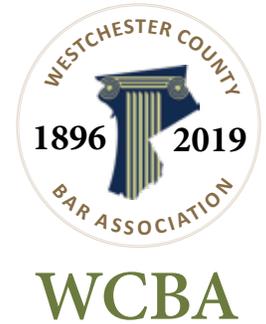


WESTCHESTER LAWYER



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NEW DATE: Rescheduled to Monday, September 23, 2019 !!!

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26th Annual
**Joseph F. Gagliardi
Award for Excellence**

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MEET THE JUDGES

FROM THE NINTH JUDICIAL DISTRICT

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Honoring Hon. Brandon R. Sall
and Edward F. Beane, Esq.

WCBF
Benefit
AND SILENT
AUCTION

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Cannabis Committee Update

Ethically Preparing for the Green Wave

By Andrew P. Schriever, Esq.

Until recently, if, in response to the question “what do you do for a living?” a lawyer responded, “I help clients cultivate, process and sell marijuana,” it would be a safe bet the lawyer could be disbarred and possibly prosecuted for aiding and abetting illegal activity. But, to quote Bob Dylan (apropos of the subject), “The Times, They Are A Changin’.”

We are in the midst of a Green Wave. Eleven states plus Washington D.C. have legalized “cannabis” (the preferred industry term) for recreational, aka, adult use, consisting of Alaska, California, Colorado, the District of Columbia, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and Washington. Additionally, over twenty more states permit medical cannabis use.

In 2019, New York and New Jersey fell shy of enacting adult use legislation by thin margins, yet conventional wisdom still suggests that for these states and many others, legalizing adult use is not so much a question of if, but when.

The trends are compelling. Despite

not achieving full legalization, New York became the fifteenth state to decriminalize cannabis possession just this past July,¹ such that in 26 states, possession for adult use is either part of a legal market or at least not a crime. New York’s legalization sponsors also plan to seek passage for adult use again in the 2020 session.² New Jersey is considering a legalization referendum, and Illinois legalized adult use cannabis this summer.

Meanwhile, federal policy continues to cede ground. For example, hemp is a sister plant sharing most characteristics with cannabis except that it has minimal amounts of the psychoactive THC component. Hemp was subjected to a blanket cannabis prohibition for decades, but in 2018, it was legalized federally. It is now legal for multiple industrial purposes (such as rope, fabric, fuel, and paper) as well as to extract cannabidiol, aka CBD, for which it seems a market sprang up overnight.

The shift in federal policy is nearing an inflection point where clients can operate in legal state cannabis markets

without fearing federal prosecution. In June 2019, the House of Representatives voted 267-165 for a bill to prevent the Justice Department from interfering with state cannabis laws. That bill expands what is known as the 2014 Rohrabacher-Farr and Leahy amendments, which prohibit federal enforcement against states’ medical cannabis programs, by now curtailing enforcement against adult use programs.³ There is also proposed federal legislation to protect from prosecution financial institutions working with legal cannabis businesses at the state level.⁴ And, in July 2019, federal legislation was introduced to decriminalize cannabis entirely. This trend of relaxing enforcement reflects national sentiment – recent polling indicates 66 percent of Americans favor legalization.⁵

But despite this federal trend of declining to prosecute cannabis violations in legalized states, the fact remains that for now, cannabis remains a Schedule I drug under the Controlled Substances Act alongside heroin, LSD, ecstasy and peyote – meaning that federally, cannabis has “no currently accepted medical use,”

despite years of contrary evidence. In states allowing cannabis, including New York where medical cannabis has been legal since 2014, the lawyer helping the client in the cannabis business is helping to violate federal law.

So, how is this ethically possible?

The problem is that providing such assistance would seem to breach New York Rule of Professional Responsibility 1.2(d), “Scope of Representation and Allocation of Authority Between Client and Lawyer”: “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.”

On its face, this Rule seems to foreclose a lawyer from representing a cannabis client, but in 2014, the state Bar issued Ethics Opinion 1024, which provides safe harbor by finding that “[i]n light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.”

The Opinion recognized that the Justice Department adopted a guidance “restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana.” It continued: “Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance,” noting it “seems fair to say that state law would not only permit but affirmatively expect lawyers to provide such assistance,” so clients can comply with state cannabis laws, particularly given the critical importance of lawyers ensuring adherence to technical regulatory schemes such as under New York’s medical cannabis law, and given that noncompliance could result in prosecution.

The Justice Department guidance referenced in Opinion 1024 is the 2013 “Cole Memorandum.” It stated

federal law enforcement would not intervene where there is adherence to state cannabis laws and no infringement on key federal priorities of preventing distribution to minors, violence, firearm use, cartel involvement, drugged driving and growing cannabis on public and federal land.

Some uncertainty arose as to whether Opinion 1024 should still be relied upon because former attorney general Sessions later rescinded the Cole Memorandum. However, that rescission (like Sessions’ tenure) was short-lived. The latest attorney general, William Barr, announced his approach would be “not to upset settled expectations and the reliant interests that have arisen as a result of the Cole Memorandum,” so, except for Sessions’ failed effort to change course, federal policy has stayed consistent in yielding to legalized markets.

Meanwhile, WCBA Cannabis Law Committee Co-Chair Jim Landau is leading the effort to update Opinion 1024 to clarify that despite the Cole Memorandum’s technical rescission, federal policy still allows attorneys to assist clients participating in our state’s legal cannabis market.

While Opinion 1024 is addressed only to medical use, its recognition that attorney assistance is critical to effectuate state regulations would seem to apply regardless of whether the representation involves medical or adult use.

Of course, when cannabis is no longer federally illegal, these ethical concerns over conflicts between federal and state law will be outdated (together with this article). Until then, Opinion 1024 will continue to provide the necessary ethics protection to operate in this space.

Endnotes

1 Voytko, Lisette (2019, July 29). New York Decriminalizes Recreational Marijuana, Falls Short of Governor’s Goal to Legalize. Retrieved from <https://www.forbes.com/sites/lisettevoytko/2019/07/29/new-york-decriminalizes-recreational-marijuana-falls-short-of-governors-goal-to-legalize/#7c56a954ee70>.

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- 3 Angell, Tom (2019, June 20). Congress Votes To Block Feds From Enforcing Marijuana Laws In Legal States. Retrieved from <https://www.forbes.com/sites/tomangell/2019/06/20/congress-votes-to-block-feds-from-enforcing-marijuana-laws-in-legal-states/#3650dbfc4b62>. Mitchell, Thomas (2019, June 21). House Votes to Protect All Legal Marijuana States. Retrieved at <https://www.westword.com/marijuana/house-of-representatives-votes-to-protect-recreational-marijuana-states-11387632>.
- 4 Angell, Tom (2019, March 28). Marijuana Banking Bill Approved By Congressional Committee. Retrieved at <https://www.forbes.com/sites/tomangell/2019/03/28/marijuana-banking-bill-approved-by-congressional-committee/#1ae2d32d2ce1>; Associated Press (2019, March 28). Cannabis Banking Bill Advances In US House Committee. Retrieved at <https://www.nytimes.com/aponline/2019/03/28/us/ap-us-marijuana-banking.html>.
- 5 Hartig, H. and Geiger, A. (2018, October 8). About six-in-ten Americans support marijuana legalization. Retrieved from <https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/>; Shutt, J. (2019, March 6). Congress is finally going to pot. Retrieved from <https://rollcall.com/news/congress/marijuana-gains-traction-both-parties>.

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