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CANNABIS LAW

THE THIN GREEN LINE

Rule 1.2(d) and the Ethical Considerations in Advising Cannabis Clients in Maryland

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After many years of legislative wrangling, administrative rulemaking, application processing, and rollouts, the medical cannabis industry is officially open for business in Maryland. Thousands of patients have already received recommendations and registered with the Department of Health to qualify to purchase medical cannabis for themselves or a patient they care for. Hundreds of businesses have received a license to grow, process, and/or dispense medical cannabis. Hundreds of millions of dollars have been invested in procuring real estate, building state of the art facilities, and preparing for the new industry. Prognosticators estimate that the total sales of medical cannabis in Maryland could reach $400 million by 2022.

Of course, Maryland is not the first state to roll out a medical cannabis program of this size and scope. At least two dozen other states have taken on this new industry, most notably Colorado, Washington, Oregon, Nevada, Illinois, and Massachusetts, with varying but generally positive results. And while Maryland looks to establish its own unique medical cannabis program, the experiences of these various states that came before can lend valuable insights into how to best tackle the challenges and questions attendant with all medical cannabis programs. Among these questions, and the subject of this brief article, is how to address for

attorneys the ethical implications of advising cannabis businesses in the Maryland.

Shakespeare famously wrote in Henry VI, Part II, Act IV, "The first thing we do, let's kill all the lawyers." However, without access to lawyers and to the courts, businesses could not operate and investors would run for the hills. For their part, lawyers are reticent to advise these businesses because they are openly flouting the Controlled Substances Act (CSA) of 1970, PUB. L. NO. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 812 (2012)), in which cannabis is listed in Schedule I. Schedule I is reserved for drugs with a high potential for abuse and no recognized medical use. Thus, its cultivation, possession, sale, and distribution are prohibited, with a very narrow exception for federally approved research under 21 U.S.C. § 872(e). And while the federal government has softened its approach to enforcement against medical cannabis and some adult-use cannabis programs and operators, the law is hardly settled on the issue (as the accompanying articles in this issue demonstrate).

Lawyers therefore face an ethical dilemma in deciding whether they may advise cannabis clients. The CSA makes clear that any cannabis commerce is unlawful, and yet the regulation of lawyers is a state-based matter, and the principal means of ethical obligations are the state's rules of professional conduct. Rule 1.2(d) of the American Bar Association Model Rules of Professional Conduct (2015), which the Maryland Lawyer's Rules of Professional Conduct replicates, 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.*

It is interesting to note that Rule 8.4 involving professional misconduct of the ABA Model Rules and Maryland Rule of Professional conduct also may play into the analysis of lawyers' participation in the cannabis industry. However, that is outside the scope of this brief article.

How is it possible, then, given the plain language of Rule 1.2(d) and the CSA, that lawyers all around the country have advised cannabis clients over the past decade since the industry has taken root in various states? There is at least one organization, The National Cannabis Bar Association, that organizes, educates, and connects lawyers who work with cannabis clients. How have other states tackled this conflict to ensure that businesses there have access to lawyers and to the courts?

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This article will 1) take a look how other medical cannabis states have addressed the issue of lawyers' professional responsibility in advising cannabis clients, 2) and make some simple and basic suggestions that Maryland lawyers may follow when considering taking on a cannabis client.

Broadly, state approaches on this issue fall into one of three categories: 1) Amendment of the state rules directly; 2) interpretation or opinion by the bar or the state's high court; or 3) disallowance. Several instructive examples are described below. A chart is included at the end of the article for easy reference.

Maryland: Maryland's Court of Appeals has not amended Maryland Rule of Professional Conduct 19-301.2. However, the Maryland State Bar Association's Committee on Ethics (the "Committee") has issued Ethics Docket 2016-10 ("Opinion 2016-10"), which is an extensive advisory opinion that not only addresses whether providing legal advice to clients who seek to engage in conduct pursuant to the Maryland Medical Cannabis Law, Md. Code Ann. Health Gen. §13-3301, et seq., (the "Act"), but also addresses whether it is ethically permissible to have an ownership interest in an entity that operates pursuant to the Act. Like many other opinions issued in other states with medical cannabis laws, Opinion 2016-10 explains the conflict between the Act and the federal Controlled Substances Act, 18 U.S.C. §§ 801-904, which continues to criminalize the production, distribution, and use of marijuana. Opinion 2016-10 includes several caveats stating that current federal law enforcement policy is not to impede sales of medical marijuana permitted under state law, but that enforcement priorities may change.

