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VIA E-MAIL

Richard A. Dove, Director
D. Allan Asbury, Senior Counsel
Board of Professional Conduct
Supreme Court of Ohio
65 South Front Street, 5th Floor
Columbus, Ohio 43215-3431
Allan.Asbury@sc.ohio.gov
Richard.Dove@sc.ohio.gov

Re: Advisory Opinion Request
Issues Relating to Medical Marijuana

Dear Messrs. Dove and Asbury:

Following the Ohio General Assembly's passage of H.B. 523,¹ I would like to formally request an Advisory Opinion from the Ohio Supreme Court Board of Professional Conduct Advisory Opinion Committee on three distinct issues relating to the topic of medical marijuana, as outlined more fully below.

By way of background, H.B. 523 allows for the licensing of medical marijuana cultivators, processors, retail dispensaries, and testing laboratories. The law also allows for the registration of patients and caregivers. The regulation of medical marijuana has been delegated to the State Board of Pharmacy (responsible for patient and caregiver registration, and regulation and licensure of retail dispensaries), the Department of Commerce (responsible for regulation and licensure of cultivators and processors) and the State Medical Board (responsible for training and approval of physicians to recommend medical marijuana). A Medical Marijuana Advisory Committee will offer nonbinding recommendations to the aforementioned agencies.

Currently marijuana remains a Schedule I substance under federal law, meaning that it is illegal to be distributed, possessed, or recommended. That being said, 24 states have

¹ The full text of H.B. 523 can be found on the Ohio General Assembly's website by clicking the "PDF" link next to "As passed by the Senate," available at <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA131-HB-523>.

enacted comprehensive public medical marijuana and cannabis programs.² Furthermore, the United States Department of Justice has deferred the right to challenge state marijuana laws as long as those laws are strictly enforced and comply with a number of federal enforcement priorities.³

The Ohio Rules of Professional Conduct contain a number of provisions that may be impacted by the legalization of medical marijuana in Ohio. For instance, Prof.Cond.R. 1.2(d) provides:

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. [emphasis in original]

Additionally, Prof.Cond.R. 8.4(b) states that it is professional misconduct for an Ohio lawyer to “commit an illegal act that reflects adversely on the lawyer’s honesty or trustworthiness.” Comment 2 to this Rule advises that:

Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable *only for offenses that indicate lack of those characteristics relevant to law practice*. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. [emphasis added]

The General Assembly has sought to address the issue of attorney discipline, at least in part, by prohibiting disciplinary action against professional license holders solely as a result of “engaging in professional or occupational activities related to medical marijuana.”⁴

Taking Rules 1.2(d) and 8.4(b) into account, along with R.C. 3796.24(A), I would ask the Committee to address the following hypothetical issues:

² National Conference of State Legislatures, State Medical Marijuana Laws, available at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

³ The Department of Justice August 29, 2013 Press Release, which includes a link to the memorandum from Deputy Attorney General James M. Cole (the “2013 Cole Memo”) is available at <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy>.

⁴ R.C. 3796.24(A), which states: “The holder of a license, as defined in section 4776.01 of the Revised Code, is not subject to professional disciplinary action solely for engaging in professional or occupational activities related to medical marijuana.”

1. Whether an Ohio lawyer may ethically counsel, advise, and represent medical marijuana cultivators, processors, retail dispensaries, testing laboratories, caregivers, and/or patients as each may be licensed or seek to become licensed under Ohio state law;
2. Whether an Ohio lawyer (or a member of a lawyer's immediate family) may ethically operate or hold an ownership interest in a medical marijuana cultivator, processor, retail dispensary, and/or testing laboratory as each may be licensed (or may apply for a license) under Ohio state law; and
3. Whether an Ohio lawyer may ethically use medical marijuana as provided by Ohio state law.

Each of these questions pose an issue of broad interest or importance to the Ohio bar and judiciary, and lawyer involvement in both medical and recreational marijuana industries has been addressed by a number of advisory opinions in other states.

Generally speaking, bar associations have recognized that it is permissible for a lawyer to represent entities and individuals engaged in marijuana industries legal at the state level.⁵ Candidly, a minority of states have taken the opposite position.⁶

⁵Ariz. Ethics Comm. Op. 11-01 (2011) (a lawyer may ethically counsel a client in legal matters expressly permissible under the Arizona Medical Marijuana Act), available at <http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710>; Colo. Ethics Comm. Formal Op. 125 (2013) (an attorney may represent and advise a client about the consequences of marijuana related activities; may advise a client about establishing, interpreting, enforcing, or amending zoning, local ordinances, or legislation; and may advise about the tax consequences of growing or selling marijuana, but also specifying a range of conduct impermissible until Colorado ethics rules were revised – which they later were), available at http://www.cba.cobar.org/tcl/tcl_articles.cfm?articleid=8370; N.Y. Comm. On Prof'l Ethics Op. 1024 (2014) (a lawyer may assist a client in conduct designed to comply with state medical marijuana law), available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=52179>; Washington King County Bar Association Ethics Advisory Op. (Oct. 2013) (an attorney is not subject to discipline as long as the client's conduct complies with Washington state law and the client is advised about federal law and the Cole Memo), available at http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf; San Francisco Bar Association Opinion 2015-1 (attorney not subject to discipline for representing a client with respect to lawfully forming and operating a marijuana dispensary, but should advise as to the risk of liability under federal law), available at https://www.sfbar.org/ethics/opinion_2015-1.aspx; Illinois State Bar Association Op. 14-07 (2014) (considering a rule similar to Prof.Cond.R. 1.2(d), stating “[u]nder the present state of affairs, it is the opinion of the Committee that the provision of legal services to clients involved in the medical marijuana business is consistent with the Rules of Professional Conduct.”), available at <https://www.isba.org/sites/default/files/ethicsopinions/14-07.pdf>.

⁶ See, e.g., Hawaii Supreme Court Disciplinary Board Formal Opinion 49 (2015) (a lawyer may not “provide legal services to facilitate the establishment and operation of a medical marijuana

Furthermore, as more states legalize marijuana, bar associations are also finding that lawyers can use marijuana and operate marijuana businesses.⁷

Providing direction to Ohio lawyers relating to the extent that they may be involved in Ohio's legal medical marijuana industry will ensure that the industry will be well-regulated and operational by the General Assembly's target date in 2018. Should you have any questions, please do not hesitate to contact me directly.

Regards,



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business” until Hawai'i ethics rules are revised or federal law changes), available at http://www.odchawaii.com/uploads/Formal_Opinion_49.pdf; Connecticut Bar Association Informal Opinion 2013-02 (providing virtually no guidance by simply stating that lawyers may counsel on compliance with state law but not assist in violating federal law), available at http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf.

⁷ Washington State Bar Association Opinion 201501 (2015) (a lawyer may engage in business under state law legalizing marijuana, and may use marijuana, after considering state professional conduct rule 8.4, which mirrors Ohio Prof.Cond.R. 8.4), available at <http://mcle.mywsba.org/IO/print.aspx?ID=1682>; Connecticut State Bar Association Informal Opinion 2014-08 (2014) (a lawyer who is a “qualified patient” may use medical marijuana under state law free from attorney discipline), available at [http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics_Opinions/14-08 - Lawyer s Possession .pdf](http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics_Opinions/14-08_-_Lawyer_s_Possession_.pdf).