

Advising Marijuana Business Clients: The Only Certainty Is Uncertainty

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Over 30 states and territories now permit medical marijuana use, and a few states have even legalized its recreational use. (National Conference of State Legislatures (State Medical Marijuana Laws.) Accordingly, attorneys are being sought out to advise clients regarding the development of businesses focused on selling and/or dispensing cannabis. However, a deep chasm of uncertainty exists as to what an attorney may or may not do with respect to advising a potential client in this uncharted territory. This is because the question remains whether federal law trumps state law on the issue of how attorneys may advise clients in the cannabis business.

On May 19, 2016, the Advisory Committee on Professional Ethics in New Jersey issued an opinion proposing an amendment to New Jersey Rule of Professional Conduct 1.2(d) that would allow attorneys to advise clients who legally grow cannabis for medical purposes in New Jersey even though cannabis is still violative of federal law. *If* New Jersey can successfully clarify an attorney's role in not only guiding, but also representing a cannabis business client, sanctioning an attorney should be difficult so long as the attorney is abiding by state law.

Currently, attorneys in New Jersey who would like to provide guidance on medical cannabis use face challenges because, even though its use is permissible in the state, its use still runs afoul of federal law, which considers cannabis a Schedule I drug. (Controlled Substances Act, 21 U.S.C. Section 811 et seq.) The Controlled Substances Act is the key federal policy under which marijuana is regulated. This act classifies all controlled substances into five categories based on medicinal value, harmfulness, and potential for abuse or addiction. (Erwin Chemerinsky et al., "Cooperative Federalism and Marijuana Regulation," 62 UCLA L.Rev. 74 (2015)).

Under the act, Schedule I drugs are illegal to manufacture, distribute, dispense or possess under federal auspices. Further, those classified as Schedule I drugs are defined as having no currently accepted medical use in treatment and a high potential for abuse.

It can be reasoned that the regulation of attorneys is a state-based matter since the principal means of regulation are the individual state's rules of professional conduct, which are regarded by the state's bar. (David B. Wilkins, "Who Should Regulate Lawyers?" 105 Harv. L. Rev. 799, 802-803 (1992). The New Jersey Rule of Professional Conduct 1.2(d) mimics the American Bar Association's Model Rule. It states that:

A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal, or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning, or application of the law.

Further, the New Jersey Rule of Professional Conduct 8.4(b) provides that it is considered professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." When these two rules are read in conjunction with each other, attorneys in New Jersey should be wary of potentially facing varying levels of discipline.

With the newly proposed amendment to the New Jersey Rules of Professional Conduct as well as a recently proposed law known as A4193, which was promulgated in September 2016 by a New Jersey

assemblyman, there is a strong likelihood that, even if cannabis is not legalized in the state in the coming years, there will be greater clarification regarding an attorney's role in how to provide guidance to cannabis business clients.

Uncertainty remains, however, because as of Aug. 11, 2016, the Drug Enforcement Agency continues to uphold its categorization of marijuana as a Schedule I controlled substance (<https://www.dea.gov/divisions/hq/2016/hq081116.shtml>). As a result, there are some key facts attorneys should keep in mind when advising cannabis business clients:

(1) Attorneys should first determine how their state bar defines the "good moral character" requirement and what their state bar considers to be an act that is sanctionable.

(2) Attorneys should consider the differences between providing cannabis business services in a state where a cannabis business is legal versus in a state where it is illegal. One could face licensing or reciprocity difficulties in a state where it is illegal.

(3) Choice of law determines which jurisdiction's rules of conduct apply—and that depends on where the attorney is licensed. As a result, it is best to avoid advising a cannabis client out of state, particularly when one is licensed in a state where cannabis is wholly illegal.

(4) Attorneys should draft procedures and policies so that the prospective client understands the laws concerning cannabis-related business in the state versus how it will be looked at under the federal law.

(5) In order to mitigate risk, attorneys should enter into an engagement letter with the client that explains the scope of services to be provided, which services will not be provided, and how much the services will cost.

(6) Attorneys should require all parties to sign a representation letter stating that they understand

the state law requirements related to cannabis businesses and that they intend to fully comply with the law.

(7) Attorneys should consider the potential impact on their professional liability insurance. Every professional liability insurance policy has an exclusion for criminal acts. If the attorney is deemed to have aided and abetted a client who is engaged in a criminal act—i.e., illegally producing or selling cannabis—then the insurance will most likely not cover these acts. Thus, attorneys should thoroughly examine the policy on professional liability.

(8) Attorneys should document all work and communications; follow up with emails to memorialize oral conversations.

(9) Attorneys should seek the advice of colleagues who have clients in the cannabis industry to determine how they mitigate risk.

It is clear that cannabis business clients will require legal assistance. Access to attorneys is imperative when incorporating a business, drafting employment policies, appealing to zoning boards, obtaining licenses, advising banks on monetary transactions, and with respect to landlord-tenant issues relating to retail space, etc. However, the only certainty is uncertainty. With the change in administration, potential new enforcement policies and a new attorney general, the chasm between state and federal law could continue to deepen and become murkier. For New Jersey attorneys, much hinges on the adoption of the proposed amendment to the Rule of Professional Conduct. If adopted, the door will be opened for New Jersey attorneys to assist prospective cannabis business clients. •



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