With respect to the permissibility of providing legal advice regarding the Act, the Committee declined to adopt a "letter of the law" approach to interpretation of Rule 19-301.2. Instead, the Committee adopted a "rule of reason" or "spirit of the law" approach that recognizes that the Act is Maryland's express policy on medical marijuana and that the Rules of Professional Responsibility must be read in harmony with the Act. Opinion 2016-10 indicates that providing legal advice to clients who are engaging in conduct pursuant to the Act is ethically permissible and, in fact, is socially advisable, because those in the medical cannabis industry would benefit from legal advice and could be harmed without it. Opinion 2016-10 does not address issues that lawyers in the cannabis context may encounter under Md. Rule 19-804, which pertains to misconduct and, more specifically, attorney fitness and conduct prejudicial to the administration of justice.

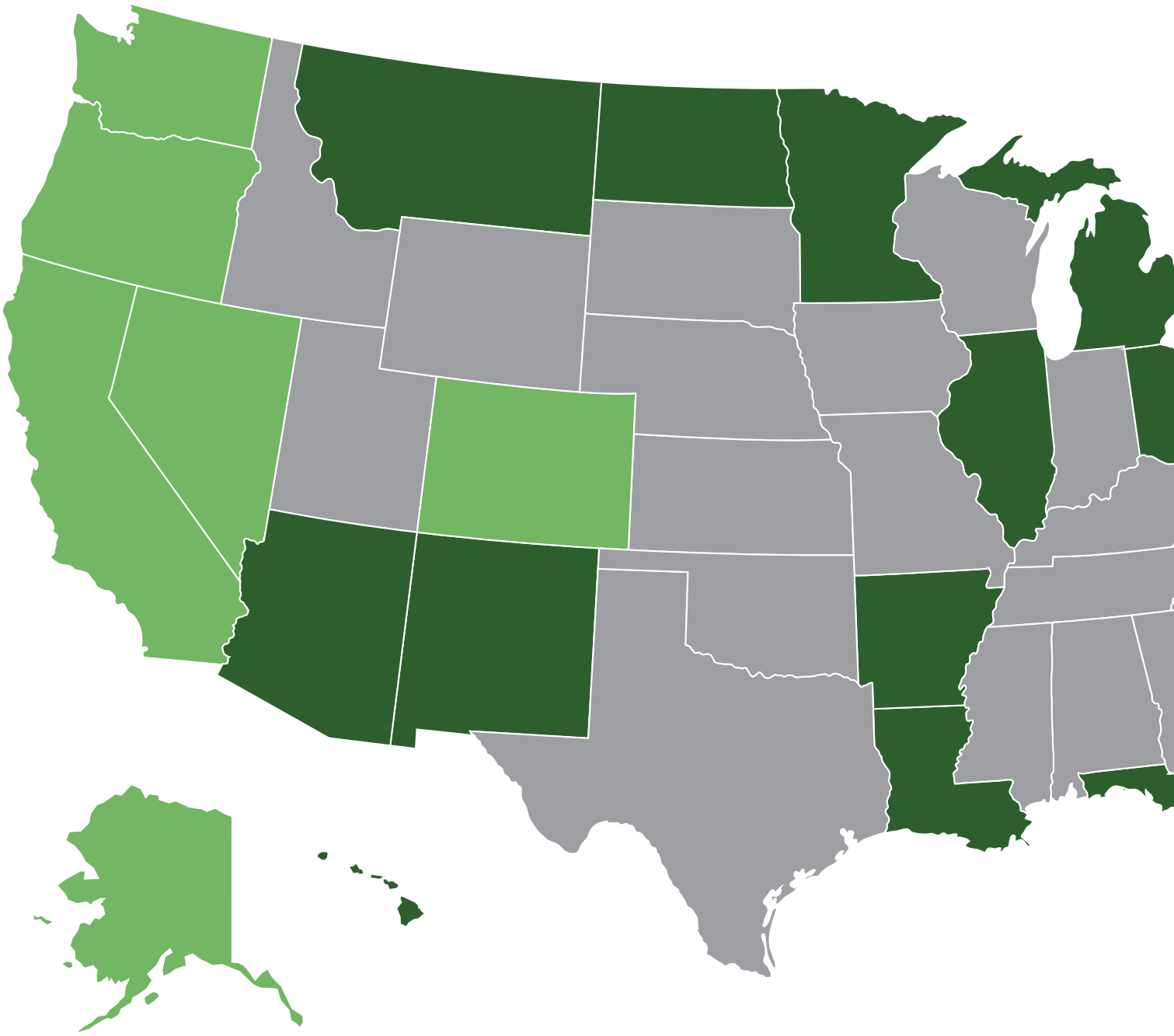
Interestingly, the Committee opined that the Maryland Rules of Professional Conduct do not prohibit an attorney from holding an interest in, or otherwise engaging in business with, a medical marijuana business. However, Opinion 2016-10 cautions that, while the Rules of Professional Conduct may not preclude attorneys from holding an interest in a medical marijuana business, other Rules, such as Rule 19-301.8, which addresses engaging in business transactions with clients, may still apply.

