Colorado Supreme Court
Colorado Judicial Ethics Advisory Board (CJEAB)

C.J.E.A.B. Advisory Opinion 2014-01
(Finalized and effective July 31, 2014)

ISSUE PRESENTED:

Colorado has decriminalized the use and possession of medicinal and small amounts of recreational marijuana, subject to some limitations. Colo. Const. Art. XVIII, sections 14 and 16; § 18-18-406(2)(a), (4), (5)(a), (b), C.R.S.; see also §§ 12-43.3-101 – 1001, C.R.S. However, the possession and use of marijuana for any purpose is still a crime under federal law. See Controlled Substances Act, 21 U.S.C. §§ 801 – 904.

In light of the fact that certain marijuana-related conduct is not a crime under Colorado law but remains a crime under federal law, the requesting judge requested an opinion addressing whether a judge who engages in the personal recreational or medical use of marijuana (as opposed to commercial use) in private and in a manner compliant with the Colorado Constitution and all related state and local laws and regulations violates Rule 1.1 of the Code of Judicial Conduct, or any other provision of the Canons.

CONCLUSION:

Because the use of marijuana is a federal crime, a judge's use of marijuana for any purpose is not a "minor" violation of criminal law and therefore violates Rule 1.1 of the Code of Judicial Conduct.

APPLICABLE PROVISIONS OF THE COLORADO CODE OF JUDICIAL CONDUCT

Rule 1.1 of the Code of Judicial Conduct provides:

> (A) A judge shall comply with the law, including the Code of Judicial Conduct.
>
> (B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.
>
> (C) Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority in writing of such conviction. . . . This obligation to self-report convictions is a parallel but independent obligation of judges admitted to the Colorado bar to report the same conduct to the Office of Attorney Regulation pursuant to C.R.C.P. 251.20.

The Terminology section defines "law" as encompassing "court rules and orders as well as statutes, constitutional provisions, and decisional law."

DISCUSSION:

Rule 1.1(A) requires judges to comply with the law. Although neither the Rule nor the Terminology section specifies that Rule 1.1 requires compliance with federal as well as state law, it is beyond dispute that judges are required to comply with federal laws. See Jud. Disc. & Disability Comm'n v. Thompson, 16 S.W.3d 212 (Ark. 2000) (judge disciplined for failure to pay federal income taxes); In re Ballance, 643 S.E.2d 584 (N.C. 2007) (same); In re Gallagher, 654 N.E.2d 353 (Ohio 1995) (judge charged with federal drug crimes prohibited from acting as a judge while charges were pending); In re Hamer, 537 S.E.2d 552 (S.C. 2000) (former judge publicly reprimanded following conviction of federal crimes). Indeed, the supreme court Committee to Consider Revisions to the Colorado Code of Judicial Conduct (Committee), which was tasked with considering revisions to the Code following adoption of the revised ABA Model Code in 2007, considered but declined to propose language in what is now Rule 1.1(B) specifying that the rule prohibits violations of "federal and state law," because "citing only federal or state criminal law might be too narrow and limiting to reach . . . violations of local or municipal law . . . that are in substance similar to misdemeanors under the criminal code." Committee to Consider Revisions to the Colorado Code of Judicial Conduct, Minutes of Apr. 22, 2008, Meeting, p. 2.

Federal law prohibits the use of marijuana for any purpose. See 21 U.S.C. §§ 802, 812(c), 841, 844. Because Colorado judges are required to comply with federal law, a judge's use of marijuana in compliance with Colorado law nevertheless violates the law within the meaning of Rule 1.1(A). Cf. Coats v. Dish Network, L.L.C., 303 P.3d 147, 150-51, 155-58 (Colo. App. 2013) ("[B]ecause activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law . . . , for an activity to be 'lawful' in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be 'lawful' under the ordinary meaning of that term.") (cert. granted Jan. 27, 2014); People v. Watkins, 282 P.3d 500, 503-06 (Colo. App. 2012) (mandatory probation condition that a probationer not commit any criminal offense includes federal offenses, and because marijuana use for any purpose is a federal offense, it is an "offense" within the meaning of the probation statute, despite the fact that if it is not a criminal offense under state law); Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 975-77 (Colo. App. 2011) (employee terminated for testing positive for marijuana in violation of employer's policy prohibiting illegal drug use may be denied unemployment compensation benefits even if the worker's use of marijuana is "medical use" as defined in article XVIII, section 14 of the Colorado Constitution; "the illegality of marijuana use under federal law made its presence in any worker's system inappropriate under employer's policy").

