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TWENTY-SIXTH ANNUAL
CORPORATE COUNSEL SYMPOSIUM
TUESDAY, OCTOBER 27, 2015

Answers That Click: Surveying the Latest Ethical Issues Facing In-House Counsel

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Program Materials are available on
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1. PowerPoint

2. Excerpts from ABA Model Rules and Minnesota Rules of Professional Conduct

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Medical Marijuana and Legal Ethics

- John is house counsel for a small biochemical company located in Minnesota. Recently the company discovered a method for gauging the THC in marijuana plants, extracting the THC and then measuring the THC as it is incorporated into medical marijuana edibles.
- The Company is excited about this new breakthrough and is eager to contract with existing medical marijuana producers as well as producers in other states where recreational marijuana is legal.
- The Company has asked John to start working on agreements whereby the company would license the technology and assist Minnesota Medical Marijuana producers at their sites to incorporate this technology into their products.

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Marijuana is illegal under Federal Law

- **John is concerned about assisting the company because he knows marijuana is still illegal under federal law and Minnesota ethics rules prohibit lawyers from assisting clients in illegal conduct.**
- **Specifically John is concerned about Professional Conduct Rule 1.2 (d) which states in relevant part:**

  A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal ….

- **John loves working for the company, but he also worked very long and hard to get his law license.**

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Question #1 - Possible Solutions

(A) John must tell the company he cannot assist with the agreements because marijuana is still illegal under federal law.

(B) John can draft the agreements as long as he tells the company that marijuana is still illegal under federal law.

(C) John can advise business people in the company about how to draft license agreements generally, but the specific agreements for the marijuana technology needs to be handled by nonlawyer business people.

(D) John needs to tell the company to hire counsel in a state where recreational marijuana is legal.

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Correct Answer

(B) John can draft the agreements as long as he tells the company that marijuana is still illegal under federal law.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD
OPINION NO. 23

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). Adopted: April 3, 2015.

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The Company is Sold

- **Due to its success with the marijuana technology, the company is purchased by a Private Equity firm that installs its own management team resulting in elimination of John's house counsel position.**
- **John secures a new position with a law firm in Fargo, and is admitted in North Dakota. John lives in Moorhead and commutes across the river to Fargo.**
- **John suffered seizures from a form of childhood epilepsy. These seizures have started to recur but are successfully managed with medical marijuana.**
- **John knows that medical marijuana is not legal in North Dakota. John wants to continue treatment using marijuana to treat the seizures but he is concerned about his North Dakota law license.**

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Question #2 - Solutions

(A) John cannot continue to use medical marijuana, even in Minnesota, without the risk of professional discipline in North Dakota.

(B) Since medical marijuana is legal in Minnesota, John can continue treatment (as long as the marijuana use is in Minnesota) without fear of North Dakota discipline.

(C) John should see if his Fargo law firm will allow him to telecommute for work from Moorhead in order to avoid North Dakota discipline.

(D) Because Minnesota Ethics Opinion No. 23 permits medical marijuana use and John lives in Minnesota, he is exempt from North Dakota discipline under the traditional conflict of laws analysis.

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Correct Answer

(A) John cannot continue to use medical marijuana, even in Minnesota, without the risk of professional discipline in North Dakota.

- North Dakota Ethics Opinion 14-02:

  A North Dakota licensed lawyer 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. Rule 8.4(b), which subjects a lawyer to discipline for committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. Use of marijuana is illegal under both federal and North Dakota law.

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Incorrect Answers

(B) Since medical marijuana is legal in Minnesota, John can continue treatment (as long as the marijuana use is in Minnesota) without fear of North Dakota discipline.

(C) John should see if his Fargo law firm will allow him to telecommute for work from Moorhead in order to avoid North Dakota discipline.

- The North Dakota Ethics opinion is clear that moving to Minnesota does not excuse or exempt the lawyer from professional discipline in North Dakota, even though the conduct is legal under Minnesota law.

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Another Incorrect Answer

(D) Because Minnesota Ethics Opinion No. 23 permits medical marijuana use and John lives in Minnesota, he is exempt from North Dakota discipline under the traditional conflict of laws analysis.

