

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS
NO. 22-03**

MAJORITY OPINION

I. Questions Presented

- A. Can a Nebraska licensed attorney invest in a medical cannabis business in another state where the business is legal in that state?
- B. If the investment by the attorney is found to violate the Rules of Professional Conduct in Nebraska, could the investment be made by the spouse of the attorney?
- C. Can a Nebraska licensed attorney advise Nebraska clients on how to deal with employment issues surrounding medical cannabis where the client has employees who live in a state where cannabis is legal, but whose employees are employed in Nebraska?

II. Summary of Opinion

- A. Pursuant to federal law, state law and the Nebraska Rules of Professional Conduct (“the Rules”), a Nebraska attorney may invest in a medical cannabis operation in a state where a cannabis business is legal. The opinion is qualified however to the limited facts provided, the lawyer remains compliant with all other Rules, and that the federal approach to the enforcement of cannabis laws remain as they are at present.
- B. If a spouse of a Nebraska attorney is not an attorney, then the Nebraska Rules of Professional Conduct would not apply and the non-attorney spouse would be free to invest in a medical cannabis operation in another state where the business is legal in that state.
- C. A Nebraska licensed attorney is permitted to advise Nebraska clients on employment issues that arise surrounding medical cannabis where the client has employees who live in a state where cannabis is legal, but whose employees are employed in Nebraska.

III. Statement of Facts

A Nebraska attorney wants to be a partial member / owner of an LLC / corporation, which has applied for and received a license to dispense, manufacture, or grow medical cannabis in the State of South Dakota, where it is legal to do so. The attorney is a Nebraska licensed attorney or has an In-House Counsel registration for the State of Nebraska and is subject to Nebraska disciplinary requirements. The attorney is not licensed in South Dakota and does not provide legal advice to the LLC or corporation. The attorney's role is merely an investor. The LLC or corporation has its own legal counsel.

Additionally, the Nebraska licensed attorney has a corporate client with employees that reside in a state that allows medical cannabis. The client seeks advice on how to deal with employees that may use medical cannabis in a legal manner in the state where the employee resides and then show up to work in Nebraska.

The Controlled Substances Act (CSA) of 1970 made it clear that the use and possession of cannabis is illegal in the United States under federal law. The CSA determined the drug to be scheduled as a Schedule I drug, meaning it has high potential for abuse and no accepted medical use. However, the federal enforcement policy, as articulated by the Department of Justice on August 29th of 2013, was to limit its enforcement of federal narcotics laws and would not ordinarily prosecute individual actors and institutions who acted consistently with state laws that legalized and extensively regulated medical marijuana. (commonly referred to as the “Cole Memo”). The Cole Memo was later rescinded by the Department of Justice, but Congress meanwhile in 2014, adopted legislation referred to as the “Rohrabacher-Farr Amendment” which prohibits the federal prosecution of individuals who are complying with the medical cannabis rules in that state. Rohrabacher-Farr essentially prohibits the Justice Department from spending federal funds that conflict with the implementation of medical cannabis laws at the state level.

At the time of this opinion, Nebraska law does not permit the medical or recreational use of cannabis. South Dakota recognized the legal use of medical cannabis effective July 1, 2021.

IV. Applicable Rules of Professional Conduct

A. § 3-508.4. 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;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers, or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law or
- (g) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by Nebraska law.

2. § 3-502.1 Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but

to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.

V. Discussion

Currently 37 states and 4 territories permit medical use of cannabis products and 18 states, two territories and the District of Columbia permit recreational use of marijuana. State Medical Marijuana Laws, NCSL, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> (last updated February 3, 2022). Nebraska, to date, does not authorize the use of either medical or recreational use of marijuana.

At the federal level, marijuana technically remains illegal under 21 U.S.C. § 841(a)(1) which states: “Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense a controlled substance.” But Congress adopted legislation known as the Rohrbacher-Farr amendment which prohibited the use of federal funds to interfere with the implementation of state medical cannabis laws. H.R. 4660—113th Congress (2013-2014) Commerce, Justice, Science and Related Agencies Appropriations Act, 2015. Essentially, this amendment bars the government from using federal funds to prosecute medical cannabis in a state where it is legal.

