

ETHICS: OPINION NO. 23 AND MEDICINAL MARIJUANA

by

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In 2014, Minnesota joined the ranks of numerous states that have legalized the medicinal use of marijuana. As evidenced by state movement on the topic, public opinion has shifted on the issue, with recent polls citing slight majorities of the general population in favor of the legalization of marijuana use and associated decriminalization and significant major cities across the country in favor of the legalization of its use for medicinal purposes when properly prescribed by a medical professional.

On the heels of that public sentiment and Minnesota's new law, a Minnesota law firm directly petitioned the Minnesota Supreme Court on July 29, 2014, to amend the Minnesota Rules of Professional Conduct (MRPC). The law firm requested the addition by the court of a comment to Rule 1.2, MRPC, which would specifically permit a lawyer to counsel and assist a client with respect to conduct the lawyer reasonably believes is compliant with Minnesota statutes regarding medicinal marijuana. By order dated Sept. 19, 2014, the court opened the matter for public comment. On Oct. 21, 2014, the Lawyers Professional Responsibility Board (LPRB) submitted comments. The LPRB suggested that perhaps a more appropriate vehicle for the petition's proposed objective would be the issuance of an LPRB opinion.

After a public hearing on Jan. 28, 2015, the court issued an order on Feb. 24, 2015, denying the law firm's petition noting, in part, that "the comments are not an appropriate place to make any changes to the [MRPC] that may be needed to address Minnesota's medical cannabis law."

Following the court's denial of the petition the LPRB Opinion Committee undertook the task of drafting an LPRB opinion addressing the interplay between the MRPC and the medicinal marijuana issue. On April 3, 2015, the LPRB voted to approve the adoption of Opinion No. 23.

Opinion No. 23, in its entirety, reads as follows:

A lawyer may advise a client about the Minnesota Medical Marijuana Law and may represent, advise and assist clients in all activities relating to and in

compliance with the Law, including the manufacture, sale, distribution and use of medical marijuana, without violating the Minnesota Rules of Professional Conduct, so long as the lawyer also advises his or her client that such activities may violate federal law, including the federal Controlled Substance Act, 21 U.S.C. §841(a)(1).

Notable in Opinion No. 23 is the requirement that an attorney advise his or her client as to the implications of the client's conduct under federal law. The sale, manufacture, distribution, or possession of marijuana for any purpose (medicinal or otherwise) remains illegal under federal law. The Department of Justice (DOJ) has, however, taken the approach that it would effectively exercise prosecutorial discretion and focus its attention on pursuing only those marijuana-related offenses which implicate certain enumerated enforcement priorities. This approach, however, is tempered by the ever-present reality that the federal government has specifically reserved for itself the right to investigate and prosecute even those offenses which do not implicate the stated enforcement priorities. In spite of this reservation of prosecutorial authority, the DOJ has, more or less, stated that it will permit states to act relatively autonomously when legislating marijuana-related conduct within its borders provided the subject states have in place and utilize a robust and effective regulatory system addressing marijuana use, sale, cultivation and distribution.

So, while offering absolutely no safe harbor from federal (or state) prosecution, Opinion No. 23 provides protection from disciplinary prosecution to Minnesota attorneys who assist clients acting in accordance with Minnesota state law.

An issue unaddressed by Opinion No. 23 relates to a Minnesota attorney's personal use of medicinal marijuana which, in the director's view, is somewhat akin to an attorney's use of prescription pain medication which can affect memory, judgment and cognitive functions. Even when the medicinal marijuana was prescribed, obtained, and used pursuant to Minnesota law, an attorney's obligations to his or her clients remain and an attorney's failure to fulfill those obligations for whatever reason, including the attorney's use of medicinal marijuana, may be subject to disciplinary prosecution in Minnesota. Simply put, a prescription for medicinal marijuana is not a license to engage in conduct which is otherwise in violation of the MRPC.

Lastly, as a warning for those Minnesota attorneys who are also licensed to practice law in North Dakota, it should be noted that the North Dakota State Bar Association Ethics Committee, in Opinion No. 14-02, specifically advises that an attorney "would not be able to live and use medical marijuana prescribed by a physician in Minnesota while being licensed to practice law in North Dakota." Opinion No. 14-02 takes the position

that such conduct would be in violation of Rule 8.4(b) of the North Dakota Rules of Professional Conduct which — like Minnesota’s Rule 8.4(b), MRPC — states that “[i]t 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.” Minnesota attorneys licensed in North Dakota who anticipate engaging in marijuana-related conduct are encouraged to review Opinion No. 14-02 in its entirety and contact the appropriate North Dakota body for guidance.