- Minnesota Opinion No. 23 does not permit use of medical marijuana, but an article written by the Minnesota Office of Lawyers Professional Responsibility implies medicinal use by itself would not be a disciplinable offense. See *Ethics: Opinion 23 and Medicinal Marijuana* (May 4, 2015) at lprb.mncourts.gov.
- However, ND Rule 8.5 (a) states "A lawyer admitted to practice in [ND] is subject to disciplinary action in [ND] even though the conduct of the lawyer giving rise to the discipline may have occurred outside of [ND] …."

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Privilege and Former Employees

Zeon Corporation is involved in Minnesota venued litigation with CompuMac. Zeon's counsel has written opposing counsel indicating (1) that her firm represents Zeon "and all of Zeon's 1,500 employees;" and (2) that "*ex parte* contact with any Zeon employee about the subject of the litigation is not authorized and would be unethical."

Zeon's CEO at the time of events relating to the litigation has since retired and lives in Florida. The CEO made various decisions based upon his discussions with Zeon's counsel that are now at issue in the CompuMac litigation.

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Question #3 - True or False or …

Zeon's Counsel is correct in stating that her firm represents all Zeon employees and any *ex parte* contact would be unethical.

(A) True.

(B) False.

(C) It depends on the subject matter of the litigation.

(D) Ethics rules do not even address this issue.

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The Correct Answer is:

(B) False – Counsel for Zeon does not represent all Zeon employees.

The comment to Rule 4.2, Rules of Professional Conduct (governing contact with represented persons) limits the representation of an Organization's counsel to those employees who:

(1) supervise, direct or regularly consult with the organization's lawyer concerning the matter; or

(2) have authority to obligate the organization with respect to the matter; or

(3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

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The Other Answers are Incorrect:

(C) It depends on the subject matter of the litigation.

The subject matter of the litigation is relevant in determining which of Zeon's employees are represented by Zeon's counsel, but the subject matter is highly unlikely to qualify all of Zeon's employees as being represented by Zeon's counsel.

(D) Ethics rules do not even address this issue.

The issue is addressed by comment [7] to Rule 4.2

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Question #4 - True or False or …

Counsel for CompuMac can ethically contact Zeon's former CEO without giving notice to Zeon's counsel.

(A) True.

(B) False.

(C) It depends upon whether Zeon's former CEO is being paid a pension by Zeon.

(D) It depends upon what Florida's ethics rules say about contacting former employees.

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The Correct Answer is:

(A) True.

The comment to Minnesota Rule 4.2 (contacting represented persons) states:

> **Consent of the organization's lawyer is not required for communication with a former constituent [*e.g.*, officer or employee]. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule.**

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The Other Answers are Incorrect:

(C) It depends upon whether Zeon's former CEO is being paid a pension by Zeon. The Ethics Rules focus upon the corporate authority of the person being contacted at the time of the contact, and not when the circumstances giving rise to the dispute occurred. Pension participation would not confer any existing corporate authority.

(D) It depends upon what Florida's ethics rules say about contacting former employees. Even if Florida's ethics rule differed from Minnesota, and prohibited contact with former employees, Minnesota Rule 4.2 would take precedence because the litigation is venued in Minnesota. *See* Rule 8.5(b) *Choice of Law.*

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Question #5

When CompuMac's counsel contacts the former CEO in Florida:

(A) He can ask the CEO anything he wants about any subject related to the litigation.

(B) He must tell the CEO that the CEO may wish to consult Zeon's counsel before providing any information to him as CompuMac's lawyer.

(C) He has to identify himself as counsel for CompuMac.

(D) He can ask the CEO about discussions with Zeon's counsel while the CEO was in charge at Zeon.

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The Correct Answer is:

(C) He has to identify himself as counsel for CompuMac.

Rule 4.3 (Dealing with Unrepresented Person) requires that:

(a) a lawyer shall not state or imply that the lawyer is disinterested;

(b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse.

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The Other Answers are Incorrect:

(A) He can ask the CEO anything he wants about any subject related to the litigation; and (D) he can ask the CEO about discussions with Zeon's counsel while CEO was in charge at Zeon.