The initial question of whether a Nebraska lawyer may invest in a cannabis related entity in a state where cannabis products are permitted, we believe to be rather narrow in nature. Generally, lawyers are free to engage in businesses to the same extent as other members of the public. And no law exists in Nebraska which would prohibit investing in companies which conduct business in the cannabis industry. In fact, investments in these types of companies can be achieved through the NYSE, NASDAQ, OTC, or many other public and private investment vehicles. Merely investing in a cannabis company, which presumably operates within the bounds of the applicable state laws, does not in our opinion rise to the level of a criminal act, nor does such conduct reflect adversely on the lawyers honesty, trustworthiness, or fitness to practice as contemplated within 3-508.4(b). We have found only two other state ethics committees which have addressed this precise issue, both of which likewise determined that a lawyers investment in a cannabis related company, without more, was permitted under the rules of professional conduct. See New York State Bar Association Opinion 1225 issued July 8, 2021; and Washington State Bar Association Advisory Opinion 201501, issued 2015.

This opinion does not however intend to address the broader and more thorny issue of whether a Nebraska lawyer may advise and/or give legal advice, to clients given the current status of Nebraska marijuana laws.

And our opinion is indeed qualified. Under all circumstances the lawyer must remain compliant with the Nebraska Rules of Professional Conduct. For example, our opinion would be different if the lawyer, by or through the company in which the investment was made, was knowingly acting in a manner which violated Nebraska law—such as distributing marijuana in Nebraska. Compliance with 3-508.4 and all other ethical rules must be analyzed on a case by case basis, but investing in a cannabis related company operating in states which permit the medical use of marijuana, without more, is not in violation of the Rules.

Also, if the federal government were to disavow its present positions concerning enforcement of the marijuana laws, this opinion must be revisited.

The second question poses the inquiry into whether the spouse of a Nebraska licensed attorney could invest in a medical cannabis operation in another state where medical cannabis is illegal if the Rules prohibited the attorney spouse. As stated above the mere act of a Nebraska attorney investing in a company which operates in the cannabis business which operates in a state permitting and regulating such activity does not, by itself and without more, violate the Rules.

The third question presented asks whether a Nebraska licensed attorney can advise Nebraska employers on employment issues that arise when an employee works in Nebraska but lives in another state where medical cannabis is legal, such as Colorado or South Dakota. Section 3-502.1 of the Rules permits a lawyer to render legal advice that considers moral, economic, social, and political factors that may be relevant to the client's situation. Under the facts presented, a Nebraska lawyer can advise a client about Nebraska law dealing with employment issues involving an employee's use of medical cannabis. Rendering advice concerning Nebraska employment issues is readily separate from rendering advice as to the legality of marijuana use and the cannabis industry permitted in other States.

For example, if a Nebraska employer has a non-resident employee who travels to work from South Dakota where medical cannabis is permitted, the Nebraska attorney can advise the Nebraska employer about the issues arising from the employee's medical cannabis use and the employer's rights under Nebraska law. Such

employment issues might include drug testing, termination due to a failed drug test, or employment appeals. All sticky issues indeed, but ones beyond the scope of this opinion.

VI. Conclusion

The Nebraska State Bar Association Ethics Advisory Committee concludes that a lawyer may invest in a medical cannabis operation in another state where the operation is legal in that state.

Additionally, a Nebraska attorney is permitted to advise Nebraska clients on employment issues surrounding medical cannabis where the employees of said client live in a state where medical cannabis is legal but, who are employed in Nebraska.

