The Supreme Court of Ohio

BOARD OF PROFESSIONAL CONDUCT

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Ethical Implications for Lawyers under Ohio's Medical Marijuana Law

SYLLABUS: A lawyer may not advise a client to engage in conduct that violates federal law, or assist in such conduct, even if the conduct is authorized by state law. A lawyer cannot provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact business with a person or entity engaged in a medical marijuana enterprise. A lawyer may provide advice as to the legality and consequences of a client's proposed conduct under state and federal law and explain the validity, scope, meaning, and application of the law.

A lawyer's personal use of medical marijuana pursuant to a state regulated prescription, ownership in, or employment by a medical marijuana enterprise, subjects the lawyer to possible federal prosecution, and may adversely reflect on a lawyer's honesty, trustworthiness, and overall fitness to practice law.

QUESTIONS: Several lawyers seek guidance concerning Ohio Sub. H.B. 523, effective September 8, 2016, that permits the cultivation, processing, sale, and use of medical marijuana under a state licensing and regulatory framework. This opinion addresses three questions:

> 1) Whether an Ohio lawyer may ethically counsel, advise, provide legal services to, and represent state regulated medical marijuana cultivators, processors, and dispensaries, as well as business clients seeking to transact with regulated entities;

2) Whether an Ohio lawyer may operate, hold employment or an ownership interest in, a licensed medical marijuana enterprise; and

3) Whether an Ohio lawyer may ethically use medical marijuana with a prescription.

APPLICABLE RULES: Prof.Cond.R. 1.2(d), 8.4(b), 8.4(h).

OPINION: Ohio Sub. H.B. 523 permits a patient, upon the recommendation of a physician, to use medical marijuana to treat a qualifying medical condition. Three state regulatory agencies are permitted to issue licenses to persons and entities for the purposes of cultivating, processing, testing, dispensing, and prescribing medical marijuana. The law provides that a registered patient or caregiver is not subject to arrest or criminal prosecution for using, obtaining, possessing, or administering marijuana and establishes an affirmative defense to a criminal charge to the possession of marijuana. The law immunizes professional license holders, including lawyers, from any professional disciplinary action for engaging in professional or occupational activities related to medical marijuana. Notwithstanding this provision, this advisory opinion analyzes the questions presented in light of rules promulgated by the Supreme Court pursuant to Oh. Const. Art. IV, Section 2(B)(1)(g).[1]

On and after September 8, 2016, a direct conflict will exist between Ohio law and federal law. The federal Controlled Substances Act ("CSA") currently designates marijuana as a Schedule I controlled substance which makes its use for any purpose, including medical applications, a crime. 21 USC §§ 812(b)(1), 841(a)(1). Additionally, under the CSA, it is illegal to manufacture, distribute, or dispense a controlled substance, including marijuana (21 USC § 841(a)(1)), or conspire to do so (21 USC § 846). Consequently, any Ohio citizen engaged in cultivating, processing, prescribing, or use of medical marijuana is in violation of federal law.

In 2013, the U.S. Department of Justice ("USDOJ") issued a memorandum stating its general policy not to interfere with the medical use of marijuana pursuant to state laws, provided the state tightly regulates and controls the medical marijuana market. Memorandum from James M. Cole, Deputy Attorney General, to All United States

[1] "The supreme court shall have original jurisdiction in * * * [a]dmission to the practice of law, the discipline of persons so admitted, and all other matters related to the practice of law."

Attorneys, Guidance Regarding Marijuana Enforcement (August 29, 2013) ("Cole Memorandum").[2] The Cole Memorandum does not override federal law enacted by Congress or grant immunity to individuals or businesses from federal prosecution.

The conflict between the Ohio and federal marijuana laws complicates the application of the Rules of Professional Conduct for Ohio lawyers. While Ohio law permits certain conduct by its citizens and grants immunity from prosecution for certain state crimes for the cultivation, processing, sale, and use of medical marijuana, the same conduct constitutes a federal crime, despite instructions to U.S. attorneys from the current administration to not vigorously enforce the law and therefore implicates Prof.Cond.R. 1.2 for lawyers with clients seeking to engage in activities permissible under state law.[3]

ANALYSIS:

Advice and Legal Services Provided to Clients Engaged in Conduct as a State Regulated Marijuana Enterprise

A lawyer cannot assist a client who engages or seeks to engage in conduct the lawyer knows to be illegal. Prof.Cond.R. 1.2(d). Nor can a lawyer recommend to a client the means by which an illegal act may be committed. Prof.Cond.R. 1.2(d), cmt. [9]. Prof.Cond.R. 1.2(d) embodies a lawyer's important role in promoting compliance with the law by providing legal advice and assistance in structuring clients' conduct in accordance with the law. The rule underscores an essential role of lawyers in preventing clients from engaging in conduct that is criminal in nature or when the legality of the proposed conduct is unclear. N.Y. Op. 1024 (2014).

