to Report Another Lawyer Who May Suffer From Disability or Impairment" n.6 (2003).

“Knows” refers to actual knowledge, which may be inferred from circumstances. Colo. RPC 1.0(f). The reporting lawyer may know of the impaired lawyer’s misconduct through first-hand observation or through a third party. *See* ABA Formal Op. 03-431 at n.12. The “actual knowledge” standard can be difficult to apply. On one hand, knowledge that a lawyer uses medical marijuana or drinks heavily, for instance, does not necessarily reflect knowledge that the lawyer is impaired in his or her ability to represent clients. *See* ABA Formal Op. 03-431 at 3. On the other hand, behavior such as frequently missing court deadlines, failing to make requisite filings, failing to perform tasks agreed to be performed, or failing to address issues that would be raised by competent counsel may supply the requisite knowledge that another lawyer is impaired. *Id.* at 2. In determining whether a lawyer “knows” of another lawyer’s impairment that has caused a violation of the ethics rules, the lawyer with the potential reporting obligation is not expected to be able to identify impairment with the precision of a medical professional. *Id.* at n.10.

Before deciding whether to report the other lawyer to the appropriate disciplinary authority under Colo. RPC 8.3, a lawyer may consider raising the issue with the impaired lawyer or the impaired lawyer’s firm, or may consider reporting the affected lawyer’s impairment to an approved lawyer’s assistance program. If the lawyer speaks with the seemingly impaired lawyer, that lawyer may be able to explain the circumstances giving rise to the other lawyer’s conclusion regarding impairment. However, the impaired lawyer’s denial or explanation may not remove the need to report if the first lawyer continues to conclude that the other lawyer has violated the Rules in a manner that raises a substantial question regarding the other lawyer’s fitness to represent clients. ABA Formal Op. 03-431 at text following n.13.

If, after analysis of the appropriate Colo. RPC, a lawyer feels compelled to report a substantially impaired lawyer to the appropriate disciplinary authority, he or she should consider the ethics issues surrounding client confidentiality. *Id.* at n.16. If information relating to the representation will be disclosed, the reporting lawyer should consider whether there is a need to get the client’s permission to disclose this information. *See* Colo. RPC 1.6. *See also* ABA Formal Ops. 03-429 and 03-431.

The Committee cannot speak to how the Colorado Supreme Court Office of Attorney Regulation Counsel or other disciplinary authorities may regard the lawful use of medicinal marijuana by attorneys under either the Colorado Rules or other disciplinary rules. *See* CRCP 251.5(b) (grounds for discipline).

*Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions.*

## Notes

1. Under Colo. RPC 8.4(b), 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.”

2. As of October 2011, sixteen states and the District of Columbia allowed the use of medical marijuana. “U.S. Attorneys in California Set Crackdown on Marijuana,” *New York Times* A-9 (Oct. 8, 2011); “Echoes of Prohibition in Nation’s Pot Policies,” *The Denver Post* 9-B (Oct. 8, 2011).

3. The Colorado Lawyer Assistance Program (COLAP) provides “[i]mmediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their ability to practice.” CRCP 254(2)(a).

4. Colo. RPC 5.1(a) and (b) describe the obligation of managerial and supervisory attorneys to ensure ethical conduct within the firms they manage and by the lawyers they supervise. Lawyers with managerial authority have an affirmative obligation to make reason-able efforts to establish internal policies and procedures designed to give reasonable assurance that all lawyers in the firm, not just impaired lawyers, fulfill the requirements of the Rules. Supervisory lawyers are obliged to make reasonable efforts to ensure that the conduct of the lawyers they supervise conforms with the Rules. <sup>11</sup>

Addendum: On December 10, 2012, subsequent to the adoption of Opinion 124, Amendment 64 to the Colorado Constitution took effect. That Amendment, COLO. CONST. art. XVIII, §16, permits the use of marijuana for non-medicinal, or recreational purposes, subject to the parameters of the Amendment and implementing legislation and regulations. The conclusions stated in this Opinion, and the underlying analysis, apply equally to a lawyer’s use of marijuana for medicinal and recreational purposes.