DISSENTING OPINION

I. Summary of Dissenting Opinion

- D. Pursuant to federal law, state law and the Nebraska Rules of Professional Conduct (“the Rules”), a Nebraska attorney is prohibited from investing in a medical cannabis operation in a state where that type of operation is legal. Due to medical cannabis being illegal at the state and federal level, the Nebraska licensed attorney would be violating § 3-508.4 and could be subject to discipline.
- E. If a spouse of a Nebraska attorney is not an attorney, then the Nebraska Rules of Professional Conduct would not apply, and the non-attorney spouse would be free to invest in a medical cannabis operation in another state where the business is legal in that state, though this would be technically illegal at the federal level. However, the non-attorney spouse would need to act independently from the attorney spouse. The attorney spouse could not have any involvement in the investment. No advice, comment or knowledge could be given by the attorney spouse regarding the investment.
- F. A Nebraska licensed attorney is permitted to advise Nebraska clients on employment issues that arise surrounding medical cannabis where the client has employees who live in a state where cannabis is legal, but whose employees are employed in Nebraska.

II. Statement of Facts

Dissenting members adopt the majority's Statement of Facts and add the following additional facts to the Statement of Facts.

The Controlled Substances Act (CSA) of 1970 made it clear that the use and possession of cannabis is illegal in the United States under federal law. The CSA determined the drug to be scheduled as a Schedule I drug, meaning it has high potential for abuse and no accepted medical use. However, cannabis policy at the state-level varies greatly and clashes with federal law when determining the legality of the recreational and medical use of cannabis.

The recreational use of cannabis is legalized in 18 states while the medical use of cannabis is legal with a doctor's recommendation in 37 states, and although cannabis remains under Schedule I classification, the Rohrabacher-Farr amendment prohibits the prosecution of individuals who are complying with the medical cannabis rules in that state. Rohrabacher-Farr essentially prohibits the Justice Department from spending federal funds that conflict with the implementation of medical cannabis laws at the state level.

Although state law in South Dakota conflicts with federal law statutes on cannabis legalization, Nebraska is one of the few states that has chosen to reflect what federal statutes say about the illegality of cannabis.

III. Applicable Rules of Professional Conduct

A. § 3-508.4. 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;

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers, or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law or
- (g) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by Nebraska law.

B. § 3-502.1 Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.

IV. Discussion

There is nothing in Nebraska Rules of Professional Conduct that directly addresses whether an attorney commits a violation if he or she were to invest in a business that is illegal in Nebraska but is legal in other states. It is also not explicitly stated within the Rules whether a Nebraska attorney can advise clients on issues surrounding a substance that is illegal in Nebraska but legal in other states.

At the federal level, cannabis is currently illegal under 21 U.S.C. § 841(a)(1) which states: “Except as authorized by this subchapter, it shall be unlawful for any person

knowingly or intentionally to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense a controlled substance.” The Commerce, Justice, Science, and Related Agencies Appropriations Act of 2015 contained an amendment called the Rohrbacher-Farr amendment which prohibited the use of federal funds to interfere with the implementation of state medical cannabis laws. H.R. 4660—113th Congress (2013-2014) Commerce, Justice, Science and Related Agencies Appropriations Act, 2015. Essentially, this amendment barred the government from using federal funds to prosecute medical cannabis in a state where it is legal.

Potential issues arise when a cannabis-legal state borders a cannabis-illegal state and there are investment opportunities in the business that are available for citizens across state lines.

The first question presented asks whether a Nebraska licensed attorney could invest in a medical cannabis business in another state where the business is legal. We determine that a Nebraska lawyer cannot invest in a medical cannabis business in another state, because the investment would violate state and federal law and, in turn, violate § 3-508.4 of the Nebraska Rules of Professional Conduct for Nebraska attorneys.

The Rule states that it is professional misconduct for a lawyer to: “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 . . . or commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as lawyer in other respects... or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation”

The conflict of laws between bordering states on cannabis policy creates a convoluted juxtaposition between state law, federal law and the Nebraska Rules of Professional conduct that govern lawyers. Nebraska is one of the few states remaining with strict anti-cannabis laws (at least for now). Regardless of whether the laws are enforced, medical cannabis is illegal in Nebraska. Furthermore, it is classified as a Schedule I drug at the federal level. If a Nebraska-licensed lawyer were to invest in a medical cannabis operation, they could be in violation of federal and Nebraska state law, which in turn could be grounds for discipline under the Nebraska Rules of Professional Conduct for engaging in misconduct under § 3-508.4.

