June 27, 2016

INQUIRY NO. 2016-017

I am a member of the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility (the "Committee") and, in that capacity, have been requested to respond to your June 21, 2016 inquiry to Victoria White, PBA Ethics Counsel. You asked "whether an attorney may participate in a Medical Marijuana Organization as a principal or financial backer" without violating the Rules of Professional Conduct (RPCs). Presumably, the Medical Marijuana Organization would be established and would operate in compliance with the newly enacted Pennsylvania Medical Marijuana Act (the "Act") referenced in your inquiry.

Last year, this Committee and the Philadelphia Bar Association Professional Guidance Committee issued Joint Formal Opinion 2015-100, entitled "Providing Advice to Marijuana Related Businesses" (Opinion 2015-100) Opinion 2015-100 addressed whether lawyers could provide advice or assistance to clients engaged in the production or distribution of marijuana for medical and recreational purposes in compliance with applicable state laws authorizing such activity, to the extent that such activities violated the Federal Control Substances Act ("CSA"). Opinion 2015-100 concluded that counseling or assisting a client in conduct which, while authorized under state law, violated the Federal CSA, would violate RPC 1.2(d) which provides, in pertinent part, that "A lawyer shall not counsel a client to engage, or assist a client in, conduct that the lawyer knows is criminal". As noted in your inquiry, the Disciplinary Board of the Pennsylvania Supreme Court has recently proposed an amendment to RPC 1.2 which would, in practical effect, permit lawyers to counsel and assist clients engaged in activities authorized under the Pennsylvania Medical Marijuana Act.

In this case, however, the lawyer's proposed activity apparently would not involve counseling, assisting, or otherwise representing a client engaged in activities authorized under the Pennsylvania Medical Marijuana Act, but rather the lawyer would become directly involved in, or provide financial backing to, a Medical Marijuana Organization. Therefore, RPC 1.2(d) is not applicable to this inquiry. However, several provisions of the RPCs are applicable to the conduct of lawyers outside the realm of the practice of law. The provision that would be most likely to apply here is RPC 8.4(b), which 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".

The Committee does not provide opinions or advice on matters of substantive law. Therefore, the Committee expresses no opinion on whether either becoming a principal in or providing financial backing to a Medical Marijuana Organization would violate the Federal CSA. However, even if such conduct did violate the CSA, it would not be the sort of criminal offense

that "reflects adversely on [a] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" within the meaning of RPC 8.4(b).

Comment [2] to RPC 8.4 provides helpful guidance as to the kinds of criminal activities that do and do not fall within the scope of RPC 8.4(b):

> [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

In this case, the proposed activity would all be in compliance with, and specifically authorized under, existing state law. There is nothing inherently "dishonest" or "untrustworthy" about carrying on such state-sanctioned activities, and they cannot otherwise be considered to "indicate [a] lack of those characteristics relevant to law practice" as discussed in Comment [2]. Therefore, participation in a Medical Marijuana Organization authorized under the Pennsylvania Medical Marijuana Act, either as a principal or as a financial backer, would not violate the Pennsylvania Rules of Professional Conduct.

Finally, I would emphasize that this opinion assumes that the lawyer who intends to participate in a Medical Marijuana Organization, whether as a principal or otherwise as a financial backer, will not also represent or provide legal advice to that entity. Such representation would give rise to the issues under RPC 1.2(d) that are addressed in Formal Opinion 2015-100, discussed above. Further, acquiring an ownership interest in or lending funds to a client requires strict compliance with the provisions of RPC 1.8(a), as well as an objective evaluation of whether such a pecuniary stake in the client would give rise to a "personal interest" conflict of interest under RPC 1.7(a)(2).

Please let me know if you have any questions or would like to discuss this matter at greater length.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.