

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 14-02**

THIS OPINION IS ADVISORY ONLY

QUESTION PRESENTED

The Ethics Committee has been asked to render its opinion on whether Attorney may live and use medical marijuana prescribed by a physician in Minnesota and be licensed to practice law in North Dakota.

OPINION

Based on the facts presented below, 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. The conduct would be a violation of N.D.R. Prof. Conduct 8.4(b).

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 8.4, N.D.R. Prof. Conduct: Misconduct

FACTS PRESENTED

Attorney, who currently lives in North Dakota, has a nonterminal medical condition qualifying the attorney for medical marijuana treatment under Minnesota law. Attorney has tried other treatments, which have been unsuccessful in maintaining Attorney's desired quality of life. Attorney wishes to move to Minnesota to participate in a medical marijuana treatment program while continuing to have a license to practice law in North Dakota.

DISCUSSION

Attorney recognizes that N.D.R. Prof. Conduct 8.4(b) is the governing authority on whether the conduct would be a per se ethical violation. Attorney suggests that use of medical marijuana is not within the scope of N.D.R. Prof. Conduct 8.4(b).

The rule provides 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[.]" N.D.R. Prof. Conduct 8.4(b). The comment to the rule notes the distinction between criminal acts that are ethical violations and criminal acts that are not: "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." N.D.R. Prof. Conduct 8.4(b) cmt. Beyond that distinction, the comment points out that recurring criminal acts may also be an ethical violation: "A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations." Id.

The comment's explanation about a pattern of repeated offenses shows why Attorney's conduct would be an ethical violation. As Attorney acknowledges, federal law designates the use of marijuana for any purpose, even a medical one, as a crime. See 21 U.S.C. § 841(a)(1). As a schedule I controlled substance under federal law, marijuana has been determined to have a high potential for abuse and to have no accepted medical use for treatment and lack accepted safety for use under medical

supervision. See 21 U.S.C. § 812(b)(1). Thus physicians, practitioners, and pharmacists are prohibited under federal law from prescribing or dispensing marijuana. See United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (Controlled Substances Act has no medical necessity exception for marijuana).

Further, it is unquestionable that the federal government has authority to prohibit marijuana for all purposes despite valid state laws authorizing the medical use of marijuana. See Gonzales v. Raich, 545 U.S.1 (2005). So if Attorney purchased, possessed or ingested marijuana in Minnesota, the attorney would be violating federal law each and every time Attorney did so. In other words, Attorney would be engaging in a "pattern of repeated offenses" that indicates indifference to legal obligations and constitute a violation of N.D.R. Prof. Conduct 8.4(b). N.D.R. Prof. Conduct 8.4(b) cmt.

North Dakota law bolsters the conclusion that Attorney's conduct would constitute a violation. Indeed, North Dakota law on controlled substances – and marijuana in particular - aligns with federal law. As under federal law, the manufacture, possession, and use of marijuana for any purpose, even a medical one, is a crime under North Dakota law. See N.D.C.C. § 19-03.1-23. As under federal law, marijuana is classified as a schedule I controlled substance and thus has been determined to (1) have high potential for abuse and (2) have no accepted medical use in treatment in the United States or lack accepted safety for use in treatment under medical supervision. See N.D.C.C. § 19-03.1-05(5)(h); N.D.C.C. § 19-03.1-04. North Dakota even criminalizes marijuana ingestion and provides for prosecution either where the offender takes marijuana into the body or where marijuana is merely detected in the offender's body. See N.D.C.C. § 19-03.1-22.3.

Further, our supreme court has recently recognized North Dakota's policy against marijuana and adhering to the supremacy of federal law. State v. Kuruc, 2014 ND 95, 846 N.W.2d 314. Earlier this year, the court in Kuruc considered criminal defendants' claim that their Washington prescriptions for marijuana provided a defense to controlled substance crimes. Id. at ¶ 1. Recognizing that marijuana was a schedule I controlled substance, the court explained that "it does not logically follow that there could be a valid prescription for a substance that has no medical use or lacks accepted safety." Id. at ¶ 33. Rejecting the defendants' claim, the court reasoned that the legislature did not enact controlled substance laws "to put North Dakota in the perplexing position where it must recognize out-of-state marijuana prescriptions even though the same exact prescription cannot be made legal for its own citizens." Id. The court also emphasized that medical marijuana is still illegal under federal law and thus under the Supremacy Clause, "a state law that conflicts with federal law is without effect." Id. at ¶ 34 (citing U.S. Const. art. VI and State ex rel. Stenehjem v. FreeEats.com, Inc. 2006 ND 84, ¶ 19, 712 N.W.2d 828).

In short, federal law and North Dakota law and policy show that Attorney's conduct would be unlawful and unethical. Attorney's conduct (participating in a medical marijuana treatment program) would constitute a "pattern of repeated offenses" that indicates indifference to legal obligations and constitutes a violation of N.D.R. Prof. Conduct 8.4(b).

CONCLUSION

Attorney's conduct would frequently violate federal law and North Dakota policy. The conduct thus would constitute a pattern of repeated offenses in violation of N.D.R. Prof. Conduct 8.4(b).

This opinion was drafted by Cheri Clark and was approved by the Ethics Committee 4-2 on the 12th day of August, 2014.


Douglas A. Bahr, Ethics Committee Chairperson

This opinion is provided under Rule 1.2(b), North Dakota Rules for Lawyer Discipline, which states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.