Arizona: In 2011, Arizona was one of the first states to address the cannabis question head on. In State Bar Opinion 11-01, the Arizona State Bar's Committee on the Rules of Professional Conduct issued an advisory opinion that states that "a lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act" so long as the following conditions are met:

1. at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void, or otherwise invalid;
2. the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and
3. the lawyer advises the client regarding possible federal law implications of the proposed conduct, if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

The opinion goes on to say:

In these circumstances, we decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured. 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. In any poten-



tial conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.

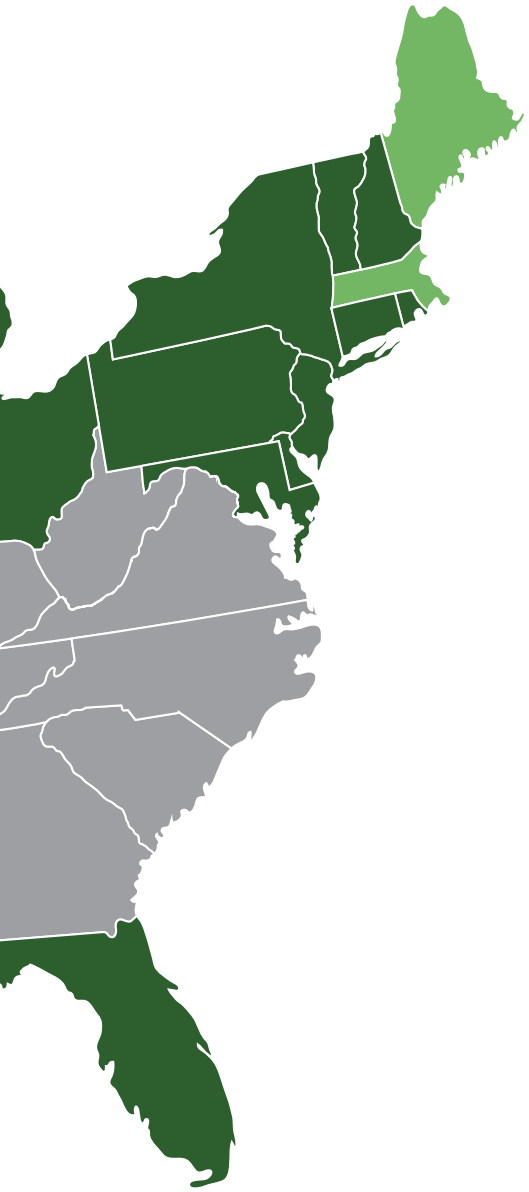
Illinois: In October 2014, the Illinois State Bar Association issued Professional Conduct Advisory Opinion No. 14-07, which largely adopts the reasoning of Arizona's State Bar Opinion 11-01, holding that lawyers should not be stifled from representing clients under a regulatory scheme that clearly requires legal expertise. The opinion further states that legal advice to municipalities on zoning issues related to medical marijuana does not fall within the prohibition of illegal conduct under Rule 1.2.

On October 15, 2015, the Illinois Supreme Court adopted an amendment to Rule 1.2(d), effective January 1, 2016, which reads as follows (edits indicated in underlining and strikethrough):

(d) 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

(1) discuss the legal consequences of any proposed course of conduct with a client,

(2) counsel or assist a client to make a good-faith effort to determine the validity, scope, mean-



ing or application of the law, and

(3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.

The amendment does not explicitly mention cannabis but rather mentions conduct "explicitly permitted by Illinois law."

Maine: In another early opinion from 2010, the Professional Ethics Commission of the Maine Board of Overseers of the Bar issued Opinion #199, which all but prohibited lawyers from representing clients under that state's Medical Marijuana Act, noting that distribution of marijuana is still a violation of federal law and that Rule 1.2 makes no distinction "between crimes which are enforced and those which are not." While the opinion does not, by its own terms, forbid any interaction between lawyers and medical marijuana businesses, it also does not clearly state which types of representation would conceivably be permitted: "We cannot determine which specific actions would run afoul of the ethical rules. We can, however, state that participation in this endeavor by an attorney involves a significant degree of risk which needs to be carefully evaluated."

