

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey



OPINION 744

Lawyers May Use Regulated Cannabis, and Operate or Invest In a Regulated Cannabis Business; No Violation of RPC 8.4(b)

The Advisory Committee on Professional Ethics received an inquiry about whether New Jersey lawyers may, consistent with the Rules of Professional Conduct, use regulated cannabis. In addition, the Secretary received attorney ethics research assistance hotline calls from New Jersey lawyers who inquire about the application of the Rules if they were to operate or invest in regulated cannabis businesses. As explained below, the Committee determines that the Rules of Professional Conduct do not forbid lawyers from engaging in such conduct. While the conduct remains technically illegal under federal law, it does not, as a general matter, violate Rule of Professional Conduct 8.4(b) (prohibiting lawyers from

committing “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”).

In 2010, New Jersey enacted a law permitting production and use of cannabis for medical purposes when the cannabis is prescribed for patients diagnosed with defined medical conditions. N.J.S.A. 24:6I-1 et seq. Pursuant to the Act, entities may apply to the State for permits to operate as alternative treatment centers and produce and distribute medical marijuana to qualified patients. N.J.S.A. 24:6I-7. The law was designed “to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes.” N.J.S.A. 24:6I-2(e).

On February 22, 2021, the Governor signed the New Jersey Cannabis Regulatory, Enforcement, Assistance and Marketplace Modernization Act, P.L. 2021, c. 16, which legalizes cannabis for recreational use, subject to comprehensive regulation. This Act created the Cannabis Regulatory Commission to oversee the development, regulation, and enforcement activities associated with the personal use of cannabis. N.J.S.A. 24:6I-24(a)(2). Dispensaries for the purchase of regulated cannabis opened for business on April 21, 2022.

While New Jersey has legalized production, sale, and use of cannabis, the federal government maintains its categorization of cannabis as a controlled dangerous substance that is illegal to produce, sell, or use. In 2009 and again in 2013, however, the United States Department of Justice issued guidance to federal prosecutors in states that enacted laws authorizing the use of cannabis. The Department stated that, as a matter of allocating prosecutorial resources, federal law enforcement should focus on significant traffickers of illegal drugs and not on individuals who act in compliance with State law regulating cannabis. The federal guidance instructed prosecutors to focus on money-laundering, sales to minors, and sales outside the state regulatory system.

This federal guidance was rescinded by the Department of Justice on January 4, 2018, though the federal position on enforcement appears to remain unchanged. Congress, in 2014, adopted legislation that prohibits use of federal funds to pursue federal prosecution of individuals who are in compliance with State medical cannabis laws authorizing production, sale, and use of cannabis (known as the “Rohrabacher-Blumenauer amendment”). Accordingly, production, sale, and use of cannabis remains technically illegal under federal law, although there is no practical enforcement against individual medical or recreational use that is permitted under State law.

Rule of Professional Conduct 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.”

Production, sale, and use of regulated cannabis in New Jersey is legal under State law but illegal under federal law. Hence, it is a “criminal act” under federal law.

The issue for the Committee is whether conduct that complies with State cannabis law but violates federal controlled substances law “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

While a review of numerous decisions issued by the Disciplinary Review Board in which a lawyer was charged with a violation of Rule of Professional Conduct 8.4(b) reveals consistent imposition of discipline when the lawyer has been convicted of a criminal act, there was no explicit separate analysis of whether the criminal conduct “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”¹ The Committee assumes that is so because the criminal conduct involved in each case so obviously involved dishonest or untrustworthy conduct, poor judgment, or a willful disregard of the law, that the issue did not require further explanation.

¹ The Committee notes one exception – the Disciplinary Review Board recently dismissed disciplinary charges (RPC 8.4(b)) against a lawyer charged with possession of cannabis. In re Pagano, DRB Docket No. 20-287 (July 20, 2021). The Board reasoned that, given the recent legalization of recreational marijuana in New Jersey, the lawyer should not face discipline.

The regulated production, sale, and use of cannabis, however, presents a unique situation that requires the Committee to consider not merely whether a lawyer's conduct violates a law but also whether that violation "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." As noted above, New Jersey has enacted robust regulations on the production, sale, and use of cannabis for medical and recreational purposes. The Committee finds that lawyers' conduct that fully complies with State law does not "reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" and does not violate Rule of Professional Conduct 8.4(b).