However, the fact that a judge's use of marijuana violates the law within the meaning of Rule 1.1(A) does not resolve the requesting judge's question, because not every violation of the law constitutes a violation of the Code. Under Rule 1.1(B), "[c]onduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a

judge must comply with the law." The issue, then, is whether a judge's personal marijuana use is a "minor" violation of the law within the meaning of Rule 1.1(B). We conclude that it is not.

Initially, we note that Rule 1.1(A) is identical to Rule 1.1 of the Model Code, but Rule 1.1(B) appears to be unique to Colorado. The supreme court adopted it at the Committee's recommendation as part of the 2010 Code.[1] Neither the Rule nor the Terminology section defines "minor," but the minutes memorializing the Committee's discussion regarding the reasons for proposing the rule, the scope of the self-reporting requirement in Rule 1.1(C), and the annotation to Rule 1.1 shed light on the court's intent in adopting Rule 1.1(B).

The minutes include the following explanation for the Committee's recommendation that the court adopt what is now Rule 1.1(B):

> The . . . proposed [rule] was crafted in response to the committee's concerns, raised at previous meetings, that the requirement that "[a] judge shall comply with the law" is vague and confusing, and could potentially subject judge's to discipline for misconduct that is minor. . . . As the committee noted, the rule, if read literally and expansively, could subject a judge to discipline for failure to follow precedent in on-the-bench rulings (which would be one form of non-compliance with the law). It also could subject judges to discipline for what typically are regarded as minor infractions, such as receiving a parking ticket or permitting the judge's dog to run at large. Thus, the proposed [rule], which was drawn from a West Virginia Supreme Court opinion, was designed to clarify that judges should be subject to discipline under this rule for more serious failures to adhere to the law in their personal conduct, such as when engage[d] in conduct that would be criminal under state or federal law.

This explanation, particularly the parking ticket[2] and dog at large examples, suggests that the Committee's intent in drafting and the supreme court's intent in adopting Rule 1.1(B) was to exempt as "minor" only violations of relatively insignificant traffic offenses and local ordinances, not state or federal drug laws.

The self-reporting requirement in Rule 1.1(C) reinforces that conclusion, because it requires judges to report having sustained any criminal convictions other than "misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs." The rule thus reflects the court's determination that drug-related traffic offenses are sufficiently serious to trigger the self-reporting requirement while other traffic offenses are too insignificant to be of concern. Concluding that a judge's use of marijuana in violation of federal law is a

[1] The Committee proposed the language in Rule 1.1(B) as a comment to Rule 1.1, but the court adopted it as part of the rule.

[2] We note that even parking tickets can give rise to judicial discipline. See In re Harrington, 877 A.2d 570 (Pa. Ct. Jud. Disc. 2005) (magistrate who repeatedly parked at expired parking meters and displayed parking tickets issued to others violated rule requiring judges to respect and comply with the law).

"minor" violation within the meaning of Rule 1.1(B) would lead to the illogical result that a judge's use of marijuana does not violate the requirement in Rule 1.1(A) that judges comply with the law, but that a judge is nevertheless required to report a federal conviction for marijuana use under Rule 1.1(C). We decline to construe Rule 1.1 as containing such an inherent inconsistency.[3] See People in Interest of S.M.A.M.A., 172 P.3d 958, 959-60 (Colo. App. 2007) (in determining the meaning of court promulgated rules, courts "give the words of the rules their plain meaning and read all the rules in pari materia to effectuate their intent and avoid inconsistencies").