Prof.Cond.R. 1.2(d) does not distinguish between illegal client conduct that will, or will not, be enforced by the federal government. The first inquiry of a lawyer is whether the legal services to be provided can be construed as assisting the client in conduct that is a violation of either state or federal law. If the answer is in the affirmative

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[2] http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

[3] Federal laws ordinarily preempt inconsistent state laws under the federal Supremacy Clause. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court rejected a claim that Congress exceeded its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal use of marijuana for medical purposes. Additionally, the federal government always may enforce its own criminal statutes. "Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized." *United States v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013).

under either law, Prof.Cond.R. 1.2(d) precludes the lawyer from providing those legal services to the client.[4]

Under Prof.Cond.R. 1.2(d), a lawyer cannot deliver legal services to assist a client in the establishment and operation of a state regulated marijuana enterprise that is illegal under federal law. The types of legal services that cannot be provided under the rule include, but are not limited to, the completion and filing of marijuana license applications, negotiations with regulated individuals and businesses, representation of clients before state regulatory boards responsible for the regulation of medical marijuana, the drafting and negotiating of contracts with vendors for resources or supplies, the drafting of lease agreements for property to be used in the cultivation, processing, or sale of medical marijuana, commercial paper, tax, zoning, corporate entity formation, and statutory agent services. *See also,* Colo. Op. 125 (2013). Similarly, a lawyer cannot represent a property owner, lessor, supplier or business in transactions with a marijuana regulated entity, if the lawyer knows the transferred property, facilities, goods or supplies will be used to engage in conduct that is illegal under federal law. Even though the completion of any of these services or transactions may be permissible under Ohio law, and a lawyer's assistance can facilitate their completion, the lawyer ultimately would be assisting the client in engaging in conduct that the lawyer knows to be illegal under federal law.

However, Prof.Cond.R. 1.2(d) does not foreclose certain advice and counsel to a client seeking to participate in the Ohio medical marijuana industry. Prof.Cond.R. 1.2(d) also provides:

> A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

This portion of the rule permits a lawyer to explain to the client the conflict that currently exists between state and federal law, the consequences of engaging in conduct that is permissible under Ohio law but contrary to federal law, and the likelihood of federal enforcement given the policies of the current administration. A lawyer may counsel and advise a client regarding the scope and general requirements of the Ohio medical

[4] Jurisdictions in accord with this view include Connecticut (Conn. Op. 2013-02); Hawaii (Haw. Op. 49 (2015)); Maine (Me. Op. 199 (2010)); and Colorado (Colo. Op. 125 (2014)).

marijuana law, the meaning of its provisions, and how the law would be applied to a client's proposed conduct. A lawyer also can advise a client concerning good faith arguments regarding the validity of the federal or state law and its application to the client's proposed conduct.

In addition to the permissible range of advice permitted under Prof.Cond.R. 1.2(d), the rule does not preclude a lawyer from representing a client charged with violating the state medical marijuana law, representing a professional license holder before state licensing boards, representing an employee in a wrongful discharge action due to medical marijuana use, or aiding a government client in the implementation and administration of the state's regulated licensing program. With regard to the latter, lawyers assisting a government client at the state or local level in the establishment, operation, or implementation of the state medical marijuana regulatory system are not advising or assisting the client in conduct that directly violates federal law. The state or a local government is not directly involved in the sale, processing, or dispensing of medical marijuana prohibited by federal law, even though it is arguably enabling the conduct through the issuance of licenses and the maintenance of its regulatory system.

For these reasons, the Board concludes that a lawyer violates Prof.Cond.R. 1.2(d) when he or she transitions from advising a client regarding the consequences of conduct under federal and state law to counseling or assisting the client to engage in conduct the lawyer knows is prohibited under federal law. Colo. Op. 125 (2013). Unless and until federal law is amended to authorize the use, production, and distribution of medical marijuana, a lawyer only may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law and explain the scope and application of state and federal law to the client's proposed conduct. However, the lawyer cannot provide the types of legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact with medical marijuana businesses. To document compliance with his or her ethical obligations, a lawyer approached by a prospective client seeking to engage in activities permitted by Ohio Sub. H.B. 523 should enter into a written fee agreement with the client that encompasses a mutual understanding about the exact scope of services the lawyer is ethically and lawfully able to provide under Prof.Cond.R. 1.2(d).

