MARYLAND STATE BAR ASSOCIATION, INC.

COMMITTEE ON ETHICS

ETHICS DOCKET NO. 2016-10

Do the Maryland Rules of Professional conduct prohibit attorneys from advising clients seeking to engage in conduct pursuant to Maryland's Medical Marijuana Laws? Similarly, do the Rules prohibit Maryland attorneys from having an ownership interest in medical marijuana businesses?

Question Presented:

Do the Maryland Rules of Professional conduct prohibit attorneys from advising clients seeking to engage in conduct pursuant to Maryland's Medical Marijuana Laws? Similarly, do the Rules prohibit Maryland attorneys from having an ownership interest in medical marijuana businesses?

Summary Conclusion:

Maryland attorneys are not prohibited under the Maryland Rules of Professional Conduct from advising clients as to medical marijuana business related activities in Maryland, or providing legal services such as contracting or negotiating to advance such projects; and Maryland attorneys are not prohibited by the Rules of Professional Conduct from owning a business interest in such a venture. However, the Committee emphasizes that this opinion is subject to several limitations, which are included at the conclusion of this opinion.

Opinion:

The extraordinary landscape surrounding medical marijuana laws and policy coupled with federal acquiescence in state authorization of marijuana use has left an attorney's related ethical obligations unclear. A number of State ethics opinions predating this opinion offer good background as to lawyers' ethical conduct at the point where state authorized medical marijuana or recreational marijuana use – and the legal services associated with those uses – intersect. We now offer our interpretation of this legal landscape under the Maryland Rules of Professional Conduct ("MRPC").

Since 2013, Maryland's legislature has taken steps to legalize marijuana production, sale, and use for medical purposes, including enacting the Maryland Medical Cannabis Law, Md. Code Ann. Health General §13-3301, et seq. ("Maryland Medical Marijuana Law" or "the Law"). This statutory scheme contemplates permissible marijuana-related activities defined and regulated by statute, including the licensing of growers who will "operate in the State to provide cannabis to: [similarly licensed] (i) Processors. . . ; Dispensaries….; Qualifying patients and caregivers; and Independent testing laboratories…." See §13-3301 to 13-3311. The statute contemplates that individuals and organizations who engage in marijuana-related processing, dispensing, use, and testing in accordance with the statute are "[e]xempt[ed] from arrest, prosecution, or any civil or administrative penalty; penalty for distributing, possessing, manufacturing, or using cannabis diverted from [an] approved program." See §13-3313. The statute further expressly prohibits a number of activities, including smoking cannabis in a public place or operating motor vehicles and other vehicles under the influence of cannabis. See §13-3314. The Act contemplates the fragile foundation upon which the Act stands given possible federal prosecution, stating that "[t]he Governor may suspend implementation of this subtitle on making a determination that there is a reasonable chance of federal prosecution of State employees for involvement with

implementation of this subtitle. Under §13-3316, additional Code of Maryland Regulations (COMAR) regulations governing this law were adopted in 2014.

While Maryland law now permits certain cannabis related activities, the federal Controlled Substances Act, 21 USC §§ 801-904 ("CSA"), however, continues to criminalize the production, distribution, and use of marijuana. Noteworthy to the Committee is the fact that the CSA – with its attendant provisions criminalizing such conduct – existed when the Maryland legislature enacted the Maryland Medical Marijuana Law. It is clear from the provisions of the Law that the legislature intended and expected that individuals and businesses would seek licenses and take other action necessary to operate businesses to accomplish the purposes of the Maryland Medical Marijuana Law.

To further complicate the landscape, while the federal government has not repealed the federal law criminalizing medical marijuana, it has repeatedly stated that it does not wish to impede retails sales of medical marijuana permitted under state law. See, e.g., Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys, re Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), available at http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf (underlining in original); Memorandum from James M. Cole, Deputy Attorney General, to United States Attorneys, re Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) (underlining in original), available at http:/ www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf; Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, re Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf (underlining in original) ("Cole Memorandum"). Additionally, Congress in 2014 appears to have financially prevented the Department of Justice from enforcing the CSA insofar as state medical marijuana schemes are concerned. See the Consolidated and Further Continuing Appropriations Act, 2015, H.R. 83, 113th Cong. §538 (2014). This summary is cursory and should not be relied upon as exhaustive or authoritative. Instead, it is illustrative of the factual background the Committee assumes for the assessment of these ethical questions: State law has legalized medical marijuana, its production, distribution and use (and created a statutory and regulatory scheme for businesses to create this industry), while federal law still criminalizes marijuana use, production and distribution, although the expressed federal policy is not to enforce its criminal laws in this context.