The cases in the annotation to Rule 1.1 support our conclusion that the scope of the minor violations exception to the compliance with the law requirement is extremely narrow. In each case, the court found that the judge's unlawful conduct violated the equivalent of Rule 1.1(A) and warranted discipline; none concluded that the judge's violation of the law was so "minor" or "trivial" that it did not violate the state's Code of Judicial Conduct. See In re Conduct of Roth, 645 P.2d 1064, 1070 (Or. 1982) (noting that not every "violation of law, however trivial, harmless or isolated, would also be a violation" of the requirement that judges comply with the law, but concluding that the judge's misdemeanor criminal offenses warranted discipline, despite the dismissal of the charges); In re Sawyer, 594 P.2d 805, 811-12 (Or. 1979) (recognizing that some violations of law "such as minor traffic infractions[] may be of such a nature as to not come within the intended meaning of" the requirement that judges comply with the law, but concluding that the judge's part-time employment as a teacher at a state-funded college in violation of a state constitutional prohibition on officials of one state department exercising functions of another was not such a "minor" violation and warranted his temporary suspension); Matter of Vandelinde, 366 S.E.2d 631, 633-34 & nn.4, 6, 638 (W.Va. 1988) (noting that a judge's criminal conduct "may, unless the violation is trivial, constitute a violation of the requirement that a judge must comply with the law," but concluding that the judge's excessive contributions to a political organization that supported his candidacy – a misdemeanor offense under the applicable statute -- violated the requirement that judges comply with the law and warranted a public reprimand, despite the fact that the judge was not criminally charged) (citing West Virginia Jud. Inquiry Comm'n v. Dostert, 271 S.E.2d 427 (W. Va. 1980) (judge who violated gun licensing statute found to be in violation of Canon requiring compliance with the law)).

Analogizing Rule 1.1(B) to Rule 8.4(b) of the Colorado Rules of Professional Conduct, 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 requesting judge notes that in Formal Opinion 124, the Colorado Bar Association Ethics Committee concluded that, by itself, a lawyer's personal use of marijuana constitutes a

[3] We recognize that the self-reporting requirement in Rule 1.1(C) applies only to convictions while Rule 1.1(B) provides that unlawful conduct – not just criminal convictions – may constitute a violation of the Code. See In re Conduct of Roth, 645 P.2d 1064, 1070 (Or. 1982) (conviction not required to support a finding that judge failed to comply with the law). We do not by this comparison suggest that a judge is required to report criminal conduct that does not result in a conviction, or that the requirement that a conviction be reported under Rule 1.1(C) is conclusive as to whether a violation is minor within the meaning of Rule 1.1(B). A violation may be other than a "misdemeanor traffic offense[] or traffic ordinance violation[] not including the use of alcohol or drugs" and still be a minor violation. Conversely, there may be some traffic offenses not involving alcohol or drugs that do not trigger the self-reporting requirement of Rule 1.1(C) but nevertheless violate the law within the meaning of Rule 1.1(A).

federal criminal act that does not violate R.P.C. 8.4(b). Relying on that analogy, the judge suggests that whether an offense is "minor" within the meaning of Rule 1.1(B) should be determined based on a "moral turpitude" test.

But the analogy fails, because Rule 1.1(A) is broader than R.P.C. 8.4(b): it provides that it is judicial misconduct for judges to violate laws in general, not just laws relating to honesty, trustworthiness and professional fitness. The premise of the judge's argument for application of a "moral turpitude" test akin to the test used under R.P.C. 8.4(b) is also flawed, because, while the "moral turpitude" test applied under the now obsolete Code of Professional Responsibility, it is not the standard for determining which offenses constitute professional misconduct under current R.P.C. 8.4(b). As comment 2 to that Rule makes clear, the relevant test is not whether the offense is one of "moral turpitude" but whether it "indicate[s] lack of those characteristics relevant to law practice."[4]