For similar reasons, the Committee further finds that these activities do not violate the attorney's oath to support the Constitutions of the United States and New Jersey, Rule 1:27-5. The State has legalized and regulated the production, sale, and use of cannabis and while such conduct is technically illegal under federal law, the Justice Department has publicly taken the position that it will not enforce the federal law in certain circumstances and Congress has prohibited such enforcement through the Rohrabacher-Blumenauer amendment. Provided the United States does not change its approach in this area, lawyers, like other New Jersey residents, may engage in this conduct.

Cannabis, like alcohol, prescription medications, and certain over-the-counter drugs, can affect a lawyer's ability to provide competent representation of

clients. Lawyers may not use regulated cannabis in a manner that would impair the lawyer in the provision of legal services. It is also possible, depending on the specific nature of the representation, that personal cannabis use might create a personal interest that materially limits the lawyer's representation of a client under Rule of Professional Conduct 1.7(a)(2), or the ability to provide independent professional judgment and render candid advice under Rule of Professional Conduct 2.1, but these would be fact-specific determinations and not per se ethical proscriptions.

Lawyers have inquired on the hotline whether they may, consistent with the Rules of Professional Conduct, operate or invest in regulated cannabis businesses. Lawyers are permitted to engage in non-legal businesses that are separate and apart from their legal businesses. ACPE Opinion 657 (1992). Provided the lawyers comply with the regulation of such businesses under State law, the Committee finds that, for the reasons set forth above, such conduct does not violate the Rules.² The Committee notes, however, that if a lawyer intends to enter into such a business with a client, the lawyer must strictly comply with Rule of Professional

² The Committee notes that this Opinion, that use of regulated cannabis and investment in cannabis businesses does not violate the Rules of Professional Conduct, also applies to conduct by government lawyers. The Committee, however, has no jurisdiction to opine on application of other laws or rules to government lawyers, such as conflict of interest laws that may apply to government lawyers who regulate the cannabis industry.

Conduct 1.8(a). Further, lawyers must be aware of potential conflicts of interest under Rule of Professional Conduct 1.7(a)(2) if the lawyer invests in a client's business and provides legal services to the client about the business.

New York, Washington State, Colorado, and Nebraska have issued opinions on this issue. New York State Bar Association Opinion 1225 (July 8, 2021) states that lawyers may use regulated cannabis and invest in a regulated cannabis dispensary in accordance with State law. It found that such conduct does not violate Rule of Professional Conduct 8.4, as it complies with State law and “fall[s] within the scope of federal forbearance.” “For that reason, although those activities are technically illegal under federal law, they will not constitute illegal conduct that involves ‘dishonesty, fraud, breach of trust, or serious interference with the administration of justice.’”

Washington State Advisory Opinion 201501 (2015) states that lawyers are permitted to engage in non-legal businesses and there should be no prohibition for lawyers to engage in legal cannabis businesses. If the lawyer engages in the business with a client, the provisions of Rule of Professional Conduct 1.8 should be followed. The Opinion further states that lawyers, including government lawyers, are permitted to purchase and use cannabis, provided it does not interfere with the lawyers' ability to provide competent advice.

Colorado Formal Opinion 124 (2012) states that use of cannabis by lawyers does not violate Rule of Professional Conduct 8.4(b). The Opinion states that Rule of Professional Conduct 8.4(b) requires “a nexus between the violation of law and the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” Lawyers are permitted to use cannabis, provided the use does not impair the lawyer’s ability to provide competent representation.

Nebraska Ethics Advisory Opinion for Lawyers No. 22-03 (2022) similarly states that a Nebraska lawyer may invest in a medical cannabis operation in a state where such business is legal. While Nebraska has not passed cannabis laws, its neighbor, South Dakota, permits medical cannabis. “Merely investing in a cannabis company, which presumably operates within the bounds of the applicable state laws, does not in our opinion rise to the level of a criminal act, nor does such conduct reflect adversely on the lawyers’ honesty, trustworthiness, or fitness to practice”

Accordingly, New Jersey lawyers may, consistent with the Rules of Professional Conduct, purchase, possess, or use regulated cannabis, and operate or invest in regulated cannabis businesses, in accordance with New Jersey law. While such conduct remains technically illegal under federal law, it does not violate Rule of Professional Conduct 8.4(b) (prohibiting lawyers from committing

“a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”).

This Opinion is based on the assumption that federal enforcement policy does not change and that lawyers do not engage in other illegal conduct, such as operating a business that violates the State’s cannabis laws. The disparate treatment of cannabis by the federal government and the State of New Jersey is highly unusual; if the federal approach were to change and enforcement begin, the application of the Rules of Professional Conduct would be reconsidered.