The Board is mindful that the current state of the law creates a unique conflict for Ohio lawyers and deprives certain clients of the ability to obtain a full range of legal services in furtherance of activities deemed lawful by the General Assembly. The

Supreme Court may amend the Rules of Professional Conduct to address this conflict. Several jurisdictions have reached similar conclusions to those contained in this opinion and have amended, or are considering amending Rule 1.2 or the comments to that rule. These states include Illinois, Alaska, Colorado, Nevada, Oregon, Washington, and Hawaii.

A Lawyer's Personal Use of Medical Marijuana and Participation in a Medical Marijuana Enterprise

Under current federal law, an Ohio lawyer's use of medical marijuana, even obtained through a state regulated prescription, constitutes an illegal act and subjects a lawyer to possible prosecution under federal law. Such activity may implicate Prof.Cond.R. 8.4(b) (commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness) and Prof.Cond.R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law).

Whether the illegal act "reflects adversely on the lawyer's honesty or trustworthiness" under Prof.Cond.R. 8.4(b) only can be determined on a case-by-case basis. A lawyer is "answerable to the entire criminal law," but is only "professionally answerable" to those offenses that demonstrate a lack of honesty or trustworthiness. Prof.Cond.R. 8.4(b), cmt. [2]. For example, a single violation of the CSA by a lawyer using medical marijuana would not, by itself, demonstrate the requisite lack of honesty or trustworthiness to constitute a violation of Prof.Cond.R. 8.4(b). Other misconduct related to the illegal act, such as lying to federal investigators or obtaining a prescription for medical marijuana for purposes of resale or providing it to a minor, would need to be present to trigger a violation of Prof.Cond.R. 8.4(b). A nexus must be established between the commission of an illegal act and the lawyer's lack of honesty or trustworthiness. Colo. Adv. Op. 124 (2012). Similarly, multiple violations of federal law would likely constitute "a pattern of repeated offenses" indicating an "indifference to legal obligations" and constitute a violation of the rule. Prof.Cond.R. 8.4(b), cmt. [3]. *See Stark County Bar Ass'n v. Zimmer*, 135 Ohio St.3d 462, 2013-Ohio-1962 (respondent's multiple driving infractions constituted a violation of Prof.Cond.R. 8.4(b)).

Personal conduct involving medical marijuana that does not implicate a specific Rule of Professional Conduct may give rise to a standalone violation of Prof.Cond.R. 8.4(h). In these cases, a violation is found when there is clear and convincing evidence that the lawyer has engaged in misconduct that adversely reflects on the lawyer's fitness

to practice law. *Disciplinary Counsel v. Bowling*, 2010-Ohio-5040 (magistrate charged, but not convicted, for marijuana possession under state law violated Prof.Cond.R. 8.4(h)).

Similar to the issue of personal marijuana use, a lawyer's personal ownership or other participation in an Ohio medical marijuana enterprise violates federal law. Consequently, under circumstances similar to those previously discussed in relation to personal marijuana use, a lawyer's ownership of a medical marijuana enterprise may implicate Prof.Cond.R. 8.4(b), Prof.Cond.R. 8.4(h), or both. Likewise, participating in a medical marijuana enterprise as an employee or personally investing or lending money to a medical marijuana enterprise, subjects the lawyer to the same criminal and professional liabilities as having an ownership interest in a medical marijuana enterprise.

CONCLUSION: Federal law currently prohibits the sale, cultivation, processing, or use of marijuana, for any purpose. Prof.Cond.R. 1.2 prohibits a lawyer from counseling or assisting a client to engage in conduct the lawyer knows is illegal under any law. The rule does not contain an exception if the federally prohibited conduct is legal under state law. However, a lawyer may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law, explain the scope and application of the law to the client's conduct, but a lawyer cannot provide the legal services necessary to establish and operate a medical marijuana enterprise or transact with a medical marijuana business. A lawyer seeking to use medical marijuana or participate in a regulated business under Ohio law is in technical violation of federal law. A lawyer's personal violation of federal law, under certain circumstances, may adversely reflect on a lawyer's honesty, trustworthiness, and fitness to practice law in violation of Prof.Cond.R. 8.4(b) or 8.4(h).

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.