Minnesota: Minnesota has taken an unusual (but highly industry-favorable) approach to this issue. While its Supreme Court has not yet amended its Rules of Professional Conduct to accommodate representation of cannabis clients, the state law includes extensive statutory protections for registry program participation, including specific protection for attorneys representing cannabis industry clients: "An attorney may not be subject to disciplinary action by the Minnesota Supreme Court or professional responsibility board for providing legal assistance to prospective or registered manufacturers or others related to activity that is no longer subject to criminal penalties under state law pursuant to sections 152.22 to 152.37." Minn. Stat. 152.32 Subd. 2(i).

Moreover, the Minnesota Lawyers Professional Responsibility Board issued its Opinion No. 23 on April 3, 2015, which states in its entirety:

A lawyer may advise a client about the Minnesota Medical Marijuana Law and may represent, advise and assist clients in all activities relating to and in compliance with the Law, including the manufacture, sale, distribution and use of medical marijuana, without violating the Minnesota Rules of Professional Conduct, so long as the lawyer also advises his or her client that such activities may violate federal law, including the federal Controlled Substance Act, 21 U.S.C. § 841(a)(1).

Nevada: The Nevada Supreme Court adopted a comment to its version of Rule 1.2, last amended May 7, 2014: "[1] A lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution article 4, section 38, and NRS chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

Oregon: In February of 2015, the Oregon Supreme Court amended the state's version of Rule 1.2 to add a new paragraph as follows: (d) Notwithstanding paragraph (c), a law-

Table of Changes to State Ethics Rule 1.2 for Cannabis Clients

State	New Rule?	New Comment?	Explicitly mentions marijuana?	Remarks
Alaska	Yes	No	Yes	
Arizona	No	No	N/A	Relatively permissive opinion
California	No (uses 3-210)	No	N/A	Bar assoc. opinion, no official changes yet
Colorado	No	Yes	No	Previous restrictive ethics opinion may be deprecated
Connecticut	Yes	Yes	Yes (in comment)	Previous ethics opinion may be deprecated
Florida	No	No	N/A	Policy not to prosecute
Hawaii	Yes	No	No	Previous ethics opinion is deprecated
Illinois	Yes	No	No	Similar to Hawaii's change, previous ethics opinion was relatively permissive
Maine	No	No	N/A	Probably the strictest prohibitive ethics opinion
Maryland	No	No, but non-binding opinion issued	Yes	"Spirit of the law" non-binding ethics opinion favors policy of attorneys advising cannabis client on state legal activity
Massachusetts	No	No	N/A	Policy not to prosecute
Minnesota	No, but see remarks	No	N/A	Statutory protection + permissive ethics opinion
Nevada	No	Yes	No	Comment refers only to new laws and state constitution
New Jersey	Yes	No	Yes	
New Mexico	No	No	N/A	Highly restrictive ethics opinion, cites to Maine and previous Colorado opinions
New York	No	No	N/A	Permissive ethics opinion in line with Arizona's
Ohio	Yes	No	Yes	Previous ethics opinion may be partially deprecated, at least with respect to R. 1.2
Oregon	Yes	No	Yes	Only state to mention both federal and tribal laws
Pennsylvania	Yes	No	No	
Rhode Island	No	No	N/A	Highly permissive ethics opinion
Vermont	No	Yes	No, but mentioned in Reporter's notes	
Washington	No	Yes	No	

yer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy. Interestingly, Oregon is the only state whose new Rule 1.2 mentions conflicts with both federal and Indian tribal laws.

Pennsylvania: The Supreme Court of Pennsylvania acted on the 2015 advice of the Pennsylvania Bar Association's Legal Ethics and Professional Responsibility Committee and amended its version of Rule 1.2 by adding a new subsection to the rule: (e) A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

In summary, where permissible under state law and under state ethical rules or opinions, attorneys may provide legal advice to clients regarding medical marijuana. In rendering such advice, attorneys should proceed cautiously. Because federal law continues to criminalize production, distribution, and possession of marijuana, attorneys should always advise their clients of federal law's prohibitions and of the inconsistency between federal law and state law in states where marijuana is legal in some form. It may be prudent to explain these issues in a written retainer agreement or in other writings supplied to clients. Also, in states (such as Maryland) with medical marijuana laws but without a binding ethical rule or opinion regarding medical marijuana, attorneys should be especially mindful that they are operating in an ethical gray area and that they may still be at risk of sanction.

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