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VIA EMAIL

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Re: Proposed Amendments to Professional Conduct Rules 1.2 and 8.4

Dear Messrs. Buenger, Dove, and Asbury:

Following the Ohio Supreme Court Board of Professional Conduct's August 5 Advisory Opinion, proposed amendments to Professional Conduct Rules 1.2 and 8.4, as well as amendments to the applicable comments, are being submitted for review.

The August 5 advisory opinion has placed Ohio's legal medical marijuana community in an untenable position: an industry that will be regulated heavily and subject to heightened scrutiny from the federal government will be almost entirely without access to legal services. The practical effect of this lack of access will post numerous problems, including:

- Patients will be unable to consult with legal counsel regarding legal possession of medical marijuana pursuant to the "affirmative defense" provision in House Bill 523;
- Businesses will be unable to draft meaningful contracts or obtain advice regarding tax and regulatory compliance; and
- Medical marijuana business will effectively be shut out of court when disputes arise, as corporate entities cannot proceed *pro se* (with the exception of small claims) – this largely leaves "self-help" as the only effective remedy should contractual breaches occur or other disputes arise involving a legal medical marijuana business.

These issues are largely caused by continued federal prohibition of marijuana in all forms, despite the fact that more than half of the states have legalized marijuana for either medical or recreational use. However, the conflict between state and federal law must not prevent the quintessential function of the legal community from offering services precisely when they are needed most. The medical marijuana industry in Ohio will not function effectively – to the detriment of thousands of patients – without meaningful access to legal counsel.

To remedy these problems, this proposal is respectfully submitted for consideration as an amendment to Prof.Cond.R. 1.2 and includes a new division (f) that adopts the language used by the Alaska Rules of Professional Conduct. As proposed, new Prof.Cond.R. 1.2(f) would read:

(f) Notwithstanding division (d) of this rule, a lawyer may counsel and advise a client regarding Ohio's marijuana laws, and may assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Ohio law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

As proposed, Prof.Cond.R. 1.2 would allow Ohio lawyers to provide the full panoply of legal services to medical marijuana clients, as long as the lawyer reasonably believes the client's conduct is legal under Ohio law. In addition, the Rule would require Ohio lawyers to advise clients regarding any conflicting law.

These changes would also be reflected in revisions to comments 9 and 10, as well as a new comment 14 expanding on the change to Prof.Cond.R. 1.2. Comment 14 would state explicitly that Ohio lawyers may assist cultivators, processors, dispensaries, patients, caregivers, and testing laboratories with the types of services that the August 5 advisory opinion prohibits.

The August 5 Advisory Opinion also opined that an Ohio lawyer may violate Prof.Cond.R. 8.4(b) and/or (h) by using medical marijuana repeatedly or by having an ownership interest in a medical marijuana business. Accordingly, the following additional comment to the Rule is submitted and states as follows:

[6] Divisions (b) and (h) of this Rule do not prohibit a lawyer from engaging in conduct that the lawyer reasonably believes is authorized by Ohio's marijuana laws, including R.C. 3796, et seq. and all administrative regulations promulgated pursuant to Ohio's medical marijuana control program.

Therefore, an Ohio lawyer may use medical marijuana in a method the lawyer reasonably believes is authorized under Ohio law as long as such use does not adversely affect the lawyer's work or representation of clients.

In addition, nothing in divisions (b) and (h) of this Rule prohibits a lawyer from having an ownership interest in, being employed by, or lending money to a medical marijuana enterprise that the lawyer reasonably believes is authorized under Ohio law.


The clarification is necessary because the advisory opinion would allow for the “repeated” use of medical marijuana to subject the attorney to discipline – however, a lawyer with a chronic condition may need to use medical marijuana on a repeated basis to manage the condition as authorized under Ohio law.

The proposed comment also recognizes that the Ohio General Assembly has decided that, as a matter of public policy, Ohioans should be free to cultivate, process, sell, and use medical marijuana in compliance with state regulations. As such, it is not clear how a lawyer’s honesty, trustworthiness, or fitness to practice law could be adversely impacted by engaging in conduct which the General Assembly has endorsed.

Regardless of one’s opinion on the merits of medical marijuana, virtually all lawyers would agree that it makes little sense for the industry to be without access to counsel. The amendments and clarifications to the Rules should have the effect of ensuring that this new industry will be well regulated, properly structured, and legally functioning.

Please do not hesitate to contact our firm if we can provide any assistance as these proposed changes are considered.

Regards,



Daniel F. Gourash
Thomas G. Haren

**RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY
BETWEEN CLIENT AND LAWYER**

- (a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.
- (b) [RESERVED]
- (c) A lawyer may limit the scope of a new or existing representation if the limitation is *reasonable* under the circumstances and communicated to the client, preferably in *writing*.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is *illegal* or *fraudulent*. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.
- (e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.
- (f) Notwithstanding division (d) of this rule, a lawyer may counsel and advise a client regarding Ohio's marijuana laws, and may assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Ohio law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

Relevant Comments to Rule 1.2:

[9] Subject to division (f), division (d) prohibits a lawyer from knowingly counseling or assisting a client to commit an illegal act 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. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent 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 an illegal act or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally permissible but then discovers is improper. This includes conduct that the lawyer reasonably believed was authorized by Ohio's marijuana laws, including R.C. 3796, et seq. and all administrative regulations promulgated pursuant to Ohio's medical marijuana control program. See Rules 3.3(b) and 4.1(b).

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Division (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate illegal or fraudulent avoidance of tax liability. Division (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of division (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[14] Division (f) explicitly allows Ohio lawyers to assist, advise, and counsel clients engaging in conduct that the lawyer reasonably believes is authorized by Ohio's marijuana laws, including R.C. 3796, et seq. and all administrative regulations promulgated pursuant to Ohio's medical marijuana control program. An Ohio lawyer may, therefore, assist a medical marijuana cultivator, processor, dispensary, patient, caregiver, and testing laboratory with filing of marijuana license applications, negotiations with regulated individuals and businesses, representation before state regulatory boards responsible for the regulation of medical marijuana, drafting of lease agreements, formation of business entities, contract preparation and negotiation, and other legal services that lawyers traditionally provide to clients engaged in other types of business.

To the extent that Ohio law conflicts with federal law, the lawyer must reasonably advise the client of the conflict between state and federal law, the consequences of engaging in conduct that is contrary to federal law, and the likelihood of federal enforcement.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

- (a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;
- (b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Relevant Comment to Rule 8.4:

[6] Divisions (b) and (h) of this Rule do not prohibit a lawyer from engaging in conduct that the lawyer reasonably believes is authorized by Ohio's marijuana laws, including R.C. 3796, et seq. and all administrative regulations promulgated pursuant to Ohio's medical marijuana control program.

Therefore, an Ohio lawyer may use medical marijuana in a method the lawyer reasonably believes is authorized under Ohio law as long as such use does not adversely affect the lawyer's work or representation of clients.

In addition, nothing in divisions (b) and (h) of this Rule prohibits a lawyer from having an ownership interest in, being employed by, or lending money to a medical marijuana enterprise that the lawyer reasonably believes is authorized under Ohio law.