ETHICAL LIMITATIONS WHEN ADVISING CLIENTS CONCERNING THE BURGEONING MEDICINAL MARIJUANA INDUSTRY IN MARYLAND

The era of state-legal medicinal marijuana in Maryland is upon us. During 2015, the amount of sales of legal marijuana in the United States totaled *$5.4 billion*, according to *ArcView Market Research and New Frontier Data*, February 1, 2016. Nationwide, twenty-four states and the District of Columbia currently have laws legalizing marijuana in some form.[1]

In 2014, the Maryland legislature enacted the Maryland Medical Cannabis Law ("the law"). (Maryland Code Annotated, Health General Article §§ 13-3306-13-3316.) COMAR regulations followed.[2] In short, medical marijuana has been legalized in Maryland.

The law and regulations provide a legal framework for the growing, processing, dispensing and use of medical marijuana in Maryland and exempt cultivators, processors, and dispensers of medical marijuana who are in full compliance with the statutory scheme from arrest, prosecution, and both civil and administrative penalty. The commission created to implement this legislation anticipated that legal medical cannabis would be available in Maryland by the second half of 2016, but so many applications to obtain business licenses were submitted that the timeline has been extended to 2017. ("Sale of medical marijuana in Maryland probably won't commence until 2017", *The Washington Post*, December 15, 2015.) [3]

This article focuses upon the ethical considerations that Maryland attorneys should consider before performing legal services in to this burgeoning cannabis industry. The Maryland State Bar Association's Committee on Ethics ("Ethics Committee") recently issued Ethics Docket No. 2016-10 ("Ethics Opinion") that provides significant guidance as to two major issues, specifically: "Do the Maryland Rules of Professional conduct prohibit attorneys from advising clients seeking to engage in conduct pursuant to Maryland's Medical Marijuana Laws?" And, "Do the Rules prohibit Maryland attorneys from having an ownership interest in medical marijuana businesses?" The Ethics Committee responded "No" to both questions, with "caveats."

Interestingly, the Maryland Judicial Ethics Committee came to the opposite conclusion as relates to judges. In a published opinion issued March 31, 2016, the committee opined that a "judicial appointee may *not* grow, process or dispense medical cannabis in Maryland. (Opinion Request Number 2016-09.)[4] The Judicial Ethics Committee relied on Code of Conduct for Judicial Appointees, ("Judicial Code") Maryland Rule 16-814, Rules 1.1 and 3.1, which provide, in relevant part: Rule 1.1: "A judicial appointee shall comply with the law, including the Rules in this Code of Conduct…"; Rule 3.1(c): "A judicial appointee may engage in extra-judicial activities, except as prohibited by law or this Code."

The Judicial Ethics Committee reasoned that Rules 1.1 and 3.1(c) were not limited to Maryland law, but included federal law. Thus, as long as federal law makes marijuana possession, distribution and use illegal, judges may not participate in its growth, processing or distribution. Even if the federal government were to legalize marijuana, the Judicial Ethics Committee went further and expressed the view that judges may nonetheless be prohibited from participation in cannabis-related activities by reason of Rule 1.2(a), which requires judicial appointees to act "at all times in a manner to promote public confidence in the… integrity…of the judiciary." *Id.* at 2.

An ethical problem is created by a conflict between the Maryland law and the federal Controlled Substances Act ("CSA"), 21 U.S.C. §801-904. Under the CSA, marijuana is an illegal "Schedule 1" drug. (CSA §812). As long as marijuana remains illegal under federal law, possession, sale, and distribution of marijuana are federal crimes, as are conspiring with or aiding and abetting someone who possesses, sells or distributes marijuana.

The risk of prosecution for violating the CSA may be theoretical, at least for the time being. The Department of Justice ("DOJ") has issued public announcements, most notably in August 2013, stating federal prosecutors would not target medical marijuana entities that are in strict compliance with the laws of their state, since the federal government "has traditionally relied on state and local authorizes [sic] to address marijuana activity through enforcement of their own narcotics laws."[5]

However, there is no guarantee that the present DOJ policy will remain the same. As long as a U.S. attorney could prosecute an attorney who is in full compliance with the Maryland law, there will be attorneys who will hesitate to represent clients involved in the medical marijuana business.

In addition to the risk of committing a federal crime, Maryland attorneys could be subject to disciplinary proceedings for a violation Rule 1.2(d) of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), which provides:

> "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

After parsing decisions of other states that have grappled with this dilemma, the Ethics Committee decided that there was no ethical violation of Rule 1.2(d). In addition, it decided there was no violation of MLRPC Rule 8.4, which provides:

> "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Maryland Lawyers' 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."

Likewise, the Ethics Committee felt that an attorney should not be prohibited from holding an ownership interest in a medical marijuana business either, as long as it complies with the law. (Ethics Opinion at 4.)

The Committee reasoned that legal advice to businesses about licensing, establishing and operating medical marijuana companies was the "natural and inevitable result" of the passage of the law since it was "clear from the provisions of the law that the legislature intended and expected that individuals and businesses would seek licenses and take other action" to comply with the law. (Ethics Opinion at 1-2.)