Given that exemption from prosecution under state law is enjoyed by parties in compliance with Maryland's Medical Marijuana Law, those individuals and enterprises are now seeking legal services to set up and maintain those businesses, as well as to assure their marijuana production, distribution, testing and/or use is in conformance with the Act. Indeed, attorney assistance to advise and assist individuals and businesses to become licensed and/or to establish and operate the medical marijuana production and distribution services in accordance with the statute, while not expressly contemplated by the statute, is the natural and inevitable result of the implementation of such a law and regulatory scheme. However, because marijuana production, distribution, and use remain criminalized under federal law, MRPC 1.2(d) must be considered:

> 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.

The ethical issue presented by MRPC 1.2(d) in this context is that by advising a client with regard to Maryland's Medical Marijuana Law in such a way as to assist people in becoming licensed producers or distributors of medical marijuana, or by engaging in legal services such as negotiations or contract construction in order to assist medical marijuana related businesses, a lawyer could run afoul of the continuing, though unenforced, federal marijuana prohibition.

Different states have applied this rule under their own canons of legal ethics with differing results. For the reasons that will be explored below, Illinois, Arizona, and Washington have produced thorough and detailed opinions in which they have allowed attorneys to engage in advising and providing additional legal services (e.g. negotiations, contracts, etc.) to persons who are seeking to conduct activities in furtherance of the state's law governing marijuana production, use, and distribution. See Washington State Bar Association Advisory opinion No. 201501 (2015); State of Arizona Ethics Op. 11-01 (2011); Illinois State Bar Association Professional Conduct Advisory Opinion No. 14-07 (2014). In short, those opinions reason that Rule 1.2(d) is constructed to maintain the rule of law and that legal services in fact advance that purpose. These opinions disfavor withholding legal advice and forcing clients to guess how to pursue activities that are consistent with conduct contemplated by state statute. Connecticut, on the other hand, has declined to authorize services beyond advice and prohibits more active services such as contract drafting or negotiations to advance marijuana production, sales, and use. That opinion, too, is similarly well reasoned, holding that a plain application of the rule recognizes that marijuana production, sale and use remains illegal, and under a literal application of the Rule, legal services beyond advice such as negotiating and contracting to advance marijuana sales violate Rule 1.2(d).

The challenge faced by this Committee is that both interpretations can be seen as logically correct with one analysis focusing on a "letter of the law" interpretation and the other relying upon a "rule of reason" or spirit of the law approach. While both points of view could be applicable under the MRPC, this Committee believes that the interpretations of similar rules adopted by Arizona, Washington, and Illinois allowing attorneys to advise, assist legally, and/or own business interest in medical marijuana businesses consistent with Maryland's state regulatory scheme is more in accord with the Maryland Rules of Professional Conduct and harmonizes the Rules with the stated public policy of the State. *See Adler v. American Standard Corp.*, 291 Md. 31, 39, 432 A.2d 464 (1981)(quoting *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 389 (1980))("Certainly when there is a relevant state statute we should not ignore the statement of public policy that it represents.")

An attorney may always advise a client as to the consequences of conduct.[1] That is the attorney's role. However, even though the CSA continues to criminalize medical marijuana use, this Committee believes that the method for applying the Maryland Rules of Professional Conduct adopted in the MRPC preamble allows legal services to further the policy goals and expressly authorized activities under state law and allows attorneys to advise clients conducting medical marijuana activities within the State as to the ramifications of their activities as well as to also actively provide legal services beyond advice, including contract construction, negotiations, assistance in procuring state licenses, and any other legal service necessary to protect or promote business activities sanctioned by the statute, or to comply with the Maryland State Legislature's regulatory scheme of a business.

Paragraph 14 of the preamble to the MRPC states: "The Maryland Lawyers' Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." The Maryland Medical Marijuana Law creates, governs, and legally sanctions an industry new to Maryland. Prohibiting attorney services would serve to molest and inhibit activities allowed by state law and

express federal acquiescence. As the Illinois State Bar opined with regard to its enacted medical marijuana law: "It creates a classic example of a business in serious need of legal advice and counsel." Illinois Opinion No. 14-07 at 3. As that body concluded:

> Given the conflict between federal and state law on the subject of marijuana as well as the accommodation provided by the Department of Justice, the provision of legal advice to those engaged in nascent medical marijuana businesses is far better than forcing such businesses to proceed by guess work.

Id. See also Arizona State Bar Opinion No, 14-07 ("A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law.") Similarly, the Washington State Bar Association explained that

> the predominant purpose of lawyer discipline is to protect the public…. The [State's] public needs protection to assure that the boundaries of [state medical marijuana law] are enforced, and that requires allowing lawyers to do their work. Clients who wish to comply with [state medical marijuana laws] necessarily require assistance with, for example, drafting contracts, forming limited liability companies, retaining employees, and performing other business functions that benefit from sound legal advices.