If the supreme court had intended the minor violation exception in Rule 1.1(B) to mirror R.P.C. 8.4(b), it could have done so expressly, by including language in the rule itself or explaining in a comment that "minor" violations are those that do not reflect adversely on the judge's honesty, trustworthiness and professional fitness. But the court did not do so. Indeed, we note that the self-reporting requirement in Rule 1.1(C) expressly refers to the corollary self-reporting requirement for attorneys under C.R.C.P. 251.20. The court was thus aware of the interplay between the rules governing the professional conduct of attorneys and rules governing the conduct of judges when it promulgated Rule 1.1, and we presume that its decision not to analogize the minor violations exception in Rule 1.1(B) to R.P.C. 8.4(b) was intentional. See S.M.A.M.A., 172 P.2d at 960.[5] Moreover, we note that the Standing Committee on the Colorado Rules of Professional Conduct recently proposed an amendment that would have added a comment to R.P.C. 8.4 expressly protecting a lawyer from being disciplined for the personal or medical use of marijuana consistent with Colorado law, but the supreme court did not adopt the

[4] Comment 2 to R.P.C. 8.4(b) explains that "[m]any 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."

[5] Nor do the cases in the annotation to Rule 1.1 suggest that the minor violations language in Rule 1.1(B) is intended to exempt crimes that do not involve moral turpitude. See, e.g., Sawyer, 594 P.2d 811-12 (part-time teaching job at state funded college); Vandelinde, 366 S.E.2d at 638 (excess campaign contributions). In fact, one specifically held that a judge may be disciplined for behavior that does not affect judicial fitness or the ability to perform judicial duties, and discussed the gravity and seriousness of the judge's conduct in the context of deciding whether it warranted discipline, not in the context of discussing whether it violated the Code. In re Conduct of Roth, 645 P.2d at 1067-70.

proposed comment. We presume that the court likewise would not approve exempting a judge's use of marijuana from discipline under Rule 1.1(A).

We recognize that simple possession of marijuana is a misdemeanor under federal law and that, in some circumstances, marijuana use is an infraction punishable only by a civil penalty. See 18 U.S.C. § 3559(a)(6)-(9); 21 U.S.C. §§ 802(13), (44), 844(a), (c), 844a(a). It is nevertheless a violation of federal criminal law and, in our view, while not necessarily a "serious" offense, it is not a "minor" offense within the meaning of Rule 1.1(B). It is significantly more serious than the parking ticket and dog at large violation referred to in the Committee minutes, and is no less serious than the unlawful conduct of the judges involved in Sawyer and Vandelinde.

Other states have disciplined judges for using and possessing marijuana, concluding that such conduct violates the requirement that judges comply with the law. See, e.g., Matter of Marquardt, 778 P.2d 241, 247-48 (Ariz. 1989); In re Peters, 715 S.E.2d 56, 58 (Ga. 2011); In re Whitaker, 463 So.2d 1291, 1303 (La. 1985); In re Gilbert, 668 N.W.2d 892, 894-95 (Mich. 2003); In re Sherrill, 403 S.E.2d 255, 257 (N.C. 1991); In re Toczydlowski, 853 A.2d 20, 22 (Pa. Ct. Jud. Disc. 2004), overruled on other grounds by In re Murphy, 10 A.3d 932 (Pa. Ct. Jud. Disc. 2010); In re Binkoski, 515 S.E.2d 828 (W. Va. 1999). While marijuana use was illegal under state law when those opinions were issued and the judges' marijuana use was, in many cases, not the only basis for discipline, the requesting judge did not cite and we are not aware of any judicial ethics opinions on this issue from states that have decriminalized the personal use of medicinal or recreational marijuana. Moreover, the difficult issue in those decisions was not whether a judge's illegal marijuana use violates the requirement that judges comply with the law, but whether such a violation warrants discipline. Because we are authorized only to provide state judicial officers with opinions "concerning the compliance of intended, future conduct with the Colorado Code of Judicial Conduct," not regarding whether such conduct is censurable, see CJD 94-01(I)(A), (XI)(A), (XIII)(A), we do not address whether a judge who uses marijuana consistent with Colorado law should be disciplined for violating Rule 1.1(A) of the Code.

Having concluded that a judge's use of marijuana violates Rule 1.1, we need not address whether it also violates the requirement in Rule 1.2 that judges "act at all times in a manner that promotes public confidence in the . . . integrity . . . of the judiciary" and "avoid impropriety and the appearance of impropriety."

FINALIZED AND EFFECTIVE AS MODIFIED this 31st day of July, 2014.