



**CALIFORNIA SUPREME COURT
COMMITTEE ON JUDICIAL ETHICS OPINIONS**

350 McAllister Street, Room 1144A

San Francisco, CA 94102

(855) 854-5366

www.JudicialEthicsOpinions.ca.gov

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EXTRAJUDICIAL INVOLVEMENT IN MARIJUANA ENTERPRISES

I. Question Presented

The Committee on Judicial Ethics Opinions has been asked to provide an opinion on the following question:

“Is it ethical under the California Code of Judicial Ethics for a judicial officer to have an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana?”¹

II. Summary of Conclusions

An interest in an enterprise involving the sale or manufacture of marijuana that is in compliance with state and local law is still in violation of federal law pursuant to the

¹ The relatively recent enactment of state medical and recreational marijuana laws, and the conflict with federal law, presents a myriad of issues related to marijuana. However, for purposes of this opinion, the committee addresses only the question presented.

Controlled Substances Act. (21 U.S.C. §§ 801-904.) A violation of federal law violates a judge’s explicit obligation to comply with the law (canon 2A) and is an activity that involves impropriety or the appearance of impropriety (canon 2). Moreover, such extrajudicial conduct may cast doubt on a judge’s capacity to act impartially. (Canon 4A(1).) Therefore, the committee advises that a judicial officer should not have an interest in an enterprise that involves the sale or manufacture medical or recreational marijuana.

III. Authorities

A. Applicable Canons²

Terminology: “‘Impartial,’ ‘impartiality,’ and ‘impartially’ mean the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as the maintenance of an open mind in considering issues that may come before a judge. (¶) . . . (¶)

‘Impropriety’ includes conduct that violates the law, court rules, or provisions of this code, as well as conduct that undermines a judge’s independence, integrity, or impartiality. (¶) . . . (¶)

‘Law’ means constitutional provisions, statutes, court rules, and decisional law.”

Canon 2: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”

Canon 2A: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary”

Advisory Committee Commentary following canon 2A: “. . . A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly. (¶) . . . (¶) The test for . . . impropriety

² All further references to canons and to Advisory Committee commentary are to the California Code of Judicial Ethics unless otherwise indicated.

is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence.”

Canon 4A(1): “A judge shall conduct all of the judge’s extrajudicial activities so that they do not (¶) . . . cast reasonable doubt on the judge’s capacity to act impartially”

Advisory Committee Commentary following canon 4D(1): “ Participation by a judge in financial and business dealings is subject to the general prohibitions in Canon 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Canon 2B against the misuse of the prestige of judicial office. (¶) In addition, a judge must maintain high standards of conduct in all of the judge’s activities, as set forth in Canon 1.”

B. Other Authorities

Title 18 United States Code sections 1956, 1957, 3282

Title 21 United States Code sections 801-904

Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. No. 113-235, § 538 (Dec. 16, 2014) 128 Stat. 2129, 2217)

Consolidated Appropriations Act, 2016 (Pub. L. No. 114-113, § 542 (Dec. 18, 2015) 129 Stat. 2242, 2332-2333)

California Constitution, article VI, section 18

California Business and Professions Code, sections 19300-19360

Gonzales v. Raich (2005) 545 U.S. 1

U.S. v. McIntosh (9th Cir. 2016) 833 F.3d 1163

U.S. v. Marin Alliance for Medical Marijuana (N.D.Cal. 2015) 833 F.3d 1163

Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal.4th 920

Inquiry Concerning Hall (2006) 49 Cal.4th CJP Supp. 146

In re Conduct of Roth (Or. 1982) 645 P.2d 1064

Rothman, California Judicial Conduct Handbook (3d ed. 2007) sections 7.36, 7.57

Colorado Supreme Court Judicial Ethics Advisory Board, Opinion 2014-01

Maryland Judicial Ethics Opinion Request Number 2016-09

Washington Judicial Ethics Advisory Committee Opinion 15-02

Memorandum from James M. Cole, Deputy Attorney General, U.S. Dept. of Justice, Guidance Regarding Marijuana Enforcement (Feb. 14, 2014)

Memorandum from James M. Cole, Deputy Attorney General, U.S. Dept. of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013)

Voter Information Pamphlet, General Election (Nov. 8, 2016), Proposition, analysis by the Legislative Analyst

III. Discussion

A. Introduction

Since 1996, more than half of the states have decriminalized and created regulatory schemes for medical marijuana. Most states have made these changes in the past 10 years. Even more recently, several states, including California, have gone further, decriminalizing recreational marijuana use. In California, state and local taxes currently collected on medical marijuana reach several tens of millions of dollars each year and recreational marijuana could eventually generate tax revenues of \$1 billion annually. (Voter Information Pamp., Gen. Elec. (Nov. 8, 2016), Prop. 64, analysis by the Legislative Analyst, pp. 92, 97.) The profits to be gained from the marijuana industry in California are substantial and investors are flocking to this lucrative industry.

