FORMAL OPINION NO. 2021-200

March 17, 2021

ETHICAL CONSIDERATIONS RELATING TO USE OF MEDICAL MARIJUANA

The Pennsylvania Medical Marijuana Act, 35 P.S. § 10231.101, et seq. (the “MMA”), authorizes eligible individuals with specified medical conditions to obtain prescriptions that will allow them to procure medical marijuana at Pennsylvania marijuana dispensaries established under the Pennsylvania Medical Marijuana Program. The Committee has received inquiries from lawyers regarding whether procuring and using marijuana in compliance with the MMA gives rise to any ethical concerns.

For the reasons that follow, obtaining a prescription that would authorize the procurement of marijuana from dispensaries in conformance with the MMA, or obtaining and using marijuana as authorized by the MMA, should not, by itself, give rise to a violation of the Pennsylvania Rules of Professional Conduct (“RPCs”). The analysis of this issue largely conforms to the analysis of the issue addressed in the Committee’s Informal Opinion 2016-017, which related to “whether an attorney may participate in a Medical Marijuana Organization as a principal or financial backer” without violating the RPCs. Informal Opinion 2016-017 concluded that such conduct would not, in itself, violate the RPCs.

As with the previous inquiry, the provision of the RPCs 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 ordinarily does not provide opinions or advice on matters of substantive law. By definition, obtaining a prescription in compliance with the MMA that would authorize obtaining medical marijuana from Pennsylvania dispensaries established under the provisions of the MMA would not constitute a “criminal act” under Pennsylvania law. Similarly, obtaining, possessing, and using medical marijuana in compliance with the MMA would not violate Pennsylvania law. For purposes of this inquiry, however, it is assumed that obtaining and possessing medical marijuana, a Schedule I substance under the federal Controlled Substance Act (“CSA”), would violate the CSA, even though authorized under Pennsylvania law. Not all crimes, even federal crimes, violate RPC
8.4(b), which prohibits only those criminal acts which reflect “adversely on [a] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

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 be in compliance with, and specifically authorized under, existing state law. There is nothing inherently “dishonest” or “untrustworthy” about carrying on such state-sanctioned activity, and it cannot otherwise be considered to “indicate [a] lack of those characteristics relevant to law practice” as discussed in Comment [2]. Therefore, obtaining a patient ID card as authorized under the MMA, and obtaining and using medical marijuana in compliance with the MMA, would not violate the Pennsylvania Rules of Professional Conduct.

1 Pennsylvania Rule of Disciplinary Enforcement (PaRDE) 214 requires lawyers to report a conviction of a crime, i.e., “an offense that is punishable by imprisonment in the jurisdiction of conviction, whether or not a sentence is actually imposed” to the Office of Disciplinary Counsel. PaRDE 203(b)(1) provides that conviction of any crime, and not just those which reflect “adversely on [a] lawyer’s honesty, trustworthiness or fitness as a lawyer,” may be grounds for discipline. Therefore, in the hypothetical, and highly improbable, circumstance in which a Pennsylvania lawyer was convicted under federal law for procuring, possessing or using medical marijuana in compliance with the MMA, the lawyer would be required to report that conviction under PaRDE 214, and would at least theoretically face discipline under PaRDE 203(b)(1).

Additionally, note that RPC 1.16(a)(2) provides, in pertinent part, that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if…the lawyer’s physical or medical condition impairs the lawyer’s ability to represent the client.” While many, if not most, medical conditions that might support issuance of a medical ID under the MMA may not give rise to concerns regarding impairment under RPC 1.16(a)(2), all lawyers are under a constant obligation to consider whether they have medical or physical conditions that might, at least temporarily, impair their ability to represent clients. accord Colorado Opinion 124.

Similarly, even in circumstances where there is no impairment that would require the lawyer to decline a matter altogether or withdraw from the matter, if the temporary or short-term effects of any medication or other medical treatment are such that they potentially impair the lawyer’s ability to act on a client’s behalf with the competence and diligence required under RPCs 1.1 and 1.3, then the lawyer should refrain from acting on any client’s behalf until such temporary or short-term impairment has subsided.

On the other hand, State Bar Association of North Dakota Ethics Committee Opinion 14-02 ("N.D. Opinion 14-02") (accessible at https://cdn.ymaws.com/www.sband.org/resource/resmgr/ethics/opinion_14-02.pdf ) concluded that an attorney living in Minnesota and using medical marijuana prescribed by a physician in Minnesota (as authorized by Minnesota law) cannot be “licensed to practice law in North Dakota.” Referring to the comment to North Dakota RPC 8.4, which corresponds to Comment [2] to Pennsylvania RPC 8.4 quoted above, N.D. Opinion 14-02 concluded that regular use of medical marijuana would amount to “a pattern of repeated offenses” which, even if “of minor significance when considered separately,” indicates “indifference to legal obligations.” However, the circumstances addressed in N.D., Opinion 14-02 are at least partially distinguishable from the circumstances addressed in this Opinion. First, at the time N.D. Opinion 14-02 was issued, any possession or use of marijuana was illegal under North Dakota law (medical marijuana was subsequently authorized in North Dakota through a ballot measure in 2016) as well as federal law, and North Dakota had an express legislative policy that marijuana had “no accepted medical use in treatment” and “lacked accepted safety for use in treatment under medical supervision.” Of course, use of medical marijuana in Pennsylvania is expressly authorized under Pennsylvania law. The Pennsylvania Supreme Court had at least tacitly acknowledged lawyers’ ability to act, at least in the context of client representation, to further the policies of the MMA when it adopted RPC 1.2(e), which provides that “a lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client’s proposed course of conduct.” RPC 1.2(e) was adopted following, and in apparent response to, Pennsylvania’s enactment of the MMA. Therefore, it seems highly unlikely that the Court would adopt the reasoning of N.D. Opinion 14-02.
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.