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The Ethics of Representing Marijuana-Related Businesses

By Justice J. Brooks, I



Since the passage of the Arkansas Medical Marijuana Amendment of 2016 (“Medical Marijuana Amendment”), marijuana related businesses (“MRBs”) are soliciting lawyers to provide legal advice and assistance. Some have posited that a lawyer advising or assisting a client on the cultivation or dispensing of marijuana under state law is in violation of Rule 1.2(d) of the Arkansas Rules of Professional Conduct given that those activities are still illegal under federal law. However, other states interpreting language identical to Rule 1.2(d) have come to different conclusions and neither the Supreme Court of Arkansas nor the Arkansas Committee on Professional Conduct (“ACPC”) has taken a public stance on the issue. This leaves lawyers interested in representing MRBs with two choices: (1) risk violating Rule 1.2(d) by working with MRBs or (2) deprive MRBs of needed legal representation.

The Conflict: Federal v. State Law

Under the federal Controlled Substances Act (“CSA”), it is illegal to manufacture, distribute, or dispense marijuana.¹ In spite of this fact, 29 states and the District of Columbia have legalized marijuana for medical or recreational purposes.² In doing so, many of these states have relied upon the Obama Administration’s CSA enforcement policy—the United States Department of Justice (“DOJ”) will forgo the prosecution of individuals who are in full compliance with state medical marijuana laws and do not implicate federal enforcement priorities.³ While that policy may have allowed MRBs to operate with a reduced risk of prosecution, it did nothing to change the fact that marijuana is illegal under federal law.

Differing Interpretations of Rule 1.2(d)

Individual states govern and enforce the ethical conduct of lawyers in their respective jurisdictions.⁴ In Arkansas, the Supreme Court promulgates the rules of professional conduct, and, at the court’s direction, the ACPC enforces those rules.⁵ Rule 1.2(d) of the Arkansas Rules of Professional Conduct 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.⁶



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States that have interpreted this language differ on whether it permits an attorney to advise and assist MRBs to comply with state marijuana laws. The State Bar of Arizona Ethics Committee ("Arizona Ethics Committee") found 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 may violate applicable federal law."⁷ In reaching its decision, the Arizona Ethics Committee noted that:

[w]e 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 interest 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.⁸

Still, lawyers may only advise MRBs if the following occur: (1) a client requests assistance related to an action permitted by the act; (2) the lawyer advises the client of the risks related to federal law; and (3) the client chooses to proceed with the action having been fully informed of the risk.⁹

The Ohio Board of Professional Conduct Committee ("Ohio Professional Conduct Committee") came to the opposite conclusion in finding that "a lawyer cannot provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact business with a person or entity engaged in a medical marijuana enterprise."¹⁰ The Ohio Professional Conduct Committee reasoned that the language of Rule 1.2(d) prohibits lawyers from advising MRBs to engage in conduct they know is illegal under any law and "does not contain an exception if the federally prohibited conduct is legal under state law."¹¹ Lawyers, however, may still provide advice re-

lated to the legality of any proposed conduct under state and federal law.¹²

The opinions of the Arizona Ethics Committee and the Ohio Professional Conduct Committee accurately reflect the dilemma the ACPC faces in its interpretation and enforcement of Rule 1.2(d) in relation to lawyers who advise or assist MRBs. They also demonstrate the ethical uncertainty that plagues Arkansas attorneys interested in representing MRBs.

Clarification Of Professional Conduct Rules In Other States

To clarify this uncertainty, other states have changed the language or comments of Rule 1.2(d) to reflect the necessity of legal representation for MRBs. For instance, Rule 1.2(d) of the Connecticut Rules of Professional Conduct was changed to allow lawyers to "counsel or assist a client regarding conduct expressly permitted by Connecticut law."¹³ In another example, the addition of Comment 14 to Rule 1.2 of the Colorado Rules of Professional Conduct provided clarity to lawyers representing MRBs. Comment 14 instructs lawyers that they may "counsel a client regarding . . . [Colorado's medical and recreational marijuana amendments] and may assist a client in conduct the lawyer reasonably believes is permitted" under Colorado law.¹⁴ These changes to Rule 1.2 make it unambiguously clear to lawyers in those states that it is ethical to advise and assist all businesses legal under state law, including MRBs.

Arkansas' Proposed Solution

On February 9, 2017, the Arkansas Bar Association submitted a petition to the Supreme Court of Arkansas requesting an addition to the Comments of Rule 1.2 that reflects the passage of the Medical Marijuana Amendment.¹⁵ The petition recommends that the court add the following comment:

A lawyer may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of Arkansas law, and regarding conduct expressly permitted by Arkansas law, provided that the lawyer shall also counsel and inform the client in writing about the legal consequences of the client's proposed course of conduct under other applicable state or federal statutory law, rule, regulation, agency policy, or case law when such law, rule or regulation may make the conduct criminal or fraudulent.¹⁶

This language would allow a lawyer to counsel and assist an MRB related to the conduct permitted under the Medical Marijuana Amendment as long as that lawyer informs the MRB, in writing, of the potential consequences under federal law. It would also eliminate the uncertainty regarding the duties of a lawyer when representing MRBs.

In response to the petition, the Supreme Court of Arkansas referred the proposed comment to the ACPC for input and suggestions. The ACPC submitted its report in regard to the comment on March 31, 2017, but the Supreme Court has yet to act. In the meantime, lawyers continue to speculate whether the representation of MRBs violates Rule 1.2(d).

Endnotes:

1. 21 U.S.C. § 841.
2. *State Marijuana Laws In 2017 Map*, August 2, 2013, updated March 23, 2017, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.
3. See James M. Cole, Memorandum, *Guidance Regarding Marijuana Enforcement*, U.S. Department of Justice, Office of the Deputy Attorney General (August 29, 2013), *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.
4. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 802-803 (1992).
5. See *Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law* (May 26, 2011), *available at* <https://courts.arkansas.gov/administration/professional-conduct>.
6. Ark. R. Prof'l Conduct 1.2(d).
7. State Bar of Ariz. R. of Prof'l Cond. Comm., Formal Op. 11-01 (2011) (discussing scope of representation for marijuana-related businesses), *available at* <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>.
8. *Id.*
9. *Id.*
10. Sup. Ct. of Ohio Bd. of Prof'l Cond. Comm., Informal Op. 2016-6, p. 1, (2016) (discussing ethical implications for lawyers under Ohio's medical marijuana law).
11. *Id.* at p. 7.
12. *Id.*
13. Conn. R. Prof'l Cond. 1.2(d).
14. Colo. R. Prof'l Cond. 1.2 cmt. 14.
15. *In Re: Arkansas Rules of Professional Conduct, Rule 1.2*, Case No. CV-17-97 (Ark. filed Feb. 9, 2017).
16. *Id.* at p. 4-5. ■