Despite the rapid decriminalization and new regulation of marijuana across the states, it remains a schedule I drug pursuant to the Controlled Substances Act. (21 U.S.C. §§ 801-904.) Under federal law, the use, possession, distribution, or manufacture of marijuana remains illegal, even if such conduct otherwise conforms to state law. Because of the financial incentives to enter to the marijuana market, the rapid changes to

marijuana law, and the continuing disparity between state and federal law, the committee has been asked to provide guidance on whether a judicial officer may have an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana. For purposes of this opinion, an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana includes, but is not limited to, a personal financial investment in such an enterprise, private equity fund investments in such an enterprise, maintaining shares in a corporation that invests in marijuana, maintaining a real property interest in a property that is leased for marijuana growth or distribution, or a spouse's or registered domestic partner's financial interest in such an enterprise, shares, or real property.

B. State and Federal Regulation of Marijuana

In 1996, California voters approved Proposition 215 and enacted the Compassionate Use Act, making California the first state to decriminalize limited personal possession or cultivation of marijuana for medical purposes on a physician's recommendation, or possession or cultivation by his or her primary caregiver. (Health & Saf. Code, §11362.5.) In 2004, the Legislature expanded these criminal immunities through the Medical Marijuana Program for the cultivation and possession for sale to specific groups of people. (Health & Saf. Code, § 11362.7 et seq.) In 2015, the Medical Marijuana Regulation and Safety Act³ was enacted to establish a statewide regulatory system for medical marijuana businesses, governing, among other things, cultivation, processing, transportation, testing and distribution of medical marijuana, and allowing for medical marijuana businesses to operate for profit. (Bus. & Prof. Code, §§ 19300-19360 [enactment of the Medical Marijuana Regulation and Safety Act included additions to other sections of Bus. & Prof. Code, Gov. Code, Health & Saf. Code, Lab. Code, Rev. & Tax. Code, and Wat. Code not applicable to this opinion].) In 2016, California voters

³ The Medical Marijuana Regulation and Safety Act was enacted through three bills, Assembly Bill No. 266, Assembly Bill No. 243, and Senate Bill No. 643 in the 2015-2016 legislative session. Each bill was conditioned on enactment of the other two.

approved Proposition 64, allowing for recreational use of marijuana for those 21 years old or older. (Health & Saf. Code, §§ 11362.1 et seq.)

California's marijuana laws do not *legalize* medical or recreational marijuana. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926 [stating that “[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law”]; *U.S. v. McIntosh* (9th Cir. 2016) 833 F.3d 1163, 1179, fn. 5.) Instead, they decriminalize certain marijuana offenses under California law. Under federal law, the knowing or intentional manufacture, possession, and distribution of marijuana remains a federal crime. (21 U.S.C. §§ 812, subd. (c), 841, 844; see also *Gonzales v. Raich* (2005) 545 U.S. 1, 32-33 [commerce clause gives Congress authority to prohibit the local cultivation and use of marijuana, despite state law to the contrary, because local use affects the national marijuana market].) An attempt to violate or a conspiracy to commit a violation of the Controlled Substances Act is subject to the same penalties as the underlying offense. (21 U.S.C. § 846.) Moreover, it is unlawful to knowingly lease, rent, or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance, or to manage or control any place as an owner, lessee, mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance. (*Id.*, § 856.) Any capital placed into a marijuana business not only puts an individual at risk of criminal prosecution, but such assets, investments, and profits are subject to forfeiture (*id.*, §§ 853, 881) and any investment of marijuana profits further violates federal law (*id.*, § 854). Similarly, financial transactions that involve proceeds generated by marijuana can form the basis for federal prosecution under money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act of 1970. (18 U.S.C. §§ 1956, 1957.)

