

Ethics Implications of the Law Legalizing Some Sales of Marijuana: An Informal Preliminary Analysis by the Ethics Committee

In the recent election, voters approved Ballot Measure 2, the initiative that legalizes certain recreational use and distribution of marijuana in Alaska. The law will take effect on February 24, 2015.

Members of the Bar Association's Ethics Committee started thinking about some of the ethical implications for lawyers under the new law – particularly in light of the conflict between state and federal law. This brief article shares some of our thinking. It is *not* an official opinion of the Ethics Committee, much less an expression of the views of the Bar Board of Governors or the Alaska Supreme Court, who are the entities with authority to discipline Alaska lawyers for violations of the Alaska Rules of Professional Conduct.

We address three discrete ethical issues.

A lawyer's personal use of marijuana: The ethics analysis on this point actually has not changed. Since the *Ravin* decision in 1975, adult Alaskans have had a constitutional right to smoke marijuana in at least some circumstances, but throughout the time such use was (as it still is) a federal crime. The Preamble to the Alaska Rules of Professional Conduct advises that a lawyer's conduct should conform to the requirements of the law in the lawyer's personal affairs, as well as in professional service to clients. But Rule 8.4(b) defines a criminal act as professional misconduct only when the act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. No Alaska lawyer has ever been disciplined for discrete and private use of marijuana.

Excessive marijuana usage that affects one's practice would be a very different matter. Drug dealing or other marijuana-related conduct that would be a felony under either the old law or the new one likely would be unethical as well.

Advising clients about the parameters of the new law: Alaska Professional Conduct Rule 1.2(d) prohibits a lawyer from counseling or assisting a client to engage in conduct that the lawyer knows is criminal. Advising a client about how he or she could open a marijuana business that complies with the new Alaska law would entail advising a client how to violate the federal laws that still prohibit all marijuana sales. Other states that recently have legalized small-scale marijuana sales have wrestled with this ethical dilemma, and most have concluded that it is not unethical for an attorney to advise a client how to comply with the new state law, so long as the attorney also advises that the conduct remains illegal under federal law. This same logic seems to apply to attorneys who must advise a state or local governmental body about adopting regulations that the government may be required to adopt to comply with the new state law; that is, giving such advice would not appear to violate Rule 1.2(d) if the attorney also advises about the conflict with federal law.

The Alaska Rules of Professional Conduct Committee has recommended amendments to the Alaska Rules to make giving advice on complying with the Alaska law clearly ethical in Alaska; if adopted by the Alaska Supreme Court, the amendments would likely take effect in October 2015. In the short term, even prior to a formal rule amendment, it seems that a lawyer who gives advice that accurately reflects both state and federal laws should not be subject to professional discipline in Alaska.

Assisting with a marijuana business: This is the hardest issue to analyze under the current state of the law. If it is presumptively ethical to advise a client how to operate a business that complies with Alaska law, can the lawyer take the next step and assist in the development of the business by drafting the LLC paperwork? Could the lawyer assist by investing financially in the business or taking a turn at the store's counter on a weekend away from the law office? Because the line between giving advice and actually drafting the documents is very gray, we believe that a principled line can't be drawn and, for the reasons stated in the previous paragraph, we believe that an Alaska lawyer probably could ethically provide to a marijuana business that is legal under Alaska law the same types of business law services a lawyer could provide to any other legal business.

The question of the lawyer actually participating in the business – as by investing or being on a board of directors – is more complex. The uncertainties as to how the ethics rules will develop suggest that, until the Supreme Court or Bar Board of Governors has spoken, a lawyer should exercise caution and not become directly involved in operating a business that remains illegal under federal law.