Due to these potential violations, a Nebraska licensed attorney is prohibited from investing in a medical cannabis operation in a state where medical cannabis is legal.

The second question poses an interesting inquiry into whether the spouse of a Nebraska licensed attorney could invest in a medical cannabis operation in another state where medical cannabis is illegal if the Rules prohibited the attorney spouse. In this case, a similar analysis applies. To mitigate the risk of the attorney spouse violating § 3-508.4, the non-attorney spouse must act independently from the attorney spouse when investing in the medical cannabis business. Any advice, comment or knowledge given to the non-attorney spouse by the attorney spouse could be seen as contributing to a criminal act and therefore in violation of § 3-508.4.

Additionally, the “independent actions” of the non-attorney spouse could be blurred and drag the attorney spouse into the sphere of being an investor under some circumstances. What if the spouses have a joint bank account that is used to invest in the medical cannabis business? There could be less risk for a violation of the Rules if the non-attorney spouse used a separate personal bank account or separately owned LLC to invest in the business. But, where is the line to be drawn? Although the non-attorney Nebraska spouse might be in violation of federal law for investing in a cannabis operation that is legal in South Dakota, they are unlikely to be prosecuted for their investment due to the Rohrabacher-Farr amendment. If there is no federal prosecution, then the attorney spouse should not be subject to discipline under the Nebraska Rules of Professional Conduct.

If this analysis continues down the rabbit hole, what if the non-attorney spouse dies and leaves a Will bequeathing the investment in the South Dakota cannabis operation to the attorney spouse? Must the attorney spouse renounce or disclaim? Divest? Liquidate? This opinion poses these questions because they naturally flow from the narrow question posed; however, the Committee does not attempt to answer these broader questions.

The third question presented asks whether a Nebraska licensed attorney can advise Nebraska employers on employment issues that arise when an employee works in Nebraska but lives in another state where medical cannabis is legal, such as Colorado or South Dakota. Section 3-502.1 of the Rules permits a lawyer to render legal advice that considers moral, economic, social, and political factors that may be relevant to the client’s situation. Under the facts presented, a Nebraska lawyer can advise a client about Nebraska law dealing with employment issues involving an employee’s

use of medical cannabis. This is so because rendering advice about employment issues can be readily separated from rendering advice about an illegal activity.

For example, if a Nebraska employer has a non-resident employee who travels from South Dakota where they live and use medical cannabis to work in Nebraska, then a Nebraska attorney could advise the Nebraska employer about the issues that arise from the employee's medical cannabis use and the employer's rights under Nebraska law to deal with an employee who might test positive for cannabis, which could be in violation of the employer's drug policy. Other employment issues might include drug testing, termination due to a failed drug test, or employment appeals. Sticky issues indeed, but ones which this opinion does not address.

V. Conclusion

The dissenting members of the Nebraska State Bar Association Ethics Advisory Committee conclude that a lawyer may not invest in a medical cannabis operation in another state where the operation is legal in that state; however, the spouse of the Nebraska attorney would be able to invest in such an operation if they acted entirely independently from their attorney spouse regarding their investment.

Additionally, a Nebraska licensed attorney is permitted to advise Nebraska clients on employment issues surrounding medical cannabis where the client has employees that live in a state where cannabis is legal but who are employed in Nebraska.

The committee is split as to the outcome of the primary question, "can a Nebraska lawyer invest in a medical cannabis operation in another state where that type of operation is legal under that state's law?"

The existence of such a split illustrates the complexity of this issue.

The Supreme Court of South Dakota, where cannabis is legal under certain limited conditions, created an ethical rule that permits SD lawyers to do what this NE lawyer wants to do.

The Nebraska Supreme Court has not created an ethical rule, thus the question remains unanswered by the highest authority in this state and the one that regulates lawyers.

The dissenting members of the Committee, who are in the minority on this debate, suggest that rather than the committee issuing a split opinion, this question be referred to the Nebraska Supreme Court so it can address this issue head on by making a rule upon which Nebraska lawyers can rely.