Neither is correct. Rule 4.4 prohibits lawyers from using methods of evidence that violate the legal rights of [a party]. The former CEO lacks the authority to waive Zeon's attorney-client privilege and therefore asking questions about discussions with counsel is improper.

(B) He must tell the CEO that the CEO may wish to consult Zeon's counsel before providing any information to him as CompuMac's lawyer.

The ethical obligations in *Dealing with Unrepresented Persons* do not require this type of *Miranda-like* warning but require the lawyer to correct any obvious misunderstanding of the unrepresented person about the lawyer's role in the matter.

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Prospective Clients – Beauty Contest

- **Dr. Green asked Partner X at Big Firm to take his antitrust case against Large Drug Co on a contingency basis. Partner X tells Dr. Green that Big Firm does not generally take cases on a contingency basis, but would review any material documents to assess whether the case was viable on a contingency basis.**
- **Partner X reviewed numerous documents to get a thorough understanding of liability and damage issues which Big Firm needed in order to assess contingency representation viability.**
- **Partner X and Big Firm decline to represent Dr. Green and later another partner at Big Firm defends Large Drug against Dr. Green's lawsuit.**

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Question #6 - Motion to disqualify Big Firm

(A) Big Firm will be disqualified if Partner X reviewed significantly harmful information from Dr. Green.

(B) The information from Dr. Green is not confidential because an attorney-client relationship was never formed with Big Firm and therefore no disqualification.

(C) Big Firm will not be disqualified if Partner X was properly and timely "walled off," even if Partner X obtained significantly harmful information from Dr. Green.

(D) Big Firm is disqualified because it did not warn Dr. Green that it could later represent Large Drug in the matter.

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Correct Answer (*Vaccine Center v. GlaxoSmithKline,* 2013 WL 1787176)

(C) Big Firm will not be disqualified if Partner X was properly and timely "walled off," even if, Partner X obtained significantly harmful information from Dr. Green.

Key facts found by court are:

- **Dr. Green was told firm does not typically take contingent cases.**
- **The significant amount of information reviewed by Partner X was necessary to determine whether firm was willing to take an antitrust case on a contingent fee basis.**
- **Dr. Green was a sophisticated prospective client.**

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The Applicable Ethics Rule

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(c) A lawyer [*who receives prospective client information*] shall not represent a client with interests materially adverse to those of [*the*] prospective client in the same or a substantially related matter if the lawyer received information … that could be significantly harmful to that person in the matter.

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Partner X is disqualified but not the entire law firm

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(d) When the lawyer has received disqualifying [*prospective client*] information, [*law firm*] representation is permissible if:

- the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;
- the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- written notice is promptly given to the prospective client.

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Incorrect Answers

(A) Big Firm will be disqualified if Partner X reviewed significantly harmful information from Dr. Green.

Law firm can avoid Disqualification even when significantly harmful information is obtained provided the interviewing lawyer(s) avoided exposure to information that was not necessary to determine whether to represent the client.

(B) The information from Dr. Green is not confidential because an attorney-client relationship was never formed with Big Firm and therefore no disqualification.

Rule 1.18 (b) states that information imparted by prospective clients is confidential in that it cannot be used or revealed by the interviewing lawyer(s).

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Outsourcing Services & Ethics

- **Matt is house counsel for Mini Corp. Matt often retains Hometown law firm for litigation matters.**
- **Matt retained Hometown to handle a large litigation matter requiring extensive electronic discovery review.**
- **For the past year Mini Corp's CFO has demanded that litigation document review be outsourced to an overseas litigation support company.**
- **When Matt mentions use of the litigation support company, Hometown reminds Matt of the problems recently encountered in another case where privileged information was disclosed and discovery documents were returned without encryption.**
- **Hometown suggests that it perform the document review.**

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Question #7 - What should Matt do?

(A) Since the CFO has authority for company financial matters, Matt must defer to and accept the CFO's decision.

(B) Matt must hire Hometown or another litigation support company for the document review because of the problems in the past case.

(C) This is a business issue and ethics rules do not apply to the selection of company vendors.

(D) Matt should alert the company's other officers about the problems with using the litigation support company selected by the CFO.

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Correct Answer

(D) Matt should alert the company's other officers about the problems with using the litigation support company selected by the CFO.

