THE ETHICS OF MARIJUANA

by

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Delaware may join several other states which have legalized the use of marijuana for medicinal or even recreational use. In addition to those states which have "legalized" marijuana, many other jurisdictions have de-criminalized the possession of marijuana—at least on the state or local level.

That is precisely the problem facing attorneys (and other professionals and license-holders). While states and local jurisdictions have legalized or de-criminalized the possession of marijuana, the federal government has not. Under federal law, marijuana is still classified as a Schedule I controlled substance, making it illegal to manufacture, distribute or dispense a controlled substance even for medicinal purposes. The current administration has expressed considerable hostility toward this trend. What liability might an attorney face for possession of marijuana which is state-legal but still constitutes a federal crime? In addition to liability for possession, what is the potential liability of an attorney who provides legal services to a client involved in a state-legal marijuana-related industry?

Delaware Professional Conduct Rule 8.4(b) makes it professional misconduct for a lawyer to commit a criminal act that reflects adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. While Comment [2] to the Rule notes that, "Traditionally, the distinction was drawn in terms of offenses involving 'moral turpitude.' That concept can be construed to include offenses involving some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is 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 the legal obligation.

However, while not all misdemeanors may not constitute a violation of Rule 8.4, any felony charge or conviction is likely to be viewed as a violation. In fact, Rule 16(k) of the Rules of Disciplinary Procedure requires any lawyer subject to the disciplinary jurisdiction of the Court who is charged with or convicted of a felony, whether within or outside this state, to report the charge or conviction to the Office of Disciplinary Counsel. It should further be noted that Rule 16 deals with the interim suspension procedure, and any felony charge against an attorney is likely to receive at least a request for an interim suspension by ODC. Disciplinary sanctions for Rule 8.4 violations do not require a conviction. Felony charges resolved by plea bargain, reduction to misdemeanors, or probation before judgment are still disciplined on the facts rather than the disposition. *In re Enna*, 971 A.2d 110 (Del. 2009).

As a result, a Delaware attorney charged with a marijuana-related felony could receive an interim suspension for conduct that does not violate Delaware law, even if that charge does not result in a felony conviction. Similar concerns can arise when an attorney advises a client in connection with the legal state possession, cultivation or sale of marijuana since such activities are illegal under federal law.

Attorneys face the possibility of being federally charged with assisting or conspiring with clients to violate federal law in the course of giving a client legal advice and services under state law. Such federal prosecutions were unlikely before the 2016 change of administration. The U.S. Department of Justice issued a memorandum in 2013 stating that it would not interfere with

the medicinal use of marijuana pursuant to state law.

However, the federal government has expressed its displeasure at state legalization by leaning on banks to deny loans and accounts. Marijuana-related businesses have also been denied trademark and copyright protections. There is precedent for a federal attempt to regulate the practice of law on a state level. In 1998, federal legislation provided for a jail term of up to one year for anyone who "for a fee, knowingly and willingly counsels or assists an individual to dispose of assets...to become eligible for [Medicaid]." That statute was struck when the New York State Bar Association brought suit against then-Attorney General Janet Reno. The Court concluded that the statute violated the First Amendment rights of attorneys and would have a chilling effect on lawyers counseling seniors. The ABA described the statute as a "gag rule" criminalizing advice about asset transfers that are legal, creating a conflict of interest for lawyers. *New York State Bar Assoc. v. Reno*, 999 F.Supp. 710 (N.D.N.Y. 1998).

A number of states have addressed the potential for attorney liability in connection with representing marijuana-related individuals and entities. The Ohio Board on Professional Conduct issued Opinion 2016-6 stating that it would be a violation of the Professional Conduct Rules to assist a client in conduct the lawyer knows to be illegal. However, the Ohio Supreme Court immediately responded by amending its Rule 1.2 to provide that a lawyer may counsel or assist a client in conduct expressly permitted under Ohio's medical marijuana law. Alaska, Colorado, Hawaii, Illinois, Nevada, Oregon and Washington have or are pending similar amendments or adding comments to the Rule which specify that violating federal law as a result of lawful legal services in a state does not give rise to a disciplinary violation.

Other states have issued ethics advisory opinions stating that a lawyer may ethically represent a client in respect to a medical marijuana enterprise. Not surprisingly, Colorado, a

pioneer in legalization, issued Ethics Op. 124 (2012) which concluded that the use of medicinal cannabis pursuant to Colorado law does not necessarily violate Rule 8.4(b) notwithstanding the fact that it may constitute a federal crime. *See also* Opinion 2015-1 of the Bar Association of San Francisco.

However, there are states that are holdouts. The North Dakota State Bar Association Ethics Commission concluded that a lawyer who uses medical marijuana commits a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness even if the lawyer has a valid prescription to use the drug and does so in a state that permits the use of medicinal marijuana because that conduct is still prohibited in North Dakota and under federal law. Opinion 14-02 (8/12/14).

Unless there is an amendment to Delaware Professional Conduct Rule 1.2 or 8.4 or a Comment added to those rules or some other guidance issues, Delaware attorneys should exercise a reasonable degree of caution before indulging in any state-permitted recreational or medicinal use of marijuana or in providing legal services to clients in connection with the marijuana industry.

* "Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association. Additional information about the author is available at www.delawgroup.com.

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