Based on the rapid decriminalization of medical marijuana by the states, on August 29, 2013, the U.S. Department of Justice issued guidance applicable to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions concerning medical marijuana. (Memorandum from James M. Cole,

Deputy Atty. Gen., U.S. Dept. of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) (Marijuana Enforcement).) This federal policy concentrated and, to a certain extent, limited medical marijuana enforcement efforts in accordance with eight priorities. (*Id.* at pp. 1-2.)⁴ On February 14, 2014, these policies were clarified and the same priorities were made applicable to financial crimes that are predicated on medical marijuana-related conduct. (Memorandum from James M. Cole, Deputy Atty. Gen., U.S. Dept. of Justice, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014) (Financial Crimes).) More recently, federal appropriations bills have prohibited the U.S. Department of Justice and Drug Enforcement Agency from spending funds to prevent states' implementation of medical marijuana laws.⁵ (Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, §538 (Dec. 16, 2014) 128 Stat. 2129, 2217; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542 (Dec. 18, 2015) 129 Stat. 2242, 2332-2333.)

⁴ These priorities include (1) preventing the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property.

⁵ Based on these appropriations bills, the United States District Court for the Northern District of California has prohibited the U.S. Department of Justice from enforcing a permanent injunction enjoining a medical marijuana dispensary from distributing marijuana, to the extent the dispensary complied with California law. (*U.S. v. Marin Alliance for Medical Marijuana* (N.D.Cal. 2015) 139 F.Supp.3d 1039, app. dism. Apr. 12, 2016.) The Ninth Circuit has ruled that the U.S. Department of Justice may not use federal funds to continue prosecutions for violations of the Controlled Substances Act where the defendants' conduct was authorized by state law. (*U.S. v. McIntosh, supra*, 833 F.3d 1163.)

Although medical marijuana regulation is not currently an enforcement priority for the federal government and the federal government is restricted from spending funds to prosecute certain individuals, these priorities could change. “Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding.” (*U.S. v. McIntosh, supra*, 833 F.3d 1163, 1179, fn. 5.) A change in executive branch administration could shift federal attitudes and priorities, and these offenses can be prosecuted for up to five years after the offenses occur. (See 18 U.S.C. § 3282.) Moreover, both U.S. Department of Justice memoranda explicitly state that nothing precludes investigation or prosecution, even in the absence of any of the priorities, “in particular circumstances where investigation and prosecution otherwise serves an important federal interest.” (Cole, Marijuana Enforcement, *supra*, at p. 4; Cole, Financial Crimes, *supra*, at p. 3.) It is also important to note that these federal policies and appropriations bills *do not* address enforcement priorities for recreational marijuana that is decriminalized and regulated by state law. Therefore, an individual who maintains an interest in a marijuana enterprise that complies with state and local law remains in violation federal law and risks prosecution.

C. Activity Involving Impropriety and the Appearance of Impropriety

As the Code of Judicial Ethics observes, a judge is a highly visible member of government (Preamble) and “must expect to be the subject of constant public scrutiny” and “accept restrictions on the judge's conduct that might be viewed as burdensome by other members of the community and should do so freely and willingly” (Advisory Com. foll. Canon 2A). These restrictions extend to a judge’s extrajudicial activities, such as maintaining an ownership interest in a business. (Canon 4.)

1. Failure to Comply with the Law

Participation in extrajudicial activities is subject to the general prohibition in canon 2 against activities involving impropriety or the appearance of impropriety.

(Advisory Com. com. foll. canon 4D(1).) Impropriety includes conduct that violates the law. (Terminology, “impropriety.”) Moreover, canon 2A explicitly states that a judge must respect and comply with the law, which is defined to include statutes generally. (Canon 2A; terminology, “law”; Advisory Com. com. foll. canons 1, 4A.) Nothing in the code limits compliance to state law only. The California Constitution also obligates a judge to comply with the law. A judge may be disqualified from acting as a judge when subject to a pending indictment or an information charging him or her with a crime punishable as a felony under California or federal law. (Cal. Const., art. VI, § 18, subd. (a).) If the judge is convicted, and if the conviction becomes final, the judge must be removed from office. (*Id.*, art. IV, § 18, subd. (c).)