ABA Formal Ethics Opinion 08-451:

- **Lawyers should obtain "informed consent" before hiring outside lawyers to assist in providing legal services.**
- **Lawyers have a duty to actively ensure that outside service providers safeguard confidentiality.**
- **Extra due diligence concerning selection and competence of foreign service providers may be required.**

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Recent Amendment to Rule 1.1 ("Competence")

- **Effective October 1, 2015, a new comment was added to Rule 1.1, providing:**
- The reasonableness of the decision to [outsource] will depend upon the circumstances, including
  - the education, experience and reputation of the non-firm lawyers;
  - the nature of the services assigned to the non-firm lawyers; and
  - the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, **particularly relating to confidential information.**

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Disqualification of House Counsel?

- Charlotte was IP Counsel for Schlumco for several years rising to the position of Deputy General Counsel.
- At Schlumco, Charlotte worked on licensing a product called Petrel.
- In 2013 Charlotte left Schlumco and became Associate GC of Acacia.
- As Acacia's lawyer Charlotte met with the owners of the "319 Patent" in order to assess whether the patent should be acquired for assertion against other companies. Also present was Acacia's licensing VP.
- After acquiring the patent, Charlotte reviewed the 319 Patent in anticipation of litigation. She and the VP later hired the Collins Edmond law firm to advise Acacia about the 319 Patent.

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More Facts

- The Collins Edmonds firm made recommendations to Charlotte and the VP to acquire the patent and sue several companies, including Schlumco. Charlotte approved the recommendations.
- Acacia then sued Schlumco alleging Petrel infringed the 319 Patent. Some of Petrel's alleged infringing features existed while Charlotte was at Schlumco.
- Schlumco then moved to disqualify Charlotte, all in house counsel at Acacia, and the Collins Edmonds law firm.

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Question #8 - And the Court Rules?

(A) Disqualification motion denied in its entirety.

(B) Charlotte is disqualified, but the motion is denied as to Acacia's in house counsel and the Collins Edmonds firm.

(C) Charlotte and Acacia's in house counsel are disqualified. Motion denied as to the Collins Edmonds firm.

(D) Charlotte, Acacia's in house counsel department and the Collins Edmonds law firm are all disqualified. Case dismissed without prejudice.

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Correct Answer

(D) Charlotte, Acacia's in house counsel department and the Collins Edmonds law firm are all disqualified. Case dismissed without prejudice.

- *See Dynamic 3D Geosolutions v. Schlumberger,* 2015 U.S. Dist. Lexis 67353 (W. D. Tex).
- **Texas Rule of Professional Conduct 1.09**
  - (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client … if it is the same or a substantially related matter.
  - (b) … [W]hen lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

The Court finds

- **Charlotte's work at Schlumco on Petrel was substantially related to the 319 Patent Infringement suit because she worked to license Petrel and the infringing features of Petrel existed during this time.**
- **Although Acacia claimed Charlotte had been screened, the court found she had met with the Acacia VP and participated in the decision to acquire the 319 Patent and authorize the infringement suits. Therefore, it was presumed confidential information was shared with the in house lawyers.**
- **There were multiple communications between Charlotte, the VP, and other in house lawyers with the Collins Edmonds lawyers.**

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Corporate Privilege vs. Dissident Corporate Director

- **Kalisman, a director of Morgans Hotel Group, filed suit in Delaware against the Company and the remaining members of the Company's Board of Directors upon learning that a Special Committee of the Board—of which Kalisman was a member—secretly considered and approved a recapitalization transaction. Kalisman then served subpoenas on the Company's legal advisors, including counsel to the Special Committee, seeking all communications with counsel both before and after the recapitalization decision.**
- **The Defendants asserted the attorney-client privilege and work product doctrine notwithstanding Kalisman's status as a director and refused to produce any documents.**

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Question #9 - How Did the Judge Rule?

(A) A Board majority may invoke the attorney-client privilege against a fellow director and deprive the director of information.

(B) The Board may properly assert the privilege with respect to the Special Committee's counsel because Board committees are free to retain separate legal counsel with respect to the committee's ongoing work.