However, the Ethics Committee warned that its position is subject to limitations, principally "the federal government maintaining its acquiescence of allowing states to authorize the intrastate production, distribution and use of marijuana for medicinal purposes without interference." (Ethics Opinion at 5.) Other limitations on this Ethics Opinion are that it applies *only* to the medical marijuana law and nothing else and "should the DOJ alter its stance, the proposed conduct may no longer be appropriate." (Id.) The Committee cautions attorneys that it is not dispensing legal advice, is not accountable for the shifting landscape of medical marijuana laws and even suggests that the Court of Appeals should consider amending the MRPC on this issue.

Presently, among the 24 states and the District of Columbia which have laws legalizing medicinal marijuana, bar associations in some of those jurisdictions have issued ethics opinions. Not surprisingly, they conflict. In addition to the positions of Arizona, Washington, Illinois, and Connecticut on Rule 1.2(d) that are considered in the Ethics Opinion, the state ethics board in Maine has taken the position that attorneys must analyze on a case-by-case basis whether the service they are being asked to perform constitutes assistance in violating a federal law. (Maine Professional Ethics Commission, Opinion 199 (2010.) Since it is a violation of federal law to aid someone who possesses, sells or distributes marijuana, the opinion effectively seems to prevent attorneys from providing any transactional legal assistance.

On the other hand, the ethics committee in Arizona decided that a "lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act, despite the fact that such conduct potentially may violate applicable federal law." (State Bar of Arizona Commission on the Rule of Professional Conduct, Opinion 11-01 (2011).)

In an informal opinion, the State of Connecticut Professional Ethics Committee said, "Lawyers may not assist clients with conduct that is in violation of federal criminal law." Connecticut Bar Association Professional Ethics Commission, Informal Opinion 2013-02 (2013). In a backlash to the opinion, the Connecticut Judicial Branch's Rules Committee changed the language of Rule 1.2 to allow a lawyer to counsel a client about compliance with Connecticut law "provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct." [6]

Colorado's Standing Committee on the Colorado Rules of Professional Conduct proposed a similar change to comment to Rule 1.2 as well as a proposal to allow lawyers to counsel clients on marijuana issues without fear of disciplinary action. In March 2014, the Colorado Supreme Court issued a change to the Comment [14] to its Rule 1.2 of the Colorado Rules of Professional Conduct, permitting lawyers to advise marijuana businesses operating under authority of the state constitutional amendment legalizing the drug for medical and recreational use. The comment advises that lawyers must also counsel clients on relevant federal law and policy. [7] The Colorado equivalent of Maryland's Bar Counsel has publicly stated that lawyers there should be allowed to advise clients on marijuana-related issues, assuming they are in compliance with Colorado law. ("Conflicting state and federal marijuana laws create ethical complications for lawyers" ABA.org/news.)

In June 2015, the Bar Association of San Francisco issued an opinion in support of an attorney's ability to advise clients in state-sanctioned marijuana-related business ventures.[8] In August 2015, the Los Angeles County Bar Association issued its opinion that "a member may advise and assist a client regarding compliance with California's marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law…In so doing, the member must advise the client regarding the violation of federal law and the potential penalties associated with a violation of federal law." [9]

In the wake of the Maryland Ethics Opinion, one conclusion seems clear: lawyers can advice, prepare contracts and perform other legal services for individuals and entities engaged in the medical marijuana business in Maryland, and even have an interest in medical marijuana business, as long as the DOJ's position on enforcement does not change. Lawyers need to counsel clients, however, that the safe haven from federal prosecution and from disciplinary proceedings against themselves only exists for those in full compliance with state law.

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[1] (State Marijuana Laws Map, http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html.) Of the Twenty-four states which have legalized marijuana in some form, four states have legalized its recreational use: Alaska, Colorado, Oregon and Washington.

[2] (http://www.dsd.state.md.us/COMAR/subtitle_chapters/10_Chapters.aspx#Subtitle62)

[3] A total of 1,081 in applications were submitted: 811 applications for dispensary licenses to sell medical marijuana directly to consumers, 146 applications for licenses to cultivate marijuana, and 124 applications to transform marijuana into a product or extract. The commission will select a maximum of two dispensary licenses per senatorial district, a potential total of 94 dispensaries statewide. Some counties and municipalities have attempted to prevent the introduction of the medical marijuana industry into their jurisdictions, but the state attorney general has precluded this under the doctrine of preemption.

[4] Under Code of Conduct for Judicial Appointees Maryland Rule 16-814, B "Definitions," a "judicial appointee" means an auditor, examiner, or master appointed by a court and a district court commissioner appointed pursuant to Article IV, § 41G of the Maryland Constitution.

[5] ("Guidance Regarding Marijuana Enforcement" available at www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf and "Justice Department Announces Update to Marijuana Enforcement Policy," August 29, 2013) (known as the "Cole memorandum"), available at www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy.)

[6] (http://www.jud.ct.gov/Publications/PracticeBook/Old/pblj_070114.pdf at page 15PB.)

[7] (http://www.cobar.org/repository/homepage/2014(05).pdf)

[8] (The Bar Association of San Francisco, Opinion 2015-1, June 2015.)

[9] (Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Opinion No. 527, August 12, 2015.)