Maintaining an ownership interest in an enterprise that involves the sale or manufacture of marijuana is a crime under the Controlled Substances Act that potentially subjects a judge to federal prosecution. Therefore, having an interest in a marijuana business is an extrajudicial activity that fails to comply with the law and involves impropriety, in violation of the code. Discipline can be imposed for a violation of the canon 2A obligation to comply with the law, whether or not the judge is prosecuted or convicted of a criminal offense. (*Inquiry Concerning Hall* (2006) 49 Cal.4th CJP Supp. 146 [judge disciplined under canon 2A for violating several provisions of the Political Reform Act during her reelection campaign, even though the criminal case was dismissed]; *In re Conduct of Roth* (Or. 1982) 645 P.2d 1064, 1070 [proof of unlawful conduct, not conviction, sufficient to support finding that a judge failed to comply with the law].) Thus, involvement in a marijuana business that would violate federal law is unethical regardless of the likelihood of prosecution. Further, it is the committee’s opinion that, like the duty of a judge to be informed as to his or her personal and financial interests in relation to disclosure and disqualification, a judge has a duty to make reasonable efforts to inform himself or herself as to whether any financial or property interest that the judge maintains is being used in an enterprise that involves the sale or manufacture of marijuana. (See canon 3E(5)(d); Code Civ. Proc., § 170.1, subd. (a)(3)(C).) If the judge determines his or her financial or property interest is being so

utilized, the judge has a duty to divest himself or herself of such investment or otherwise take steps to ensure the termination of the enterprise.

The committee's opinion that a judicial officer should not have an interest in an enterprise that involves medical or recreational marijuana is consistent with judicial ethics advisory opinions from states that have similarly decriminalized marijuana. Maryland, which permits medical marijuana use, and Washington and Colorado, which permit both medical and recreational marijuana use, prohibit judicial involvement with marijuana.

In Maryland, the judicial ethics committee concluded that a judicial appointee may not grow, process, or dispense medical cannabis. (Md. Jud. Ethics Com., Opinion Request No. 2016-09 (Mar. 31, 2016).) The Maryland Code of Conduct for Judicial Appointees requires a judicial appointee to comply with the law. (Md. Rules Judges, rule 18-201.1.) As in California's canon 2A, nothing limits application of the Maryland rule to compliance with Maryland law only. Therefore, the committee opined, "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." (Md. Jud. Ethics Com., Opinion Request No. 2016-09, *supra*, pp. 1-2.) The committee went further, stating, "Even if the Congress enacted federal legislation analogous to Health General §§ 13-33-6 et seq. [exempting growers, processors and dispensers licensed by the state of Maryland from arrest, prosecution or administrative penalty], a proposal by a judicial appointee to act as a medical cannabis grower, processor and dispenser might raise concerns with other provisions of the Code, for example, Rule 1.2 'Promoting Confidence In The Judiciary.' We need not address these issues at this juncture, however." (*Id.*, fn. 2 [some capitalization omitted].)

In Washington, the judicial ethics advisory committee concluded that it was a violation of the state judicial ethics code for a judge to allow a court employee to maintain an extracurricular medical marijuana business, which remains illegal under federal controlled substances laws. (Wn. Jud. Ethics Advisory Com., Opinion 15-02.)

After examining a judge’s duty to direct the conduct of court employees, the committee concluded: “[E]ven if owning a medical marijuana business may comply with the state statutory scheme, possessing, growing, and distributing marijuana remains illegal under federal law for both recreational and medical use. See Controlled Substances Act, 21 U.S.C. §§ 801-904. Although the Code does not generally prohibit a court employee from engaging in outside businesses or employment, operating a business in knowing violation of law undermines the public’s confidence in the integrity of the judiciary in violation of CJC 1.2, and is contrary to acting with fidelity and in a diligent manner consistent with the judge’s obligations under the Code.” (*Id.*, at p. 2.)

In Colorado, the judicial ethics advisory board concluded that it is a violation of the state judicial ethics code for a judge to engage in the personal recreational or medical use of marijuana in private, and in a manner compliant with the Colorado Constitution and related state and local laws. (Colo. Judicial Ethics Advisory Bd., Opinion 2014-01, p. 1.) The board found that “because 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.” (*Id.*, at p. 2.)

Consistently with these opinions, and as the California canons state, to maintain an interest in an enterprise that involves the sale or manufacture of medical or recreational marijuana is not lawful under federal law and violates the obligations expressed in canon 2. Therefore, it is the committee’s opinion that a judge violates his or her ethical obligations if the judge maintains an interest in an enterprise involving marijuana.

