Counsel to Legalized Medical Marijuana? Ohio Attorneys Voice Concerns

Although 25 states (as well as the District of Columbia and Guam) currently allow marijuana use in some form (the majority, for medicinal use), it is still illegal on a federal level. With this inherent division in place, then, it's no wonder that there are potential gray-area quagmires for licensed professionals working with individuals possessing, using, or growing marijuana, even when in a manner proscribed by the governing state. And no wonder, too, that some licensed professionals are concerned about jeopardizing their licenses through affiliation with users of legalized marijuana.

In this case, the licensed professionals are attorneys practicing in Ohio, the most recent state to legalize medical marijuana.

The Buckeye State, the Newest Addition to the Medical Marijuana Roster

Patients suffering from various ailments will now be eligible to use the drug medicinally in Ohio if it's recommended by a licensed physician in the state. Despite the fact that it may be two years before the program is fully operational, Ohio attorneys are proactively exploring the possible ramifications should they represent someone using state-sanctioned cannabis, or should they use it themselves.

Ohio's new medical marijuana law precludes professionals working with patients in the program from receiving disciplinary action "solely for engaging in professional or occupational activities related to medical marijuana." But the question at stake is whether that protection applies to attorneys.

Considering that attorneys licensed in Ohio can only be disciplined by the Ohio Supreme Court, the general professional clause may be irrelevant. Clarifying what, if any, punitive action they might receive over professional engagement with medical marijuana users or distributors is the impetus behind attorneys formally reaching out to the Ohio Supreme Court's Board of Professional Conduct.

Attorney questions currently on the table (questions not addressed in the Ohio Rules of Professional Conduct):

- May Ohio attorneys use medical marijuana?
- May they own or operate medical marijuana businesses?
- May they represent individuals or businesses engaged in the use or production of medical cannabis (i.e., growers, processors, dispensaries, patients, caregivers)?

Because the Court's professional board operates under Supreme Court rules, it may issue non-binding opinions in response to questions that anticipate future scenarios.

Ohio attorneys are not unusual in that they are prohibited from committing an illegal act that "reflects adversely on the lawyer's honesty or trustworthiness." Further, they are not permitted to knowingly counsel or assist a client to commit a crime. Again, the knotty issue of state versus federal arises: A compliant medical marijuana patient may not be violating state laws, but the fact remains that marijuana is a Schedule 1 substance under the Controlled Substances Act (substances classified as Schedule 1 are thought to come with a high risk for dependency and no acknowledged medical benefit), and therefore, its distribution is a federal offense.

In 2009, the Obama Administration sent a memo to federal prosecutors that encouraged them to refrain from prosecuting individuals who were adhering to state laws in distributing marijuana for medical use. However, encouragement does not equal guarantee.

In 2013, the U.S. Department of Justice announced an update to its marijuana enforcement policy. The statement reiterated marijuana's status as an illegal drug, but it also acknowledged that states like Washington and Colorado (where certain amounts of cannabis are legal recreationally as well as medically) would develop their own enforcement systems to ensure that the drug was being distributed and used according to the states' mandates. The DOJ went on to say that it "will defer the right to challenge [those states'] legalization laws at this time." With that said, though, the department made it clear that that deference could be revoked if the DOJ felt it necessary, at which point it would challenge the states.

Possible precedents in other states where medical marijuana is legal?

As it deliberates, perhaps the Ohio board will consider how other states have addressed this issue.

A 2014 ethics opinion from the Connecticut Bar Association states:

"The committee is of the opinion that a lawyer/qualified patient who possesses and uses medical marijuana as permitted by the State Act does not engage in a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer" notwithstanding the fact that such possession and use may violate federal law. Therefore we conclude that a lawyer who possesses and uses medical marijuana in compliance with the State Act does not violate Rule 8.4(2)."

However, it goes on to caution attorneys that "the lawyer may still face discipline pursuant to Connecticut Practice Book § 2-41 in the event he or she is convicted of a serious crime in federal court or in another state."

In Washington state, where recreational marijuana use has been legal since 2012, a 2015 advisory opinion affirms that attorneys are permitted to purchase marijuana legally, own marijuana businesses, and advise clients who use legalized marijuana.

Hawaii's disciplinary board issued an opinion last year noting that lawyers could dispense advice about the state's medical marijuana law. However, they would not be permitted to offer legal services that would assist in setting up a marijuana business because that would be seen as assisting in the commission of a federal crime.

Here in California, the first state to legalize medical marijuana, a 2015 ethics opinion by the San Francisco Bar Association expresses:

"We do not believe that the State Bar Act or California Rules of Professional Conduct should be used to discipline lawyers whose clients seek advice on how to comply with state or local laws when the client's proposed conduct may violate the Controlled Substance Act. Provided that the client limits his or her activities to those that comply with state law, and provided that the lawyer counsels against otherwise violating the Controlled Substances Act, a lawyer should be permitted to advise and represent a client regarding matters related to medical marijuana under state law."

In the ongoing discussion about medical marijuana, any mention of state laws is usually followed by the echo of the federal—the California opinion further notes:

“Assisting the client who wants to comply with state and local laws is not the same as advising the client to violate federal laws. A lawyer should tell the client that the proposed activities will violate federal laws and may warn the client of the associated risks. But that lawyer may concurrently advise the client how to comply with state and local laws and ordinances that permit such activities.”

Ohio panel invites additional attorney questions; elucidation forthcoming

The Ohio Supreme Court’s Board of Professional Conduct states that lawyers who have questions beyond those mentioned above should send them to the board prior to July 11. It is anticipated that board staff members will issue recommendations to the board sometime in August.

For more information/questions regarding any legal matters, please email info@nelsonhardiman.com or call 310.203.2800.