(C) Defendants cannot assert the attorney-client privilege or work product doctrine against Kalisman, except as to matters that are the subject of the litigation and post-date the Special Committee's vote in favor of the recapitalization transaction.

(D) The Board can withhold privileged information because Kalisman was adverse to the Company and, as a result, did not have a reasonable expectation that he was a client of the Board's counsel.

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Correct Answer (*Kalisman v. Friedman, 2013 WL 1668205 (Del. Ch. Apr. 17, 2013)*)

(C) Defendants cannot assert the attorney-client privilege or work product doctrine against Kalisman, except as to matters that are the subject of the litigation and post-date the Special Committee's vote in favor of the recapitalization transaction.

- **Under Delaware law, a director's right to information extends to privileged material. As a general rule, a corporation cannot assert the privilege to deny a director access to legal advice furnished to the Board during the director's tenure.**
- **The rationale for the rule is that all directors are responsible for proper management of the corporation and should be treated as a joint client when legal advice is rendered to the corporation.**
- **Although a Board may withhold privileged information once sufficient adversity exists between the director and corporation, the adversity exception applies here only after the recapitalization decision was made and extends only to matters at issue in the lawsuit.**

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Incorrect Answer

(A) A Board majority may invoke the attorney-client privilege against a fellow director and deprive the director of information.

- **Although a minority position, under Delaware law, each director has a right to information that is "essentially unfettered in nature." *Schoon v. Troy Corp*., 2006 WL 1851481 (Del. Ch. June 27, 2006).**

Incorrect Answer

(B) The Board may properly assert the privilege with respect to the Special Committee's counsel because Board committees are free to retain separate legal counsel with respect to the committee's ongoing work.

- **Although a committee may retain separate counsel and assert the privilege with respect to communications with counsel, this exception does not apply because Kalisman was a member of the Special Committee. As a result, he was a "joint client" of the Special Committee's counsel.**

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Incorrect Answer

(D) The Board can withhold privileged information because Kalisman was adverse to the Company and, as a result, did not have a reasonable expectation that he was a client of the Board's counsel.

- **This exception applies only after the adversity arises. Here, the Court determined that the adversity arose only after the Special Committee voted on the recapitalization transaction. After that time, Kalisman could no longer have a reasonable expectation that he was a client of the Board's counsel or the Special Committee's counsel with respect to the recapitalization transaction and matters at issue in the lawsuit.**

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The End

Tuesday, October 27, 2015

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ABA MODEL RULES

ABA MODEL RULE 1.1 Competence – Comment

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

MINNESOTA RULES OF PROFESSIONAL CONDUCT

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has consulted with a prospective client shall not use or reveal information obtained in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. The term "constituent" is defined in Comment [1] to Rule 1.13. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel:

(a) a lawyer shall not state or imply that the lawyer is disinterested;

(b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;

(c) when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and

(d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

RULE 8.5 JURISDICTION

(a) A lawyer admitted to practice in this jurisdiction is subject to disciplinary action in this jurisdiction even though the conduct of the lawyer giving rise to the discipline may have occurred outside of this jurisdiction and even when that conduct may subject or has subjected the lawyer to discipline by another jurisdiction.

(b) Persons not licensed to practice law in this jurisdiction, but eligible to practice elsewhere who actually engage in this jurisdiction in the practice of law, are subject to the disciplinary authority of this jurisdiction.

MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

OPINION NO. 23

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).

Adopted: April 3, 2015.

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.

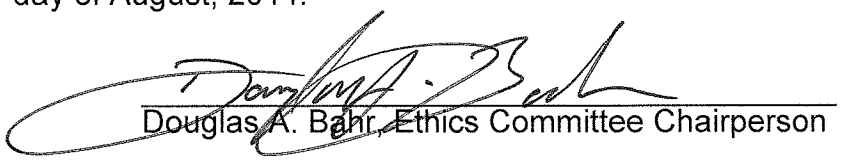
Further, our supreme court has recently recognized North Dakota's policy against marijuana and adhering to the supremacy of federal law. State v. Kuruc, 2014 ND 95, 846 N.W.2d 314. Earlier this year, the court in Kuruc considered criminal defendants' claim that their Washington prescriptions for marijuana 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.