2. Judge’s Capacity to Act Impartially

An interest in a marijuana enterprise may also create an appearance of impropriety and cast doubt on a judge’s ability to act impartially. (Canon 2 [requiring judges to avoid impropriety and its appearance in all activities]; Advisory Com. com. foll. canon 2A [test for impropriety is whether a person aware of the facts might reasonably entertain a doubt

that the judge would be able to act with independence, integrity, and impartiality]; Terminology, “impropriety” [includes conduct that undermines a judge’s impartiality].) Canon 4A(1) also explicitly requires a judge to conduct all extrajudicial activities so that they do not cast reasonable doubt on the judge’s capacity to act impartially.

A judge must disqualify himself or herself when a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Judges “are expected to honestly examine their lives, thoughts, experiences, relationships and biases and not to sit on a case unless they have determined that none of these things will stand in the way of rendering fair and impartial justice.” (Rothman, Cal. Judicial Conduct Handbook (3d ed. 2007) § 7.36, p. 335.) Even if a judge determines that owning an interest in a marijuana enterprise will have no bearing on his or her ability to be impartial, if “a reasonable mind (not the mind of a particular lawyer or party) would conclude that there is an objective doubt that the judge would be able to remain impartial regardless of the judge’s professional efforts to put aside his or her bias,” then the judge should disqualify himself or herself. (*Id.*, § 7.57, p. 366.)

The decriminalization of certain marijuana activities in California has not eliminated state criminal investigation and prosecution for numerous marijuana crimes, such as driving under the influence or possession of large quantities of marijuana, as well as the variety of civil matters that may arise from the marijuana industry, including civil violations of state marijuana regulations, zoning, licensing, seizure or forfeiture of assets, employment disputes, landlord-tenant disputes, and contract disputes. A reasonable person could conclude that a judge who disregards applicable marijuana laws for his or her own benefit is unable to act impartially anytime the judge rules on a marijuana-related matter. For example, it may appear to a reasonable person that a judge who owned an interest in a marijuana business would be unable to act impartially in evaluating a forfeiture of assets that were earned through a marijuana business. This is also true if a judge’s spouse holds a separate, noncommunity property investment in a marijuana enterprise. The distinction between separate and community property may be insufficient to eliminate an appearance of impropriety. A reasonable person could

conclude that the judge supports his or her spouse's decision to maintain a separate interest in a marijuana enterprise, and that this spousal interest could impact the judge's ability to act impartially.

There will always be at least an appearance of impropriety and doubts regarding impartiality when a judge decides to disregard a law to benefit his or her personal interest. Therefore, it is the committee's opinion that a judge cannot maintain an interest in a marijuana enterprise and has an ongoing duty to make reasonable efforts to inform himself or herself about any financial interest in a marijuana enterprise. If the judge discovers such a financial interest, he or she should divest himself or herself of such investment or otherwise take steps to ensure the termination of the enterprise. (See canon 3E(5)(d), Code Civ. Proc., § 170.1, subd. (a)(3)(C).). To maintain any such interest would create an appearance of impropriety and cast doubt on a judge's ability to act impartially.

IV. Conclusion

It is the committee's opinion that maintaining any interest in an enterprise that involves the cultivation, production, manufacture, transportation or sale of medical or recreational marijuana is incompatible with a judge's obligations to follow the law under canon 2. Such conduct is an activity involving impropriety that fails to comply with federal law and puts a judge at risk for federal prosecution. Despite the limited decriminalization of medical and recreational marijuana use, there will continue to be numerous marijuana-related matters in the courts. Moreover, a reasonable person could easily conclude that a judge's disregard of federal law creates an appearance of impropriety and casts doubt on the judge's ability to act impartially, particularly in marijuana-related cases. Therefore, the committee concludes that an interest in a marijuana-related business creates an appearance of impropriety, casts doubt on a judge's ability to act impartially, and is incompatible with a judge's obligations under canon 2 and canon 4A(1).



This opinion is advisory only (Cal. Rules of Court, rule 9.80(a), (e); Cal. Com. Jud. Ethics Opns., Internal Operating Rules & Proc. (CJEO) rule 1(a), (b)). It is based on facts and issues, or topics of interest, presented to the California Supreme Court Committee on Judicial Ethics Opinions in a request for an opinion (Cal. Rules of Court, rule 9.80(i)(3); CJEO rule 2(f), 6(c)), or on subjects deemed appropriate by the committee (Cal. Rules of Court, rule 9.80(i)(1); CJEO rule 6(a)).