See also Illinois State Bar 14-07 ("The Committee believes that it is reasonable to permit Illinois lawyers, whose expertise in draftsmanship and negotiations is of great value to the public, to provide the same services to medical marijuana clients that they provide to other businesses. One of the purposes of legal representation is to enable clients to engage in legally regulated businesses efficiently, and that purpose is advanced by their retention of counsel to handle matters that require legal expertise.")

The Committee does not believe that Rule 8.4, which defines and prohibits professional misconduct, is violated by an attorney who advises and assists clients who conduct medical marijuana activities in compliance with Maryland's Medical Marijuana Law. The proposed conduct does not, in the Committee's opinion:

> (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;
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> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
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> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
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> (d) engage in conduct that is prejudicial to the administration of justice;
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> …

Attorneys holding interest in medical marijuana businesses

In general, the MRPC do not limit attorneys from engaging in business activities available to other members of their communities. For the reasons stated above, the Committee feels that an attorney is not prohibited from holding an ownership interest in a medical marijuana business that conforms to Maryland's Medical Cannabis Laws. MRPC rules applicable to any business transactions with clients can still affect the appropriateness of business activities under specific circumstances and must be applied. For instance, under Rule 1.8, an

attorney cannot obtain a business interests in a client's business absent the client seeking and receiving independent advice.

Caveats

This Committee points out that this opinion is limited by many factors, and attorneys employing it must understand the limitations of this opinion as well as unresolved legal and ethical issues, including, but not limited to:

1. This opinion is offered under unique circumstances where this State has enacted a law that directly runs in contradiction with federal law, but where the United States has expressly acquiesced to the state action by stating it will not interfere with activities complying with the state law. Whether the Committee would reach the same conclusion in other situations should not be predicted, and this opinion should not be extrapolated to any other context. And, as always, ultimately what is deemed ethical under the MRPC is up to the Court of Appeals, for whom this Committee cannot speak.
2. The medical marijuana landscape is unique. Nothing in this opinion implies that lawyers are free in any other circumstance to disregard established law, conflicts in law, or to attempt to circumvent ethical obligations by applying a "rule of reason approach" to other ethical duty or ethical question before them.
3. The Committee's position is largely predicated upon the DOJ's stated position it will leave appropriately state regulated medical marijuana activities unmolested. Should the DOJ alter its stance, the proposed conduct may no longer be appropriate.
4. This opinion, like all ethics opinions, is not intended as legal advice, and it does not immunize any lawyer from disciplinary action or prosecution by authorities with such powers. This Committee does not specialize in the shifting and complicated legal landscape of medical marijuana laws or of the DOJ approaches to enforcement or nonenforcement. The questions posed by the party soliciting this opinion required an overview of the legal landscape, but this Committee's overview should not be relied upon as legal research, and it is by no means exhaustive. For further guidance on the legal posture, one could request an opinion of the Attorney General's Office.
5. The Local Rules of the U.S. District Court for the District of Maryland contain rules contemplating potential attorney discipline before the federal bar for violations of ethical obligations. This fact is applicable to any potential interpretation of the Rules of Professional Conduct. However, we raise it in this context given the competing federal law that runs contrary to the state scheme raises the possibility that a federal arbiter of an attorney's ethical obligations may hold opinions contrary to this Committee's position and take action against attorneys admitted to practice before the federal court system for activities under Maryland's Medical Marijuana Law.
6. The Committee's opinion is limited to application of the MRPC to activities that the DOJ has acquiesced to under Maryland's Medical Marijuana Law. There always remains the possibility that certain acts of counsel or clients could be deemed by the DOJ as outside of the scope of conduct permitted by state law. Concern was particularly raised in the Committee's discussion of the questions presented whether medical marijuana activities involving interstate rather than intrastate activities might be deemed to fall outside of the DOJ's stance as to what Medical Marijuana activities it will not prosecute. Such potential activities are potentially innumerable, and this Committee cannot speak for the DOJ or its views, preventing any meaningful analysis of those circumstances. However, a prudent attorney engaging in a medical marijuana business or related legal services should constantly gauge whether proposed conduct or legal assistance might be deemed appropriate by the DOJ, and that where such conduct is deemed to be outside of the protections offered by the DOJ's acquiescence, it may similarly be deemed unethical under the MRPC.

In conclusion, this Committee feels that the MRPC do not prohibit attorneys from advising and assisting medical marijuana businesses by providing legal services to advance the business's interests and to ensure compliance with Maryland's statutory regulation scheme, nor do they prohibit ownership of such ventures by attorneys. This position is subject to the limitations enumerated above, including 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.

The Committee is further of the opinion that it would be beneficial for the Court of Appeals, assuming it is in agreement with this opinion, to amend the Maryland Rules of Professional Conduct to reflect the ethical nature of assisting in or conducting business activities under Maryland's Medical Malpractice Law. The Committee hereby offers whatever assistance the Court desires to accomplish that task.

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1 As noted by the Comment No. 9 to MRPC 1.2(d):
Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.