Maryland Judicial Ethics Committee

Opinion Request Number: 2021-06

Date of Issue: May 11, 2021

☒Published Opinion ☐ Unpublished Opinion ☐Unpublished Letter of Advice

Judicial Appointee Use of Medical Marijuana

Issue: May a judicial appointee obtain and use medical marijuana?[1]

Answer: No.

Facts: Requestor is a District Court Commissioner and, presumably, a qualifying patient under Md. Code Ann., Health General Article § 13-3301(o) (2019 Repl. Vol.).[2]

Discussion: Because the Maryland Code of Conduct for Judicial Appointees "is patterned after the Maryland Code of Judicial Conduct (MCJC)," its "provisions…should be read in a consistent manner with [the] parallel provisions in the MCJC." Rule 18-200.1.[3] The Rules implicated by this request include:

> Rule 18-201.1 Compliance with the Law.
>
> A judicial appointee shall comply with the law, including the Rules in this Code of Conduct for Judicial Appointees that are applicable.
>
> Rule 18-201.2 Promoting Confidence in the Judiciary.
>
> (a) A judicial appointee shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.
> (b) A judicial appointee shall avoid conduct that would create in reasonable minds a perception of impropriety.

---

[1] Md. Code Ann., Health General Article (2019 Repl. Vol.) ("HG"), uses the term "cannabis" and the Controlled Substance Act, 21 U.S.C. 801 et. *seq.,* uses the term "marijuana" for the same substance. Both are used in this opinion.

[2] To be a qualifying patient, the individual must have a written certification from a "certifying provider" who has "a bona fide provider-patient relationship" with the individual. HG § 13-3301(o).

[3] To that end, opinions involving both judicial employees and judges are relevant to our discussion in this case.

> Rule 18.203.1 Extra-Official Activities in General
>
> Except as prohibited by law or this Code, a judicial appointee may engage in extra-official activities. When engaging in extra-official activities, a judicial appointee shall not:
>
> (c) participate in activities that would appear to a reasonable person to undermine the judicial appointee's independence, integrity, or impartiality[.]

Parallel provisions of the Maryland Code of Judicial Conduct include Rule 18-101.1 Compliance with the Law (ABA Rule 1.1), Rule 18-101.2 (a) and (b), and Rule 18-103.1.

In Opinion No. 2016-09, this Committee addressed a cannabis related issue. There, the Requestor asked whether a judicial appointee could apply for or receive a license to grow, process, and dispense cannabis for medical purposes in Maryland. The Committee considered ABA Rule 1.1 (Compliance with the Law), ABA Rule 3.1(c) (Extra-Official Activities in General), and ABA Rule 1.2 (Promoting Confidence in the Judiciary), as now codified in Rules 18-101.1, 18-101.2, and 18-103.1, respectively. And the Committee discussed Comment [2] to ABA Rule 1.2, stating that "judicial appointees 'should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by this Code.'" The Committee concluded that as long as "federal laws make the possession, use, manufacturing and/or distribution of marijuana (cannabis) illegal, a judicial [employee] may not participate in the growing, processing, or dispensing of the substance regardless of the purpose."

The California Committee on Judicial Ethics Opinions reached a similar result in California Judicial Ethics Formal Opinion 2017-010, citing this Committee's Opinion No. 2016-09 and the Washington Judicial Ethics Advisory Committee Opinion 15-02.

In 2018, in Advisory Opinion #2018-01, the Alaska Commission on Judicial Conduct concluded that "[a]s long as federal law criminalizes marijuana use, Alaska judges who choose to use marijuana will violate the Alaska Code of Judicial Conduct," even though the "right to privacy" in the Alaska Constitution had been held by the Alaska Supreme Court "to protect the right to personal use of marijuana in the home." Its opinion was based on "two aspects of Canon 2A . . . (1) a judge must respect and follow the law and (2) a judge must avoid the appearance of impropriety." According to the opinion, the use of marijuana "violates federal law and its use by a judge would reflect a lack of respect for the law by showing a selective attitude towards the law suggesting that some are appropriate to follow but others are not." The Alaska Commission also opined that "[p]ublic use of marijuana by a judge would further create an appearance of impropriety," and that restricting even "personal use in the home is reasonable and necessary to preserve public confidence in the judiciary."

The Alaska opinion cited a judicial ethics opinion from Colorado, which was then the only other state having legalized personal use of marijuana. In that opinion, the Colorado Judicial Ethics Advisory Board concluded that a judge's personal use of marijuana violated the Colorado Code of Judicial Conduct. C.J.E.A.B. Advisory Opinion 2014-01. The Colorado Code provided that a judge "shall comply with the law," but also provided an "unusual" exception for a "minor violation" of a criminal law. It determined that marijuana use was not a minor violation under the Colorado Code of Judicial Conduct.

To be sure, the law related to the personal and medical use of marijuana has shifted at the state level. According to Dennis A. Rendleman, *Ethical Issues for Lawyers and Judges in the State Approval of Cannabis: One Toke Over the Line?*, Judges' J., Winter 2021, at 4, 5, 7, the law of 39 jurisdictions is in conflict with federal law. What has not changed, however, is federal law in regard to the use of marijuana. As it did when we issued Opinion 2016-09, using marijuana for any purpose—medical or recreational—remains a crime under the Controlled Substances Act. 21 U.S.C. §§ 801 et. seq.

In Opinion No. 2016-09, we stated:

> Nothing in the Code of Conduct for Judicial Appointees limits the mandates of Rules 1.1 and 3.1 to Maryland law. Accordingly, as long as federal laws make the possession, use, manufacturing and/or distribution of marijuana (cannabis) illegal, a judicial appointee may not participate in the growing, processing or dispensing of the substance, regardless of the intended purpose.[4]

In short, the applicable legal landscape on which that opinion was based has not significantly changed since 2016. The facts here differ only in that the Requestor would be a user rather than a grower, processor, or dispenser of medical cannabis. We are not persuaded that that difference supports a different result.

Application: The Maryland Judicial Ethics Committee cautions that this Opinion is applicable only prospectively and only to the conduct of the Requestor described herein, to the extent of the Requestor's compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this Opinion. Additionally, this Opinion should not be considered to be binding indefinitely.

---

[4] In that opinion, we noted that even a change of federal law similar to the Maryland legislation "might raise concerns with other provisions of the Code, for example, Rule 1.2 PROMOTING CONFIDENCE IN THE JUDICIARY." Opinion 2016-09, 2 n.2. We did not need to address those concerns then, and we do not need to do so now.

The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If the request for advice involves a continuing course of conduct, the Requestor should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.